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Judicial and statutory definitions of words and phrases

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JUDICIAL AND STATUTORY DEFINITIONS

OF

WORDS AND PHRASES

SECOND SERIES

COLLECTED, EDITED, AND COMPILED
BY THE
EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM

VOLUME 1

A — DEPOSIT

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1914

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PREFACE

THIS is the Second Series of the compilation entitled "Words and Phrases," published by us in 1904. It contains the judicial interpretation and construction of words and phrases found in the reported decisions of the American appellate courts since the original compilation, down to January 1, 1913. The alphabetical arrangement of the matter is exactly the same as that of the First Series; and one having located a definition of a word or phrase in this series has but to look under the same heading in the First Series to find the earlier definitions. Reference from the First Series to the Second Series may be made in like manner.

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TABLE OF ABBREVIATIONS

A

Abb. Adm.	Abbott's Admiralty (U. S.)
Abb. Dec.	Abbott's Decisions (N. Y.)
Abb. Law Dict.	Abbott's Law Dictionary.
Abb. N. C.	Abbott's New Cases (N. Y.)
Abb. Prac.	Abbott's Practice (N. Y.)
Abb. Prac. (N. S.)	Abbott's Practice, New Series (N. Y.)
Abb. Shipp.	Abbott on Shipping.
Abb. (U. S.)	Abbott's United States.
Abr.	Abridgment.
Adams	Adams (N. H.)
Adams, Eq.	Adams' Equity.
Add.	Addams' Ecclesiastical Reports.
Add.	Addison (Pa.)
Add. Cont.	Addison on Contracts.
Add. Ecc.	Addams' Ecclesiastical Reports.
Add. Torts	Addison on Torts.
Adj. Sess.	Adjourned Session.
Adol. & El.	Adolphus and Ellis' English King's Bench Reports.
Adol. & El. (N. S.)	Adolphus and Ellis' English Queen's Bench Reports, New Series.
Aik. Dig.	Aikin's Digest of Laws (Ala.)
Aikens	Aikens (Vt.)
A. K. Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama.
Alb. Law J.	Albany Law Journal.
Alex. Ins.	Alexander on Life Insurance in New York.
Alger's Law Promoters & Prom. Corp.	Alger's Law in Relation to Promoters and Promotion of Corporations.
Allen	Allen (Mass.)
Allison's Am. Dict.	Allison's American Dictionary.
Amb.	Ambler's English Chancery Reports.
Am. Bankr. Reg.	National Bankruptcy Register (U. S.)
Am. Bankr. Rep.	American Bankruptcy Reports.
Am. Dec.	American Decisions.
Am. Ed.	American Edition.
Am. Enc. Dict.	American Encyclopedic Dictionary.
Amend.	Amendment.
Am. Eng. Enc. Law.	American and English Encyclopedia of Law.
Am. Ins.	Arnold on Marine Insurance.
Am. Law J.	American Law Journal.
Am. Law Rec.	American Law Record (Cin.)
Am. Law Reg. (N. S.)	American Law Register, New Series.
Am. Law Reg. (O. S.)	American Law Register, Old Series.
Am. Law Rev.	American Law Review.
Am. Law T. Rep.	American Law Times Reports.
Am. Lead. Cas.	American Leading Cases (Hare & Wallace's).
Amos & F. Fixt.	Amos and Ferard on Fixtures.
Am. Reg.	American Law Register.
Am. Rep.	American Reports.
Am. St. Rep.	American State Reports.
Am. & Eng. Dec. Eq.	American and English Decisions in Equity.
Am. & Eng. Enc. Law	American and English Encyclopedia of Law.
Am. & Eng. Ry. Cas.	American and English Railway Cases.
Anc. Charters	Ancient Charters (1692).
And. Law Dict.	Anderson's Law Dictionary.
Ang. Car.	Angell on Carriers.
Ang. Highw.	Angell & Durfee on Highways.
Ang. Ins.	Angell on Insurance.
Ang. Lim.	Angell on Limitation of Actions.
Ang. Tide Waters.	Angell on Tide Waters.
Ang. Water Courses.	Angell on Water Courses.
Ang. Waters.	Angell on Tide Waters.
Ang. & A. Corp.	Angell and Ames on Corporations.
Ann.	Queen Anne (as 8 Ann. c. 19).
Ann. Cas.	American & English Annotated Cases; American Anotated Cases.
Ann. Code.	Annotated Code.
Ann. Codes & St.	Bellinger and Cotton's Annotated Codes and Statutes (Or.)
Ann. St.	Annotated Statutes.
Ann. St. Ind. T.	Annotated Statutes of Indian Territory.
Anstr.	Anstruther's English Exchequer Reports.
Anth. N. P.	Anthon's Nisi Prius Reports (N. Y.)
App.	Appleton (Me.)
App. Cas.	Appeal Cases, English Law Reports.
App. D. C.	Appeal Cases (D. C.)
App. Div.	Appellate Division (N. Y.)
Append.	Appendix.
Archb. Cr. Law.	Archbold's Pleading and Evidence in Criminal Cases.
Archb. Cr. Prac. & Pl.	Archbold's Pleading and Evidence in Criminal Cases.
Arch. Cr. Pl.	Archbold's Criminal Pleading.
Arch. N. P.	Archbold's Law of Nisi Prius.
Ariz.	Arizona.
Ark.	Arkansas.
Arn. Ins.	Arnold's Marine Insurance.
Ashm.	Ashmead (Pa.)
Assem.	Assembly (State Legislature).
Assiz.	Assizes.
Atk.	Atkyns' English Chancery Reports.
Atl.	Atlantic Reporter.
Aust. Jur.	Austin's Jurisprudence.

B

Bac. Abr.	Bacon's Abridgment.
Bac. Ins.	Bacon on Benefit Societies and Life Insurance.
Bac. Law Tracts.	Bacon's Law Tracts.
Bac. Max.	Bacon's Maxims of the Law.

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Bac. Ben. Soc.....Bacon on Benefit Societies and Life Insurance.
Bail. Bailey (S. C.)
Bailey Bailey (S. C.)
Bailey, Dict.....Nathan Bailey's English Dictionary.
Bailey, Eq.....Bailey's Equity (S. C.)
Bailey, Mast. Liab..Bailey's Law of Master's Liability for Injuries to Servant.
Bainb. Mines.....Bainbridge on Mines and Minerals.
Baldw. Baldwin (U. S.)
Ballinger's Ann. Codes & St.....Ballinger's Annotated Codes and Statutes (Wash.)
Bankr. Act.....Bankruptcy Act.
Bankr. Form.....Bankruptcy Forms.
Ban. & A.....Banning & Arden's Patent Cases (U. S.)
Barb. Barbour (N. Y.)
Barb. (Ark.).....Barber (Ark.)
Barb. Ch. Barbour's Chancery (N. Y.)
Barb. Ch. Pr.....Barbour's Chancery Practice.
Barb. Cr. Law.....Barbour's Criminal Law.
Barn. & Adol.....Barnewall and Adolphus' English King's Bench Reports.
Barn. & Ald.....Barnewall and Alderson's English King's Bench Reports.
Barn. & C.....Barnewall and Cresswell's English King's Bench Reports.
Barb. & C. Ky. St..Barbour and Carroll's Kentucky Statutes.
Barn. & S.....Best and Smith's English Queen's Bench Reports.
Barr Barr (Pa.)
Bates' Ann. St.....Bates' Annotated Revised Statutes (Ohio).
Bates, Part.....Bates' Law of Partnership.
Bat. Rev. St.....Battle's Revisal of the Public Statutes of North Carolina.
Battle's Revisal....Battle's Revisal of the Public Statutes of North Carolina.
Batts' Ann. St. } ... Batts' Annotated Revised
Batts' Rev. St. } Civil Statutes (Tex.)
Baxt. Baxter (Tenn.)
Bay Bay (S. C.)
Bayley, Bills.....Bayley on Bills.
Baylies, Sur.....Baylies on Sureties and Guarantors.
Beach, Contrib. Neg..Beach on Contributory Negligence.
Beach, Inj.....Beach on Injunctions.
Beach, Mod. Eq. Jur..Beach's Commentaries on Modern Equity Jurisprudence.
Beach, Priv. Corp...Beach on Private Corporations.
Beach, Eq. Prac....Beach's Modern Practice in Equity.
Beach, Pub. Corp...Beach on Public Corporations.
Beasl. Beasley (N. J.)
Beav. Beavan's English Rolls Court Reports.
Beavan, Ch.....Beavan's English Rolls Court Reports.
Beawes' Lex Merc..Beawes' Lex Mercatoria.
Beck, Med. Jur.....Beck's Medical Jurisprudence.
Bee Bee (U. S.)
Bell, Comm.....Bell's Commentaries on the Law of Scotland.
Ben. Benedict (U. S.)
Ben. Adm. Benedict's American Admiralty Practice.
Benj. Sales.....Benjamin on Sales.
Benn. Bennett (Cal.)
Benth. Jud. Ev.....Bentham's Judicial Evidence.
Best, Ev.....Best on Evidence.
Best, Presumptions..Best on Presumptions of Law and Fact.
Best & S.....Best and Smith's English Queen's Bench Reports.
Bibb Bibb (Ky.)
Bid. Ins.....Biddle on Insurance.
Bid. War. Sale Chat..Biddle on Warranties in Sale of Chattels.
Big. Bignell's Reports (India).
Bigelow, Estop.....Bigelow on Estoppel.
Bigelow, Lead. Cas..Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.
Big. Torts.....Bigelow on Torts.
Binn. Binney (Pa.)
Bing. Bingham's English Common Pleas Reports.
Bing. N. C.....Bingham's New Cases, English Common Pleas.
Bish. Cont. Bishop on Contracts.
Bish. Cr. Law.....Bishop on Criminal Law.
Bish. Cr. Proc.....Bishop on Criminal Procedure.
Bish. Eq.....Bispham's Principles of Equity.
Bish. Mar., Div. & Sep. Bishop on Marriage, Divorce, and Separation.
Bish. Mar. & Div...Bishop on Marriage, Divorce.
Bish. New Cr. Law..Bishop's New Criminal Law.
Bish. New Cr. Prac..Bishop's New Criminal Procedure.
Bish. Non-Cont. Law Bishop on Non-Contract Law, Rights and Torts.
Bish. St. Crimes....Bishop on Statutory Crimes.
Bisp. Eq.....Bispham's Principles of Equity.
Biss. Bissell (U. S.)
Bissett, Est.....Bisset on Estates for Life.
Bl. Henry Blackstone's English Common Pleas Reports.
Black Black (U. S.)
Blackb. Sales.....Blackburn on Sales.
Black. Com.....Blackstone's Commentaries on the Laws of England.
Black, Const. Law..Black on Constitutional Law.
Black, Dict.....Black's Law Dictionary.
Blackf. Blackford (Ind.)
Black, Interp. Laws..Black on the Construction and Interpretation of Laws.
Black, Intox. Liq...Black on the Laws Regulating the Manufacture and Sale of Intoxicating Liquors.
Black, Judg.....Black on Judgments.
Black, Law Dict....Black's Law Dictionary.
Black, St. Const....Black on Construction and Interpretation of Laws.
Black, Tax Titles...Black's Treatise on Tax Titles.
Blackw. Tax Titles..Blackwell's Tax Titles.
Bland Bland (Md.)
Blatchf. Blatchford (U. S.)
Blatchf. Prize Cas..Blatchford's Prize Cases (U. S.)
Blatchf. & H.....Blatchford & Howland (U. S.)
Bl. Comm.....Blackstone's Commentaries on the Laws of England.
Bliss, Code Pl.....Bliss on Code Pleading.
Bliss, Ins.....Bliss on Life Insurance.
B. Mon.....B. Monroe (Ky.)
Bond Bond (U. S.)
Bosw. Bosworth (N. Y.)
Bos. & P.....Bosanquet and Puller's English Common Pleas Reports.
Bos. & P. (N. R.)..Bosanquet and Puller's New Reports, English Common Pleas.

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Bouv. Inst.	Bouvier's Institutes of American Law.
Bouv. Law Dict.	Bouvier's Law Dictionary.
Bradf. Sur.	Bradford's Surrogate (N. Y.)
Bradw.	Bradwell (Ill.)
Branch	Branch (Fla.)
Brandt, Sur.	Brandt on Suretyship and Guaranty.
Brayt.	Brayton (Vt.)
Breese	Breese (Ill.)
Brev.	Brevard (S. C.)
Brev. Dig.	Brevard's Digest of the Public Statute Law (S. C.)
Brewst.	Brewster (Pa.)
Brick. Dig.	Brickell's Digest (Ala.)
Brightly, Dig.	Brightly's Analytical Digest of the Laws of the United States
Brightly, Elect. Cas.	Brightly's Leading Election Cases (I)
Brightly, N. P.	Brightly's Nisi Prius Reports (Pa.)
Bro. C. C.	Brown's English Chancery Cases or Reports.
Bro. Civ. Law	Browne's Civil and Admiralty Law
Brock.	Brockenbrough (U. S.)
Brock. & H.	Brockenbrough & Holmes (Va.)
Brod. & B.	Broderip & Bingham's English Common Pleas Reports.
Brooke, Abr.	Brooke's Abridgment.
Broom, Leg. Max.	Broom's Legal Maxims.
Broom's Com. Law.	Broom's Commentaries on the Common Law.
Broom & H. Comm.	Broom and Hadley's Commentaries on the Laws of England.
Brown, Adm.	Brown's Admiralty (U. S.)
Brown, C. C.	Brown's English Chancery Cases or Reports.
Brown, Ch.	Brown's English Chancery Reports.
Brown, Civ. Law	Browne's Civil and Admiralty Law.
Browne	Browne (Pa.)
Browne, Jud. Interp.	Browne's Judicial Interpretation of Common Words and Phrases.
Browne's Roman Law	Brown's Epitome and Analysis of Saligny's Treatise on Obligations in Roman Law.
Browne, St. Frauds.	Browne on Statute of Frauds.
Brownl. & G.	Brownlow and Goldsborough, English Common Pleas Reports.
Brunner, Col. Cas.	Brunner's Collected Cases (U. S.)
Buff. Super. Ct.	Sheldon's Buffalo Superior Court Reports (N. Y.)
Bull. N. P.	Buller's Law of Nisi Prius.
Bulst.	Bulstrode's English King's Bench Reports.
Bump. Fraud. Conv.	Bump on Fraudulent Conveyances.
Bump's Int. Rev. Law	Bump's Internal Revenue Laws.
Burge, Sur.	Burge on Suretyship.
Burl. Natural & Pol. Law	Burlamaqui's Natural and Politic Law.
Burn.	Burnett (Wis.)
Burn, J. P.	Burn's Justice of the Peace.
Burns' Ann. St.	Burns' Annotated Statutes (Ind.)
Burns' Ecc. Law	Burns' Ecclesiastical Law.
Burns' Rev. St.	Burns' Annotated Statutes (Ind.)
Burr.	Burrows' English King's Bench Reports.
Burrill, Assignm.	Burrill on Assignments.
Burrill, Circ. Ev.	Burrill on Circumstantial Evidence.
Burr. Law Dict.	Burrill's Law Dictionary.
Burr. Pr.	Burrill's New York Practice.
Burt. Real Prop.	Burton on Real Property.
Busb.	Busbee (N. C.)
Busb. Eq.	Busbee's Equity (N. C.)
Bush	Bush (Ky.)
B. & Ald.	Barnewall and Alderson's English King's Bench Reports.
B. & C.	Barnewall and Cresswell's English King's Bench Reports.
B. & C. Comp.	Bellinger and Cotton's Annotated Codes and Statutes (Or.)
B. & P.	Bosanquet & Puller's English Common Pleas Reports.

C

Cab. & El.	Cababé and Ellis' Queen's Bench Reports.
Caines	Caines (N. Y.)
Caines, Cas.	Caines' Cases (N. Y.)
Cal.	California.
Call	Call (Va.)
Callis, Sew.	Callis on Sewers.
Calvin, Lex.	Calvin's Lexicon Juridicum.
Calv. Parties	Calvert's Parties to Suits in Equity.
Camp.	Campbell's English Nisi Prius Reports.
Cam. & N.	Cameron & Norwood's Conference (N. C.)
Can. Leg. N.	Canada Legal News.
Car.	Carolus (as 22 & 23 Car. II).
Car. Law Repos.	Carolina Law Repository (N. C.)
Carr. & M.	Carrington and Marshman's English Nisi Prius Reports.
Cart.	Carter (Ind.)
Carth.	Carthew's English King's Bench Reports.
Carv. Carr.	Carver's Treatise on the Law Relating to the Carriage of Goods by Sea.
Car. & K.	Carrington and Kirwan's English Nisi Prius Reports.
Car. & P.	Carrington & Payne's English Nisi Prius Reports.
Casey	Casey (Pa.)
Ca. temp. Hard.	Cases temp. Hardwicke by Lee and Hardwicke.
Cates	Cates Reports (Tenn.)
C. B.	English Common Bench Reports (Manning, Granger & Scott).
C. B. (N. S.)	English Common Bench Reports, New Series, by John Scott.
C. C. A.	Circuit Court of Appeals (U. S.)
C. E. Green	C. E. Green (N. J.)
Cent. Dict.	Century Dictionary.
Cent. Dict. & Ency.	Century Dictionary and Encyclopedia.
Cent. Law J.	Central Law Journal, St. Louis, Mo.
Chambers' Cyclopædia	Ephraim Chambers' English Cyclopædia.
Chand.	Chandler (Wis.)
Chan. Sentinel	Chancery Sentinel (N. Y.)
Ch. App.	Chancery Appeal Cases, English Law Reports.

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Charlt., R. M. R. M. Charlton (Ga.)
Charlt., T. U. P. T. U. P. Charlton (Ga.)
Chase Chase (U. S.)
Chase's St. Chase's Statutes at Large (Ohio)
Chase, Steph. Dig. Ev. Chase on Stephens' Digest of Evidence.
Ch. Cas. English Cases in Chancery.
Ch. Div. Chancery Division, English Law Reports.
Chest. Co. Rep. Chester County Reports (Pa.)
Cheves Cheves (S. C.)
Cheves, Eq. Cheves' Equity (S. C.)
Chi. Leg. N. Chicago Legal News (Ill.)
Chip., D. D. Chipman (Vt.)
Chip., N. N. Chipman (Vt.)
Chit. Bills Chitty on Bills.
Chit. Bl. Comm. Chitty's Edition of Blackstone's Commentaries.
Chit. Cont. Chitty on Contracts.
Chit. Cr. Law Chitty's Criminal Law.
Chit. Gen. Pr. Chitty's General Practice.
Chit. Pl. Chitty on Pleading.
Chit. Pr. Chitty's General Practice.
Chitty Chitty on Bills.
Chitty, Bl. Comm. .. Chitty's Edition of Blackstone's Commentaries.
Chitty, Com. Law. . Chitty on Commercial Law.
Ch. Pl. Chitty on Pleading.
Cin. R. Cincinnati Superior Court Reports (Ohio)
Cin. Super. Ct. Rep'r Cincinnati Superior Court Reporter (Ohio)
Cir. Ct. Dec. Circuit Court Decisions (Ohio)
Cir. Ct. Rule. Circuit Court Rule.
City Ct. R. City Court Reports (N. Y.)
City Ct. R. Supp. .. City Court Reports, Supplement (N. Y.)
City H. Rec. City Hall Recorder (N. Y.)
Civ. Code. Civil Code.
Civ. Code Practice. . Civil Code of Practice.
Civ. Prac. Act. Civil Practice Act.
Civ. Proc. R. Civil Procedure Reports (N. Y.)
C. L. English Common Law Reports (American Reprint).
Clancy, Husb. & W. } Clancy, Rights. } Clancy's Treatise of the Rights, Duties, and Liabilities of Husband and Wife.
Clark Clark (Pa.)
Clarke Clarke (Iowa)
Clarke, Ch. Clarke's Chancery (N. Y.)
Clark's Code. Clark's Annotated Code of Civil Procedure (N. C.)
Clark & F. Clark and Finnelly's House of Lords Reports.
Clay's Dig. Clay's Digest of Laws of Alabama.
Cleve. Law Rec. Cleveland Law Recorder (Ohio)
Cleve. Law Rep. Cleveland Law Reporter (Ohio)
Clev. Insan. Clevenger's Medical Jurisprudence of Insanity.
Cliff. Clifford (U. S.)
C., M. & R. Compton, Meeson, and Roscoe's English Exchequer Reports.
Co. Coke's English King's Bench Reports.
Cobb, Dig. Cobb's Digest of Statute Laws (Ga.)
Cobbey, Repl. Cobbey's Practical Treatise on the Law of Replevin.
Cobbey's Ann. St. .. Cobbey's Annotated Statutes (Neb.)
Code Civ. Proc. Code of Civil Procedure.
Code Cr. Proc. Code of Criminal Procedure.
Code Gen. Laws. Code of General Laws.
Code Prac. Code of Practice.
Code Proc. Code of Procedure.
Code Pub. Gen. Law Code of Public General Laws.
Code Pub. Loc. Law Code of Public Local Laws.
Code (N. S.) Code Reports, New Series (N. Y.)
Code Rep. Code Reporter (N. Y.)
Code Sup. Supplement to the Code.
Cod. St. Codified Statutes.
Cohen, Adm. Law. . Cohen's Admiralty Jurisdiction, Law, and Practice.
Co. Ins. Coke's Institutes.
Coke Coke's English King's Bench Reports.
Cold. Coldwell (Tenn.)
Colem. C. Coleman's Cases (N. Y.)
Colem. & C. Cas. Coleman & Caines' Cases (N. Y.)
Co. Litt. Coke on Littleton.
Coll. Ban. Collier's Law of Bankruptcy.
Colly. Collyer's English Chancery Cases.
Colly. Part. Collyer on Partnership.
Colo. Colorado.
Colo. App. Colorado Appeals Reports.
Colo. Law Rep. Colorado Law Reporter.
Colq. Rom. Civ. Law Colquhoun's Roman Civil Law.
Com. Dig. Comyn's Digest of the Laws of England.
Comm. Commentaries.
Com. on Con. Comyn's Law of Contracts.
Comp. Laws. Compiled Laws.
Comp. St. Compiled Statutes.
Comst. Comstock (N. Y.)
Comyn Comyns' English King's Bench Reports.
Comyn, Usury. Comyn on Usury.
Conf. R. Conference Reports (N. C.)
Cong. Congress.
Conn. Connecticut.
Con. St. Consolidated Statutes.
Const. Constitution.
Const. Amend. Amendment to Constitution.
Const. U. S. Amend. . Amendment to the Constitution of the United States.
Con. Sur. Connoly's Surrogate (N. Y.)
Cook, Corp. Cook on Corporations.
Cooke Cooke (Tenn.)
Cooke, Ins. Cooke on Life Insurance.
Cook's Pen. Code . Cook's Penal Code (N. Y.)
Cook, Stock, Stock. & Corp. Law. Cook on Stock, Stockholders, and General Corporation Law.
Cooley, Bl. Comm. .. Cooley's Edition of Blackstone's Commentaries.
Cooley, Const. Law. Cooley's Constitutional Law.
Cooley, Const. Lim. . Cooley's Constitutional Limitations.
Cooley, Tax'n Cooley on Taxation.
Cooley, Torts. Cooley on Torts.
Coop. Cooper's English Chancery Reports temp. Eldon.
Coop. Eq. Pl. Cooper's Equity Pleading.
Copp, Pub. Land Laws Copp's United States Public Land Laws.
Co. Rep. Coke's English King's Bench Reports.
Corn. Deeds Cornish on Purchase Deeds.
Cornish, Purch. Deeds Cornish on Purchase Deeds.
Cow. Cowen (N. Y.)
Cow. Cr. R. Cowen's Criminal Reports (N. Y.)
Cowell Cowell's Law Dictionary.

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Cowp. Cowper's English King's Bench Reports.
Cox Cox (Ark.)
Cox Cox's English Chancery Cases.
Cox, C. C..... Cox's English Criminal Cases.
Cox, Cr. Cas..... Cox's English Criminal Cases.
Coxe Coxe (N. J.)
C. P. Div..... Common Pleas Division, English Law Reports.
C. P. Rep..... Common Pleas Reporter (Pa.)
Crabbe Crabbe (U. S.)
Crabb, Eng. Synonyms Crabb's English Synonymes.
Crabb, Real Prop... Crabb on Real Property.
Cr. Act..... Criminal Act.
Craig, Dict..... Craig's Etymological, Technological, and Pronouncing Dictionary.
Craig & P..... Craig and Phillips' English Chancery Reports.
Cranch Cranch (U. S.)
Cranch, C. C..... Cranch's Circuit Court (U. S.)
Cranch, Pat. Dec... Cranch's Patent Decisions (U. S.)
Cr. Cir. Comp..... Crown Circuit Companion (Irish)
Cr. Code..... Criminal Code.
Cr. Law Mag..... Criminal Law Magazine (N. J.)
C. Rob. Adm..... Charles Robinson's English Admiralty Reports.
Cro. Car..... Croke's English King's Bench Reports temp. Charles I (3 Cro.)
Cro. Cas..... Croke's English King's Bench Reports temp. Charles I (3 Cro.)
Cro. Eliz..... Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)
Cro. Jac..... Croke's English King's Bench Reports temp. James (Jacobus) I (2 Cro.)
Cromp. Just..... Crompton's Office of Justice of the Peace.
Cromp., M. & R.... Crompton, Meeson, and Roscoe's English Exchequer Reports.
Crompt. Star Chamber Cases by Crompton.
Cromp. & J..... Crompton & Jervis' English Exchequer Reports.
Cr. Prac. Act Criminal Practice Act.
Cr. Proc. Act Criminal Procedure Act.
Cr. St..... Criminal Statutes.
Cruise's Dig..... Cruise's Digest of the Law of Real Property.
Ct. Cl..... Court of Claims (U. S.)
Curt. Curtis (U. S.)
Curt. Ecc..... Curteis English Ecclesiastical Reports.
Curt. Pat..... Curtis on Patents.
Cush. Cushing (Mass.)
Cush. Law & Prac. Leg. Assem..... Cushing's Law and Practice of Legislative Assemblies.
Cushm. Cushman (Miss.)
Cyc. Cyclopedia of Law and Procedure.
Cyc. Law & Proc... Cyclopedia of Law and Procedure.
Cyclop. Dict..... Shumaker & Longsdorf's Cyclopedia Dictionary.
C. & K..... Carrington and Kirwan's English Nisi Prius Reports.
C. & P..... Carrington and Payne's English Nisi Prius Reports.

D

Dak. Dakota.
Dall. (Pa.)..... Dallas (Pa.)
Dall. (U. S.)..... Dallas (U. S.)
Dall. Dig..... Dallam's Digest and Opinions (Tex.)
Dall. Laws..... Dallas' Laws (Pa.)
Daly Daly (N. Y.)
Dana Dana (Ky.)
Dane's Abr..... Dane's Abridgment of American Law.
Daniell, Ch. Pl. & Prac. Daniell's Chancery Pleading and Practice.
Daniell, Ch. Prac... Daniell's Chancery Pleading and Practice.
Daniel, Neg. Inst... Daniel's Negotiable Instruments.
Dass. Ed..... Dassler's Edition, Kansas Reports.
Davis, Cr. Law..... Davis' Criminal Law.
Dawson's Code..... Dawson's Code of Civil Procedure (Colo.)
Day Day (Conn.)
D. C..... District of Columbia.
D. Chip..... D. Chipman (Vt.)
Deac. Cr. Law..... Deacon on Criminal Law of England.
Deady Deady (U. S.)
Dears. & B. Crown Cas. Dearsly and Bell's English Crown Cases.
De Gex, F. & J.... De Gex, Fisher & Jones' English Chancery Reports.
De Gex, J. & S..... De Gex, Jones, and Smith's English Chancery Reports.
De Gex, M. & G.... De Gex, Macnaghten, and Gordon's English Chancery Reports.
De Jure Mar..... Hale's De Jure Maris (Appendix to Hall on the Sea Shore).
Del. Delaware.
Del. Ch..... Delaware Chancery.
Del. Co. R..... Delaware County Reports (Pa.)
Del. Term R..... Delaware Term Reports.
Dem. Sur..... Demarest's Surrogate (N. Y.)
Denio Denio (N. Y.)
Denison, Cr. Cas.... Denison's English Crown Cases.
Desaus. Desaussure's Equity (S. C.)
Desty, Tax'n..... Desty on Taxation.
Detroit Leg. N..... Detroit Legal News (Mich.)
Dev. Devereux (N. C.)
Dev. Ct. Cl..... Devereux's Court of Claims (U. S.)
Dev. Eq..... Devereux's Equity (N. C.)
Devl. Deeds..... Devlin on Deeds.
Dev. & B..... Devereux & Battle (N. C.)
Dev. & B. Eq..... Devereux & Battle's Equity (N. C.)
Dicey, Confl. Laws.. Dicey on Conflict of Laws.
Dicey, Dom..... Dicey's Law of Domicil.
Dick. Dickinson (N. J.)
Dickens Dickens' English Chancery Reports.
Dict. Dictionary.
Dict. Droit Civil.... Dictionnaire Droit Civil.
Dig. Digest.
Dig. English's Digest of the Statutes (Ark.)
Dig. Compiled Public Laws (R. I.)
Dig. Rev. St. 1835 (Mo.)
Dig. Fla..... Thompson's Digest of Laws (Fla.)
Dig. Littell and Swigert's Digest of Statute Law (Ky.)
Dig. St..... English's Digest of the Statutes (Ark.)

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Dill. Dillon (U. S.)
Dill. Laws Eng. & Am. Dillon's Laws and Jurisprudence of England and America.
Dill. Mun. Corp.... Dillon on Municipal Corporations.
Disn. Disney (Ohio)
Doct. & Stud. Dial.. Doctor and Student; or, Dialogues between a Doctor of Divinity and a Student in the Laws of England, by C. St. Germain.
Dom. Civ. Law..... Domat's Civil Law.
Doug. Douglas' English King's Bench Reports.
Doug. Douglass (Mich.)
Dowl. Dowling's English Bail Court Cases.
Dowl. & L..... Dowling & Lowndes' English Bail Court Reports.
Dowl. & R..... Dowling and Ryland's English King's Bench Reports.
Dow. & C..... Dow and Clark's English House of Lord's Cases.
Drake, Attachm..... Drake on Attachment.
Dud. Dudley (Ga.)
Dud. Eq..... Dudley's Equity (S. C.)
Dud. Law..... Dudley's Law (S. C.)
Duer Duer's Superior Court (N. Y.)
Dup. Jur..... Duponceau on Jurisdiction of United States Courts.
Durn. & E..... Durnford and East's English King's Bench Reports (Term Reports).
Dutch. Dutcher (N. J.)
Duv. Duvall (Ky.)
Dyche & P. Dict.... Dyche and Pardon's Dictionary.
Dyer Dyer's English King's Bench Reports.

E

East East's English King's Bench Reports.
East, P. C..... East's Pleas of the Crown.
Eccl. R..... English Ecclesiastical Reports.
E. C. L..... English Common Law Reports (American Reprint).
Ed. Edition.
Eden, Pen. Law.... Eden's Principles of Penal Law.
Eden's Prin. P. L... Eden's Principles of Penal Law.
Edmonds' St. at Large Edmonds' Statutes at Large (N. Y.)
Edm. Sel. Cas..... Edmonds' Select Cases (N. Y.)
E. D. Smith..... E. D. Smith (N. Y.)
Edw. King Edward (as 4 Edw. I).
Edw. Bailm..... Edwards on the Law of Bailments.
Edw. Bills & N..... Edwards on Bills and Notes.
Edw. Brok. & F.... Edwards on Factors and Brokers.
Edw. Ch..... Edwards' Chancery (N. Y.)
Edw. Rec..... Edwards on Receivers in Equity.
El., Bl. & El..... Ellis, Blackburn, and Ellis' English Queen's Bench Reports.
Eliz. Queen Elizabeth (as 13 Eliz.).
Elliot, Deb. Fed. Const. Elliot's Debates on the Federal Constitution.
Elliott, Roads & S.. Elliott on Roads and Streets.
Elliott, R. R..... Elliott on Railroads.
Elliott, Supp..... Elliott Supplement to the Indiana Revised Statutes.
Ellis & Bl..... Ellis and Blackburn's English Queen's Bench Reports.
Elm. Dig..... Elmer's Digest of Laws (N. J.)
Elph. Interp. Deeds.. Elphinstone's Rules for Interpretation of Deeds.
El. & Bl..... Ellis and Blackburn's English Queen's Bench Reports.
E. L. & Eq..... English Law and Equity (American Reprint).
Emerig. Assur..... Emerigon, Traité des Assurances et des Contrats à la Grosse.
Emerig. Ins..... Emerigon on Insurance.
Enc. Amer..... Encyclopædia Americana.
Enc. Arch..... Gwilt's Encyclopedia of Architecture.
Enc. Brit..... Encyclopædia Britannica.
Enc. Dict..... Encyclopædic Dictionary, Edited by Robert Hunter 1879–1888.
Enc. Ins. U. S..... Insurance Year-Book.
Enc. Law..... American and English Encyclopædia of Law.
Enc. Pl. & Prac... Encyclopedia of Pleading and Practice.
End. Interp. St..... Endlich's Commentaries on the Interpretation of Statutes.
End. Bldg. Ass'ns... Endlich on Building Associations.
Eng. English (Ark.)
Eng. C. L..... English Common Law Reports (American Reprint).
Eng. Ecc. R..... English Ecclesiastical Reports (American Reprint).
Eng. Law & Eq.... English Law and Equity Reports (American Reprint).
Eq. Equity.
Eq. Cas. Abr..... English Equity Cases Abridged.
Ersk. Inst..... Erskine's Institutes of the Law of Scotland.
Ersk. Speeches..... Erskine's Speeches.
Escriche, Dict..... Escriche's Dictionary of Jurisprudence.
Esp. Espinasse's English Nisi Prius Reports.
Ev. Evidence.
Ex. English Exchequer Reports (Welsby, Hurlstone & Gordon).
Exch. English Exchequer Reports (Welsby, Hurlstone & Gordon).
Exch. Div..... Exchequer Division, English Law Reports.
Ex. Sess. Extra Session.
E. & B..... Ellis and Blackburn's English Queen's Bench Reports.

F

Fairf. Fairfield (Me.)
Falc. Marine Dict.. Falconer's Marine Dictionary.
Faust Faust's Compiled Laws (S. C.)
Fearne, Rem..... Fearne on Contingent Remainders.
Fed. Federal Reporter (U. S.)
Fed. Cas..... Federal Cases (U. S.)
Fernald, Eng. Synonyms Fernald's English Synonyms.
Fett. Carr..... Fetter's Treatise on Carriers of Passengers.
Field, Corp..... Field on Corporations.

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Finch, Law..... Finch, Sir Henry; a Discourse of Law (1759).
Fish. Dig..... Fisher's English Common Law Digest.
Fish. Pat. Cas..... Fisher's Patent Cases (U. S.)
Fish. Pat. Rep..... Fisher's Patent Reports (U. S.)
Fish. Prize Cas..... Fisher's Prize Cases (U. S.)
Fitz. Abridg..... Fitzherbert's Abridgment.
Fla. Florida.
Flip. Flippin (U. S.)
Foote & E. Incorp. Co. Foote and Everett's Law of Incorporated Companies Operating under Municipal Franchises.
Fost. Foster (N. H.)
Fost. Crown Law... Foster's English Crown Law or Crown Cases.
Fost. Fed. Prac..... Foster's Treatise on Pleading and Practice in Equity in Courts of United States.
Fost. & F..... Foster and Finlason's English Nisi Prius Reports.
Fras. Dom. Rel.... Fraser on Personal and Domestic Relations, Scotland.
Freem. Freeman (Ill.)
Freem. Ch..... Freeman's Chancery (Miss.)
Freem. Judgm..... Freeman on Judgments.

G

G. King George (as 15 Geo. II).
Ga. Georgia.
Gabb. Cr. Law..... Gabbett's Criminal Law.
Ga. Dec..... Georgia Decisions.
Gale's St..... Gale's Statutes (Ill.)
Gale & Whatley Easem. Gale and Whatley (afterwards Gale) on Easements.
Gall. Gallison (U. S.)
Gantt's Dig..... Gantt's (& Caldwell's) Digest of Statutes (Ark.)
Gav. & H. Rev. St.. Gavin and Hord's Revised Statutes (Ind.)
Gear, Landl. & T... Gear on Landlord and Tenant.
Gen. Assem..... General Assembly.
Gen. Dig. U. S..... General Digest of the United States.
Gen. Laws..... General Laws.
Gen. R. R. Act..... General Railroad Act.
Gen. St..... General Statutes.
Geo. King George (as 15 Geo. II).
George George (Miss.)
George, Partn..... George on Partnership.
Gibbon Gibbon on Nuisances.
Gil. Gilfillan (Minn.)
Gilbert, Ev..... Gilbert's Law of Evidence.
Gilbert, Tenures.... Gilbert on Tenures.
Gilbert, Uses (by Sugd.) Gilbert's Uses and Trusts by Sugden.
Gilb. Rents..... Gilbert's Treatise on Rents.
Gilb. Repl..... Gilbert on Replevin.
Gild. Gildersleeve Reports (N. M.)
Gill Gill (Md.)
Gillet, Cr. Law..... Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.
Gill & J..... Gill & Johnson (Md.)
Gilman Gilman (Ill.)
Gilmer Gilmer (Va.)
Gilp. Gilpin (U. S.)
Godd. Easem..... Goddard on Easements.
Gould, Pl..... Gould on the Principles of Pleading in Civil Actions.
Gould's Dig..... Gould's Digest of Laws (Ark.)
Gould, Wat..... Gould on Waters.
Grah. & W. New Trials Graham and Waterman on New Trials.
Grant, Cas. Grant's Cases (Pa.)
Grant's Dig..... Gantt's (& Caldwell's) Digest of Statutes (Ark.)
Grat. Grattan (Va.)
Gray Gray (Mass.)
Green, C. E..... C. E. Green (N. J.)
Green, Cr. Law R... Green's Criminal Law Reports (N. Y.)
Greene, G..... G. Greene (Iowa)
Greenh. Pub. Pol.... Greenhood's Doctrine of Public Policy in the Law of Contracts.
Green, H. W..... H. W. Green (N. J.)
Green, J. S..... J. S. Green (N. J.)
Greenl. Greenleaf (Me.)
Greenl. Cruise, Real Prop. Greenleaf's Edition of Cruise's Digest of Real Property.
Greenl. Ev. Greenleaf on Evidence.
Green's Brice, Ultra Vires Green's Edition of Brice's Ultra Vires.
Gross, St..... Gross' Illinois Compiled Laws (or Statutes).
Grotius Grotius' Latin Law.

H

Hagg. Adm..... Haggard's English Admiralty Reports.
Hagg. Cons..... Haggard's English Consistory Reports.
Hagg. Etc..... Haggard's English Ecclesiastical Reports.
Hale, Com. Law.... Hale's History of the Common Law.
Hale, De Jure Mar.. Hale's De Jure Maris (Appendix to Hall on the Sea Shore).
Hale, P. C..... Hale's Pleas of the Crown.
Hale, Torts..... Hale on Torts.
Hall Hall's Superior Court (N. Y.)
Halleck, Int. Law.. Halleck's International Law.
Hall, Mex. Law.... Hall's Mexican Law.
Halst. Halsted (N. J.)
Halst. Ch. Halsted's Chancery (N. J.)
Ham. Hammond (Ohio)
Ham. Cont..... Hammon on Contracts.
Hand Hand (N. Y.)
Handy Handy (Ohio)
Har. (Del.)..... Harrington (Del.)
Har. (Mich.)..... Harrington (Mich.)
Har. (N. J.)..... Harrison (N. J.)
Hardin Hardin (Ky.)
Hardw. Cas. Temp.. Cases temp. Hardwicke, by Lee and Hardwicke.
Hare Hare's English Vice Chancellors' Reports.
Hare, Const. Law.. Hare's American Constitutional Law.
Harg. Co. Litt..... Hargrave's Notes to Coke on Littleton.
Hargrave & Butler's Notes on Co. Litt.. Hargrave and Butler's Notes on Coke on Littleton.
Harp. Harper (S. C.)
Harp. Eq. Harper's Equity (S. C.)
Harris Harris (Pa.)
Harrison, Ch..... Harrison's Chancery Practice.
Hart. Dig. Hartley's Digest of Laws (Tex.)
Har. & G. Harris & Gill (Md.)
Har. & J. Harris & Johnson (Md.)
Har. & McH. Harris & McHenry (Md.)

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Hasb. Hasbrouck's Reports (Idaho)
Hask. Haskell (U. S.)
Hats. Hatsell's Parliamentary Precedents.
Haw. Hawaiian Reports.
Hawes, Jur..... Hawes on Jurisdiction of Courts.
Hawk. Hawkins' Pleas of the Crown.
Hawk. P. C. Hawkins' Pleas of the Crown.
Hawk. Wills..... Hawkins' Construction of Wills.
Hawks Hawks (N. C.)
Hayes Hayes' Irish Exchequer Reports.
Hayw. (N. C.)..... Haywood (N. C.)
Hayw. (Tenn.)..... Haywood (Tenn.)
Hayw. & H..... Hayward & Hazelton (U. S.)
Haz. Reg. Hazard's Register (Pa.)
H. Bl. Henry Blackstone's English Common Pleas Reports.
Head Head (Tenn.)
Heard's Shortt, Extr. Rem. Heard's Edition of Shortt on Extraordinary Legal Remedies.
Heisk. Heiskell (Tenn.)
Hemp. Hempstead (U. S.)
Hen. King Henry (as 8 Hen. VI).
Hen. St..... Hening's Statutes (Va.)
Hen. & M..... Hening & Munford (Va.)
Herm. Chat. Mortg.. Herman on Chattel Mortgages.
Herm. Estop..... Herman's Law of Estoppel.
Herm. Ex'ns..... Herman's Law of Executions.
High, Extr. Leg. Rem. High on Extraordinary Legal Remedies.
High, Inj..... High on Injunctions.
High, Rec..... High on Receivers.
Hil. Abr..... Hilliard's American Law.
Hill Hill (N. Y.)
Hill. Cont..... Hilliard on Contracts.
Hill. Elem. Law.... Hilliard's Elements of Law.
Hill, Eq..... Hill's Equity (S. C.)
Hilliard, R. R..... Hilliard on Real Property.
Hill, Law..... Hill's Law (S. C.)
Hill. Mortg..... Hilliard's Law of Mortgages.
Hill's Ann. Codes & Laws Hill's Annotated Codes and General Laws (Or.)
Hill's Ann. St. & Codes Hill's Annotated General Statutes and Codes (Wash.)
Hill's Code..... Hill's Annotated Codes and General Laws (Or.)
Hill's Code..... Hill's Annotated General Statutes and Codes (Wash.)
Hill & D. Supp..... Hill & Denio, Lalor's Supplement (N. Y.)
Hilt. Hilton (N. Y.)
Hil. Term 4, Will. IV. Hilary Term 4, William IV.
Hil. Torts..... Hilliard on the Law of Torts.
Hittell's Laws..... Hittell's General Laws (Cal.)
H. L. Cas. House of Lords' Cases, English.
Hob. Hobart's English King's Bench Reports.
Hodge, Presb. Law.. Hodge on Presbyterian Law.
Hoff. Ch. Hoffman's Chancery (N. Y.)
Hoff. Land Cas..... Hoffman's Land Cases (U. S.)
Hoff. Mast..... Hoffman's Master in Chancery.
Holl. Jur..... Holland's Elements of Jurisprudence.
Holmes Holmes (U. S.)
Holt Holt's English King's Bench Reports.
Holthouse, Law Dict. Holthouse's Law Dictionary.
Holt, N. P..... Holt's English Nisi Prius Reports.
Holt, Shipp..... Holt on Shipping.
Hopk. Ch..... Hopkins' Chancery (N. Y.)
Horner's Ann. St... Horner's Annotated Revised Statutes (Ind.)
Horner's Rev. St.... Horner's Annotated Revised Statutes (Ind.)
Horr & B. Mun. Ord. Horr and Bemis' Treatise on Municipal Police Ordinances.
Horr. & T. Cas. Self-Def. Horrigan and Thompson's Cases on Self-Defence.
Houst. Houston (Del.)
Houst. Cr. Cas..... Houston's Criminal Cases (Del.)
How. (Miss.)..... Howard (Miss.)
How. Howard (U. S.)
How. Ann. St..... Howell's Annotated Statutes (Mich.)
Howell, N. P..... Howell's Nisi Prius Reports (Mich.)
Howell, St. Tr..... Howell's English State Trials.
How. Prac..... Howard's Practice (N. Y.)
How. Prac. (N. S.).. Howard's Practice, New Series (N. Y.)
How. St..... Howell's Annotated Statutes (Mich.)
How. & H. St..... Howard and Hutchinson's Statutes (Miss.)
Hughes (Ky.)..... Hughes (Ky.)
Hughes Hughes (U. S.)
Hume's Hist. Eng.. Hume's History of England.
Humph. Humphrey (Tenn.)
Hun Hun (N. Y.)
Hurd's Rev. St..... Hurd's Revised Statutes (Ill.)
Hurl. Bonds..... Hurlstone on Bonds.
Hurl. & C..... Hurlstone & Coltman's English Exchequer Reports.
Hurl. & G..... Hurlstone and Gordon's Reports (10, 11, English Exchequer Reports).
Hurl. & N..... Hurlstone and Norman's English Exchequer Reports.
Hutch. Carr..... Hutchinson on Carriers.
Hutch. Code..... Hutchinson's Code (Miss.)
Hutch. Dig. St.... Hutchinson's Code (Miss.)

I

Idaho Idaho.
Ill. Illinois.
Ill. App..... Illinois Appellate Court Reports.
Imp. Dict..... Imperial Dictionary.
Ind. Indiana.
Ind. App..... Indiana Appellate Court Reports.
Ind. T. Indian Territory.
Ind. T. Ann. St..... Indian Territory Annotated Statutes.
Ins. Law J..... Insurance Law Journal (Pa.)
Inst. Coke's Institutes.
Internat. Dict. Webster's International Dictionary.

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Interst. Com. R.... Interstate Commerce Reports.
Int. Rev. Manual... Internal Revenue Manual.
Int. Rev. Rec..... Internal Revenue Record (N. Y.)
Iowa Iowa.
Ired. Iredell's Law (N. C.)
Ired. Eq. Iredell's Equity (N. C.)
Irwin's Code..... Clark, Cobb and Irwin's Code (Ga.).

J

Jac. King James (as 21 Jac. I).
Jac. Law Dict..... Jacob's Law Dictionary.
Jagg. Torts..... Jaggard on Torts.
Jarm. Wills..... Jarman on Wills.
Jeff. Jefferson (Va.)
Jellett, Cr. Law.... Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.
Jeremy, Eq..... Jeremy's Equity Jurisdiction.
J. J. Marsh. J. J. Marshall (Ky.)
John. Johnson (N. M.)
John. Dict..... Johnson's English Dictionary.
John. Eng. Ch..... Johnson's English Vice-Chancellors' Reports.
Johns. Johnson (N. Y.)
Johns. Cas. Johnson's Cases (N. Y.)
Johns. Ch. Johnson's Chancery (N. Y.)
Johnson's Quarto Dict. Johnson's Quarto Dictionary.
Jones Jones (Pa.)
Jones, Bailm..... Jones on Bailments.
Jones, Chat. Mortg.. Jones on Chattel Mortgages.
Jones, Easem..... Jones' Treatise on Easements.
Jones, Eq..... Jones' Equity (N. C.)
Jones, Law..... Jones' Law (N. C.)
Jones, Liens..... Jones on Liens.
Jones, Mortg..... Jones on Mortgages.
Jones, Pledges..... Jones on Pledges and Collateral Securities.
Jones, Securities.... Jones on Railroad Securities.
Jones & S..... Jones & Spencer (N. Y.)
Jones & V. Laws... Jones and Varick's Laws (N. Y.)
Jour. Juris. Journal of Jurisprudence.
Joyce, Ins..... Joyce on Insurance.
J. P..... The Justice of the Peace, London (periodical).
J. P. Smith..... J. P. Smith's English King's Bench Reports.
J. Scott (N. S.)..... English Common Bench Reports, New Series by John Scott.
Jud. Repos. Judicial Repository (N. Y.)
Jur. The Jurist, London.
Jur. (N. S.)..... The Jurist, New Series, London.
Just. Inst..... Institutes of Justinian.

K

Kames, Eq..... Kames' Principles of Equity.
Kan. Kansas.
Kan. App..... Kansas Appeals.
Kay & J..... Kay and Johnson's English Vice Chancellors' Reports.
Keb. Keble's English King's Bench Reports.
Keen Keen's English Rolls Court Reports.
Keen, Ch..... Keen's English Rolls Court Reports.
Keener, Quasi Cont.. Keener on Quasi Contracts.
Kel. Sir John Kelyng's English Crown Cases.
Kelly Kelly (Ga.)
Kent, Comm. Kent's Commentaries on American Law.
Kent & R. St..... Kent and Radcliff's Law of New York (Revision of 1801).
Kern. Kernan (N. Y.)
Kerr, Inj..... Kerr on Injunctions.
Kerr, Rec..... Kerr on Receivers.
Kersey, Dict..... John Kersey's English Dictionary, 1708.
Keyes Keyes (N. Y.)
Kielway Keilwey's English King's Bench Reports.
Kinney, Law Dict. & Glos..... Kinney's Law Dictionary and Glossary.
Kirby Kirby (Conn.)
Knight, Mech. Dict.. Knight's American Mechanical Dictionary.
Kulp Kulp (Pa.)
Ky. Kentucky.
Kyd Kyd on Bills of Exchange.
Kyd, Corp..... Kyd on Corporations.
Ky. Dec..... Kentucky Decisions.
Ky. Law Rep. Kentucky Law Reporter.
Ky. St. Law..... Morehead and Brown Digest of Statute Laws (Ky.)
K. & R..... Kent and Radcliff's Law of New York (Revision of 1801).

L

La. Louisiana.
La. Ann. Louisiana Annual.
Lack. Jur. Lackawanna Jurist (Pa.)
Lack. Leg. N..... Lackawanna Legal News (Pa.)
Lalor, Supp. Lalor's Supplement to Hill & Denio's Reports (N. Y.)
Lamb. Eir..... Lambard's Eiranarcha.
Lanc. Bar Lancaster Bar.
Lanc. Law Rev. .. Lancaster Law Review.
Lans. Lansing (N. Y.)
Lans. Ch..... Lansing's Chancery (N. Y.)
Law J. Ch..... Law Journal, New Series, Chancery.
Law J. Exch..... Law Journal, New Series, Exchequer.
Law J. Q. B..... Law Journal, New Series, Queen's Bench (English).
Law of Trusts (Tiff. & Bul.) Tiffany and Bullard on Trusts and Trustees.
Law Rep..... Monthly Law Reporter, Boston, Mass.
Law Rep. Ex..... English Law Reports, Exchequer.
Lawson, Exp. Ev... Lawson on Expert and Opinion Evidence.
Lawson, Pres. Ev... Lawson on Presumptive Evidence.
Lawson, Rights, Rem. & Pr..... Lawson on Rights, Remedies and Practice.
Lawson, Usages & Cust. Lawson's Law of Usages and Customs.
Law T..... English Law Times Reports.
Law T. (N. S.).... English Law Times Reports, New Series.
Ld. Raym..... Lord Raymond's English King's Bench Reports.
Lea Lea (Tenn.)
Leach, Cr. Cas..... Leach's English Crown Cases.
Leach's C. L..... Leach's Club Cases, London.
Leam. & Spic..... Leaming and Spicer's Laws, Grants, Concessions and Original Constitutions (N. J.)
L. Ed..... Lawyers' Edition Supreme Court Reports.

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Lee Lee (Cal.)
Leg. Acts of the Legislature.
Leg. Chron. Legal Chronicle.
Leg. Gaz. Legal Gazette (Pa.)
Leg. Gaz. R. Legal Gazette Reports (Pa.)
Leg. Int. Legal Intelligencer (Pa.)
Leg. News Legal News, Chicago.
Leg. Op. Legal Opinions.
Leg. Rec. Rep. Legal Record Reports.
Leg. Rep. Legal Reporter (Tenn.)
Leg. & Ins. Rep. ... Legal & Insurance Reporter.
Lehigh Val. Law Rep. Lehigh Valley Law Reporter.
Leigh Leigh (Va.)
Leigh & C. Leigh and Cave's English Crown Cases.
Leon. Leonard's English King's Bench Reports.
Lev. Levinz's English King's Bench Reports.
Lewin, Cr. Cas. ... Lewin's English Crown Cases Reserved.
Lewis, Em. Dom. ... Lewis on Eminent Domain.
Lewis, Perp. Lewis' Law of Perpetuity.
Lex Mercatoria Americana An Enquiry into the Law Merchant of the United States by George Caines.
Lieb. Herm. Lieber's Hermeneutics.
Lil. Conv. Lilly's Conveyancer.
Lilly, Abr. Lilly's Abridgment, or Practical Register.
Lindl. Copartn. Lindley on Partnership.
Lindl. Partn. Lindley's Law of Partnership.
Litt. Coke on Littleton.
Litt. Littell (Ky.)
Litt. Comp. Laws. .. Littell's Statute Law (Ky.)
Litt. Sel. Cas. Littell's Select Cases (Ky.)
Litt. & S. St. Law. . Littell and Swigert's Digest of Statute Law (Ky.)
Livermore, Ag. Livermore on Principal and Agent.
Liv. Law Mag. Livingston's Law Magazine (N. Y.)
L. J. Ch. Law Journal, New Series, Chancery, English.
L. J. Exch. Law Journal, New Series, Exchequer.
L. J. M. Cas. Law Journal, New Series, Magistrates' Cases.
Loc. Acts. Local Acts.
Loc. Code. Local Code.
Loc. Laws. Local Laws.
Lofft Lofft's English King's Bench Reports.
Lomax, Ex'rs. Lomax on Executors.
Lom. Dig. Lomax's Digest of Real Property.
Long, Irr. Long on Irrigation.
Low. Lowell (U. S.)
Lower Ct. Dec. Lower Court Decisions (Ohio)
L. R. A. Lawyers' Reports Annotated.
L. R. App. Cas. English Law Reports, Appeal Cases, House of Lords.
L. R. C. P. English Law Reports, Common Pleas.
L. R. Eq. English Law Reports, Equity.
L. R. Ex. Cas. English Law Reports, Exchequer.
L. R. Exch. English Law Reports, Exchequer.
L. R. H. L. English Law Reports, English and Irish Appeal Cases.
L. R. H. L. Sc. English Law Reports, Scotch and Divorce Appeal Cases.
L. R. P. C. English Law Reports, Privy Council, Appeal Cases.
L. R. Prob. Div. English Law Reports, Probate, Divorce and Admiralty Division.
L. R. Prob. & Div. .. English Law Reports, Probate and Divorce.
L. R. Prov. & Div. .. See L. R. Prob. & Div.
L. R. Q. B. English Law Reports, Queen's Bench.
L. R. Q. B. Div. English Law Reports, Queen's Bench Division.
Lush. Lushington's English Admiralty Reports.
Lut. Lutwyche's English Common Pleas Reports.
Luz. Law T. Luzerne Law Times (Pa.)
Luz. Leg. Obs. Luzerne Legal Observer (Pa.)
Luz. Leg. Reg. Luzerne Legal Register (Pa.)

M

McAdam, Landl. & T. McAdam on Landlord and Tenant.
McAll. McAllister (U. S.)
MacArthur MacArthur (D. C.)
MacArthur, Pat. Cas. .. MacArthur's Patent Cases (U. S.)
MacArthur & M. .. MacArthur & Mackey (D. C.)
Macaulay, Hist. Eng. .. Macaulay's History of England.
McCahon McCahon (Kan.)
McCart. McCarter (N. J.)
McCarty, Civ. Proc. .. McCarty's Civil Procedure Reports (N. Y.)
McClain, Cr. Law. . McClain's Criminal Law.
McClain's Code. McClain's Annotated Code and Statutes (Iowa)
McClel. Dig. McClellan's Digest of Laws (Fla.)
McCord McCord's Law (S. C.)
McCord, Eq. McCord's Equity (S. C.)
McCrary McCrary (U. S.)
McCrary, Elect. McCrary's American Law of Elections.
McCul. Dict. McCulloch's Commercial Dictionary.
McGloin McGloin (La.)
McKelvey, Ev. McKelvey on Evidence.
Mackey Mackey (D. C.)
McLean McLean (U. S.)
Macl. Shipp. Maclachlan on Merchant Shipping.
McMul. McMullan (S. C.)
McMul. Eq. McMullan's Equity (S. C.)
Macn. & G. Macnaghten and Gordon's English Chancery Reports.
Macq. Macqueen's Scotch Appeal Cases.
Madd. Maddock's Reports, English Chancery.
Maine, Anc. Law. . Maine's Ancient Law.
Man. Manning (Mich.)
Man., G. & S. Manning, Granger, and Scott's English Common Pleas Reports.
Mansf. Dig. Mansfield's Digest of Statutes (Ark.)
Manson, Bankr. Cas. . Manson's Bankruptcy and Winding-Up Cases.
Man. Unrep. Cas. . . Manning's Unreported Cases (La.)
Man. & G. Manning & Granger's English Common Pleas Reports.
Man. & R. Manning & Ryland's English Magistrates' Cases.
Marsh. Marshall's English Common Pleas Reports.
Marsh., A. K. A. K. Marshall (Ky.)
Marsh. Ins. Marshall on Marine Insurance.
Marsh., J. J. J. J. Marshall (Ky.)

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Martin, Dict.	Edward Martin's English Dictionary.
Mart. (N. C.)	Martin (N. C.)
Mart. (N. S.)	Martin's New Series (La.)
Mart. (O. S.)	Martin's Old Series (La.)
Mart. & Y.	Martin & Yerger (Tenn.)
Marv.	Marvel's Reports (Del.)
Mason	Mason (U. S.)
Mass.	Massachusetts.
Math. Pres. Ev.	Mathews on Presumptive Evidence.
Maule & S.	Maule and Selwyn's English King's Bench Reports.
Maxw. Adv. Gram.	W. H. Maxwell's Advanced Lessons in English Grammar.
Maxw. Cr. Proc.	Maxwell's Treatise on Criminal Procedure.
Maxw. Interp. St.	Maxwell on Interpretation of Statutes.
May, Ins.	May on Insurance.
Md.	Maryland.
Md. Ch.	Maryland Chancery.
Me.	Maine.
Mechem, Ag.	Mechem on Agency.
Mechem, Pub. Off.	Mechem on Public Offices and Officers.
Mees. & W.	Meeson and Welsby's English Exchequer Reports.
Meigs	Meigs (Tenn.)
Meigs, Dig.	Meigs' Digest of Decisions of the Courts of Tennessee.
Mer.	Merivale's English Chancery Reports.
Merl. Repert.	Merlin, Répertoire de Jurisprudence.
Metc. (Ky.)	Metcalfe (Ky.)
Metc. (Mass.)	Metcalf (Mass.)
Mich.	Michigan.
Mich. N. P.	Michigan Nisi Prius.
Miles	Miles (Pa.)
Mill, Const.	Mill's Constitutional Reports (S. C.)
Miller, Const.	Miller on the Constitution of the United States.
Miller's Code.	Miller's Revised and Annotated Code (Iowa)
Mills' Ann. St.	Mills' Annotated Statutes (Colo.)
Mills, Em. Dom.	Mills on Eminent Domain.
Mill. & V. Code	Milliken & Vertrees' Code (Tenn.)
Minn.	Minnesota.
Minor	Minor (Ala.)
Minor, Inst.	Minor's Institutes of Common and Statute Law.
Misc. Laws.	Miscellaneous Laws (Or.)
Misc. Rep.	Miscellaneous Reports (N. Y.)
Miss.	Mississippi.
Mitch. Mod. Geog.	Mitchell's Modern Geography.
Mitf. Eq. Pl.	Mitford's Equity Pleading.
Mo.	Missouri.
Moak, Eng. R.	Moak's English Reports.
Moak, Underh. Torts	Moak's Edition of Underhill on Torts.
Mo. App.	Missouri Appeal Reports.
Mo. App. Rep'r	Missouri Appellate Reporter.
Mod.	Modern Reports, English King's Bench.
Monag.	Monaghan (Pa.)
Mon., B.	B. Monroe (Ky.)
Mon., T. B.	T. B. Monroe (Ky.)
Mont.	Montana.
Montg. Co. Law Rep'r	Montgomery County Law Reporter (Pa.)
Month. Law Bul.	Monthly Law Bulletin (N. Y.)
Mont. & B.	Montagu & Bligh's English Bankruptcy Reports.
Mont. & M.	Montagu and MacArthur's English Bankruptcy Reports.
Moody, Cr. Cas.	Moody's Crown Cases, English Courts.
Moody & M.	Moody and Malkin's English Nisi Prius Reports.
Moody & R.	Moody and Robinson's English Nisi Prius Reports.
Moore	Moore (Ark.)
Moore	Sir Francis Moore's English King's Bench Reports.
Moore, Cr. Law	Moore's Criminal Law and Procedure.
Moore, P. C.	Moore's Privy Council Reports.
Moore, Presb. Dig.	Moore's Presbyterian Digest.
Moore & S.	Moore and Scott's English Common Pleas Reports.
Mor. Corp.	Morawetz on Private Corporations.
Moreau & Carleton's Partidas	Moreau-Lislet and Carleton's Laws of Las Siète Partidas in force in Louisiana.
Mor. Priv. Corp.	Morawetz on Private Corporations.
Morrell, Bankr. Cas.	Morrell's English Bankruptcy Cases.
Morris	Morris (Iowa)
Morris, Repl.	Morris on Replevin.
Morr. Min. Rep.	Morrison's Mining Reports.
Morse, Banks	Morse on the Law of Banks and Banking.
Mos.	Mosely's English Chancery Reports.
Mun. Code.	Municipal Code.
Munf.	Munford (Va.)
Murfree, Off. Bonds.	Murfree on Official Bonds.
Murph.	Murphey (N. C.)
Murray's Eng. Dict.	Murray's English Dictionary.
Myl. & C.	Mylne & Craig's English Chancery Reports.
Myl. & K.	Mylne and Keen's English Chancery Reports.
Myr. Prob.	Myrick's Probate Court Reports (Cal.)
M. & C. Partidas.	Moreau-Lislet and Carleton's Laws of Las Siète Partidas in force in Louisiana.
M. & W.	Meeson and Welsby's English Exchequer Reports.

N

Nat. Bankr. Law.	National Bankruptcy Law.
Nat. Bankr. R.	National Bankruptcy Register (U. S.)
N. B. R.	National Bankruptcy Register (U. S.)
N. C.	North Carolina.
N. C. Term R.	North Carolina Term Reports.
N. Chip.	N. Chipman (Vt.)
N. D.	North Dakota.
N. E.	Northeastern Reporter.
Neb.	Nebraska.
Neg. Inst. Law.	Negotiable Instrument Law.
Nev.	Nevada.
Nev. & M.	Nevile and Manning's English King's Bench Reports.
Newb. Adm.	Newberry's Admiralty (U. S.)
Newell, Defam.	Newell on Defamation, Slander and Libel.

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Newell, Eject..... Newell's Treatise on the Action of Ejectment.
Newell, Mal. Pros.. Newell's Treatise on Malicious Prosecution.
Newell, Sland. & L.. Newell on Slander and Libel.
Newl. Ch. Prac..... Newland's Chancery Practice.
N. H. New Hampshire.
Nisi Prius & Gen. T. Rep. Nisi Prius & General Term Reports (Ohio)
Nix. Dig. Nixon's Digest of Laws (N. J.)
N. J. Eq. New Jersey Equity.
N. J. Law New Jersey Law.
N. J. Law J..... New Jersey Law Journal.
N. M. New Mexico.
Norris Norris (Pa.)
Northam. Law Rep.. Northampton County Law Reporter (Pa.)
Northumb. Co. Leg. N. Northumberland County Legal News (Pa.)
Nott & McC. Nott & McCord (S. C.)
N. R. L. Revised Laws 1813 (N. Y.)
N. S. New Series.
N. W. Northwestern Reporter.
N. Y. New York.
N. Y. Ann. Cas. ... New York Annotated Cases.
N. Y. Cr. R..... New York Criminal Reports.
N. Y. Daily Reg.... New York Daily Register.
N. Y. Law J..... New York Law Journal.
N. Y. Leg. Obs. New York Legal Observer.
N. Y. St. Rep. New York State Reporter.
N. Y. Super. Ct.... New York Superior Court.
N. Y. Supp..... New York Supplement.

O

O. C. D. Ohio Circuit Decisions.
Odgers, L. & Sland. } Odgers on Libel and Slander.
Odgers, Sland. & L. }
Ogilvie, Dict..... Ogilvie's Imperial Dictionary of the English Language.
Ohio Ohio.
Ohio Cir. Ct. R.... Ohio Circuit Court Reports.
Ohio Dec..... Ohio Decisions.
Ohio Law J..... Ohio Law Journal.
Ohio Leg. N..... Ohio Legal News.
Ohio N. P..... Ohio Nisi Prius.
Ohio St. Ohio State.
Ohio S. & C. P. Dec. Ohio Superior and Common Pleas Decisions.
Okl. Oklahoma.
Olcott Olcott (U. S.)
O. L. D..... Ohio Lower Court Decisions.
Ont. Ontario Reports.
Op. Attys. Gen..... Opinions of the United States Attorneys General.
Or. Oregon.
Ord. Ordinance.
O. S. Old Series.
Outerbridge Outerbridge (Pa.)
Overt. Overton (Tenn.)
Owen Owen's English King's Bench Reports.
O. & W. Dig..... Oldham and White's Digest of Laws (Tex.)

P

Pa. Pennsylvania State.
Pac. Pacific Reporter.
Pa. Co. Ct. R..... Pennsylvania County Court Reports.
Pa. Com. Pl..... Pennsylvania Common Pleas Reporter.
Pa. Dist. R..... Pennsylvania District Reports.
Paige Paige's Chancery (N. Y.)
Paine Paine (U. S.)
Paine, Elect..... Paine on Elections.
Pa. Law J..... Pennsylvania Law Journal.
Paley, Ag..... Paley on Principal and Agent (or Agency).
Paley, Mor. Ph..... Wm. Paley's Moral Philosophy (English).
Pamphl. Laws..... Pamphlet Laws (Acts).
Park, Ins..... Park on Marine Insurance.
Parker, Cr. R..... Parker's Criminal Reports (N. Y.)
Pars. Bills & N.... Parsons on Bills and Notes.
Pars. Cont..... Parsons on Contracts.
Pars. Eq. Cas..... Parsons' Select Equity Cases (Pa.)
Pars. Mar. Ins..... Parsons on Marine Insurance and General Average.
Pars. Mar. Law.... Parsons on Maritime Law.
Pars. Merc. Law... Parsons on Mercantile Law.
Pars. Shipp. & Adm.. Parsons on Shipping and Admiralty.
Partidas Moreau-Lislet and Carleton's Laws of Las Siete Partidas in force in Louisiana.
Paschal's Ann. Const. Paschal's United States Constitution, Annotated.
Pasch. Dig..... Paschal's Texas Digest of Decisions.
Pa. Super. Ct..... Pennsylvania Superior Court Reports.
Pat. Paterson's Laws.
Pat. & H..... Patton & Heath (Va.)
Pears. Pearson (Pa.)
Peck (Ill.)..... Peck (Ill.)
Peck (Tenn.)..... Peck (Tenn.)
Pen. Code..... Penal Code.
Pen. Laws..... Penal Laws.
Pennewill Pennewill Reports (Del.)
Penning. Pennington (N. J.)
Penny. Pennypacker (Pa.)
Pen. & W..... Penrose & Watts (Pa.)
Pepper & L. Dig. Laws Pepper and Lewis' Digest of Laws (Pa.)
Perry, Trusts..... Perry on Trusts.
Pet. Peters (U. S.)
Pet. Ab..... Petersdorff's Abridgment.
Pet. Adm. Peters' Admiralty (U. S.)
Pet. C. C..... Peters' Circuit Court (U. S.)
Petersd. Ab. Petersdorff's Abridgment.
P. F. Smith P. F. Smith (Pa.)
Phil. Phillips' Treatise on Insurance.
Phila. Philadelphia (Pa.)
Phil. Phillips' Law (N. C.)
Phil. Ch..... Phillips' English Chancery Reports.
Phil. Eq..... Phillips' Equity (N. C.)
Phil. Ev. Phillipps on Evidence.
Phil. Ev. [Cow. & H. & Edw. Notes]. ... Phillipps' on Evidence, Notes by Cowen, Hill and Edwards.
Phil. Ins..... Phillips' Law of Insurance.
Phillim. Int. Law... Phillimore's International Law.
Phil. Mech. Liens... Phillips on Mechanics' Liens.
Phil. & M..... Philip and Mary (as 4 & 5 Phil. & M.)
Pick. Pickering (Mass.)
Pickle Pickle (Tenn.)
Pierce, R. R..... Pierce on Railroad Law.
Pierce & King's Revisory Legislation.. Pierce, Taylor and King's Revised Statutes (La.)
Pike Pike (Ark.)
Pin. Pinney (Wis.)

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Ping. Chat. Mortg.	Pingrey's Treatise of Chattel Mortgages.
Pittsb. Leg. J.	Pittsburgh Legal Journal (Pa.)
Pittsb. Leg. J. (N. S.)	Pittsburgh Legal Journal, New Series (Pa.)
Pittsb. R.	Pittsburgh Reports (Pa.)
P. L.	Public Laws.
Platt, Leas.	Platt on Leases.
Ploud.	Plowden's English King's Bench Reports.
Plow.	Plowden's English King's Bench Reports.
Poe, Pl.	Poe on Pleading and Practice.
Pol. Code	Political Code.
Pol. Cont.	Pollock on Principles of Contract at Law and Equity.
Pom. Code Rem.	Pomeroy on Code Remedies.
Pom. Eq. Jur.	Pomeroy's Equity Jurisprudence.
Pom. Rem.	Pomeroy on Civil Remedies.
Pom. Rem. & Rem. Rights	Pomeroy on Civil Remedies & Remedial Rights.
Pom. Spec. Perf.	Pomeroy on Specific Performance of Contracts.
Poph.	Popham's English King's Bench Reports.
Port. (Ala.)	Porter (Ala.)
Port. Ins.	Porter's Laws of Insurance.
Posey, Unrep. Cas.	Posey's Unreported Cases (Tex.)
Poth. Oblig.	Pothier on Obligations.
Pow. App. Proc.	Powell's Law of Appellate Proceedings.
Pow. Cont.	Powell on Contracts.
Pow. Dev.	Powell on Devises.
Pow. Mortg.	Powell on Mortgages.
Prac. Act	Practice Act.
Pr. Ch.	Precedents in Chancery, by Finch.
Prest. Est.	Preston on Estates.
Priv. Laws	Private Laws.
Priv. St.	Private Statutes.
Prob.	English Probate and Admiralty Reports for year cited.
Prob. Div.	Probate Division, English Law Reports.
Prob. Pr. Act.	Probate Practice Act.
Prob. R.	Probate Reports (Ohio)
Prov. St.	Statutes (Laws) of the Province of Massachusetts.
Pub. Acts	Public Acts.
Pub. Gen. Laws	Public General Laws.
Pub. Laws	Public Laws.
Pub. Loc. Laws	Public Local Laws.
Pub. St.	Public Statutes.
Pub. & Loc. Laws.	Public and Local Laws.
Puffendorf	Pufendorf's Law of Nature and Nations.
Purd. Dig. Laws	Purdon's Digest of Laws (Pa.)
Purple's St.	Purple's Statutes, Scates' Compilation.
P. Wms.	Peere Williams' English Chancery Reports.
P. & L. Dig. Laws.	Pepper & Lewis' Digest of Laws (Pa.)
P. & L. Laws	Private and Local Laws.

Q

Q. B.	Queen's Bench Reports, Adolphus & Ellis, N. S. (English).
Q. B. Div.	Queen's Bench Division (English Law Reports).
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rand. Com. Paper.	Randolph on Commercial Paper.
Rand. Em. Dom.	Randolph on Eminent Domain.
Rap. Contempt	Rapalje on Contempt.
Rap. Wit.	Rapalje's Treatise on Witnesses.
Rap. & L. Law Dict.	Rapalje and Lawrence Law Dictionary.
Rawle	Rawle (Pa.)
Rawle, Const. U. S.	Rawle on the Constitution of the United States.
Rawle, Cov.	Rawle on Covenants for Title.
Raym.	Lord Raymond's English King's Bench Reports.
Ray, Med. Jur.	Ray's Medical Jurisprudence of Insanity.
R. C.	Revised Statutes 1855 (Mo.)
Redf. Carr.	Redfield on Carriers and Bailments.
Redf. Railways.	Redfield on Railways.
Redf. Sur.	Redfield's Surrogate (N. Y.)
Redf. Wills	Redfield on the Law of Wills.
Rees' Cyclopædia.	Abraham Rees' English Cyclopædia.
Reeves, Dom. Rel.	Reeve on Domestic Relations.
Reeves, Eng. Law.	Reeve's History of the English Law.
Rep.	Coke's English King's Bench Reports.
Reports	The Reports, English.
Rev.	Revision of the Statutes Revised.
Rev. Civ. Code	Revised Civil Code.
Rev. Civ. St.	Revised Civil Statutes.
Rev. Code	Revised Code.
Rev. Code Civ. Proc.	Revised Code Civil Procedure.
Rev. Code Cr. Proc.	Revised Code of Criminal Procedure.
Rev. Cr. Code	Revised Criminal Code.
Rev. Laws	Revised Laws.
Rev. Mun. Code.	Revised Municipal Code.
Rev. Ord.	Revised Ordinances.
Rev. Pen. Code	Revised Penal Code.
Rev. Pol. Code	Revised Political Code.
Rev. St.	Revised Statutes.
Reynolds' Land Laws	Reynolds' Spanish and Mexican Land Laws.
R. I.	Rhode Island.
Rice	Rice's Law (S. C.)
Rice, Eq.	Rice's Equity (S. C.)
Rice, Ev.	Rice's Law of Evidence.
Rice's Code.	Rice's Code of Practice (Colo.)
Rich.	Richard (as 5 Rich. II).
Rich. Dict.	Richardson's New Dictionary of the English Language.
Rich. Eq.	Richardson's Equity (S. C.)
Rich. Eq. Cas.	Richardson's Equity Cases (S. C.)
Rich. Law.	Richardson's Law (S. C.)
Rich. (S. C.)	Richardson (S. C.)
Rich. Wills.	Richardson's Law of Testaments and Last Wills.
Riddle's Lex.	Riddle's Lexicon.
Riley	Riley's Law (S. C.)
Riley, Eq.	Riley's Equity (S. C.)
R. L.	Revised Laws.
R. M. Charlt.	R. M. Charlton (Ga.)
Rob.	Charles Robinson's English Admiralty Reports.
Rob. (N. Y.)	Robertson (N. Y.)
Rob. (La.)	Robinson (La.)
Rob. (Va.)	Robinson (Va.)
Robb, Pat. Cas.	Robb's Patent Cases (U. S.)

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Rob. Pat. Robinson on Patents.
Rolle Rolle's English King's Bench Reports.
Rolle, Abr. Rolle's Abridgment of the Common Law.
Roll. Rep..... Rolle's English King's Bench Reports.
Root Root (Conn.)
Rop. Leg..... Roper on Legacies.
Rorer, Jud. Sales... Rorer on Void Judicial Sales.
Rorer, R. R..... Rorer on Railways.
Roscoe, Cr. Ev..... Roscoe on Criminal Evidence.
Ross, Cont..... Ross on Contracts.
R. S..... Revised Statutes.
R. S. Comp..... Statutes of Connecticut, Compilation of 1854.
Russ. Ch..... Russell's English Chancery Reports.
Russ. Cr..... Russell on Crimes and Misdemeanors.
Russ. Fact..... Russell on Factors and Brokers.
Russ. & M..... Russell and Mylne's English Chancery Reports.
Russ. & R. Cr. Cas.. Russell and Ryan's English Crown Cases Reserved.
Ruth. Inst..... Rutherford's Institutes of Natural Law.
Ry. & Corp. Law J.. Railway and Corporation Law Journal.
Ry. & M..... Ryan and Moody's English Nisi Prius Reports.
R. & Ry. C. C..... Russell and Ryan's English Crown Cases.

S

Salk. Salkeld's English King's Bench Reports.
Sanb. & B. Ann. St.. Sanborn and Berryman's Annotated Statutes (Wis.)
Sanders, Pl. & Ev... Saunders' Pleading and Evidence.
Sandf. Sandford (N. Y.)
Sandf. Ch. Sandford's Chancery (N. Y.)
Sand. Inst. Just. Introd. Sandars' Edition of Justinian's Institutes.
Sand. Uses and Trusts Sanders on Uses and Trusts.
Sand. & H. Dig..... Sandels and Hill's Digest of Statutes (Ark.)
Saund. Saunders' English King's Bench Reports.
Saund. Pl. & Ev.... Saunders' Pleading and Evidence.
Sawy. Sawyer (U. S.)
Saxt. Ch. Saxton's Chancery (N. J.)
Sayer Sayer's English King's Bench Reports.
Sayles' Ann. Civ. St. Sayles' Annotated Civil Statutes (Tex.)
Sayles' Civ. St..... Sayles' Revised Civil Statutes (Tex.)
Sayles' Rev. Civ. St.. Sayles' Revised Civil Statutes (Tex.)
Sayles' St..... Sayles' Revised Civil Statutes (Tex.)
Sayles' Supp..... Supplement to Sayles' Annotated Civil Statutes (Tex.)
S. C. South Carolina.
Scam. Scammon (Ill.)
Scates' Comp. St.... Treat, Scates & Blackwell Compiled Statutes (Ill.)
Schmidt, Civ. Law.. Schmidt on the Civil Law of Spain and Mexico.
Schoales & L..... Schoales and Lefroy's Irish Chancery Reports.
Schouler, Bailm.... Schouler on Bailments.
Schouler, Dom. Rel.. Schouler on Domestic Relations.
Schouler, Pers. Prop. Schouler on the Law of Personal Property.
Schouler, U. S. Hist..... Schouler's History of the United States under the Const. 1783–1847.
Scrib. Dower..... Scribner on Dower.
S. D..... South Dakota.
S. E..... Southeastern Reporter.
Sedg. Dam..... Sedgwick on the Measure of Damage.
Sedg. St. & Const. Law Sedgwick on Statutory and Constitutional Law.
Sedg. & W. Tr. Title Land..... Sedgwick and Wait on the Trial of Title to Land.
Seld. Selden (N. Y.)
Seld. Notes..... Selden's Notes (N. Y.)
Sell. Prac..... Sellon's Practice in the King's Bench.
Serg. & R..... Sergeant & Rawle (Pa.)
Sess. Session.
Sess. Acts..... Session Acts.
Sess. Laws..... Session Laws.
Shan. Cas..... Shannon's Tennessee Cases.
Shankland's St.... Shankland's Public Statutes (Tenn.)
Shannon's Code.... Shannon's Annotated Code (Tenn.)
Shars. Bl. Comm... Sharswood's Edition of Blackstone's Commentaries.
Shars. & B. Lead. Cas. Real Prop.... Sharswood and Budd's Leading Cases of Real Property.
Shear. & R. Neg... Shearman and Redfield on Negligence.
Sheld. Sheldon (N. Y.)
Sheld. Subr..... Sheldon on Subrogation.
Shep. Shepley (Me.)
Shep. Abr..... Sheppard's Abridgment.
Shep. Touch. Sheppard's Touchstone of Common Assurances.
Shinn, Repl..... Shinn's Treatise on American Law of Replevin.
Shortt, Inform..... Shortt on Informations, (Criminal, Quo Warranto), Mandamus, and Prohibition.
Show. Shower's English King's Bench Reports.
Sid. Siderfin's English King's Bench Reports.
Silvernail Silvernail (N. Y.)
Sim. Simons' English Vice Chancery Reports.
Sim. (N. S.)..... Simon's English Vice Chancery Reports, New Series.
Sim. & S..... Simons & Stuart's English Vice Chancery Reports.
Skin. Skinner's English King's Bench Reports.
Slade's St..... Slade's Laws (Vt.)
Smedes & M..... Smedes & Marshall (Miss.)
Smedes & M. Ch... Smedes & Marshall's Chancery (Miss.)
Smith, Com. Law... Smith's Manual of Common Law.
Smith, Cont. Smith on Contracts.
Smith, E. D..... E. D. Smith (N. Y.)
Smith, Ex. Int..... Smith on Executory Interest.
Smith (Ind.)..... Smith (Ind.)
Smith, J. P..... J. P. Smith's English King's Bench Reports.
Smith, Man. Eq. Jur. Smith's Manual of Equity Jurisprudence.
Smith, Merc. Law.. Smith on Mercantile Law.
Smith (N. H.)..... Smith (N. H.)

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Smith (N. Y.)..... Smith (N. Y.)
Smith, P. F..... P. F. Smith (Pa.)
Smith's Comm. on Stat. Smith's Commentaries on Statutes and Constitutional Law and Statutory and Constitutional Constructions.
Smith's Laws..... Smith's Laws (Pa.)
Smith's Lead. Cas.. Smith's Leading Cases.
Sneed Sneed (Tenn.)
Snyder, Mines.... Snyder on Mines and Mining.
Sol. J..... Solicitors' Journal, London.
Soule, Syn..... Soule's Dictionary of English Synonymes.
South. Southern Reporter.
Southard Southard (N. J.)
Sp. Acts..... Special Acts.
Speers Speers' Law (S. C.)
Speers, Eq. Speers' Equity (S. C.)
Spell. Extr. Rel..... Spelling on Extraordinary Relief in Equity and in Law.
Spell. Extr. Rem.... Spelling's Treatise on Injunctions and Other Extraordinary Remedies.
Spence, Eq. Jur.... Spence's Equitable Jurisdiction of the Court of Chancery.
Spencer Spencer (N. J.)
Spinks, Prize Cas... Spinks' Admiralty Prize Cases.
Sp. Laws..... Special Laws.
Spr. Sprague (U. S.)
Sp. Sess. Special Session.
Sp. St..... Private and Special Laws.
St. Laws or Acts (in some states).
St. State, Statutes.
Stand. Dict. Standard Dictionary.
Stanton's Rev. St... Stanton's Revised Statutes (Ky.)
Starkie, Sland. & L.. Starkie, on Slander and Libel.
Starkie Starkie's English Nisi Prius Reports.
Starkie, Ev. Starkie on Evidence.
Starr & C. Ann. St.. Starr and Curtis' Annotated Statutes (Ill.)
Stat. Statutes at Large (U. S.)
St. at Large..... Statutes at Large (S. C.)
Steph. Bailm..... Story on Bailment.
Steph. Comm. Stephen's Commentaries on the Laws of England.
Steph. Cr. Law..... Stephen's General View of the Criminal Law.
Steph. Dig. Cr. Law.. Stephen's Digest of the Criminal Law.
Steph. Dig. Ev. } ... Stephen's Digest of the
Steph. Ev. } Law of Evidence.
Steph. Pl. Stephen on Pleading.
Steven's Dig..... Stephen's Digest of the Law of Evidence.
Stew. (Ala.)..... Stewart (Ala.)
Stew. Dig..... Stewart's Digest of Decisions of the Courts of Law and Equity (N. J.)
Stew. (N. J.) Stewart (N. J.)
Stew. & P..... Stewart & Porter (Ala.)
Stiles Stiles (Iowa)
St. Law..... Loughborough's Digest of Statute Law (Ky.)
St. Lim..... Statute of Limitations.
Stockt. Stockton's Equity (N. J.)
Sto. Const..... Story's Commentaries on the Constitution of the United States.
Stor. Dict..... Stormouth's Dictionary of the English Language.
Story Story (U. S.)
Story, Ag..... Story on Agency.
Story, Bailm. Story on Bailment.
Story, Bills Story on Bills.
Story, Comm. Const.. Story's Commentaries on the Constitution of the United States.
Story, Confl. Laws.. Story on the Conflict of Laws.
Story, Const. Story's Commentaries on the Constitution of the United States.
Story, Cont. Story on Contracts.
Story, Eq. Jur. Story on Equity Jurisprudence.
Story, Eq. Pl..... Story on Equity Pleading.
Story, Merchants.... Abbott's Merchant Ships and Seamen by Story.
Story, Partn..... Story on Partnership.
Story, Prom. Notes.. Story on Promissory Notes.
Story, Sales..... Story on Sales of Personal Property.
Story's Laws..... Story's United States Laws.
Strange Strange's English King's Bench Reports.
Strob. Strobhart's Law (S. C.)
Strob. Eq. Strobhart's Equity (S. C.)
Style Style's English King's Bench Reports.
Sub. Rev..... Supplement to the Revision.
Sugd. Powers..... Sugden on Powers.
Sumn. Sumner (U. S.)
Sup. Ct. Supreme Court Reporter.
Super. Ct. Rep..... Superior Court Reports (Pa.)
Supp. Code..... Supplement to Code.
Supp. Gen. St..... Supplement to the General Statutes.
Supp. Rev..... Supplement to the Revision.
Supp. Rev. Code.... Supplement to the Revised Code.
Supp. Rev. St..... Supplement to the Revised Statutes.
Supp. U. S. Comp. St. 1903 Supplement 1903 to the United States Compiled Statutes of 1901.
Sus. Leg. Chron.... Susquehanna Legal Chronicle (Pa.)
Suth. Dam..... Sutherland on Damages.
Suth. St. Const..... Sutherland on Statutes and Statutory Construction.
S. W..... Southwestern Reporter.
Swab. Swabey's English Admiralty Reports.
Swab. & T..... Swabey and Tristram's English Probate and Divorce Reports.
Swan Swan (Tenn.)
Swan's St..... Swan's Statutes (Ohio)
Swanst. Swanston's English Chancery Reports.
Swan & C. R. St... Swan and Critchfield's Revised Statutes (Ohio)
Swan & S. St..... Swan and Sayler's Supplement to the Revised Statutes (Ohio)
Sweeny Sweeny (N. Y.)
Swift, Dig..... Swift's Digest of Laws (Conn.)
S. & C. Rev. St..... Swan and Critchfield's Revised Statutes (Ohio)
S. & R. on Neg..... Shearman and Redfield on Negligence.
S. & S..... Swan and Sayler's Supplement to the Revised Statutes (Ohio)

T

Taney Taney (U. S.)
Tapp. Tappan (Ohio)
Tapping Tapping on the Writ of Mandamus.
Tariff Ind., New... New's Tariff Index.
Tate's Dig..... Tate's Digest of Laws (Va.)
Taunt. Taunton's English Common Pleas Reports.
Tayl. Taylor (N. C.)
Tayl. Corp..... Taylor on Private Corporations.

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Tayl. Ev.	Taylor on the Law of Evidence.
Tayl. Landl. & Ten.	Taylor's Landlord and Tenant.
Tayl. Med. Jur.	Taylor's Manual of Medical Jurisprudence.
Tayl. Priv. Corp.	Taylor on Private Corporations.
Tayl. St.	Taylor's Revised Statutes (Wis.)
T. B. Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee.
Tenn. Cas.	Shannon's Tennessee Cases.
Tenn. Ch.	Tennessee Chancery.
Ter. Laws	Territorial Laws.
Termes de la Ley	Terms of the Common Laws and Statutes Expounded and Explained by John Rastell.
Term R.	Term Reports, English King's Bench (Durnford and East's Reports).
Tex.	Texas.
Tex. App.	Texas Appeals Reports.
Tex. Civ. App.	Texas Civil Appeals Reports.
Tex. Cr. R.	Texas Criminal Reports.
Tex. Supp.	Texas Supplement.
Thacher, Cr. Cas.	Thacher's Criminal Cases (Mass.)
Thayer, Prelim. Treatise Ev.	Thayer's Preliminary Treatise on Evidence.
Theob. on Wills.	Theobald on Wills.
Thomas, Negl.	Thomas on Negligence.
Thom. Co. Litt.	Thomas' Edition of Coke upon Littleton.
Thomp. Corp.	Thompson's Commentaries on Law of Private Corporations.
Thomp. Dig.	Thompson's Digest of Laws (Fla.)
Thomp. Liab. Stockh.	Thompson on Liability of Stockholders.
Thomp. Neg.	Thompson on Negligence.
Thomp. Tenn. Cas.	Thompson's Unreported Tennessee Cases.
Thomp. Trials.	Thompson on Trials.
Thomp. & C.	Thompson & Cook (N. Y.)
Thomp. & S. St. / Thomp. & St. Code	Thompson and Steger's Code (Tenn.)
Thornton, Gifts.	Thornton on Gifts and Advancements.
Thornt. & Bl. Bldg. & Loan Ass'ns.	Thornton and Blackledge's Law Relating to Building and Loan Associations.
Throop, Pub. Off.	Throop's Treatise on Public Officers.
Tidd, Prac.	Tidd's Practice.
Tied. Lim. Police Power	Tiedeman's Treatise on the Limitations of Police Power in the United States.
Tiedman, Real Prop.	Tiedeman on Real Property.
Tied. Mun. Corp.	Tiedeman's Treatise on Municipal Corporations.
Tiffany	Tiffany (N. Y.)
Times L. Rep.	Times Law Reports.
Toller	Toller on Executors.
Toml. Law Dict.	Tomlins' Law Dictionary.
Townsh. Sland. & L.	Townshend on Slander and Libel.
T. R.	Term Reports, English King's Bench (Durnford and East's Reports).
T. Raym.	Sir Thomas Raymond's English King's Bench Reports.
Tread. Const.	Treadway's Constitutional Reports (S. C.)
Troub. & H. Prac.	Troubat & Haly's Practice (Pa.)
T. T.	Trinity Term.
Tuck.	Tucker's Surrogate (N. Y.)
Tucker's Blackstone.	Tucker's Blackstone's Commentaries.
T. U. P. Charlt.	T. U. P. Charlton (Ga.)
Turn.	Turner (Ark.)
Turn. & R.	Turner and Russell's English Chancery Reports.
Tyler	Tyler (Vt.)
Tyler, Ej.	Tyler on Ejectment and Adverse Enjoyment.
Tyler, Steph. Pl.	Tyler's Edition of Stephen on Principles of Pleading.
Tyr.	Tyrwhitt's English Exchequer Reports.
T. & H. Prac.	Troubat and Haly's Pennsylvania Practice.

U

Underhill, Ev.	Underhill on Evidence.
Unof.	Unofficial (Reports).
U. S.	United States.
U. S. App.	United States Appeals.
U. S. Comp. St. 1901.	United States Compiled Statutes 1901.
U. S. Comp. St. Supp.	Supplement to the United States Compiled Statutes of 1901.
U. S. Law Mag.	United States Law Magazine (N. Y.)
U. S. Month. Law Mag.	United States Monthly Law Magazine.
Utah	Utah.

V

Va.	Virginia.
Va. Cas.	Virginia Cases.
Va. Law J.	Virginia Law Journal, Richmond.
Van Fleet, Coll. Attack	Van Fleet on Collateral Attack.
Van Ness, Prize Cas.	Van Ness' Prize Cases (U. S.)
Vattel, Law Nat.	Vattel's Law of Nations.
Vent.	Ventris' English Common Pleas Reports.
Vern.	Vernon's English Chancery Reports.
Ves.	Vesey, Junior, English Chancery Reports.
Ves. Jr.	Vesey, Junior, English Chancery Reports.
Ves. Sr.	Vesey, Senior, English Chancery Reports.
Ves. & B.	Vesey and Beames' English Chancery Reports.
Vict.	Queen Victoria (as 5 & 6 Vict.)
Vin. Abr.	Viner's Abridgment.
Vroom	Vroom (N. J.)
Vt. S.	Vermont Statutes.
Vt.	Vermont.

W

W.	William (as Wm. IV).
Wade, Am. Mining Law	Wade on American Mining Law.
Wade, Attachm.	Wade on Attachment and Garnishment.
Wag. St.	Wagner's Statutes (Mo.)
Wait, Act. & Def.	Wait's Actions and Defenses.
Wait's Prac.	Wait's New York Practice.
Walk.	Walker (Miss.)
Walk. Am. Law.	Walker's American Law.
Walk. Ch.	Walker's Chancery (Mich.)

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Walk. Pat.	Walker on Patents.
Wall.	Wallace (U. S.)
Wall. Jr.	Wallace, Junior (U. S.)
Wall. Sr.	Wallace, Senior (U. S.)
Ware	Ware (U. S.)
Warv. Abst.	Warvelle on Abstracts of Title.
Wash.	Washington.
Wash. (Va.)	Washington (Va.)
Washb. Easem.	Washburn on Easements and Servitudes.
Washb. Real Estate.	Washburn on Real Property.
Washb. Real Prop.	Washburn on Real Property.
Wash. C. C.	Washington Circuit Court (U. S.)
Wash. Law Rep.	Washington Law Reporter (D. C.)
Wash. T.	Washington Territory.
Wat. Set-Off.	Waterman on Set-Off.
Watts	Watts (Pa.)
Watts & S.	Watts & Sergeant (Pa.)
W. Bl.	Sir William Blackstone's English King's Bench Reports.
Webst. Dict.	Webster's Dictionary.
Webst. Dict. Unab.	Webster's Unabridged Dictionary.
Webster in Sen. Doc.	Webster in Senate Documents.
Webst. Int. Dict.	Webster's International Dictionary.
Wedgw. Dict. Eng. Etymology	Wedgwood's Dictionary of English Etymology.
Welsb., Hurl. & G.	Welsby, Hurlstone, and Gordon's Reports (1–9 English Exchequer Reports).
Wend.	Wendell (N. Y.)
Weskett, Ins.	Weskett's Complete Digest of the Theory, Laws and Practice of Insurance.
West Coast Rep.	West Coast Reporter.
West. Law J.	Western Law Journal, Cincinnati (Ohio)
West. Law Month.	Western Law Monthly (Ohio)
West. L. M.	Western Law Monthly (Ohio)
Westm.	Statute of Westminster.
Whart.	Wharton (Pa.)
Whart. Ag.	Wharton on Agency.
Whart. Am. Cr. Law.	Wharton's American Criminal Law.
Whart. Confl. Laws.	Wharton's Conflict of Laws.
Whart. Cr. Ev.	Wharton on Criminal Evidence.
Whart. Cr. Law.	Wharton's American Criminal Law.
Whart. Cr. Pl. & Prac.	Wharton's Criminal Pleading & Practice.
Whart. Ev.	Wharton on Evidence in Civil Issues.
Whart. Homicide.	Wharton's Law of Homicide.
Whart. Law Dict.	Wharton's Law Dictionary (or Law Lexicon).
Whart. Law Lexicon	Wharton's Law Dictionary (or Law Lexicon).
Whart. Neg.	Wharton on Negligence.
Whart. St. Tr.	Wharton's State Trials (U. S.)
Whart. & S. Med. Jur.	Wharton and Stille's Medical Jurisprudence.
Wheat.	Wheaton (U. S.)
Wheat. El. Int. Law	Wheaton's Elements of International Law.
Wheeler, Am. Cr. Law	Wheeler's Abridgment of American Common Law Cases.
Wheeler, Cr. Cas.	Wheeler's Criminal Cases (N. Y.)
White's Ann. Pen. Code	White's Annotated Penal Code (Tex.)
White's Recop.	White's Recopilacion (Land Laws of Spain and Mexico).
White & T. Lead. Cas. Eq.	White and Tudor's Leading Cases in Equity.
White & W. Civ. Cas. Ct. App.	White & Willson's Civil Cases Court of Appeals (Tex.)
Wig. Wills.	Wigram on Wills.
Wilcox	Wilcox (Pa.)
Will.	William (as 1 Will. IV).
Will. Eq. Jur.	Willard's Equity Jurisprudence.
Willes	Willes' English Common Pleas Reports.
Williams (Vt.)	Williams (Vt.)
Williams, Ex'rs	Williams on Executors.
Williams, Ex'rs [R. & T. Ed.]	Williams on Executors [Randolph and Talcott Edition.]
Williams, Real Prop.	Williams on Real Property.
Wills, Cir. Ev.	Wills on Circumstantial Evidence.
Willson, Civ. Cas. Ct. App.	Willson's Civil Cases Court of Appeals (Tex.)
Willson, Tex. Cr. Law	Willson's Revised Penal Code, Code of Criminal Procedure, and Penal Laws of Texas.
Wils.	Wilson (Ind.)
Wils.	Wilson's English Common Pleas Reports.
Wilson's Rev. & Ann. St.	Wilson's Revised and Annotated Statutes (Okl.)
Winch	Winch's English Common Pleas Reports.
Winch	Winch's Entries.
Winfield, Words & Phrases	Winfield's Adjudged Words and Phrases, with Notes.
Winst.	Winston (N. C.)
Winst. Eq.	Winston's Equity (N. C.)
Wis.	Wisconsin.
Witthaus & Becker's Med. Jur.	Witthaus and Becker's Medical Jurisprudence.
Wkly. Dig.	Weekly Digest (N. Y.)
Wkly. Law Bul.	Weekly Law Bulletin (Ohio)
Wkly. Law Gaz.	Weekly Law Gazette (Ohio)
Wkly. Notes Cas.	Weekly Notes Cases (Pa.)
Wkly. Rep.	Weekly Reporter, London (English).
Wm.	William (as 9 Wm. III).
Wm. Bl.	Sir William Blackstone's English King's Bench Reports.
Wm. Rob. Adm.	William Robinson's English Admiralty Reports.
Wms. Ex'rs	Williams on Executors.
Wm. & Mary	William and Mary (as 2 Wm. & Mary, c. 1).
Woerner, Adm'n.	Woerner's Treatise on the American Law of Administration.
Woodb. & M.	Woodbury & Minot (U. S.)
Woodf. Landl. & T.	Woodfall on Landlord and Tenant.
Wood, Ins.	Wood on Fire Insurance.

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Wood, Inst.	Wood's Institutes of the (Common) Laws of England.
Wood, Landl. & Ten.	Wood on Landlord and Tenant.
Wood. Lect.	Wooddeson's Lectures on Laws of England.
Wood, Lim.	Wood on Limitation of Actions.
Wood, Mast. & Serv.	Wood on Master and Servant.
Wood, Nuis.	Wood on Nuisances.
Wood, Ry. Law	Wood's Law of Railroads.
Woods	Woods (U. S.)
Wood's Civ. Law	Wood's Institutes of the Civil Law of England.
Wood's Dig.	Wood's Digest of Laws (Cal.)
Wood, St. Frauds	Wood's Treatise on the Statutes of Frauds.
Woodw. Dec.	Woodward's Decisions (Pa.)
Woolr. Waters	Woolrych's Law of Waters.
Woolw.	Woolworth (U. S.)
Worcest. Dict.	Worcester's Dictionary.
Wor. Dict.	Worcester's Dictionary.
Works, Courts	Works on Courts and Their Jurisdiction.
Works, Pr.	Works' Practice, Pleading, and Forms.
Wright	Wright (Ohio)
Wright (Pa.)	Wright (Pa.)
W. Rob. Adm.	W. Robinson's English Admiralty Reports.
W. S.	Wagner's Statutes (Mo.)
W. Va.	West Virginia.
Wyatt, Prac. Reg.	Wyatt's Practical Register in Chancery.
Wyo.	Wyoming.
Wythe	Wythe's Chancery (Va.)

Y

Yeates	Yeates (Pa.)
Yerg.	Yerger (Tenn.)
York Leg. Rec.	York Legal Record (Pa.)
Younge & C. Ch.	Younge & Collyer's English Chancery Reports.

Z

Zab.	Zabriskie (N. J.)

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JUDICIAL AND STATUTORY DEFINITIONS

OF

WORDS AND PHRASES

SECOND SERIES

VOLUME 1

A

&

The sign "&," for "and," has been used in practice too long for a court to entertain an objection to its employment. Pickens v. State, 58 Ala. 364.

&c.

See Etcetera—Etc.

A life policy issued for three months bound insurer to renew quarterly during insured's life on the payment of premiums for the age attained according to a schedule of increasing rates. It provided that it might be exchanged at any time after insured became 60 years old for a policy on the uniform premium plan at the rate for his then age as printed below. Below was a schedule of rates ranging from age 60 to 65 and beneath the columns specifying the rates was printed "&c." Held, that the policy did not become automatically a level-premium policy, without exchange, when insured became 65 years old, merely because the schedule did not specify rates for a greater age; the character "&c." meaning "and so on" in increasing ratio if the ordinary rate should be changed to a level rate after insured became 65. Jones v. Provident Sav. Life Assur. Soc. of New York, 61 S. E. 388, 389, 147 N. C. 540, 25 L. R. A. (N. S.) 803.

& Co.

The use by an individual of his name, followed by the term "& Co.," used as a trade-name, did not necessarily create the presumption that he had a partner or partners, or that such title included more than one person. Willey v. Crocker-Woolworth Nat. Bank, 75 Pac. 106, 108, 141 Cal. 508.

@

@, as used in a note reciting "Int. @ 6 % p. a.," "is known and recognized among commercial people and business men as standing for the word 'at.'" Belford v. Beatty, 34 N. E. 254, 255, 145 Ill. 414.

A

As one

The St. Louis city charter, which authorizes the assembly to establish "a building line" along boulevards, does not prevent the assembly from establishing different building lines along the same boulevard; the word "line," as used in the charter, meaning a mark of division or demarkation, an outline or contour, a limit or boundary, and not a straight line. City of St. Louis v. Handlan, 145 S. W. 421, 422, 242 Mo. 88.

Code Civ. Proc. § 86, provided that each stenographer specified in the act, on request, must furnish with all reasonable diligence, to the defendant in a criminal case "a copy," written out at length from his stenographic notes, of the testimony and proceedings, on payment, by the person requiring same, of the fees allowed by law; that, if the district attorney or Attorney General requires such a copy in a criminal case, the stenographer is entitled to his fees therefor, which shall be a county charge, and must be paid like other county charges. General Construction Law (Consol. Laws 1909, c. 22) § 35, declares that words in the singular number include the plural, and in the plural include the singular. Held, that the latter section could not be applied to section 86, so as to authorize the district attorney to require more than one transcript of the testimony for his use

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at the expense of the county; and that, in view of such section, the district attorney had no inherent power to incur such expense as might result from ordering two or more transcripts of the testimony in an important criminal case. Moynahan v. City of New York, 98 N. E. 482, 484, 205 N. Y. 181.

The provision in paragraph 454, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, for statuary produced from "a solid block or mass of marble," etc., is not limited to statuary made from single blocks, and is held to include certain statutes, each carved from three solid blocks of marble. United States v. Perry, 133 Fed. 841.

A. M.

After the general use of solar time became obsolete, the abbreviations "a. m." and "p. m." in designating time remained in use to distinguish between forenoon and afternoon. Orvik v. Casselman, 105 N. W. 1105, 1106, 15 N. D. 34.

A MENSA ET THORO

See Divorce a Mensa et Thoro.

A VINCULO

See Divorce a Vinculo.

AB INITIO

See Void ab Initio.

ABANDON—ABANDONMENT

See Temporary Abandonment.

"Abandonment" is generally understood to mean the intentional relinquishment of a known right, and results from a mere exercise of the will, and so far as it relates to a vested estate in real property is ineffectual to transfer title. Sharkey v. Candiani, 85 Pac. 219, 224, 48 Or. 112.

"Abandonment" does not embrace the sale or conveyance of property, but is the giving up of a thing absolutely, without reference to any particular person or purpose, and includes both the intention to relinquish all claim to and dominion over the property mentioned and the external act by which this intention is executed, or the actual relinquishment of the property so that it may be appropriated by the next comer. "Abandonment must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess a thing; and, further, it must be made without a desire that any other person shall acquire the same, for, if it were made for a consideration, it would be a barter or sale, and, if without consideration, but with an intention that some other person should become the possessor, it would be a gift." St. Peter's Church v. Bragaw, 56 S. E. 688, 689, 144 N. C. 126, 10 L. R. A. (N. S.) 633 (quoting and adopting definition in Stephens v. Mansfield, 11 Cal. 363, and citing Richardson v. McNulty, 24 Cal. 339; Black's Law Dict. p. 4; 1 Words and Phrases, pp. 4, 5, 11; Middle Creek Ditch Co. v. Henry, 39 Pac. 1058, 15 Mont. 558; Mitchell v. Carder, 21 W. Va. 285; Derry v. Ross, 5 Colo. 300; Hagan v. Gaskill, 6 Atl. 880, 42 N. J. Eq. 217); Phillips v. Hamilton, 95 Pac. 846, 848, 17 Wyo. 41; Douglas Oil Fields v. Same, 95 Pac. 849, 17 Wyo. 54; Worsham v. State, 120 S. W. 439, 444, 56 Tex. Cr. R. 253, 18 Ann. Cas. 134. There can be no abandonment to a definite person. Norman v. Corbley, 79 Pac. 1059, 1060, 32 Mont. 195 (quoting 1 Cyc. p. 4); Watts v. Spencer, 94 Pac. 39, 42, 51 Or. 262.

The word "abandoned," as used in Laws 1910, c. 494, providing that no liquor tax certificates should issue for traffic in liquor to exceed one for each 750 in population, but that such prohibition should not apply to premises in which such traffic in liquor was lawfully carried on within one year before the passage of the act, "provided such traffic was not abandoned during the said period," refers to an actual cessation of traffic in liquors. In re Farley, 138 N. Y. Supp. 1050, 1053, 154 App. Div. 282.

Intention

To constitute "abandonment" there must be an intent and actual failure to use. Hough v. Porter, 98 Pac. 1083, 1107, 51 Or. 318. But the abandonment need not be directly proved, and may be inferred from acts which necessarily point to actual abandonment. Edward & John Burke v. Bishop, 175 Fed. 167, 173 (quoting and adopting definition in Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 31, 21 Sup. Ct. 7, 11, 45 L. Ed. 60).

Whether the act of the party constitutes an "abandonment" of property previously occupied by him depends entirely upon the intention with which it is done. An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself, and careless of what may thereafter become of it. Mere absence and nonuser of the property do not prove an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. Farmers' Canal Co. v. Frank, 100 N. W. 286, 292, 72 Neb. 136.

An "abandonment" is an intentional relinquishment of a known right, the intention to be ascertained from the conduct and declarations of the party in respect thereto; and there was no abandonment of a reservoir and water right appurtenant thereto, though the owner gave up its domicile in the state, and there was a nonuser for a period of 10 years, where, before it left the state, it

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executed a mortgage on the property, and the mortgagee foreclosed and had a sale after its departure, as there was no intention of the mortgagee to abandon; and the mortgagor, by his failure to pay the license fees, etc., could not defeat the mortgagee's interest. Moore v. United Elkhorn Mines (Or.) 127 Pac. 964, 967.

Nonuser

Nonuser alone, at least short of the period of the statute of limitations, is not sufficient to prove an "abandonment"; but nonuser continued for a considerable length of time, coupled with other acts of a character tending to show an intention on the part of the owner not to resume, or repossess himself of the thing whose use he relinquished, may constitute an abandonment. Alamosa Creek Canal Co. v. Nelson, 93 Pac. 1112, 1113, 42 Colo. 140.

Though mere nonuser of an easement, even for more than 20 years, will not afford conclusive evidence of "abandonment," such nonuser for a prescriptive period, united with an adverse use of the servient estate, inconsistent with the existence of the easement, will extinguish it. Canton Co. v. City of Baltimore, 67 Atl. 274, 275, 106 Md. 69, 11 L. R. A. (N. S.) 129 (citing Washburn, Easements, §§ 551, 552; 14 Cyc. p. 1195; Woodruff v. Paddock, 29 N. E. 1021, 130 N. J. 618; Matter of City of New York, 77 N. Y. Supp. 31, 73 App. Div. 394; Smyles v. Hastings, 22 N. Y. 224; Smith v. Langewald, 4 N. E. 571, 140 Mass. 205; Spackman v. Steidel, 88 Pa. 453; Horner v. Stillwell, 35 N. J. Law, 307; Bently v. Root, 32 Atl. 918, 19 R. I. 205; McKinney v. Lanning, 38 N. E. 601, 139 Ind. 170; Lathrop v. Elsner, 53 N. W. 791, 93 Mich. 599; Louisville & N. R. Co. v. Quinn, 22 S. W. 221, 94 Ky. 310; Clendenin v. Maryland Const. Co., 37 Atl. 711, 86 Md. 85; Story v. Ulman, 41 Atl. 121, 88 Md. 244).

In the absence of legislative provision to that effect, mere temporary nonuser of a portion of the territory appropriated by a boom company for the purposes for which it was organized, did not of itself constitute an "abandonment" thereof. Nicomen Boom Co. v. North Shore Boom & Driving Co., 82 Pac. 412, 416, 40 Wash. 315 (citing 3 Elliott, Railroads, § 931; Townsend v. Michigan Cent. R. Co., 101 Fed. 757, 42 C. C. A. 570; Roanoke Inv. Co. v. Kansas City & S. E. R. Co., 17 S. W. 1000, 108 Mo. 50; Perth Amboy Terra Cotta Co. v. Ryan, 53 Atl. 699, 68 N. J. Law, 474; Denison & S. R. Co. v. St. Louis S. W. R. Co., 72 S. W. 161, 96 Tex. 233; Welsh v. Taylor, 31 N. E. 896, 134 N. Y. 450, 18 L. R. A. 535; Durfee v. Peoria, D. & E. R. Co., 30 N. E. 686, 140 Ill. 435; Barlow v. Chicago, R. I. & P. R. Co., 29 Iowa, 276; Memphis & L. R. Co. v. Humphreys, 48 S. W. 86, 65 Ark. 631; Eddy v. Chace, 5 N. E. 306, 140 Mass. 471; Johnston v. Hyde, 33 N. J. Eq. 632).

Forfeiture distinguished

There is a distinction between "abandonment" and "forfeiture," as applied to oil and gas leases; abandonment resting on the intention of the lessee to relinquish the premises, which is a question of fact for the jury, while forfeiture is based on an enforced release. Garrett v. South Penn Oil Co., 66 S. E. 741, 745, 66 W. Va. 587.

Losing distinguished

The distinction between "losing" and "abandonment" lies in the fact that losing is involuntary, while abandonment is by intent or design. But the result, as it relates to the property, is practically the same; the owner not appearing to lay claim to it. In the one case the finder has the right to the possession against all except the true owner. In the other he acquires the absolute property by right of his occupancy. It is the presumption of abandonment that obtains until the owner appears and claims the property that gives the right as legal possessor to the first occupier; the presumption being disputable by the rightful owner. Such presumption or influence does not obtain as to property intentionally left or deposited in a designated place, and possibly forgotten for the time being, as the loss depends upon something more than knowledge or ignorance, or the memory or want of memory of the owner as to the locality at any given moment. "In such case, the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." And where plaintiff, while in possession of defendant's premises under a lease, discovered rich specimens of gold-bearing quartz lying on top of the ground, and by investigation he dug up a large quantity of such quartz found lying in the soil unconnected with any ledge, pocket, placer, or other natural deposit, the quartz being imbedded in the loose surface soil, there being also evidences of a sack or duck cloth in which the quartz might have been buried, such quartz was not "lost" or "abandoned" property, and therefore belonged to the owner of the soil, and not to the finder. Ferguson v. Ray, 77 Pac. 600, 602, 44 Or. 557, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1 (citing 1 Bl. Com. [Lewis' Ed.] c. 8, *295, 296; 2 Bl. Com. [Lewis' Ed.] c. 26, *402; 2 Kent, Com. *356; McLaughlin v. Waite [N. Y.] 5 Wend. 405, 21 Am. Dec. 232).

Repudiation synonymous

An allegation in a complaint that defendant "abandoned" a contract is equivalent to an allegation that the contract was repudiated, though technically "abandonment" is the relinquishment of a right, and "repudiation" the renunciation of a duty. Parker

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Land & Improvement Co. v. Ayers, 87 N. E. 1062, 1063, 43 Ind. App. 513.

Sale or transfer distinguished

The terms "sale" and "transfer" are distinguishable from the term "abandonment," in that the latter implies surrender of something deemed useless, while the former implies a thing of value. Where a deed provided that, in case the grantees should abandon the property, it should revert to the grantors, a resale of the property by the grantees did not constitute an abandonment so as to work a forfeiture. St. Peter's Church v. Bragaw, 56 S. E. 688, 690, 144 N. C. 126, 10 L. R. A. (N. S.) 633 (citing 1 Words and Phrases, pp. 4, 5, 11).

Surrender distinguished

A mining lease may be abandoned by the lessee with the consent of the lessor; such "abandonment" amounting to a surrender of the lessee's right and a restoration of the lessor's possession. Charleston, S. C., Mining & Manufacturing Co. v. American Agricultural Chemical Co. (Tenn.) 150 S. W. 1143, 1145.

Of cargo

Where a portion of the cargo of a stranded vessel was salved by strangers, under directions, however, of an agent of the insurer which had written a valued policy on the cargo, and with the consent of the agent of the vessel owners, while the master stood by and gave advice, but exercised no control, the operation was equivalent to an "abandonment" to the insurer as effecting a surrender of the vessel's lien for freight which could not thereafter be resumed as to the salved cargo or its proceeds. Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co., 158 Fed. 113, 116.

Of child

"Abandonment," as a criminal offense, contains two essential ingredients, separation from the child and failure to supply its needs; and mere absence from one's child does not constitute the offense, but it begins and continues as long as there is a failure on the part of the father to perform his parental duty, and consequent dependence of the child. Phelps v. State, 72 S. E. 524, 525, 10 Ga. App. 41; Williams v. State, 55 S. E. 480, 126 Ga. 637 (citing Mays v. State, 51 S. E. 503, 123 Ga. 507, and citations).

If, when the defendant separated from his wife, he left the children in proper care, he was not guilty of the crime of "abandonment." But if, after having thus left them, they became destitute and dependent because of their mother's inability to support them, and if he willfully neglected his duty to support his destitute and dependent offspring, he was properly convicted. Brown v. State, 50 S. E. 378, 379, 122 Ga. 568.

In order to constitute the crime of "abandonment" as defined in Pen. Code 1895, § 114, it is necessary that the child shall be not only deserted, but left in a destitute condition; if, notwithstanding the desertion, the wants of the child be provided for by others, the statutory crime of abandonment is not made out. Mays v. State, 51 S. E. 503, 123 Ga. 507.

Under Pen. Code 1895, § 114, as amended by Acts 1907, p. 57, providing that if any father shall willfully and voluntarily "abandon" his child, leaving it in a dependent condition, he shall be guilty of a misdemeanor, the offense is fully consummated if the father abandons a child in a dependent condition, and an allegation in an indictment therefor that the child was abandoned in a destitute condition is surplusage, and need not be proved. Where a father forcibly and by threats of personal violence drives his wife and babe from home, leaving the child dependent on the mother and others for support, he is guilty of "abandonment." In a prosecution under the statute, evidence of unfriendly relations between the father and the mother is inadmissible, being no justification of the abandonment. Daniels v. State, 69 S. E. 588, 8 Ga. App. 469.

Where, after his wife obtained a divorce and they were living apart, accused failed to comply with the provisions of the decree requiring him to pay her a weekly allowance for the children's support, he was not guilty of the crime of desertion and abandonment of his minor children, denounced by Pub. Laws 1907, No. 144, where the decree of divorce absolutely deprived him of all custody or right over his children, and imposed upon the wife the duty of furnishing them support, subject to his contribution; so there could be no "desertion," which is the act of a consort leaving his wife and children with intent to cause a perpetual separation, or "abandonment," which is the act by which a man deserts and abandons his minor children. People v. Dunston (Mich.) 138 N. W. 1047, 1049, 42 L. R. A. (N. S.) 1065.

A two year old boy was taken charge of by his grandmother after his mother's death, and was afterwards removed to the home of a friend of his uncle by the latter, and on the assurance that she would care for the child, the father consented to leave him with her, and she cared for the child, sent him to school, etc., for nearly seven years, and the father if given the child's tutorship would leave him with her. The father occasionally visited the child, and sent it small presents. Held, that the father has not abandoned the child within Civ. Code, art. 305, providing that no cause of exclusion from tutorship is applicable to a father except abandonment of his children, etc.; "abandonment" meaning the disregard of the paternal duty to see that the child is cared for and leaving it to support itself, so that the fa-

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ther will be confirmed as the natural tutor of such child. In re Alexander, 54 South. 125, 126, 127 La. 853.

Where the conduct of parents indicated their settled intention to leave their child permanently in the care of her aunts, though there was no actual abandonment of the child by the mother, her acts constituted "abandonment" within P. L. 1902, p. 259, as amended by P. L. 1905, p. 272, providing that any unmarried person of full age may petition the orphans' court of the county in which a minor child may reside for permission to adopt such child, and that if either parent shall have abandoned the child the consent of the other parent shall be sufficient, so that the mother's consent was not necessary to an adoption of the child by the aunts. Wood v. Wood, 77 Atl. 91, 94, 77 N. J. Eq. 593.

Evidence held not to justify a finding that a parent has abandoned a minor child, within Civ. Code, § 224, providing that a child cannot be adopted without the consent of its parents, unless the child has been abandoned. To constitute an "abandonment," there must be an intention to do so, express or implied, from the conduct of the parent respecting the child. In re Cozza, 126 Pac. 161, 167, 163 Cal. 514.

Of convict hiring system

Under the constitutional provision that the Legislature shall "abandon" the system of leasing or hiring convicts, etc., "abandon" means to give up absolutely; to forsake entirely. Henry v. State, 39 South. 856, 876, 87 Miss. 1.

Of copyright

To constitute "abandonment of a copyright" there must be a clear, unequivocal, and decisive act of the person entitled, showing a determination not to have the right relinquished. Publication in a foreign country without the consent of the author, or without the consent of the owner of the exclusive right to publish in this country, is not an abandonment. A United States copyright of a work of an English author by the American publishers is not abandoned because of the foreign publication of the work by, or with consent of, the author, without the copyright notice, and without consent of the owners of such copyright. Harper & Bros. v. M. A. Donohue & Co., 144 Fed. 491, 498 (citing 1 Cyc. p. 5; Boucicault v. Wood, 2 Biss. 34, 3 Fed. Cas. 988; Goldmark v. Kreling, 35 Fed. 661).

Of easement

"Abandonment" of an easement necessarily implies nonuser; but nonuser does not create abandonment, however long continued. Adams v. Hodgkins, 84 Atl. 530, 531, 109 Me. 361, 42 L. R. A. (N. S.) 741.

An easement may be lost, as provided in Civ. Code 1895, § 3068, by "abandonment" or nonuser, if the abandonment or nonuser continued for a term sufficient to raise the presumption of release or abandonment. Nonuser of a street for a period of some 40 years raises a very strong presumption of abandonment. Kelsoe v. Oglethorpe, 48 S. E. 366, 367, 120 Ga. 951, 102 Am. St. Rep. 138.

The fact that a landowner, having an easement in a ditch which entitled him to be supplied with water therefrom, used some other method of conveying water to his land for a time, did not constitute an "abandonment" thereof. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 92 Pac. 290, 294, 40 Colo. 467.

The erection of a building in a street west of respondent's premises and the building of a fence closing the street, the effect of which was to inclose the northwesterly half of the street abutting on a small part of a certain lot, leaving unobstructed the way from that part which was west of respondent's land to L. street, did not as a matter of law conclusively show an intention on respondent's part to "abandon" the way over the westerly part of the street, the use of which was continued. New England Structural Co. v. Everett Distilling Co., 75 N. E. 85, 87, 189 Mass. 145.

Of homestead or residence

The word "abandonment," as used in reference to the abandonment of a homestead, has a well defined meaning. It requires a union of the act of removing from a homestead and an intention to not further retain it as a homestead, or the formation of an intention after such removal of remaining away; in other words, physical act of removing is not sufficient, unless attended or followed by an intention to actually abandon the homestead. Jones v. Kepford, 100 Pac. 923, 924, 17 Wyo. 468; Edson-Keith & Co. v. Bedwell, 122 Pac. 392, 393, 52 Colo. 310; Herman v. Smith (Tex.) 141 S. W. 1087, 1090; Armstrong v. Neville, 117 S. W. 1010, 1012; Victor v. Grimmer, 95 S. W. 274, 275, 118 Mo. App. 592 (citing Holmes v. Nichols, 67 S. W. 722, 93 Mo. App. 513; Bealey v. Blake, 55 S. W. 288, 153 Mo. 657; Duffey v. Willis, 12 S. W. 520, 99 Mo. 132; Mills v. Mills, 42 S. W. 709, 141 Mo. 195).

Removal from a homestead with a fixed intent not to return and use it as such constitutes an "abandonment" thereof, whether another homestead has been acquired or not. Republic Guaranty & Surety Co. v. Wm. Cameron & Co. (Tex.) 143 S. W. 317, 320.

A homestead is not "abandoned" by the removal of the husband with his family and living elsewhere, when there is an intention to return later and make it their home. In re Schulz, 135 Fed. 228, 229 (quoting and

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adopting Porter v. Chapman, 4 Pac. 237, 65 Cal. 365).

An enforced temporary absence on account of the destruction of the dwelling house on a homestead does not operate as an "abandonment" of the homestead right. Newton v. Russian, 85 S. W. 407, 408, 74 Ark. 88.

In order to constitute an "abandonment of residence," where one leaves his home, considerable time must elapse after leaving, together with some evidence of intention to abandon the residence. State v. Tomsa, 52 South. 988, 989, 126 La. 682.

The removal of a party from premises on which he has declared a homestead after a void execution sale thereof, and his surrender of the possession to the execution purchaser, do not constitute an "abandonment of the homestead," within Civ. Code, § 1243, providing that a homestead can be abandoned only by a declaration of abandonment, etc., and he cannot declare a second homestead on other land. In re Clavo's Estate, 93 Pac. 295, 6 Cal. App. 774.

The fact that there was 16 months' delay after the levy of an execution on a homestead before proceedings were taken under a statute providing a method for subjecting to execution the excess of value over the exemption, did not show an "abandonment"; a part of the delay being explainable by the pendency of a suit to enjoin execution sale. Lean v. Givens, 81 Pac. 128, 130, 146 Cal. 739, 106 Am. St. Rep. 79.

"If, prior to the establishment of actual residence upon the land by the settler, he is prevented from establishing such residence by his own voluntary act, even though it be the commission of a crime which results in his enforced incarceration, an 'abandonment' follows as a matter of law; but if the settler had established an actual residence and made improvements upon the land, then his removal therefrom and enforced absence by reason of conviction for crime will not work an abandonment. The reason for this latter rule is doubtless twofold: First, that residence and abandonment are each determined in part by intention, and it cannot be said that the enforced absence of a settler by compulsion of the law from his established residence carries with it the intention to establish a home in the place of his confinement or the intention to abandon that from which he has been unwillingly removed; secondly, that abandonment is something more than the relinquishment of possession. It must be the voluntary relinquishment of possession united with an intention to abandon." Huffman v. Smyth, 84 Pac. 80–82, 47 Or. 573, 114 Am. St. Rep. 938, 8 Ann. Cas. 678.

That a man voted in a precinct different from that in which his homestead was located was not conclusive evidence of the abandonment of his homestead, but was merely a circumstance to be considered in connection with the other proof in determining the question of "abandonment." Farmers' & Traders' Bank v. Childers, 150 S. W. 840, 841, 150 Ky. 719.

Of husband or wife

Good cause for, see Good Cause.

"Abandonment," in divorce law, consists in the voluntary separation of one spouse from the other for the prescribed time, without the latter's consent, without justification, and without an intention to return. Luper v. Luper (Or.) 96 Pac. 1099, 1101; Heyman v. Heyman, 104 N. Y. Supp. 227, 228, 119 App. Div. 182.

"Abandonment," in the law of husband and wife, as used in P. L. 1902, p. 508, § 20, declaring that, if a husband without justifiable cause abandons and refuses or neglects to maintain his wife, the chancery court may decree such suitable maintenance as the nature of the case requires, means a "forsaking entirely" or "removing entirely" from the wife. Such "abandonment" occurs when the husband fails to perform the duties of a husband still incumbent on him, namely, to support his wife and to be true to her. Freund v. Freund (N. J.) 63 Atl. 756.

If a wife leaves her husband because of his adultery, even if it be committed elsewhere than at their dwelling, the separation thus created is constructive desertion by him for the purpose of enabling her to compel him to support her; that is, it amounts to the "abandonment" or separation (whatever the difference) by him from her without justifiable cause, within Divorce Act (P. L. 1907, p. 482) § 26. Suydam v. Suydam, 80 Atl. 1057, 1058, 79 N. J. Eq. 144.

An "abandonment" by a wife of her husband may be complete under the same shelter. Graves v. Graves, 41 South. 384, 88 Miss. 677 (citing 1 Bish. Mar. & Div. §§ 1672, 1676).

Where a husband fails and refuses to support his wife, she does not forfeit her right of action, under Rev. St. 1899, § 4327, for support, on the ground of abandonment and failure to support, by continuing to live in the same house with, but apart from, him, as a refusal to support his wife amounts to an "abandonment" of her, though they continue to live in the same house. Polster v. Polster, 123 S. W. 81, 82, 145 Mo. App. 606.

Continued refusal of sexual intercourse by a wife is not "abandonment" or desertion, justifying a divorce within Rev. St. 1899, § 2921, making the absence of either party without reasonable cause for one year a ground for divorce. Williams v. Williams, 99 S. W. 42, 44, 121 Mo. App. 349.

To constitute "abandonment" within Revisal 1905, § 2117, providing that a woman

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whose husband abandons her may convey her property without his assent, he need not leave the state. Witty v. Barham, 61 S. E. 372, 373, 147 N. C. 479.

There can be no "abandonment" of the matrimonial relation except for such causes as would constitute grounds for divorce. Warfield v. Warfield, 133 S. W. 606, 607, 97 Ark. 125.

"Abandonment" or desertion by a husband of his wife under Pub. Acts 1907, No. 144, making one who deserts and abandons his wife guilty of a felony, means to separate from wrongfully without intention of again resuming marital relations, desertion of one by the other meaning more than going away, or more than separation, and negativing the idea of a friendly separation or a separation for a just cause, an abandonment being the act of a husband or wife leaving his or her consort willfully, and with an intention of causing perpetual separation. People v. Stickle, 121 N. W. 497, 498, 156 Mich. 557.

In order to constitute "abandonment" under Greater New York Charter (Laws 1897, c. 378) § 685, as amended by Laws 1901, c. 466, making it an offense for one to abandon his wife without adequate support, willful desertion and voluntary separation by the husband from his wife without justification and with the intent of not returning are essential elements. People ex rel. Demos v. Demos, 100 N. Y. Supp. 968, 969, 115 App. Div. 410.

Where a husband and wife live separately by consent, and the wife becomes destitute, to the husband's knowledge, and he thereafter, though of sufficient ability, refuses to provide for her, he has "abandoned" her in a destitute condition, within the statute punishing a husband for willfully abandoning and neglecting to support his wife. Spencer v. State, 112 N. W. 462, 466, 132 Wis. 509, 122 Am. St. Rep. 989, 13 Ann. Cas. 969.

In a prosecution for abandonment of defendant's wife and a refusal to provide for her support, a requested instruction that there could be no conviction if it should appear that the husband, by reason of lack of property, money, or estate, was unable to support his wife, and that such a condition amounts to a good cause and constitutes a complete defense to the prosecution, is sufficiently covered by a charge that "abandonment" is an actual, willful desertion followed by a willful neglect or refusal to contribute to the support of the wife, and there can be no conviction even if there is an abandonment as above defined without good cause unless such actual, willful desertion, followed by willful neglect and refusal to contribute to the wife's support, is without good cause, and the state must prove these several facts, and also prove that at or about the time alleged the defendant was possessed of money, property, or other means available for the support of the wife, or had at least earning capacity and an opportunity to work. Graham v. State, 134 N. W. 249, 250, 90 Neb. 658.

Where a husband who has not provided a domicile for his wife takes her to the house of her parents, and without further notice to her leaves the state for an indefinite period, the wife has a right to a separation from bed and board on the ground of "abandonment." Wilcox v. Nixon, 38 South. 890, 115 La. 47, 112 Am. St. Rep. 266.

Where, in divorce on the ground of abandonment by the husband, it appeared that he left his wife because he was put out of the house by her father for drunkenness and failure to support the wife, and that at the time he asked how long it was to last; that he wrote her a number of letters; and that thereafter she visited him several times, and wrote him making engagements—there was no such "abandonment" as to authorize a final divorce. Wheeler v. Wheeler, 61 Atl. 216, 219, 220, 101 Md. 427.

"Abandonment" in the sense of the statute is not shown, where alleged as a ground for divorce, where it appears that the defendant left the house Saturday evening, taking his clothes; that he returned the following Sunday and left again, returning again the following Tuesday night, making the request, "Carrie, can I stay all night?" and receiving the reply, "Yes, but that is all the good it will do you;" and that soon thereafter, while still at the house, he was served with the papers in the present suit. Saillard v. Saillard, 2 Tenn. Ch. App. 396.

Plaintiff first abandoned defendant in May, 1896, after having transferred all his property to her, subject to his debts. He returned in the fall of the same year, and remained at home until the spring of 1898, when he went to Alaska, and again returned in 1900, but not to his home, after which he visited his home but once or twice for the next four years, and refused to live with his family, though requested to do so, and made no provision for their support until he brought suit for divorce in 1904. Held, that such facts justified the court in decreeing defendant a divorce for "abandonment," as prayed in a cross-bill. Clemans v. Western, 81 Pac. 824, 825, 39 Wash. 290.

Of insurance policy

Where an insured under a life policy refused to pay an assessment made against him solely on the ground that the amount of the assessments had been increased, but without any claim that the increase was illegal, and formally notified the company that he withdrew therefrom, such action constituted an "abandonment" of the contract, which precluded a recovery on his policy after his death, unless some other act super-

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vened to reinstate his claim. Roth v. Mutual Reserve Life Ins. Co., 162 Fed. 282, 286, 89 C. C. A. 262.

Of land

A failure to occupy land for an indefinite time does not constitute an "abandonment" of title or possession. Sowles v. Minot, 73 Atl. 1025, 1029, 82 Vt. 344, 137 Am. St. Rep. 1010 (citing 2 Wash. Real Prop. 453, 457; Perkins v. Blood, 36 Vt. 273, 283; Langdon v. Templeton, 28 Atl. 866, 66 Vt. 173, 180; Davenport v. Newton, 42 Atl. 1087, 71 Vt. 11, 17).

The "abandonment" of possessory rights upon the public domain is a question of fact as well as of intent. To find that real property has been abandoned, the evidence must show that the premises were left vacant without any intention of claiming possession, and with an intention to leave them open for the occupancy of any one who might choose to enter. Burr v. House, 3 Alaska, 641, 643.

Of logs

Where logs not marked with a recorded mark were delivered to a lumber company under an agreement whereby such company undertook to drive them to its hoist, where they were to be scaled and paid for, as between the owner of the logs and the company so undertaking to drive them, the logs were not, during the drive, "abandoned," within Rev. Laws 1905, § 2580; and the owner of such logs was not precluded from claiming a conversion thereof by such company at its hoist. Sheldon-Mather Timber Co. v. Itasca Lumber Co., 135 N. W. 1132, 1134, 117 Minn. 355.

Of mining claim

"Abandonment" of a mining claim is a matter of intention, and takes place whenever the claimant goes away with no intention of returning to it, and with the intention of leaving the claim open for the next applicant. Moffat v. Blue River Gold Excavating Co., 80 Pac. 139, 141, 33 Colo. 142.

"Abandonment" of a mining claim occurs where the locator goes away and leaves it without any intention of returning, having no regard to what becomes of the claim, or who may appropriate it, and the leaving of a claim with intent to return later is not abandonment. Davis v. Dennis, 85 Pac. 1079, 1080, 43 Wash. 54.

"Abandonment" is a matter of intention and operates instantly. The locator of a lode claim, by applying for and obtaining patent for only part of the location, including the discovery shaft, does not thereby abandon the portion not included in the patent; but, continuing to retain the possession thereof and to perform the requisite annual labor thereon, his right of possession thereof remains as before. Miller v. Hamley, 74 Pac. 980, 982, 31 Colo. 495 (adopting definition in Derry v. Ross, 5 Colo. 295).

"'Abandonment,' as applied to mining, is a voluntary act, and consists of the relinquishment of possession of the claim, with an intention not to return and occupy it. It is purely a question of intention. If there is no animus revertendi, the desertion of the claim determines the property at once, without regard to the duration of the locator's absence. To constitute an abandonment, there must be an absolute desertion of the premises. The burden of proving it is upon him who asserts it." The owner of mining locations stopped work thereon temporarily, except annual assessment work, on account of lack of transportation for ores, and another person entered the land as a homestead, but without the consent of the mine owner. Held, that there was no intention of abandonment. Buffalo Zinc & Copper Co. v. Crump, 69 S. W. 572, 576, 70 Ark. 525, 91 Am. St. Rep. 87 (quoting and adopting definition in 2 Lindl. Mines, § 643).

Where the owners of a mining claim, after a ruling of the Commissioners of the General Land Office holding for cancellation a portion of their claim, attempted to avoid the effect of such ruling, and, on failing, abandoned their application for a patent, and elected to rely on their grant from the government under their location, and at the commencement of the suit had complied with the law as to annual labor and performed additional work on the claim for several years preceding a subsequent location, such conduct negatived any intention to "abandon" or surrender their claim to the public domain, so as to subject it to relocation. Peoria & Colorado Mill. & Min. Co. v. Turner, 79 Pac. 915, 917, 20 Colo. App. 474.

Of mining shaft

Under Laws 1903, p. 364, § 18 (Rev. St. 1908, § 4297), which requires that abandoned mine shafts dangerous to life be securely covered or fenced, a mining shaft, though not shown to have been abandoned in the legal sense of that word, which is not used for working through from the surface, is such a shaft as was meant by the term "abandoned mine shaft." Richardson v. El Paso Consol. Gold Mining Co., 118 Pac. 982, 985, 51 Colo. 440.

Of office

To constitute an "abandonment" of an office, it must be total, and under such circumstances as to clearly indicate an absolute relinquishment. State ex rel. McGuyer v. Huff, 87 N. E. 141, 143, 172 Ind. 1, 139 Am. St. Rep. 355.

"Abandonment" of an office implies a volition on the part of the incumbent against whom it is charged, and such volition is essential to a cessation to discharge the du-

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ties of the office before the penalty can be invoked. Pol. Code, § 996, subd. 7, provides that an office becomes vacant by the ceasing of the incumbent to discharge the duties of the office for a period of three consecutive months, except when prevented by sickness or when absent from the state by permission of the Legislature. Held, that such section contemplated a voluntary abandonment or nonuse of the office for three consecutive months, and that an involuntary failure on the part of an incumbent to perform the duties of his office, caused by his incarceration for a felony during the statutory period, did not operate as an "abandonment" of the office within such section. - Bergerow v. Parker, 87 Pac. 248, 249, 4 Cal. App. 169 (citing People v. Hartwell, 6 Pac. 873, 67 Cal. 11; People ex rel. Tracy v. Brite, 55 Cal. 79, and distinguishing People ex rel. Flemming v. Shorb, 35 Pac. 163, 100 Cal. 537, 38 Am. St. Rep. 310).

Where a trustee in bankruptcy absconded after embezzling the funds of the estate, such conduct amounted to an "abandonment of his office," which was thereby vacated, and a new trustee may be appointed without notice to him or a hearing for his removal. - Scofield v. United States, 174 Fed. 1, 3, 98 C. C. A. 39.

Of railroad right of way

The word "abandoned," as used in Act 1890, p. 246, c. 220, providing that whenever on an unfinished railroad a right of way, or location on any part thereof, remains for 10 years unused for railroad purposes, the same shall be held to be abandoned, and shall be liable to be used and appropriated by another railroad company on purchase or condemnation in a manner provided by law, cannot import such an abandonment as would cause a reversion to the first owner, for the reason that such a construction would be to take from the railroad company property obtained by condemnation and paid for, without compensation, and therefore raise a constitutional question. Its more reasonable construction would be that it is to be applied to cases only where there has been no use of the property for railroad uses, and in such a case there has been such an abandonment that authority is granted to another railroad to take condemnation proceedings to secure it for its use without further special legislative permission so to do. Canton Co. of Baltimore v. Baltimore & O. R. Co., 57 Atl. 637, 640, 98 Md. 202.

Of railroad station

Though Ky. St. § 772, prohibits abandonment, without the Railroad Commission's consent, of a passenger station maintained for five years, reasonable changes may be made to afford better service to the public, and the removal of an interurban railroad's stopping point 876 feet to better the service was not an "abandonment" of the station within the statute. Louisville & I. R. Co. v. Callahan, 136 S. W. 1018, 1019, 143 Ky. 517, 34 L. R. A. (N. S.) 412.

Of trade-mark

The loss of the right of property in trade-marks on the ground of "abandonment" is not to be viewed as a penalty, either for nonuser or for the creation and use of a new device. There must be found an intent to abandon, or the property is not lost. "Abandonment," in industrial property, is an act by which the public domain originally enters or re-enters into the possession of the thing (commercial name, mark, or sign) by the will of the legitimate owner. The essential condition to constitute "abandonment" is that the one having a right should consent to the dispossession. Outside of this there can be no dedication of the right, because there cannot be "abandonment" in the juridical sense of the word. Baglin v. Cusenier Co., 31 Sup. Ct. 669, 674, 221 U. S. 580, 55 L. Ed. 863.

Of water rights

The word "abandonment," as applied to an appropriation of water, is a matter of intent, as such intent may be evidenced by the declaration of the party or may be fairly inferred from his acts. Gould v. Maricopa Canal Co., 76 Pac. 598, 601, 8 Ariz. 429.

The mere intention to abandon the right to divert and use water, if not coupled with an actual yielding up of possession or a cessation of user, does not constitute "abandonment"; nor will nonuser alone, without an intention to abandon, amount to an abandonment. Wood v. Etiwanda Water Co., 81 Pac. 512, 514, 147 Cal. 228.

The term "abandonment," as applied to water rights, is applicable only to completed appropriations of water, and not to a case where the claimant never acquired a fixed right because of his failure to apply the appropriation to a beneficial use within a reasonable time. Conley v. Dyer, 95 Pac. 304, 306, 43 Colo. 22.

The mere temporary nonuse of water during one year subsequent to its appropriation, without intent to abandon the appropriator's right, is insufficient to establish an "abandonment." Land v. Johnston, 104 Pac. 449, 451, 156 Cal. 253.

In order to constitute an "abandonment," there must be an intent to abandon coupled with some external act or relinquishment by which the intent is carried out. On the question as to the abandonment of a water right, there being evidence that neither plaintiff nor its predecessor in interest ceased to use the water at any one time for a period of seven years, and no showing, except some evidence of nonuser, that it was at any time the intention of plaintiff or its

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predecessor in interest to abandon the use of the water, an "abandonment" was not shown. Promontory Ranch Co. v. Argile, 79 Pac. 47, 49, 28 Utah, 398.

ABATE—ABATEMENT

See Destruction by Abatement; Matter in Abatement; Plea in Abatement.

Of action

"Abatement" is defined as "a suspension of proceedings in a suit from the want of proper parties capable of proceeding therein." The Telegraph v. Lee, 98 N. W. 364, 365, 125 Iowa, 17 (quoting Bouv.).

An "abatement" of a suit, in the sense of the common law, is an entire overthrow or destruction of it, so that it is quashed or ended; but in the sense of a court of equity it signifies only a present suspension of all proceedings in the suit for the want of proper parties capable of proceeding therein. At common law a suit, when abated, is absolutely dead; but in equity it is merely in a state of suspended animation, and may be revived by a bill of revivor. The dissolution of a corporation pending a suit in equity against it did not abate the suit in the sense that it was destroyed, but it would be subject to revival. Kelly v. Rochelle (Tex.) 93 S. W. 164, 166.

A right of action "abating," as it does, on the death of a defendant, does not simply mean a discontinuance; it means an extinguishment of the very right of action itself. The right of prosecution is effectually wiped out, as if it had never existed. Baker v. Modern Woodmen of America, 121 S. W. 794, 797, 140 Mo. App. 619 (citing State v. Brown, 1 Mo. App. 449).

Of freehold

"Abatement or intrusion" consists in a wrongful entry on land when the possession is vacant, so as to constitute an ouster of a freehold in law. Dobbins v. Dobbins, 53 S. E. 870, 872, 141 N. C. 210, 10 L. R. A. (N. S.) 185 (citing 3 Bl. 167).

Of nuisance

Under St. 1899, p. 103, which authorizes suit by the district attorney of a county to "abate" a public nuisance existing therein, suit lies to enjoin maintenance of a public nuisance by permitting noxious vapors to escape from a smelter, though, strictly construed, the words "abate" and "enjoin" have technically different meanings. People v. Selby Smelting & Lead Co., 124 Pac. 692, 695, 163 Cal. 84.

Of taxes

Good cause for, see Good Cause.

ABATABLE NUISANCE

An "abatable nuisance" may be regarded as one which is practically susceptible of being suppressed, extinguished, or rendered harmless, and whose continued existence is not authorized under the law. Sanders v. Miller, 113 S. W. 996, 1000, 52 Tex. Civ. App. 372.

ABDUCTION

See Taking (In Abduction).
See, also, Kidnapping.

"Abduction" in its broadest legal sense signifies the act of taking and carrying away by force—which may be by fraud, persuasion, or open violence—a child, ward, wife, etc., and in its more restricted sense it is confined to the taking of females for the purpose of marriage, concubinage, or prostitution. Baumgartner v. Eigenbrot, 60 Atl. 601, 603, 100 Md. 508 (quoting and adopting the definition in 1 Cyc. p. 141).

Under Pen. Code, § 282, "abduction" for the purpose of marriage of a female under the age of 18 years, without the consent of the parent or guardian, relates simply to the offense of taking the female for the purpose of marriage without obtaining that consent. On a prosecution for such an offense, evidence to show that defendant was married to another woman at the time of the offense is inadmissible. People v. Cerami, 91 N. Y. Supp. 1027, 1028, 101 App. Div. 366.

Under Gen. St. 1894, § 6529, providing that "a person who takes a female under the age of 16 years * * * without the consent of her father, mother, guardian, or other person having legal charge of her person, for the purpose of marriage, * * * is guilty of 'abduction.'" The consent of the child is immaterial and irrelevant. She was capable, when of the age of 15 years or more, of consenting to marry; but she has not the power of consenting on the part of the guardian of her person, legal or natural, to the act of taking her away for the purpose of marriage. State v. Sager, 108 N. W. 812, 813, 99 Minn. 54.

The word "abduction," as used in Rev. Codes 1899, § 2718, providing that the rights of personal relation forbid the abduction of a husband from his wife or the abduction of a wife from her husband, means the taking away by either violence, fraud, or persuasion. A married woman may maintain an action against another woman to recover damages for the alienation of the affections of her husband and his consequent abandonment of her. King v. Hanson, 99 N. W. 1085, 1088, 13 N. D. 85.

The character of the place into which a female is inveigled is an essential element of the offense of "abduction," under Penal Law, § 70, subd. 2, providing that a person who inveigles an unmarried female of previous chaste character into a house of ill fame, or of assignation, or elsewhere, for purpose of sexual intercourse, is guilty of abduction, and

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the place must to some extent be a place for purposes of prostitution; and one who induced a female to take an automobile ride with him, and who on the return trip attempted to assault her on or near a public highway, is not guilty of "abduction." People ex rel. Howey v. Warden of City Prison, 137 N. Y. Supp. 268, 269.

ABET

In criminal law the word "abet" means to encourage, or set another on, to commit a crime. This word is always applied to aiding the commission of a crime. To "abet" another to commit a crime is to command, procure, or counsel him to do it; and presence and participation are necessary to constitute one an abettor. Even if one was present at the commission of a crime, and mentally approved or consented to the same, yet, if that consent was unknown to the person committing the crime, the one so mentally approving could not be held guilty as principal. Brooks v. State, 57 S. E. 483, 128 Ga. 261, 12 L. R. A. (N. S.) 889.

Aid and assist distinguished

The word "aid" does not imply guilty knowledge or felonious intent, while "abet" includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime. State v. Allen, 87 Pac. 177, 182, 34 Mont. 403; People v. Bond, 109 Pac. 150, 155, 13 Cal. App. 175; Same v. Lewis, 98 Pac. 1078, 1079, 9 Cal. App. 279.

The word "abet" is not synonymous with "aid" and "assist." It may import presence, with instigation or encouragement towards the commission of the criminal offense, but without aid or assistance therein. The furnishing by the defendant of a machine that happened afterwards, without his privity, to be used for gambling, does not constitute either the aiding, abetting, or assisting in the keeping of a gambling resort. State v. Flynn, 72 Atl. 296, 297, 76 N. J. Law, 473.

ABIDE

"The rule [as to instantaneous seisin] as it appears in the older authorities is chiefly applied in cases where dower is sought. It is thus stated by Blackstone: 'The seisin of the husband for a transitory instant only, when the same act gives him the estate conveys it [illegible] of him again (as where by a fine land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower, for the land was merely in transitu, and never rested in the husband, the grant and render being one continued act. But, if the land abides in him but for a single moment, it seems that the wife shall be endowed thereof.' 2 Bl. Com. 132. There is much in this word 'abides.' A well-known English writer seems to have caught its meaning when he says it means when the husband holds the estate for an instant beneficially for his own use." Libbey v. Tidden, 78 N. E. 313, 316, 192 Mass. 175, 7 Ann. Cas. 617 (citing Prest. Est. tit. "Dower," as cited in Bac. Abr. "Dower," c. 2).

ABIDE BY

Where, by defendant's constitution, benefits were restricted to members in good standing who had paid all dues, and who faithfully observed the laws, rules, commands, and regulations then in force, or which might thereafter be added to the constitution, by-laws, and rules, and in taking his obligation of membership, without which admittance was impossible, decedent agreed in writing to abide by the constitution as it then was, or might thereafter be amended, the words "to observe" and "to abide by" meant to obey and to accept the consequences of, and, so far as amendments were concerned, were not restricted to amendments of those laws and rules as related entirely to disciplinary and social regulations, but extended as well to amendments affecting decedent's right to benefits. Order of United Commercial Travelers of America v. Smith, 192 F. 102, 104, 112 C. C. A. 442.

ABIDE THE EVENT

See Costs to Abide Event.

ABIDING CONVICTION

In a murder case, accused was not prejudiced by error in defining "reasonable doubt" as "the want of an 'abiding conviction' of guilt, a conviction which shall rest with you all the days of your life," though "abiding conviction" means no more than "settled conviction." State v. Silverio, 76 Atl. 1069, 1071, 79 N. J. Law, 482.

ABILITY

See Best of Ability; Impaired Ability; Inability; Pecuniary Ability; Sufficient Ability.

Inability, see Physical Inability.

A representation by defendant, charged with obtaining money by false pretenses, that he was the brother of one "V. V. Harris, a contractor at the city of V., and that he and the said contractor, as partners, had a certain contract," does not relate to defendant's ability to pay, within Rev. Laws 1905, § 5089, providing that a purchase of property by false pretenses is not criminal, where the pretenses relate to the purchaser's "ability to pay," unless such pretense shall be made in writing and signed by the party to be charged. State v. Harris, 133 N. W. 980, 981, 116 Minn. 401.

There is a marked distinction between the solvency of an individual and his "ability to purchase." "Solvency" means his ability to discharge his legal obligations,

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while his "ability to purchase property" means, as the authorities say, that he is "ready" to do so, which, according to Webster, is "equipped or supplied with what is needed for some act or event." Colburn v. Seymour, 76 Pac. 1058, 1060, 32 Colo. 430, 2 Ann. Cas. 182.

ABLE

See As Soon as Able; If Able; Unable. Pecuniarily able, see Pecuniary Ability.

The word, as used in Civ. Code Ga. 1910, § 3587, providing that a broker has earned his commissions when he finds a purchaser "able," etc., to buy, means financially "able"; and this meaning does not make the broker an insurer of the ability of the purchaser, but is a codification of the common-law principle, recognized generally throughout the entire country, and a broker has not fulfilled his undertaking by presenting a person as a purchaser who is not financially "able" to make the purchase. Shaw v. Chiles, 71 S. E. 745, 746, 9 Ga. App. 460.

Ready distinguished

Under the rule that to entitle an agent to commission the purchaser produced by him must be ready, able, and willing to buy the property on the authorized terms, the words "able" and "ready" represent distinct ideas. A purchaser may be a millionaire, and therefore be "able" to buy; but if, when he meets the seller, he cannot make payment until he goes into the market and raises the necessary money, he is not "ready," and the production of such a purchaser is not sufficient to entitle the agent to recover a commission. To be "ready" is to be completely prepared, as for immediate use, or for present requirement. McDermott v. Mahoney, 115 N. W. 32, 40, 139 Iowa, 292 (quoting and adopting definition in Century Dictionary).

ABODE

See House of Usual Abode; Last Place of Abode; Permanent Abode; Present Place of Abode; Usual Place of Abode.

Residence synonymous

See Residence.

ABOLISH

The term "repeal," with reference to statutes, means the abrogation of a previously existing law by a subsequent statute, which either declares that the former shall be revoked, or which contains provisions so irreconcilable with those of the earlier law that only one of the two can remain in force; the former being an express repeal. The term "repeal" is synonymous with "abolish," so that a statute or ordinance is repealed when it is abolished. City of St. Louis v. Kellman, 139 S. W. 443, 445, 235 Mo. 687; Wilson v. People, 85 Pac. 187, 189, 36 Colo. 418.

ABORTION

The word "abortion," when used in judicial proceedings, necessarily implies that the crime was committed on a woman with child, and is synonymous with "miscarriage" in its primary meaning. Abortion is an offense at common law. Marmaduke v. People, 101 Pac. 337, 338, 45 Colo. 357.

Act March 20, 1907 (Laws 1907, p. 230) provides that any person who, "with intent to produce or promote a miscarriage or abortion," advises, gives, sells, or administers to a woman whether pregnant or not, or who, with such intent, procures or causes her to take any drug, medicine, or article, or uses on her or advises to or for her the use of any instrument or other method or device to produce a miscarriage or abortion, not a medical necessity, shall be guilty of a felony, etc. Held, that the word "abortion" was not used in such section in its ordinary sense, to wit, the expulsion of a fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life, or the delivery or expulsion of a human fetus prematurely, or before it is yet capable of sustaining life, but rather, as the designation of a statutory offense, to distinguish it from other felonies, and that the gravamen of the offense was the intent to produce a miscarriage or abortion by administering drugs or using instruments; the actual production of a miscarriage being unnecessary to complete the offense. State ex rel. Gaston v. Shields, 130 S. W. 298, 301, 230 Mo. 91.

Under Kirby's Dig. § 1570, declaring it an offense to administer drugs to a woman with child, with intent to produce an abortion or premature delivery of any fetus before the period of quickening, the crime is complete when the drug is administered "before the period of quickening," for the purpose of causing an "abortion"; that is, with the intent of causing an expulsion of the fetus prematurely; so that it is immaterial that the result be not till after the period of quickening; and therefore the indictment charging the administering of the drug to a pregnant woman before the period of quickening, with intent to produce an abortion and premature delivery of the fetus, need not further charge it was administered for the purpose of causing a delivery of the fetus before the period of quickening. Davis v. State, 130 S. W. 547, 548, 96 Ark. 7.

Code, § 4759, defines the offense of "abortion" by saying that "if any person, with intent to produce the miscarriage on any pregnant woman, willfully administer to her any drugs, or substance whatever, or,

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with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life," he shall be punished, etc. Held, that this indicates a design to treat the woman on whom the act was perpetrated as the victim, and she could not be guilty of the crime as an accessory or an accomplice; but it does not follow that she may not engage in an unlawful conspiracy with another to perpetrate the offense on herself. State v. Crofford, 110 N. W. 921, 922, 133 Iowa, 478.

Decedent, having applied for insurance in a mutual benefit society, answered that she had never had any local disease, personal injury, or illness of any kind, but in answer to the medical questions stated that her last confinement was in 1908, and that she had had two miscarriages from overexertion. In an action on the certificate, it was shown that in 1903, about seven years prior to decedent's death, she suffered an abortion when she was about three months advanced in pregnancy, and that about three years later another occurred at about the same stage. Held, that since the words "abortion" and "miscarriage" are synonymous, both meaning premature parturition, there was no breach of warranty or misrepresentation. Royal Neighbors of America v. Bratcher (Tex.) 151 S. W. 885, 886.

As felony

See Felony.

ABOUT

See In and About; In, Upon or About; On or About.

See, also, More or Less.

The meaning of the adverb "about" is "nearly," "approximately," "with close correspondence in quality, * * * degree," etc. Nelms v. State, 51 S. E. 588, 123 Ga. 575 (quoting and adopting definition in Webster's Dictionary).

The word "about" is of somewhat flexible signification, which may vary with the circumstances and the connection in which it is used; but, when used in such a sense as to become part of a contract, it denotes approximation to exactness. It allows a play within some not narrow limits, the oscillation depending in some degree upon the subject to which it is applied. While it gives a margin for some excess or diminution, it cannot reasonably be intended to include a very large fraction of the whole touching which it is used. As to time in the immediate future, it would ordinarily be understood as indicating a near approach to definiteness. Freeman v. Hedrington, 90 N. E. 519, 204 Mass. 238, 17 Ann. Cas. 741.

Construction in courses and distances

The word "about," as used to define the location and beginning point in a description, should be construed, if possible, so as to carry out the meaning and intent of grantor. Co-operative Bldg. Bank v. Hawkins, 73 Atl. 617, 622, 30 R. I. 171.

As estimate of distance

The term "about" is a relative and frequently ambiguous term, and its precise meaning in a contract to sell property fronting on a street "about" 60 feet is affected by surrounding circumstances, which may be established by parol evidence. Harten v. Loffler, 29 Sup. Ct. 351, 354, 212 U. S. 397, 53 L. Ed. 568.

A mortgage described a lot as beginning at a point "about" 315 feet from D. street, and 363 feet from M. street, land running westerly, bounded northerly by land of the grantors, 100 feet to the land of C.; thence southerly, bounded westerly by C.'s land 50 feet to a corner; thence, turning at right angles, said land runs easterly, bounded southerly by the land of the grantors, 100 feet to a corner; thence, turning at right angles, said land runs northerly, bounded easterly by land of the grantors, 50 feet to the first-mentioned boundary, together with all buildings and improvements thereon, etc. Thereafter to prevent foreclosure proceedings, the land was conveyed to the mortgagee by the same description, and she took possession, including the whole of the dwelling house, part of which was not within the boundaries of the tract. Held, that the word "about," as so used, was not equivalent to "at," but indicated that only approximation of the distance of the beginning line from the street was intended; and, it appearing from the description that the lot conveyed was not to extend more than 100 feet east of C.'s land, extrinsic evidence and general expressions in the description were ineffective to override such definite calls and extend the lines of the lot to include the whole house within the boundaries. Co-operative Bldg. Bank v. Hawkins, 73 Atl. 617, 622, 30 R. I. 171.

The word "about," in an agreement fixing the boundary between adjoining mining claims, which stipulated that the boundary should be a vertical plane downward on a line commencing at the southeast corner of the surface ground of one of the claims, then running northerly along the easterly side line of the adjoining claim to the intersection with the westerly side line of the adjoining claim which was at a point south 19° 47' east and about 727.3 feet distant from the northeasterly corner stake of the adjoining claim, etc., entered into, with knowledge of the location of the corners marking the boundaries of the claims, and with knowledge that a monument had been established at the point of intersection, meant that the distance from the northwest corner stake of the adjoining claim to the point of intersection was not intended to be

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stated with exact precision, but the established corners and monument control. Bullion Beck & Champion Mining Co. v. Eureka Hill Mining Co., 108 Pac. 881, 884, 36 Utah, 329 (quoting 1 Words and Phrases, p. 22).

Though the preliminary report on which the construction of a ditch is ordered gives its length as "about" a certain number of feet, yet this being a mere estimate, not required to be definite, and in fact not so, and the points between which it is to be constructed being clearly shown, the drainage district is liable for the excavation between such points, though the drain is longer than estimated. Monaghan v. Vanatta, 122 N. W. 610, 613, 144 Iowa, 119.

As estimate of quantity

When there has been a levy, described as being upon certain barrels and half barrels, each "about half full," but with no statement as to the actual contents, the levy is to be treated as a levy upon the barrels and contents; and, upon the trial of a claim case arising under such a levy, it is not error to admit evidence showing what were the contents of such barrels. W. B. Parham & Co. v. Potts-Thompson Liquor Co., 56 S. E. 460, 461, 127 Ga. 303.

The terms "about" and "more or less," as used in a contract of sale of "about" 250 tons of grapes "more or less," do not create such an ambiguity in the contract as to let in extrinsic evidence of previous or contemporaneous conversations to show intent. Peterson v. Chaix, 90 Pac. 948, 951, 5 Cal. App. 525.

The degree of latitude made permissible by the use of the word "about," in a contract calling for shipment of sacks of walnuts of "about 100 pounds each," cannot be determined by any fixed rule, but must be decided by the jury according to the facts of each case, and, like the phrase "more or less" following a figure, the idea conveyed is one of estimate of probable distance or amount. Santa Paula Commercial Co. v. Parkhurst-Davis Mercantile Co., 120 Pac. 347, 348, 86 Kan. 328.

Where a charter party provided for shipment of a complete cargo of cast iron pipe, "say about 3,400 gross tons," it should be construed as contemplating a margin beyond 3,400 tons, and was not fulfilled by a shipment of 3,258 tons. Sewall v. Wood, 135 Fed. 12, 16, 67 C. C. A. 580.

As estimate of quantity of land

Where a vendor stated to the vendee that the tract conveyed contained "about 17,000 acres," such qualification did not defeat the vendee's right to recover damages in an action because of the false and fraudulent misrepresentation of the quantity, where the land did not amount to more than 15,300 acres. Boddy v. Henry, 101 N. W. 447, 452, 126 Iowa, 31.

As estimate as to time

Under a contract made on March 20th for the sale of potatoes, to be delivered on a car to be furnished by the buyer in "about five weeks," the phrase "about five weeks," considered with the nature of potatoes to decay at that season, was intended not to limit the time within which the buyer should furnish a car, but to limit the time within which the seller should complete delivery. James Higgins Co. v. Torvick, 106 Pac. 22, 23, 55 Or. 274.

The word "about," used in a time charter in designating the lengtn of the term, is applicable to the term whether it be over or under the exact term stated, and, if the voyage terminates so near the end or the fixed time as to make another voyage unreasonable, the charterer may deliver or the owner may withdraw the vessel, or, if another voyage is reasonable, the charterer may require it at the charter rate of freight. The Rygja, 149 Fed. 896, 897; Id., 161 Fed. 106, 88 C. C. A. 270.

In an action to adjudicate the right to the waters of a creek, a finding that one defendant had appropriated a certain amount of water to run a grist mill about two weeks in June of each year, is sufficient, for the court evidently intended to fix a definite time during which the use of the water might continue, and the term "about," which, when used in connection with expressions of distance or number, signifies nearly or approximately, and when used in statements of courses or distances is discarded as without significance if there are no other words necessary to retain it, should be disregarded and the finding thus made specific as to length of time. Featherman v. Hennessy, 115 Pac. 983, 985, 43 Mont. 310 (citing 1 Words and Phrases, p. 21).

As estimate of value

The word "about," as used in testimony that a particular article is worth "about" a particular amount stated, is not to be regarded as positive and unequivocal proof that the article has a value of that amount in the market, but merely as an expression of opinion, which is not altogether precise and definite. Atlantic & B. Ry. Co. v. Howard Supply Co., 54 S. E. 530, 532, 125 Ga. 478.

Indefiniteness in pleading and proof

The word "about" is frequently used as a synonym for the word "nearly" or "approximately"; and such use is sanctioned by definitions found in the various standard dictionaries. Understood in this sense, it cannot be said that a charge in an information that defendant stole "about $80 lawful money of the United States of America" rendered the information demurrable for uncertainty. People v. Peltin, 82 Pac. 980, 1 Cal. App. 612.

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The words "or about," used in connection with an allegation of time in a pleading, renders the allegation indefinite and uncertain. Gordon v. Journal Pub. Co., 69 Atl. 742, 743, 81 Vt. 237.

Intent or purpose indicated

Chinese Exclusion Act May 6, 1882, c. 126, § 6, providing for the exclusion of Chinese laborers "about to come to the United States," means to "come with the intention of remaining at least for some period of time," and therefore did not include a seaman landing at a port in the United States for temporary purposes while his vessel was in port. United States v. Jamieson, 185 Fed. 165, 168.

Allegations of the complaint in an action for damages for fraud in selling plaintiff a barber business that representations that defendant would not re-engage in the business in the city, that defendant represented to induce plaintiff to purchase, that he "was about to and would abandon the barber business" in the city, sufficiently alleged a present intention by defendant not to engage in that business, so as to constitute actionable fraud if false; "about to" meaning "on the point of" or "in the act of," and signifying present action. Sallies v. Johnson, 81 Atl. 974, 975, 85 Conn. 77, Ann. Cas. 1913A, 386.

As upon

Act March 30, 1892 (P. L. p. 369) § 1, gives a lien on money due a contractor for the construction of a city building to subcontractors, materialmen, etc., on their compliance with section 2, which requires the service of a verified statement showing the amount of the claim, that the materials were furnished to the contractor, and that they were actually used in the erection and completion of the contract with the city. Held, that where a notice of a lien recited that there was due claimant from D., subcontractor for the mason work on public school No. 9, $6,630.49 for materials supplied in accordance with the contract between claimant and D., all of which had been fully completed, and the affidavit recited that there was due and owing claimant from D. $6,630.49 for materials supplied on and about the construction of public school No. 9 in the city of Hoboken, the statement sufficiently averred that the materials were actually used in the erection and completion of the school under the contract with the city; the word "supplied" being used there in the sense of "furnish" and the word "about" being taken to mean "upon." National Fire Proofing Co. v. Daly, 74 Atl. 152, 155, 76 N. J. Eq. 35.

ABOUT A MINUTE

The phrase "about a minute" is commonly used to denote a mere point of time, and not the lapse of any certain period, and is therefore devoid of any certainty. The testimony of a witness in a prosecution for homicide that the accused stepped toward deceased and after looking at him for "about a minute" fired the fatal shot, while implying that there was a halt as if for deliberation before the firing of the fatal shot, must be regarded as wholly uncertain for that purpose, especially where the transaction occurred in the darkness of night. State v. Clifford, 52 S. E. 981, 991, 59 W. Va. 1.

ABOUT THE PERSON

Under Acts 1908, c. 259, making it unlawful for "any person to carry about his person, hid from common observation, any pistol," the words "about the person" mean that it is so connected with the person as to be readily accessible for use or surprise if desired, and hence a pistol in a scabbard and in a pair of saddlebags with the lids down, though the bags be in the hand, does not fall within the language of the statute. Sutherland v. Commonwealth, 65 S. E. 15, 109 Va. 834, 23 L. R. A. (N. S.) 172, 132 Am. St. Rep. 949.

ABOUT THE PREMISES

See On or About the Premises.
Engaged or employed about the premises, see Engaged.

ABOUT TO SIGN

The expression "about to sign" in an entry in a house journal under the caption "Signing of Bills," reciting that the speaker announced that he was about to sign certain bills, denotes that the speaker was at that time engaged in the act of signing the several bills described in the entry. State ex rel. Hynds v. Cahill, 75 Pac. 433, 441, 12 Wyo. 225.

ABOVE

See As Above Described; Highest Above Bed of River.

Where, before the fifth count of a complaint was filed, demurrers assigning three causes had been filed to the complaint, and thereafter a demurrer is filed assigning grounds of demurrer numbered from 4 to 10, some of them to the complaint generally and some of them to count 2 thereof, an eleventh assignment, on the same paper as the fourth to the tenth, with one signature to all, "Defendant reinterposes all of the 'above' demurrers to the fifth count of the complaint," does not reinterpose to such count the first three grounds of demurrer. Fulenwider v. Ridgeway, 41 South. 846, 847, 148 Ala. 675.

The charter of a railroad authorized it to construct a road from Raleigh, in an easterly direction, through Pitt county, running to or near the town of Greenville; thence on the south side of Tar river to some point on or near and across the river "above or near" the town of Washington, which was on the north side of the river. Held, that the railroad was authorized to cross the river on a

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bridge, not necessarily "above" the town of Washington, but either "above or near," such town. Pedrick v. Raleigh & P. S. R. Co., 55 S. E. 877, 883, 143 N. C. 485, 10 L. R. A. (N. S.) 554.

ABRASION

ABRASION TEST

The "abrasion test," as applied to bricks, is to test the bricks by putting them in a machine called a "rattler," which is revolved at a specified speed, and the result noted of the loss of weight by abrasion. City of Chicago v. Singer, 66 N. E. 874, 875, 202 Ill. 75.

ABROAD

Intestate is not shown to be more than a bare licensee, who has no right to be protected from dangers of the premises where he is permitted to go, by a declaration against a railroad company for death of intestate from dangerous premises maintained by defendant where intestate alighted from its train, alleging that intestate, being an officer of the watch and constable for criminal service, boarded the train for the purpose of "apprehending criminals" and "examining certain persons abroad whom he had reason to suspect of an unlawful design"; "criminals" including persons whom an officer has no right to arrest without a warrant, which intestate is not alleged to have had, and one who has become a passenger and placed himself in the car of the common carrier not being "abroad," within Rev. Laws, c. 31, § 2, authorizing officers of the watch to examine all persons "abroad" whom they have reason to suspect of an unlawful design. Creeden v. Boston & M. R. R., 79 N. E. 344, 346, 193 Mass. 280, 9 Ann. Cas. 1121.

ABROGATE—ABROGATION

The word "abrogation," as used in speaking of the abrogation of a statute, is that of laying the provisions of the former law aside. Jessee v. De Shong (Tex.) 105 S. W. 1011, 1014 (citing Horton's Law Dict.).

Repeal synonymous

See Repeal.

ABSCOND—ABSCONDING DEBTOR

Concealment

Kirby's Dig. §§ 5077, 5088, providing that limitations do not apply to absconding debtors until the creditor becomes apprised of the residence of the "absconding debtor," etc., refer to absconding debtors and persons who fraudulently conceal themselves to prevent the commencement of an action against them, and in such case limitations do not begin until the residence of the absconder has been discovered, and the commencement of the action for that reason no longer prevented, and they do not apply to a foreign corporation doing business in the state without designating an agent, where the corporation claims the benefit of section 5057 by paying taxes on lands to which it has color of title. Rachels v. Stecher Cooperage Works, 128 S. W. 348, 351, 95 Ark. 6.

ABSENCE—ABSENT

See Voluntary Absence.

"Absent" is the state of being away from a place; withdrawal from a place; not existing. Carman's Adm'r v. Illinois Cent. R. Co. (Ky.) 92 S. W. 954, 956 (quoting and adopting definition in Webster's Dictionary).

"An 'absence from the state,' such as will, for a considerable period, render it impossible to obtain such a service of process as will support a general judgment, is such an absence as will interrupt the running of the statute of limitations." State ex rel. Shipman v. Allen (Mo.) 103 S. W. 1090, 1093 (citing Rhodes v. Farish, 16 Mo. App. 430).

Nonresidence distinguished

See Nonresident—Nonresidence.

Presumption of death created

The word "absence," in the rule that a presumption of death is raised at the "absence" of a person from his domicile when unheard of for seven years, means that a person is not at the place of his domicile, and that his actual residence is unknown, and it is for this reason that his existence is doubtful, and that, after seven years of such absence, his death is presumed. But removal alone is not enough. Gorham v. Settegast, 98 S. W. 665, 668, 44 Tex. Civ. App. 254.

Public officer

Hudson City Charter (Laws 1885, c. 197), providing for a president of the city council, who during the absence of the mayor from the city shall exercise all the powers of the mayor, empowered by Laws 1909, c. 187, to appoint between the last Monday of April and the first Monday of May following, a board of police and fire commissioners, does not authorize the president to appoint the board merely because of the absence of the mayor in a distant city on the first and second days of the week within which the appointments should be made; the "absence" meaning absence on an occasion demanding the immediate exercise of the powers of the mayor. State ex rel. Olson v. Lahiff, 131 N. W. 824, 825, 146 Wis. 490, Ann. Cas. 1912C, 350.

In Ky. St. 1903, § 4541, providing that the secretary of state may appoint an assistant secretary, who, in case of "absence" or indisposition of the principal, may do the business of his office, the word "indisposition" must be given force, as well as the word "absence." Its meaning is that, when

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the secretary of state is not on hand to carry on the business of the office, it may be transacted by the assistant secretary. In other words, it is not intended that the business of the office should stop when the secretary is sick at home or absent for other reasons. While a mere physical absence will not alone be sufficient in the matter not requiring immediate attention, when he left the office in charge of the assistant secretary with the intent of absenting himself from the seat of government on a stumping tour, the assistant secretary of state is authorized to act. Commonwealth, v. Ginn & Co., 85 S. W. 688, 690, 120 Ky. 83.

ABSENT WITHOUT LEAVE

"Absence without leave," within Greater New York Charter (Laws 1901, c. 466) § 303, providing that absence without leave of any member of the police force for five consecutive days shall be held to be a resignation, and the member so absent shall, at the expiration of the period, cease to be a member of the police force, is voluntary and intentional absence, and the statute does not authorize the dismissal of a member absent because of illness. Elder v. Bingham, 103 N. Y. Supp. 617, 618, 118 App. Div. 25.

ABSENTEE

The word "absentee" has a broad meaning. One of the meanings is, according to Foullier, Vol. 1, p. 247, No. 381, "Those of whom little or nothing may be known; they may be dead." Tell v. Senac, 48 South. 448, 449, 122 La. 1040.

A person who having resided in the state has permanently removed therefrom, and left no property, is an "absentee," as well as a person who has never been domiciled therein, against whom a personal judgment on substituted service cannot be rendered. Gouner v. Missouri Valley Bridge & Iron Co., 49 South. 657, 658, 123 La. 964.

ABSOLUTE

See Ultra Vires Absolute.

"Webster's International Dictionary defines 'absolute' (from 'absolvere,' to loose, or to set free) as 'loosed from any limitation or condition; uncontrolled; unrestricted; unconditional.'" Under Acts 1859–60, p. 348, incorporating the Medical College of Alabama, to be governed by trustees having power to acquire and dispose of real and personal property, and exclusively to hold the same for use of the college, etc., which trustees are given power to cause to be taught such sciences connected with medicine as they deem proper and fill such chairs as they see fit, the college was not under the "absolute" control of the state, and hence an appropriation act for its benefit, passed by less than two-thirds of all the members of the Legislature, was invalid, under Const. 1901, § 73, declaring that no appropriation shall be made to any educational institution not under the "absolute control of the state," etc., except by vote of two-thirds of all the members elected to each house. State ex rel. Medical College v. Sowell, 39 South. 246, 247, 143 Ala. 494.

Testatrix's will gave to her surviving husband entire control of a certain farm without power to sell or incumber, and provided that at her husband's death, and after debts were paid and a sum named paid to her daughter, an equal division of her property or its proceeds should be made among her five children, and, in the event of the death of any of them before the settlement of the estate, that their part should go to their children, and, if there were none, should be equally divided among the survivors, and that it was the testatrix's desire that her children should have their part of the estate "for their exclusive benefit or maintenance and at their death go to their children absolutely," but that, if any child marry and die without issue, the part of such child should revert to the surviving children. A codicil provided that testatrix desired "all of my children to have 'absolute' control of their portion of my estate," and that she did not desire the property to be forced into the market at a sacrifice, but that it should be held at least five years, as the children could all agree to dispose of it to advantage within that time. Held that, at the husband's death, the children took a fee-simple, and not merely a life, estate; the word "absolute," as used in the codicil, importing an exclusive control and title in the children. Barnett v. Barnett, 83 Atl. 160, 162, 117 Md. 265 (citing 1 Words and Phrases, p. 38).

ABSOLUTE CLAIM

A contingent claim does not become "absolute," within the meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate. Hazlett v. Blakely's Estate, 97 N. W. 808, 811, 70 Neb. 613.

ABSOLUTE CONVEYANCE

As mortgage, see Mortgage.

ABSOLUTE DEED

As equitable mortgage, see Equitable Mortgage.

As mortgage, see Mortgage.

ABSOLUTE DIVORCE

After a decree nisi, but before a final decree is ordered in a divorce suit, the divorce is not "absolute," and the entire proceedings can be reviewed; and evidence that a daughter was born to the libelee after the decree nisi was entered may be introduced. Koffman v. Koffman, 79 N. E. 780, 193 Mass. 593.

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ABSOLUTE DOWER

The statutory provision for a widow is often called her "absolute dower." It partakes of the nature of dower in being free from the claims of creditors and not subject to disposition by the husband's will. Ellis v. Ellis, 96 S. W. 260, 261, 119 Mo. App. 63 (citing In re Klostermann, 6 Mo. App. 314).

ABSOLUTE DUTY

"An 'absolute duty' to provide a reasonably safe place, exercising reasonable and due care so to do, is not different from the duty to exercise reasonable care to provide a reasonably safe place." Firment v. Berwind-White Coal Mining Co., 162 Fed. 758, 762.

ABSOLUTE ESTATE

Civ. Code 1895, § 3081, defines an "absolute or fee-simple estate" as one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate. Gann v. Runyan, 67 S. E. 435, 134 Ga. 49.

ABSOLUTE GIFT

"An 'absolute gift' is one where not only the legal title, but the beneficial ownership as well, is vested in the donee. A gift in trust is one where the subject of the gift is transferred to the donee, not for the purpose of vesting both the legal title and beneficial ownership of the subject in the donee, but that it may be held and applied to certain uses for a third party, the beneficiary." A gift which vests both the legal title and the beneficial ownership of the subject of the gift in the donee is not one in trust, even if it be a conditional one. Such a gift is an absolute one. A gift by deed, devise, or bequest to an existing corporation, or to one to be thereafter organized within the time limited by law, with directions or conditions as to the use or management of the subject-matter of the gift, which are reasonably consistent with the purposes of the donee, is not a gift in trust, but an absolute one to the corporation, within the meaning of the statute of uses and trusts. Watkins v. Bigelow, 100 N. W. 1104, 1109, 93 Minn. 210.

A bequest to "my friend B., in the confidence that he will use it in the prosecution of his work against the encroachments" of a religious denomination "upon our common school system," was an "absolute gift," and not a "trust"; the relations of the legatee and testatrix having been those of confidence and deep interest in his work, and the expenses of the work having been in part met by public subscription, and he having never accounted to any one for the funds received. Poor v. Bradbury, 81 N. E. 882, 883, 196 Mass. 207.

ABSOLUTE GUARANTY

Where one guarantees the payment of a note, and not merely its collectibility, it is an "absolute guaranty." Walter A. Wood Reaping & Mowing Mach. Co. v. Ascher, 62 Atl. 1023, 1024, 103 Md. 133.

ABSOLUTE LIABILITY

The liability incurred by a corporation, transferring a note payable to it and guaranteeing payment thereof at maturity, or at any time thereafter, waiving demand, notice of nonpayment, and protest, is an "absolute," and not a "contingent," liability, created at the date of the making of the guaranty, though the right of the transferee to enforce it depends on the default of the maker; for a contingent liability is dependent on the happening of the event which creates the liability, while the right to enforce an "absolute liability" may be contingent on the happening of an event. First Nat. Bank of Redlands v. Consolidated Lumber Co., 116 Pac. 680, 16 Cal. App. 267.

ABSOLUTE POWER OF DISPOSITION

The life estate of the devisee was not enlarged by Code 1907, §§ 3424, 3425, 3426, respectively providing that when a power of disposition is given to any person to whom no particular estate is limited such person takes a fee, subject to any future estate; that in case an "absolute power of disposition" is given, not accompanied by any trust, and no remainder is limited on the estate of the donee, he has an absolute fee, and that an "absolute power of disposition" is one by means of which the donee is enabled in his lifetime to dispose of the entire fee for his own benefit; and that a general power to devise property to a life tenant is an absolute power, within the meaning of sections 3424 and 3425. Nabors v. Woolsey, 56 South. 533, 534, 174 Ala. 289.

ABSOLUTE PRIVILEGE

In order that defamatory words, published by parties, counsel, or witnesses in the due course of a judicial proceeding, may be "absolutely privileged," they must be connected with, or relevant or material to, the cause in hand or subject of inquiry. Such words published in due course of a judicial proceeding, and not relevant or pertinent to the subject of inquiry, are only conditionally or qualifiedly privileged; that is, prima facie privileged. Myers v. Hodges, 44 South. 357, 360, 53 Fla. 197.

ABSOLUTE PROPERTY

The word "absolute," as used in Rev. St. 1898, § 2829, providing for the setting apart of a homestead as the "absolute property" of the surviving husband or wife and minor children, means complete, final, perfect, unconditional, unrestricted, not relative, not limited, independent of anything extraneous; and in the sense of complete, and not lim-

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ited, it distinguishes an estate in fee from an estate in remainder, and characterizes a pure estate, unmixed and unconnected with any peculiarities or qualifications; a naked estate, freed from any qualifications and restrictions in the donee. In re Bedford's Estate, 95 Pac. 518, 519, 34 Utah, 24, 16 L. R. A. (N. S.) 728, 16 Ann. Cas. 118.

ABSOLUTE REFUSAL TO PAY

Unless there is a bona fide attempt by an insurer to adjust a loss under a policy of fire insurance, by an offer to pay a sum approximating the loss sustained, there is an "absolute refusal to pay," within the meaning of section 2490 of the Civil Code of 1910. Great American Co-op. Fire Ass'n v. Jenkins, 76 S. E. 159, 160, 11 Ga. App. 784.

ABSOLUTE RULE FOR NEW TRIAL

See Rule Absolute for New Trial.

ABSOLUTE SALE

A sale is "absolute" which has been completed, while a "conditional sale" is one which takes effect on the performance of a condition, though an "absolute sale" may be subject to a condition subsequent, as where there is complete change of title subject to be defeated by the nonperformance of some annexed condition; the true criterion for determining whether a sale is absolute or conditional being the intent of the parties, to be discovered from their express declarations, and, where this is not possible, from all circumstances of the case, as well as from their declarations, if any. Whitsett v. Carney (Tex.) 124 S. W. 443, 445.

If a seller of goods parts with possession to the buyer, and invests him with the right to sell as his own and treat the proceeds as his own, the sale is "absolute," and not conditional, and title vests in the buyer, even though there is an agreement that it shall not pass until the price is paid. In re Priegle Paint Co., 175 Fed. 586, 588.

ABSOLUTELY

The word "absolutely" as defined by the Standard Dictionary, means: "In an absolute degree or manner; without limitation; completely." Central of Georgia Ry. Co. v. Mote, 62 S. E. 164, 170, 131 Ga. 166.

"The word 'absolutely' is an appropriate expression for the exclusion of the idea that an estate is either partial or conditional." "Absolute" is defined in Rapalje & Lawrence's Law Dictionary as "complete; final; perfect; unconditional; unrestricted; an estate without condition or qualification." A beneficial interest, to be taxable, under War Revenue Act June 13, 1898, c. 448, Schedule B, § 2930, as amended by Act March 2, 1901, c. 806, § 1011, must not only be vested in possession or enjoyment, but it must be absolutely so vested, and the word, "absolutely" as applied to property and property rights, means unqualified ownership. A bequest to a person when he reaches a certain age is contingent, and not taxable under the act; but, where the legatee is in the meantime to receive the interest therefrom, he has a beneficial interest, which is subject to the tax. Shanley v. Herold, 141 Fed. 423, 428.

As conveying a fee simple

"Absolutely" means without limitation or qualification. As used in a will, giving testatrix's niece both real and personal property absolutely, and providing that, if the niece die without issue, the property should go to the heirs of another, the niece took an absolute and not a defeasible fee, since that construction is the only one which would give force to the word "absolutely." Pritchett v. Corder (Ky.) 105 S. W. 910, 911.

Testator gave the residue of his property of all kinds "absolutely and in fee simple" to his wife "for life," and provided that after her death it was to be equally divided among three of his children named. Held, that his wife took only a life estate under the will. Wallace v. Bozarth, 123 Ill. App. 624, 625, 626.

ABSOLUTELY DEBARRED

As strict foreclosure, see Strict Foreclosure.

ABSOLUTELY FORFEIT

The term "absolutely forfeit," as used in St. 1898, § 1214, on failure of a railroad to pay the gross earnings tax, may reasonably be read as meaning that in case of penalty being incurred by a default not reasonably attributable to excusable mistake of law or fact, or both, or some controversy fairly warranting resort to judicial aid for its solution, the forfeiture should be absolute, as in case of a penalty in aid of an ordinary tax or stipulated damages in aid of an ordinary contract. State v. Chicago & N. W. Ry. Co., 108 N. W. 594, 613, 128 Wis. 449.

ABSOLUTELY NECESSARY

Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 3, provides for the appointment of receivers by courts of bankruptcy in case the court should find it "absolutely necessary" for the preservation of the assets, etc. Held, that the words "absolutely necessary," as so used, required clear, positive, and certain proof of necessity; and hence, where a bankrupt's property was in the hands of an assignee for the benefit of creditors, and it was not claimed that it was being dissipated or improvidently cared for, or that the assignee was not careful, prudent, or responsible, an ex parte order appointing a receiver was erroneous. In re Oakland Lumber Co., 174 Fed. 634, 636, 637, 98 C. C. A. 388.

ABSOLUTELY OWING

Bankruptcy Act July 1, 1898, c. 541, § 63, permits debts of the bankrupt to be prov-

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ed which are a fixed liability, as evidenced by a judgment or instrument in writing, "absolutely owing" at the time of the filing of the petition. Defendants agreed in 1894 to purchase from plaintiff on May 1, 1900, or earlier at their option, certain shares of stock, and pay therefor a certain sum and interest at 6 per cent. from April 1, 1894, to May 1, 1900, and plaintiff agreed to sell and deliver the stock on May 1, 1900, or such earlier date as defendants elected to purchase. Defendants never performed the agreement, and were adjudged bankrupt in 1899 and discharged in May, 1900. Held, that there was no liability "absolutely owing" by defendants when they were adjudged bankrupt, so that defendants' obligation under the contract was not affected by their discharge, even if the bankruptcy be treated as a breach of the contract, giving plaintiff a claim for damages if the trustee in bankruptcy did not elect to adopt the contract. Phenix Nat. Bank v. Waterbury, 90 N. E. 435, 436, 197 N. Y. 161.

ABSOLUTELY PRIVILEGED COMMUNICATION

Privileged communications fall into two classes, those "absolutely privileged," such as the opinions of judges, and others "qualifiedly privileged," such as publications made to protect the rights of the one publishing. Allen v. Earnest (Tex.) 145 S. W. 1101, 1104.

An "absolutely privileged communication" is confined to communications in judicial and legislative proceedings, and in matters involving military affairs, and to communications made in the discharge of a duty under express authority of law by or to heads of departments of the state. Tanner v. Stevenson, 128 S. W. 878, 881, 138 Ky. 578, 30 L. R. A. (N. S.) 200.

Words spoken upon an occasion "absolutely privileged," though spoken falsely, knowingly, and with express malice, impose no liability for damages in an action for slander or libel, while, on the other hand, words spoken upon an occasion only "conditionally privileged" impose such liability, if spoken maliciously, or not in good faith; the difference between the two being that in the former case the freedom from liability is absolute and without condition, while in the latter case it is made to depend upon the absence of express malice. Sebree v. Thompson, 103 S. W. 374, 375, 126 Ky. 223, 11 L. R. A. (N. S.) 723, 15 Ann. Cas. 770.

ABSORPTION

In the provision of Oleomargarine Act May 9, 1902, c. 784, § 4, defining adulterated butter as including "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream," the word "absorption" is not used in the sense of chemical absorption, and any butter is within the definition which contains an abnormal quantity of water, whether by chemical absorption or by incorporation. Coopersville Co-operative Creamery Co. v. Lemon, 163 Fed. 145, 154, 89 C. C. A. 595.

ABSORPTION TEST

See Water Absorption Test.

ABSQUE INJURIA

See Damnum Absque Injuria.

ABSTRACT

See Complete Abstract.

An instruction is not "abstract," if there be any evidence from which the jury might infer the existence of the fact supposed. Arkadelphia Lumber Co. v. Asman, 107 S. W. 1171, 1174, 85 Ark. 568. Charges are "abstract" when they assert propositions of law not legitimately arising out of the testimony itself or the inferences deducible therefrom. Gilliam v. State, 50 Ala. 145, 146.

Code, § 1149, provides that the board of supervisors, at their first meeting on the Monday after the general election, shall open and canvass the returns and make abstracts, stating in words written at length the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office; and section 441 provides that all proceedings of the board shall be published at the expense of the county during the ensuing year in the official newspapers, and that the county auditor shall furnish all such papers selected a copy of the proceedings for that purpose. Held, that the "abstracts" which the board is required to make are abstracts of the returns as canvassed and received from the various precincts, and that the auditor is required to furnish for publication a schedule showing the vote by precinct of each person voted for at the election. Clark v. Lake, 124 N. W. 866, 867, 146 Iowa, 109.

As a copy

Code Civ. Proc. § 710, provides that a transcript of a judgment may be filed with the auditor of any county from which money is owing to the judgment debtor, whereupon it shall be the auditor's duty to draw his warrant in favor of the court from the docket of which the transcript was taken for so much of the money as necessary to cancel the judgment. Section 897 provides a form for an abstract of a justice's judgment, showing the parties, date of rendition, amount, etc. Held, that the filing of an abstract prepared in accordance with section 897 in the office of a county auditor was insufficient to entitle plaintiff to the benefits of section 710, which contemplates

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a transcript or copy of the judgment. "A certified copy is not an 'abstract,' and the statute makes the distinction, and prescribes the exact form in which the abstract is to be prepared." Erkson v. Parker, 84 Pac. 437, 438, 3 Cal. App. 98 (quoting and adopting definition in Frazier v. Crowell, 52 Cal. 399).

ABSTRACT—ABSTRACTION

"To abstract" means to take from or to withdraw from, so that to abstract the moneys, funds, or credits of the bank, or a portion of them, is to take or withdraw from the possession and control of the bank such moneys, funds or credits. United States v. Breese, 131 Fed. 915, 921.

"Abstraction," under section 5209, Rev. St., is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. It may be done by one act, or by a succession of acts. It may be done under color of loans, discounts, checks, and the like. The means used do not change the nature of the act. United States v. Breese, 131 Fed. 915, 921.

ABSTRACT OF RECORD

"As a noun the word 'abstract' denotes a less quantity containing the virtue and force of a greater quantity." 1 Cyc. p. 211. As applied to a record it would mean a complete history in short, abbreviated form of the case as found in the record. It would have to be complete enough to show that the questions presented for review have been properly preserved in the case. As to the record proper it would not mean that the whole pleadings should be set out, unless some question urged required it. It would mean, however, that there should be a showing to the effect that pleadings had been filed in some lower court at some particular times, and the character of such pleadings, so that the issue raised could be easily ascertained. It would likewise mean that there should be a concise statement of the judgment and the date of its rendition, and also of the fact that a motion for a new trial or in arrest of judgment had been filed, and the time thereof, so that this court can see that it is filed within the four days prescribed by the statute. By this we do not mean that a copy of the record entry showing the filing should be printed, but as an abstract, thereof it could be said: "And thereafter, at the same term of court, and within four days after the return of the verdict or rendition of said judgment, to wit, on ——— day of ———, 190—, the defendant [or plaintiff] filed his motion for a new trial, as shown by the record entry made at the time." Even this might be further abbreviated, so as to aver and show the same facts. So, also, should be the showing as to the overruling of such motion, the leave to file a bill of exceptions, the filing of the bill of exceptions, the affidavit for appeal, and the order granting the appeal. Later, by appropriate statement, should appear the filing of the case in this court. In all this it is not necessary to print in hæc verba the orders of the court, but enough to show the act, and that it is of record, as an order, decree, or judgment of court. In 3 Cyc. p. 78, the rule is thus announced: "With regard to the matters properly included in an abstract of the record, it may be stated, as a general rule, that such abstract should be literally an abstract or abridgment of the record, containing only so much thereof as is necessary to a full understanding of the questions presented for review. It should be as brief as possible, as long as all material matters are presented, and an abstract which does not comply with this rule to a sufficient extent to obviate the necessity of a resort to the record is insufficient. Whatever is relied upon as an error should be shown, and an appellant's abstract will, as against him, be deemed sufficiently full and accurate to present all the errors on which he relies. The abstract should not, however, contain matters wholly immaterial and unnecessary in aiding the reviewing court to determine the appeal." Harding v. Bedoll, 100 S. W. 638, 640, 202 Mo. 625.

The word "abstract," in Rev. St. 1909, § 2048, providing for filing an abstract when a cause is not brought up on a full transcript, and in court rule 15, prescribing what is necessary to an abstract, and providing that the evidence shall be stated in a narrative form, means an abbreviation or a summary; and an abstract stating in narrative form the evidence, so as to present the facts necessary to an understanding of the points in issue, is sufficient. McGrath v. Heman Const. Co., 145 S. W. 875, 878, 165 Mo. App. 184.

The "abstract of the record" must show the judgment, the orders of the filing of a motion for new trial, the rulings of the court thereon, and also that an appeal has been taken. Aultman & Taylor Machinery Co. v. Organ, 129 S. W. 1023, 1024, 149 Mo. App. 102.

A printed copy of the entire record without abridgment or condensation is not an "abstract" within Supreme Court rule 10a (92 Pac. viii). Hills v. Allison, 100 Pac. 651, 653, 79 Kan. 617.

The "abstract" is the "record" on which the court on appeal determines a case, and

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it only refers to the original record when there is a conflict in the abstracts presented by the parties. State v. Harbour, 129 N. W. 565, 567, 27 S. D. 42.

ABSTRACT OF TITLE

An "abstract of title," as used in a contract for the sale of land, is a written or printed, short, methodical summary of the documents and facts which affect the title to the land in question. Smith v. Lander (Tex.) 106 S. W. 703, 704; McMillan v. First Nat. Bank of Bowie, 119 S. W. 709, 711, 56 Tex. Civ. App. 45.

The "abstract of title," which Code 1896 provides may be demanded in ejectment suits, should not be construed as meaning an abstract in the technical sense; but the purpose of the statute is met if, in response to the demand, an abstract is furnished which is sufficiently specific to inform the party making the demand of the title upon which his adversary will rely. Jackson v. Tribble, 47 South. 310, 312, 156 Ala. 480.

An "abstract of title," in the legal sense, is a summary of the facts relied on as evidence of title, and containing a note of all conveyances, transfers, or other facts relied on as evidence of title, together with all such facts appearing of record as may impair the title. Entries in an abstract of title showing warranty and quitclaim deeds by named grantors to named grantees, and a memorandum implying that the instruments were under seal, and a notation of an acknowledgment before a notary implying a complete acknowledgment, were sufficient to show title, for a summary of a deed or acknowledgment need not be a copy thereof, and an abstract need not contain a statement of anything further, unless there is an absence of a seal, or some other defect is shown affecting the validity of the instruments. Where a contract for sale of realty requires the grantor to convey the title free of incumbrances, and that abstracts showing such title should be furnished, the abstract need not show matters not of record or all the facts connected with the conveyance which might affect the title, such as possession, who were the heirs of a deceased owner where administration was not had within the jurisdiction. But the vendor must furnish an abstract of title containing a full summary of all grants, conveyances, wills, records, and judicial proceedings, whereby the title is in any way affected, and all incumbrances and liens of record, and show whether they have been released or not. Attebery v. Blair, 91 N. E. 475, 478, 244 Ill. 363, 135 Am. St. Rep. 342.

"The object of an abstract is to furnish the buyer and his counsel with a statement of every fact and abstract of the contents of every deed on record upon which the validity and the marketableness of the title depend, so full that no reasonable inquiry shall remain unanswered, so brief that the mind of the reader shall not be distracted by irrelevant details, so methodical that counsel may form an opinion on each conveyance as he proceeds in his reading, and so clear that no new arrangement or dissection of the evidence may be required. The buyer has a right to demand a marketable title. He has a right to demand that the 'abstract of title' shall disclose such evidence of that title as will enable him to defeat any action to recover or incumber the land." Fagan v. Hook, 105 N. W. 155–157, 134 Iowa, 381 (quoting Curwin, Abstracts).

ABUSE

See Criminal Abuse.

A neglect by connecting railroads to afford track intersections is such an "abuse" as Rev. St. 1895, art. 4562, authorizes the Railroad Commission to correct. International & G. N. R. Co. v. Railroad Commission of Texas (Tex.) 86 S. W. 16, 17.

The term "abuse," as used in Rev. St. § 6908, which makes it an offense for one to resist, obstruct, or abuse any officer in the execution of his office, means to wrong in speech, reproach coarsely, disparage, revile, malign. Campf v. State, 88 N. E. 887, 888, 80 Ohio St. 321.

In an action against a railroad company, where the evidence showed that the plaintiff was cursed and kicked by the conductor of the train, a charge that it was admitted by the plaintiff that he was not injured or humiliated by reason of being cursed or abused, was properly refused, though the plaintiff admitted that it did not humiliate him when the conductor cursed him; the word "abuse" being broad enough to include personal violence. Gulf, C. & S. F. Ry. Co. v. Bates (Tex.) 95 S. W. 738, 739.

Within Code 1907, § 6218, making it an offense to send a threatening or abusive letter, which may tend to provoke a breach of the peace, a letter is "abusive" which is offensive, and charges the sendee with a degradation of character, or a moral obliquity; as is a letter calling the attention to an unpaid bill, stating that, if the sendee knew how contemptible he appeared in the matter, he would pay the bill at once, and that, if he did not pay it in a short time, the sender would have to proceed in some way to collect it, and concluding, "I know how worthless and contemptible you are, but this is news to you." Peters v. State, 51 South. 952, 953, 166 Ala. 35.

ABUSE OF DISCRETION

An error of judicial discretion is sometimes termed an "abuse of discretion." Alexander Smith & Sons Carpet Co. v. Ball, 122 N. Y. Supp. 187, 190, 137 App. Div. 100.

An accurate exhaustive definition of the phrase "abuse of discretion" would be

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difficult, each case being determined with reference to its own peculiar fact, and there are different kinds of discretion that may be exercised by the trial court, among them a discretion in the decision of what is just and proper under the circumstances, which will not be reviewed, unless there is an abuse of it. "Abuse of discretion," in granting a new trial does not necessarily imply intentional wrong, but in such a case discretion is abused, when in its exercise a court exceeds the bounds of reason; all circumstances before it being considered. Root v. Bingham, 128 N. W. 132, 133, 26 S. D. 118.

"Abuse of discretion" on denying a change of venue means a clearly erroneous conclusion and judgment, one contrary to the logic and effect of such facts as are presented in support of the application, or against the reasonable and probable deductions to be drawn from the facts disclosed on the hearing. Starr v. State, 115 Pac. 356, 363, 5 Okl. Cr. 440.

An "abuse of discretion," as that term is ordinarily used, implies not merely an error in judgment, but perversity of will, passion, or moral delinquency; discretion exercised to an end or purpose not justified by and clearly against reason and evidence. This term was used by the Supreme Court to characterize the denial of the rights of citizens clearly given by the Constitution and the laws which a just discretion will not permit, when the court characterized as an "abuse of discretion" an order of the board of education of the city requiring colored children to attend a school so located that access to it was beset with such dangers to life and limb that the colored children ought not to be required to attend it, and denying such children admission to any other school. Williams v. Board of Education of City of Parsons, 99 Pac. 216, 218, 79 Kan. 202, 22 L. R. A. (N. S.) 584.

ABUSE OF FEMALE CHILD

"Carnal knowledge" includes what is meant by "carnal abuse," if not synonymous therewith, as used in Gen. St. 1902, § 1148, directed against a person who shall carnally know and abuse a female under 16, and to "abuse," within the meaning of that section, is not to injure the genital organs of the female, and to an extent not naturally resulting from an act of normal intercourse with a fully developed female. State v. Sebastian, 69 Atl. 1054, 1057, 81 Conn. 1; State v. Ferris, 70 Atl. 587, 81 Conn. 97. But the word "abuse," as used in Code 1907, § 5447, punishing carnal knowledge, or abuse in attempting to have carnal knowledge, of any female under 14 years of age, is held to be limited in its meaning to injuries to the genital or sexual organs. Castleberry v. State, 33 South. 431, 433, 135 Ala. 24.

Under section 1 of the act for the prevention of cruelty to children (2 Gen. St. 1895, p. 1717, § 26, amended P. L. 1901, p. 276), a conviction of a defendant for the offense of abusing a female infant 8½ years of age, based upon a complaint and evidence tending to show carnal "abuse" of such infant by the defendant, cannot be sustained; the word "abuse" in that act being construed to mean only corporal "abuse," such as cruel and unnecessary punishment or failure to properly administer to its physical needs. State v. Hankins, 67 Atl. 1057, 75 N. J. Law, 318.

ABUSE OF LIBERTY

Under Const. art. 1, par. 15 (Civ. Code 1895, § 5712), providing that any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty, it is not an "abuse of that liberty" for one having his property burned, who suspects another of setting it on fire, to institute a criminal proceeding against the latter, and, in connection therewith and in the preparation of the case, to make bona fide statements of his suspicions and grounds of suspicion to third persons, who would likely possess evidence as to the guilt or innocence of the accused, with a view of ascertaining how far their knowledge and information would corroborate or weaken the charge made. Taylor v. Chambers, 58 S. E. 369, 370, 2 Ga. App. 178.

Contempt of courts and slander and libel of individuals is an "abuse of the freedom of press or speech" and cannot be excused on the ground of the constitutional guaranties of such freedom. In re Fite, 76 S. E. 397, 410, 11 Ga. App. 665.

ABUSE OF PROCESS

See Malicious Abuse of Process.

"Abuse of process" is the willful and wrongful use of the process itself, and does not require a termination of the suit in which the process issued to be available as a cause of action. Ludwick v. Penny, 73 S. E. 228, 231, 158 N. C. 104.

An action for malicious prosecution is distinguished from one for "abuse of process," in that in the former malice, want of probable cause, and termination of the former proceedings must be shown, and in the latter none of these, but an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding must be shown. Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co., 55 S. E. 422, 423 (citing Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co., 50 S. E. 571, 138 N. C. 174; 1 Cooley, Torts (3d Ed.) 354; 1 Jaggard, Torts, § 203; Hale, Torts, § 185; Mayer v. Walter, 64 Pa. 283; Jackson v. American Telephone & Telegraph Co., 51 S. E. 1015, 139 N. C. 347, 70 L. R. A. 738).

The "malicious suing out of an attachment" contemplates a wrongful motive in the securing of the issuance of the attach-

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ment from want of probable cause or other reason, while an "abuse of process" contemplates the use of it after its issue for a wrongful purpose, and a party cannot have damages for the latter offense unless the process issued was perverted to a purpose not intended or contemplated by the law. Wright v. Harris, 76 S. E. 489, 160 N. C. 542.

ABUTMENT

As part of bridge, see Bridge.

ABUTTING

The term "abutting property," as used in statutes providing for assessments against abutting property for street improvements, means that between which and the improvement there is no intervening land. Millan v. City of Chariton, 124 N. W. 766, 145 Iowa, 648.

While the word "abuts" literally means that the lines of the property owner's lot and the sidewalk shall meet or come together, an ordinance authorizing the city council to levy a special assessment on lots abutting on a sidewalk should not be construed literally. Where a sidewalk was constructed on the street space reserved therefor, which space abutted defendant's lots, and defendant also held title to the center of the street, subject to the public easement, his lots abutted the sidewalk, within an ordinance requiring the sidewalk to be constructed at the expense of "abutting owners," though there was a space between the edge of the sidewalk and the lot line. City of Joplin v. Freeman, 103 S. W. 130, 132, 125 Mo. App. 717.

Superior City Charter (Laws 1891, c. 124) § 119, provides that, before work shall be ordered done on a street in whole or in part at the expense of the "abutting" or adjacent realty, the board of public works shall determine the benefits and damages which will accrue to each parcel of such realty, the entire cost of the contemplated improvement, and the amount that should be assessed to each parcel as benefits accruing thereto by such contemplated improvements. Held, that such law contemplates improvements of streets beneficial to parcels of realty abutting on or adjacent thereto, such improvements being in front of such parcels, at the expense in whole or in part thereof, the words "abutting" and "adjacent" not being used synonymously, in the absence of anything appearing clearly to the contrary in the law, the word "abutting" meaning a parcel having a street and lot line in common, while the word "adjacent" is used to characterize a parcel not in part bounded by a street line. Northern Pac. Co. v. Douglas County, 130 N. W. 246, 247, 145 Wis. 288.

Even if an "abutting" owner is entitled to compensation for damages caused by closing streets, where only the corner of the property touched the corner of the part of the street closed, and no part of it was immediately opposite the property, it was not "abutting property," so as to entitle the owner to damages for closing it. Ables v. Southern Ry. Co., 51 South. 327, 329, 164 Ala. 356.

The owner of property at the end of a road is not an "abutting" property owner along the road who may sign a petition requesting a police jury to advertise and sell a franchise to construct an electric railway in the road under Act No. 48 of 1906, authorizing police juries to sell franchises for the operation of such railways on highways upon written petition of abutting property owners along the road. Friscoville Realty Co. v. Police Jury of St. Bernard Parish, 53 South. 578, 581, 582, 127 La. 318.

Under Code 1906, § 3336, conferring on municipalities power to vacate streets and alleys, and providing that no vacation shall be made, except on due compensation being first made to abutting owners for all damages sustained thereby, one owning property on a continuous street, which, though the north and south ends bore different names, formed a continuous way in front of such property, and across a railroad right of way, and into a town, was an "abutting owner," and the city could not vacate the street, and permit the erection of a railroad depot therein, without first making compensation. Alabama & V. Ry. Co. v. Turner, 52 South. 261, 262, 95 Miss. 594.

The words "abutting property," as used in statutes relating to assessments for public improvements, contemplate the res or subject of property between which and the street there is no intervening land. Kneebs v. Sioux City (Iowa) 137 N. W. 944, 945.

ACADEMY

See Public Dancing Academy.

ACCELERATOR

The word "accelerator," in its ordinary meaning, is harmless, and as defined by the dictionaries signifies only one who or that which accelerates or hastens; but in the new sense it has acquired a definite and settled signification, and as used in an article designating a man as an accelerator for a trust, it offensively designates him as an agent of certain interests, and one not sincere in his speech. The word as applied to plaintiff in a newspaper article, denoting dishonesty, hypocrisy, or double dealing, is libelous per se. Levey v. Brooklyn Union Pub. Co., 121 N. Y. Supp. 643, 644, 65 Misc. Rep. 373.

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ACCEPT

The ordinary and accepted meaning of "accept" is synonymous with that of "receive." Standard Oil Co. of Indiana v. United States, 164 Fed. 376, 390, 90 C. C. A. 364.

The terms "accept" and "receive," within Kirby's Dig. § 1814, which makes it an offense to accept and receive deposits in an insolvent bank, are synonymous. Morris v. State (Ark.) 145 S. W. 213, 214.

A representation by a vendor that a third person had "accepted" a loan on the premises for a specified amount, while the third person had as a fact declined to "pass" a loan for that amount because of the construction of a wall on the premises, is a material representation as to value and the facility with which the purchaser may complete the purchase by mortgaging the property; the word "pass" being equivalent to "accept." Kreshover v. Berger, 119 N. Y. Supp. 737, 738, 135 App. Div. 27.

As retain

See Retain.

ACCEPT AND RECEIVE

See, also, Acceptance.

The words "accept and actually receive," as used in the law of sales, "are understood to mean a final and absolute appropriation by the purchaser" of the subject of the sale; the acts showing an acceptance and actual receipt being required to be "of such character as to unequivocally place the property within the power and under the exclusive dominion of the buyer." Sotham v. Weber, 92 S. W. 181, 182, 116 Mo. App. 104 (quoting and adopting definition in Story, Sales, § 276).

The acceptance and receipt, to satisfy Wilson's Rev. & Ann. St. 1903, § 780, providing that a parol agreement for the sale of goods at a price not less than $50 shall be invalid, unless the buyer "accept or receive" part of such goods, need not be contemporaneous with the making of the agreement, but may take place at any time before the contract is sought to be enforced. The parol agreement stands for a mutual agreed proposition, and the subsequent acceptance and receipt while the proposition remains open will make the contract effective. Gabriel v. Kildare Elevator Co., 90 Pac. 10, 11, 18 Okl. 318, 10 L. R. A. (N. S.) 638, 11 Ann. Cas. 517 (citing 20 Cyc. p. 247).

ACCEPTANCE

See Conditional Acceptance; General Acceptance; Partial Acceptance; Voluntary Acceptance.

Presentment for acceptance, see Presentment.

"Acceptance," where no element of estoppel intervenes, is a question of intent. Harrison v. Scott, 120 N. Y. Supp. 377, 379, 135 App. Div. 546.

Of bid

The council of defendant town recommended to the electors that they authorize the council to make certain improvements in the town building, and that plaintiff's bid of $2,250 for the work be accepted, and the work awarded to it. The financial town meeting, acting on the report, passed a resolution appropriating $2,250, or so much thereof as was necessary, for the improvement of the town building, to be expended under the supervision of the town council, as recommended in its report. At a subsequent meeting of the council, a resolution to award the contract to plaintiff was rejected, and plaintiff brought mandamus against the council to compel the execution of the contract. Held, that the acts did not constitute a contract, since the financial town meeting did not "accept" the bid, as it might have done. Putnam Foundry & Machine Co. v. Town Council of Barrington, 67 Atl. 733, 735, 28 R. I. 422 (citing State ex rel. Phelan v. Board of Education of Fond du Lac, 24 Wis. 683; distinguishing Boren v. Darke County Com'rs, 21 Ohio St. 311; Beaver v. Trustees of Institution for Blind, 19 Ohio St. 97; People ex rel. Putnam v. Commissioners of Buffalo County, 4 Neb. 150).

Of bill of exchange

An "acceptance" of a bill of exchange is an engagement to pay according to the tenor of the acceptance, and a general acceptance is an engagement to pay according to the tenor of a bill. Thomas v. Thomas, 7 Wis. 476, 481; Van Buskirk v. State Bank of Rocky Ford, 83 Pac. 778, 779, 35 Colo. 142, 117 Am. St. Rep. 182.

The "acceptance" of a bill is the signification by the drawee of his assent to the order of the drawer. It must be in writing and signed by the drawee. Wadhams v. Portland, V. & Y. Ry. Co., 79 Pac. 597, 598, 37 Wash. 86.

Failure to return a bill of exchange does not constitute an "acceptance" of the same, since it is expressly required by statute that an "acceptance" of a bill of exchange shall be in writing. St. Louis Southwestern Ry. Co. v. James, 95 S. W. 804, 806, 78 Ark. 490, 8 Ann. Cas. 611 (citing Kirby's Dig. § 495; Overman v. Hoboken City Bank, 31 N. J. Law, 564; Colorado Nat. Bank of Denver v. Boettcher, 5 Colo. 190, 40 Am. Rep. 142; Hall v. Flanders, 22 Atl. 158, 83 Me. 242; Rousch v. Duff, 35 Mo. 312).

The effect of an "acceptance" of an order for the payment of money is to constitute the acceptor the principal debtor. It admits that the acceptor has funds of the drawer in his hands, since the drawing of the order or bill implies this. It also admits the genuineness of the signature, and

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imports an engagement upon the part of the acceptor, payee, or other lawful holder thereof to pay the bill according to the tenor of the acceptance when it becomes due, upon the presentment thereof. It is not a collateral promise to pay the debt of another within the statute of frauds, but as between the acceptor and the payee it is an original and direct undertaking. Ragsdale v. Gresham, 37 South. 367, 368, 141 Ala. 308 (quoting and adopting 1 Daniel, Neg. Inst. §§ 552, 554; Story, Bills of Exchange, § 113).

Where a drawee, on his acceptance of a draft payable to a bank, transmitted the draft to the bank by letter stating that the acceptance was on the terms indicated in a prior letter reciting that the acceptance was for accommodation only and without any intention to be bound to pay anything thereon, the letters showed that there was no acceptance within the negotiable instrument law (Rev. St. 1909, § 10,102), defining an "acceptance" of a bill of exchange as "the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawer. It must not express that the drawee will perform his promise by any other means than the payment of money." Lehnhard v. Sidway, 141 S. W. 430, 431, 160 Mo. App. 83.

An "acceptance" is an engagement to pay according to the tenor of the acceptance, and, while the acceptance is usually evidenced by the word "accepted" written on the bill and signed by the drawee, it need not be in writing, since any act or word evidencing a promise to pay is sufficient, and a statement by a bank officer that checks drawn by a depositor are all right if the signatures are all rignt is not equivalent to a promise to accept or certify the checks. Home Nat. Bank of Baird v. First State Bank & Trust Co. of Abilene (Tex.) 133 S. W. 935.

The payment of a check by the drawee amounts to more than an acceptance, and has all the efficacy of an "acceptance," which is defined by L. O. L. § 5965, to be the signification by the drawee of his assent to the order of the drawer. First Nat. Bank of Cottage Grove v. Bank of Cottage Grove, 117 Pac. 293, 296, 59 Or. 388.

A telegram sent by a bank addressed to another bank stating that it would honor a person's draft for a specified sum is an "acceptance" of a draft for such sum from which the bank may not recede. Wells v. Western Union Telegraph Co., 123 N. W. 371, 377, 144 Iowa, 605, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317. But where a bank wrote another bank that it would "accept" drafts drawn on J. by B. for fruit not to exceed a certain amount per car, bill of lading attached, the bank not being the drawee, the word "accept" did not render the bank liable as an ordinary acceptor of a draft or bill of exchange, but the transaction amounted to an agreement of guaranty. National Bank of Brunswick v. Sixth Nat. Bank, 61 Atl. 889, 891, 212 Pa. 238.

Where a bank refuses to accept a renewal note, "acceptance" is not shown by the fact that, when it wanted to make a demand on the original note, it attached to it the renewal note, so that both could be restored to the maker on payment. Allentown Nat. Bank v. Clay Product Supply Co., 66 Atl. 252, 253, 217 Pa. 128.

In contracts

As contract, see Contract.

The "acceptance" of a contract must be as broad as the offer, and exactly meet its terms. Miller v. Sharp (Ind. App.) 100 N. E. 108, 110.

To "accept" a contract is to admit it and agree to it; to accede to it; to assent to it. The ordinary meaning embodies assent and agreement. State ex rel. Cleveland Trinidad Paving Co. v. Board of Public Service of Columbus, 90 N. E. 389, 391, 81 Ohio St. 218. An "acceptance" must be such as to conclude an agreement or contract between the parties. Where it modifies the terms of an original agreement, it must be unconditional and unqualified, and must be intended as an acceptance. Rapp v. Jennings State Bank, 87 Pac. 598, 600, 17 Okl. 449 (citing Bennecke v. Connecticut Mut. Life Ins. Co., 105 U. S. 355, 26 L. Ed. 990).

"'Acceptance' of an offer, to result in a contract, must be absolute and unconditional, identical with the terms of the offer, in the mode, at the place, and within the time expressly or impliedly required by the offer." Baird Bros. v. Walter Pratt & Co., 89 S. W. 648, 653, 6 Ind. T. 38 (quoting and adopting the definition in Clark, Contracts, § 36).

An "acceptance" of a contract must conform exactly to the offer, and if it contains new conditions there is no contract. A contract is not accepted, although parties agree on terms, if they agree subject to the preparation and approval of a former contract, for the concurrence of their wills is suspended, and where nothing further is done there is no contract. The mere fact that the reduction of an informal agreement to a formal written one was contemplated or stipulated for does not prevent the former from taking immediate effect. The question whether it does or not depends upon what the parties intended. Scott v. Fowler, 81 N. E. 34, 36, 227 Ill. 104 (citing Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Gradle v. Warner, 29 N. E. 1118, 140 Ill. 123; Baltimore & O. S. W. R. Co. v. People ex rel. Allen, 63 N. E. 262, 195 Ill. 423; Bishop, Contracts, § 318).

Where a proposal is made relating to some act to be performed by the person to whom the proposal is addressed, and not some promise to be made, the performance of the thing asked to be done is ordinarily

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sufficient notice of its acceptance. But to make performance of a thing proposed sufficient as an "acceptance" of the proposal, the performance must have been induced by the proposal. Schmitt v. Weil, 92 N. E. 178, 180, 46 Ind. App. 264.

The "acceptance" of a distinct proposal must be put by the party accepting in a proper channel to be communicated to the party making the offer. Cleveland, C., C. & St. L. Ry. Co. v. Shea, 91 N. E. 1081, 1083, 174 Ind. 303.

Where defendants wrote plaintiff, offering to pay him 10 per cent. commission for sales of land made for defendants, at a specified price, to persons obtained by plaintiff that defendants had no agreement with, and plaintiff immediately began to search for, purchasers, whom he succeeded in procuring, and he notified defendants of having the buyers, his acts constituted a sufficient "acceptance of the offer." Brown v. Smith, 87 S. W. 556, 558, 113 Mo. App. 59. And where plaintiff offered to take the agency for the sale of defendant's real estate, and defendant sent forward a power of attorney authorizing plaintiff to sell the same, such act was an "acceptance" of plaintiff's offer to take the agency. If further acceptance on plaintiff's part was necessary, a letter from him, stating that he had a buyer for the place, and that he would leave on a day named with him for the purpose of looking over the property, was sufficient. Luckett Land & Emigration Co. v. Brown, 43 South. 628, 631, 118 La. 943.

A letter acknowledging receipt of an order for goods and promising to give it prompt attention is either an "acceptance" of the order or is open to that interpretation in view of subsequent conduct of the parties. Bauman v. McManus, 89 Pac. 15, 17, 75 Kan. 106, 10 L. R. A. (N. S.) 1138 (citing Rees v. Warwick, 2 Barn. & Ald. 113; Manier v. Appling, 20 South. 978, 112 Ala. 663).

Where the owners, as vendors, draw up a contract of sale containing a provision that no damages shall be recoverable "if the owner refuses to accept the sale," they are liable for damages for a breach of the contract; for, by entering into the contract as vendors, they "accept the sale," within the meaning of the contract. Western Land Securities Co. v. Daniels-Jones Co., 129 N. W. 587, 113 Minn. 317.

Of dedication

Where there had been a dedication of land as public streets, a resolution of a municipal board changing the grade of such streets and a map relating thereto were competent evidence to show an "acceptance" by the city of the land dedicated. Palmer v. East River Gas Co. of Long Island City, 101 N. Y. Supp. 347, 349, 115 App. Div. 677. And continuous possession and public user of ground dedicated to the public for a street is an "acceptance." Clarke v. Evansville Boat Club, 88 N. E. 100, 101, 44 Ind. App. 426.

The erection of a street light by a private corporation within the limits of a street dedicated to a village, the maintenance of which was paid for by the village, was not sufficient to show an "acceptance" by the village of the street dedicated. The construction of a public sewer by proper municipal authority at the expense of the municipality in a dedicated street connected with the municipality's general system of sewers was an "acceptance" of the dedication of the street through which the sewer was constructed. An agreement by a village with a city, granting the latter the right to lay water pipes through certain of the village streets for a valuable consideration, to which was attached a map showing the location and boundaries of a dedicated street included among those in which the pipes were to be laid, was an express recognition of the public character of the dedicated street, and sufficient to show an "acceptance" of the dedication. Arnold v. City of Orange, 66 Atl. 1052, 1053, 73 N. J. Eq. 280.

Where a city, in addition to its approval of a long and continuous use of dedicated streets by the public as highways, extended its sewer and lighting systems over such streets, its acts constituted an "acceptance" of the dedication. Twedell v. City of St. Joseph, 152 S. W. 432, 433, 167 Mo. App. 547.

Of deed

A grantor in a deed, who was the grantee's general agent as to all her financial concerns and as to all matters connected with the possession and care of her papers of value and her property, executed a deed and had it recorded, though he retained it in his own possession. The grantee executed and delivered a mortgage to the grantor on the property conveyed. Held, that there was an "acceptance" of the deed. Blackwell v. Blackwell, 81 N. E. 910, 911, 196 Mass. 186, 12 Ann. Cas. 1070.

Of freight

Proof that cars containing plaintiff's property were placed on defendant railroad's connecting track, the usual place of delivery of freight destined for it as connecting carrier, under an arrangement with other roads that freight so placed would be accepted for further transportation, did not amount to an "acceptance" until defendant took actual charge of the property, accepted the bill of lading, or performed some other acts amounting in law to an "acceptance." Gray v. Wabash R. Co., 95 S. W. 983, 984, 119 Mo. App. 144.

Of new powers

Approval at a railroad stockholders' meeting in November, 1901, of the directors'

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report suggesting improvements, the passage of a directors' resolution in January, 1902, directing double tracking, and similar resolutions in May and June, 1902, that it was deemed advisable to make changes in the location of the road, there being no showing of abandonment of the old line, cannot be regarded as an "acceptance" of Act April 2, 1902 (Laws 1901-02, c. 667), enlarging railroad corporations' powers, within Const. § 158 (Code 1904, p. cclviii), effective July 10, 1902, providing that a corporation's "acceptance of new powers" shall be deemed a surrender of exemption from taxation not enjoyed by other like corporations. Commonwealth v. Richmond, F. & P. R. Co., 69 S. E. 1070, 1073, 111 Va. 611.

Of option

An option contract for the sale of real estate required the purchaser, on his electing to purchase within a specified time, to pay one-half of the purchase money and secure the balance. He demanded the execution of a deed not called for by the contract, and did not pay or tender any part of the purchase price. Held that the purchaser did not "accept" the option, though he was willing and able to pay, authorizing the vendor to refuse to perform. Trogden v. Williams, 56 S. E. 865, 869, 144 N. C. 192, 10 L. R. A. (N. S.) 867.

A sale of leased land by the lessor to the lessee on different terms from those recited in an option contained in the lease did not constitute an "acceptance of the option," but a new contract, under the rule that a conditional acceptance of an offer is a new offer which requires acceptance to close the bargain. Millard v. Martin, 68 A. 420, 28 R. I. 494.

In sales

"Acceptance" is the receipt of goods with the intention of retaining them, indicated by some act manifesting an intent to accept unconditionally in full performance of the contract. Brown & Bigelow v. Bard, 118 N. Y. Supp. 371, 376, 64 Misc. Rep. 249.

One receiving goods sold him and using them as his own thereby "accepts" them. Noel & McGinnis v. Kauffman Buggy Co. (Ky.) 106 S. W. 237, 238.

On the completion of a portrait, the person ordering it expressed satisfaction, and gave the artist permission to temporarily keep it for exhibition. Held a constructive "acceptance" and delivery. Scott v. Miller, 99 N. Y. Supp. 609, 610, 114 App. Div. 6.

A provision in a contract for the sale of machinery for a manufacturing plant, which was to be delivered by a specified date, that "the acceptance of this machinery when delivered is understood to constitute a waiver of all claims for damages by reason of any delay," is valid, and, while it was optional with the purchaser to accept or refuse to accept the machinery if delivered after the time limited, his action in receiving, installing, and continuing to use the same when so delivered was an "acceptance," which rendered such provision operative and binding, and he cannot set off a claim for damages caused by the delay in delivery in an action for the purchase money. Victor Chemical Works v. Hill Clutch Co., 152 Fed. 393, 395, 81 C. C. A. 519, 10 L. R. A. (N. S.) 814.

A contract to furnish certain machinery, to be subject to tests after its shipment and installation to determine whether it met the warranties on which it was sold before it was to be fully paid for, which installation and tests would necessarily require a considerable time, provided that "the acceptance of the machinery upon arrival shall constitute a waiver of all damages for delays." Held that, construing the entire contract together, the word "acceptance" in such provision was used in the sense only of "receipt," meaning that the voluntary receipt of the machinery on its shipment, notwithstanding delays, should be a waiver of the same, although still subject to the tests as to its efficiency and final acceptance. Lancaster Electric Light, Heat & Power Co. v. Platt Iron Works Co., 172 Fed. 314, 319, 97 C. C. A. 148.

Where plaintiff's contract for the sale of goods shipped to the consignee by defendant carrier, and claimed to have been stolen, was unenforceable under the statute of frauds, and the goods were sent subject to inspection and approval before the buyer would be liable for the price, delivery to the carrier was not an "acceptance" by the buyer, and hence the seller was entitled to sue the carrier for the loss. Fein v. Weir, 114 N. Y. Supp. 426, 432, 129 App. Div. 299.

Where a bill of lading was received and held for several days, with the intention of receiving the goods when they arrived, and no objection was made until after learning of an injury to the goods, the conduct of the consignee constituted a ratification of the delivery to the carrier and an "acceptance" of the goods, even if a delivery to the carrier had not been authorized. Murphy & Hutt v. American Can Co., 67 Atl. 17, 18, 106 Md. 190.

An attempt on the part of a buyer of shoes to sell some of the shoes which were salable, and adjust the buyer's claim that the shoes were not equal to sample, did not constitute an "acceptance" by the buyer of the entire lot of shoes. Wolfe Bros. Shoe Co. v. Bishop, 84 Pac. 133, 72 Kan. 687.

That on the arrival of goods the purchaser paid the freight both ways and at once reshipped them to the seller does not show an "acceptance" thereof. Jarrell v. Young, Smyth, Field Co., 66 Atl. 50, 51, 105 Md. 280, 23 L. R. A. (N. S.) 367, 12 Ann. Cas. 1.

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That a part of goods alleged by buyers not to conform to the contract of sale was, after delivery to the buyers, issued to their tenants after the discovery of the alleged deficiency, does not amount to an "acceptance," where the issuance happened against the positive orders of the buyers and was evidently a mere mistake. Plotner & Stoddard v. Markham Warehouse & Elevator Co. (Tex.) 122 S. W. 443, 446 (citing Dauphiny v. Red Poll Creamery Co., 56 Pac. 451, 123 Cal. 548.

A traveling salesman of a manufacturer, with authority to take orders subject to approval, sold a bill of goods to a buyer in April, which the manufacturer approved and filed. In September following the salesman sold other goods to the buyer, as evidenced by a written order signed by the salesman, which designated the goods and the price to be paid therefor. The manufacturer held the order until November following, without indicating to the buyer whether it would accept or reject the order. Held, that the silence on the part of the manufacturer did not constitute an "acceptance" of the order. Gould v. Cates Chair Co., 41 South. 675, 677, 147 Ala. 629.

In statute of frauds

The term "acceptance" covers more than "receipt," and a receipt of goods without an acceptance is not sufficient to satisfy the statute of frauds. Where a contract had been made to sell several articles of machinery, the receipt and acceptance of one of the articles took the whole contract out of the statute of frauds. Patterson & Holden v. Sargeant, Osgood & Roundy Co., 77 Atl. 338, 83 Vt. 516, 138 Am. St. Rep. 1102.

A salesman of a paper manufacturer took the order of a paper dealer for a quantity of paper. The order was indicated by a memorandum made by the salesman. The goods were shipped in a car consigned to a third person, who inquired of the dealer about the delivery, and the dealer replied that it had its own teams and wagons, and would do its own hauling. The paper arrived at the place of destination, and was unloaded, and the third person notified the dealer thereof. Held not to show an "acceptance" of any part of the goods sufficient to satisfy the statute of frauds (Rev. St. 1899, § 3419). Eichberg Co. v. Benedict Paper Co., 95 S. W. 963, 119 Mo. App. 262 (citing Sotham v. Weber, 92 S. W. 181, 116 Mo. App. 104).

Where one orally sells merchandise of a greater value than $50 for cash, and the seller weighs up the articles and puts them aside in his storeroom, where they are to be turned over to the purchaser's drays, and the purchaser refuses to pay for them or send for them, there is no such "acceptance and receipt," under Civ. Code 1895, § 2693, par. 7, as makes the transaction enforceable; the goods being still within the control of the vendor and not within that of the vendee. Blumenfeld v. Palmer Hardware Co., 68 S. E. 618, 619, 8 Ga. App. 79.

ACCEPTANCE OF RISK

See Assumption of Risk.

ACCEPTED

See Test Accepted.

An allegation that defendant "selected" certain cattle sold did not constitute an allegation of a delivery and acceptance within the statute of frauds; the words "selected" and "accepted" not being synonymous. McMillan v. Heaps, 123 N. W. 1041, 85 Neb. 535.

A deed from father to son "granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said (son) all that section, lot, tract or parcel of land," etc. The habendum clause recited, "to have and to hold all and singular the said premises unto the said [son] his heirs and assigns forever." The warranty clause read, "and I hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said [son] his heirs and assigns. * * *" The deed also provided that "the land herein conveyed to be accepted by the said [son] as a portion of my estate at its estimated value whenever my estate shall be divided among my heirs after my death as one of my heirs." Held, that the clause "land herein conveyed to be 'accepted' by the said [son]," meant that the land was to be accepted by him at the delivery of the deed; it being the intent to vest a present estate in the son at its delivery as an advancement to be accounted for whenever the father's estate was distributed at the value of the land when it was given to the son. Burgess v. McCommas (Tex.) 129 S. W. 382, 384, 385.

Where a deed of land provided that all poplar, etc., 20 inches and upward in diameter, is "accepted" in this deed, and all the walnut timber 16 inches in diameter is "accepted," and all rights to remove same it reserved in the grant or the timber described; the word "accepted" being intended for the word "excepted." Baustic v. Phillips, 121 S. W. 629, 630, 134 Ky. 711.

ACCEPTING THIS OPTION

See On Accepting This Option.

ACCESS

See Safe and Decent Access.

The word "access" is defined as a way of approach, or entrance, passage, path, means of approach, way of entrance, or passage to anything. Dexter & N. R. Co. v. Foster, 119 N. Y. Supp. 731, 733, 64 Misc. Rep. 500.

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The riparian owner's right of "access" from his land to the lake—in other words, the right to pass to and from the waters of the lake within the width of his premises as they border on the lake—has been expressly recognized by this court as a common-law right, which cannot be taken from him without just compensation. The owner of a lot abutting on the waters of Lake Michigan does not acquire the right to construct a wharf over submerged lands, not owned by him, immediately in front of his property, by obtaining a license to build such wharf from the Secretary of War under River and Harbor Act March 3, 1899, c. 425, § 10, 30 Stat. 1151. By Act June 15, 1895 (Laws 1895, p. 282), the land covered by the waters of Lake Michigan that lies immediately in front of appellant's lot was granted by the state to the commissioners of Lincoln Park for certain specific purposes. Held, that appellant had no right, by virtue of his shore ownership, to build a wharf on such submerged land, without obtaining the consent of the park commissioners. Cobb v. Commissioners of Lincoln Park, 67 N. E. 5, 6, 8, 202 Ill. 427, 63 L. R. A. 264, 95 Am. St. Rep. 258.

"Riparian proprietors on a cove in a river have each the important right of 'access'; that is, the right to go from their land to the river and from the river to their land through the waters of the cove. This right is distinct from the right of each as a member of the public to navigate the waters of the cove. It is a private right, belonging to each as the owner of land bordering upon waters forming part of a great water highway." Richards v. New York, N. H. & H. R. Co., 60 Atl. 295, 297, 77 Conn. 501, 69 L. R. A. 929.

ACCESSIBLE

See Inaccessible.

ACCESSION

Rev. Codes 1905, § 4752, provides that the owner of a thing owns all its products and accessions. Held, that the word "accession" as used applies to things added to the realty, and there may be a point of time when the products of a farm cease to be the property of the owner of the land, so that, where a crop has been raised by one in adverse possession, it may cease to be the property of the owner of the fee out of possession and become the property of the adverse possessor on its severance from the soil. Golden Valley Land & Cattle Co. v. Johnstone, 128 N. W. 691, 694, 21 N. D. 101, Ann. Cas. 1913B, 631.

ACCESSORY

One who persuades another to commit a crime is an "accessory," and where he testifies as a witness his testimony is to be weighed accordingly. Ackley v. United States, 200 Fed. 217, 222, 118 C. C. A. 403.

Under a statute providing that an "accessory" is one who, knowing that an offense has been committed, conceals the offender or gives him aid, that he may evade arrest, trial, or the execution of his sentence, in order that a person may be an accessory he must render to the principal some overt, active assistance. Chenault v. State, 81 S. W. 971, 972, 46 Tex. Cr. R. 351. An "accessory" is not connected with the crime, and is only connected with the offender after that offender has committed an offense and is seeking to avoid trial or arrest or the execution of his sentence. An accessory, therefore, cannot be connected with the offense, and could not be guilty of the commission of the main offense. Strong v. State, 105 S. W. 785, 52 Tex. Cr. R. 133.

Pen. Code, § 32, defining "accessories" as those who after knowledge of the commission of a felony conceal it from the magistrate or protect the person charged with the crime, states the common-law rule that a person must know that he is assisting a felon or else he cannot be charged as an accessory, and the mere neglect to inform the authorities that a felony has been committed is not sufficient. Ex parte Goldman (Cal. App.) 88 Pac. 819, 820 (citing Bishop, Crim. Law, vol. 1, § 694; Blackstone's Commentaries, p. 37, notes 25, 120; People v. Garnett, 61 Pac. 1115, 129 Cal. 366).

Kirby's Dig. § 1560, defines an "accessory" as one who stands by, aids, abets, or assists, or one who, not being present, has advised and encouraged a crime. A person who is one of the procuring causes of a violation of law is an "accessory," or principal in the second degree. Strong v. State, 114 S. W. 239, 240, 88 Ark. 240, 22 L. R. A. (N. S.) 560.

One who advises another to commit a burglary or larceny, but is at another place at the time of its commission, is not a principal, but an "accessory." Holmes v. State, 91 S. W. 588, 49 Tex. Cr. R. 348; Skidmore v. State, 115 N. W. 288, 289, 80 Neb. 698.

Where accused conspired with another to kill H., and deceased was shot by mistake for H., accused was guilty of murder, and this though accused was charged as an absent accessory before and after the fact, under Cr. Code 1902, § 635, making a party who has hired or counseled another to commit a crime which is committed out of his presence an "accessory." State v. Kennedy, 67 S. E. 152, 154, 85 S. C. 146.

Kirby's Dig. § 1560, defines an "accessory" as one "who stands by, aids, abets, or assists," etc. In a prosecution for assault and battery, the court instructed the jury to return a verdict of guilty if they found that defendant aided, "assented," abetted, etc. Held that, the words of the statute being

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clear and self-explanatory, the court should have refrained from changing or adding to them. Clerget v. State, 103 S. W. 381, 382, 83 Ark. 227.

Under Hurd's Rev. St. 1905, c. 38, § 274, defining an "accessory" as one "who stands by and aids, abets, or assists, or who, not being present aiding, abetting or assisting, both advised, encouraged, aided or abetted the perpetration of the crime," an instruction following such language is not incorrect for failure to use the word "feloniously." People v. Everett, 90 N. E. 226, 227, 242 Ill. 628.

ACCESSORY AFTER THE FACT

An "accessory after the fact" is one who, knowing a felony to have been committed, assists the felon, and at common law such an accessory may also be an accessory before the fact. State v. Naughton, 120 S. W. 53, 64, 221 Mo. 398.

An "accessory after the fact" is one who, knowing a felony to have been committed, shelters, receives, relieves, comforts, or assists the felon. State v. Jones, 120 S. W. 154, 155, 91 Ark. 5, 18 Ann. Cas. 293.

An "accessory after the fact" is one who, knowing a felony has been committed, harbors the felon, or assists him to escape punishment; and mere neglect to inform as to the crime or arrest the criminal will not make one an accessory after the fact. Levering v. Commonwealth, 117 S. W. 253, 257, 132 Ky. 666, 136 Am. St. Rep. 192, 19 Ann. Cas. 140.

Kirby's Dig. § 1562, defining an "accessory after the fact" as one who, after a full knowledge that a crime has been committed conceals it from the magistrate, implies some act or refusal to act by which it is intended to prevent or hinder the discovery of the crime; and for one to merely remain passively silent as to what was told him is not enough, and so does not make his testimony objectionable as that of an accomplice. Davis v. State, 130 S. W. 547, 549, 96 Ark. 7.

A wife does not become an "accessory after the fact" because after the arrest of her husband and defendant she told persons, who inquired, that she knew nothing of the offense charged against them, though she was cognizant of their criminal acts, for an accessory is one who conceals the offender or gives him aid. Pinckard v. State, 138 S. W. 601, 602, 62 Tex. Cr. R. 602.

ACCESSORY BEFORE THE FACT

To render one guilty as an "accessory before the fact," it is not necessary that he should have shared the criminal or mischievous design of the principal felony, and that that design should have been substantially effected through his incitement thereto. People ex rel. Perkins v. Moss, 99 N. Y. Supp. 138, 144, 113 App. Div. 329 (citing People v. Perkens, 47 N. E. 883, 153 N. Y. 576).

Under Kirby's Dig. §§ 1560, 1561, defining an "accessory before the fact" as one who stands by, aids, abets, or assists, or who, not being present, has advised and encouraged the perpetration of the crime, and providing that he shall be punished as a principal, one indicted as accessory before the fact to a murder cannot complain of his conviction as accessory to murder in the second degree, where under the evidence it should have been for the higher grade of murder. Roberts v. State, 131 S. W. 60, 61, 96 Ark. 58.

There can be an "accessory before the fact" in the crime of murder in the third degree or in manslaughter. Mathis v. State, 34 South. 287, 293, 45 Fla. 46.

Aiders and abettors distinguished

"To constitute one an 'aider and abettor' in the commission of a crime, he must be present when it is committed, aiding, advising, or assisting therein. Upon the other hand, though he be not present when the crime is committed, if its commission nevertheless results from his advice or assistance or by his procurement, he is equally guilty with the perpetrator of the crime, but as an 'accessory before the fact.'" Wheeler v. Commonwealth, 87 S. W. 1106, 1109, 120 Ky. 697.

Those present assisting one who personally commits a felony are "aiders and abettors," and are guilty as principals, while those who are absent, but who counseled the commission of the crime, "are accessories before the fact." Vogel v. State, 119 N. W. 190, 197, 138 Wis. 315.

ACCESSORY TO THE CRIME OF BURGLARY

An instruction defining an "accessory to the crime of burglary" in the language of Hurd's Rev. St. 1905, c. 38, § 274, viz., as one "who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime," is not incorrect for failure to use the word "feloniously" in the description. People v. Everett, 90 N. E. 226, 227, 242 Ill. 628.

ACCIDENT—ACCIDENTAL

See Inevitable Accident; Pure Accident: Time of Accident; Unavoidable Accident.
Cause of, see Cause.
Such accident, see Such.
See, also External, Violent and Accidental Means.

The word "accident" per se means an unforeseen and unexpected event. Lehman, Stern & Co. v. Morgan's L. & T. R. & S. S.

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Co., 38 South. 873, 874, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818. An event resulting from an unknown cause, or an unusual and unexpected event from a known cause; chance; casualty. Simpson v. Southern Ry. Co., 69 S. E. 683, 154 N. C. 51. It "may be an unusual event attending the performance of a usual and necessary act, or an unusual effect of a known cause." Young v. Railway Mail Ass'n, 103 S. W. 557, 562, 126 Mo. App. 325.

An "accident" is "an undesigned contingency; a happening without intentional causation; that which exists or occurs abnormally; something unusual or phenomenal; an uncommon occurrence." Patterson v. Missouri Pac. Ry. Co., 94 Pac. 138, 141, 77 Kan. 236, 15 L. R. A. (N. S.) 733 (quoting and adopting the definition in State v. Hansford, 92 Pac. 554, 76 Kan. 678, 14 L. R. A. [N. S.] 548).

An "accident" is such an unexpected casualty as occurs without any one being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done, or omitting to do, the particular things that caused such casualty. Briscoe v. Metropolitan St. Ry. Co., 120 S. W. 1162, 1165, 222 Mo. 104; Chicago Veneer Co. v. Jones, 135 S. W. 430, 432, 143 Ky. 21.

An "accident" may be defined as an event happening unexpectedly and without fault. Indiana Union Traction Co. v. Long, 96 N. E. 604, 608, 176 Ind. 532. Or as "an event happening without the concurrence of the will of the person by whose agency it was caused." State v. Matheson, 103 N. W. 137, 140, 130 Iowa, 440, 114 Am. St. Rep. 427, 8 Ann. Cas. 430.

Webster defines an "accident" to mean "literally, a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency; often an undesigned and unforeseen occurence of an afflictive or unfortunate character; a casualty or mishap." Young v. Railway Mail Ass'n, 103 S. W. 557, 561, 126 Mo. App. 325; Harrod v. Hammond Packing Co., 102 S. W. 637, 638, 125 Mo. App. 357; Erickson v. Ladies of the Maccabees of the World, 126 N. W. 259, 261, 25 S. D. 183.

Death by "accident," within an accident benefit certificate, means death which is not the natural and probable consequence of the act causing it. Belle v. Travelers' Protective Ass'n of America, 135 S. W. 497, 500, 155 Mo. App. 629. An event which takes place without one's foresight or expectation, and which proceeds from an unknown cause, or an unusual effect of a known cause not within the expectation of the person injured. Phœnix Accident & Sick Ben. Ass'n v. Stiver, 84 N. E. 772, 773, 42 Ind. App. 636.

The word "accident," in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental. Death resulting from voluntary physical exertions or from intentional acts of insured is not accidental, nor is disease or death caused by the viccissitudes of climate or atmosphere the result of an accident; but where, in the act which precedes an injury, something unforeseen or unusual occurs which produces the injury, the injury results through accident. Schmid v. Indiana Travelers' Acc. Ass'n, 85 N. E. 1032, 1034, 42 Ind. App. 483; Ludwig v. Preferred Accident Ins. Co. of New York, 130 N. W. 5, 7, 113 Minn. 510; Young v. Railway Mail Ass'n, 103 S. W. 557, 562, 126 Mo. App. 325.

The term "accident," as used in accident insurance policies, should be construed most strongly against the companies, and be defined according to the ordinary and usual understanding of its signification. "Any unusual and unexpected event attending the performance of a usual and necessary act," whether the act be performed by the party injured or by another, is ordinarily and usually understood to be an event which happened by accident. Young v. Railway Mail Ass'n, 103 S. W. 557, 562, 126 Mo. App. 325.

Where a man is so afflicted that he will die from such affliction within a very short time, yet if, by some accidental means, his death is caused sooner, it will be a death from "accident," within the meaning of the terms of an accident insurance policy. Hooper v. Standard Life & Accident Ins. Co., 148 S. W. 116, 117, 166 Mo. App. 209.

"An 'accident' is something unexpected and unavoidable." In an action against a street railway for injuries received by plaintiff in a collision, an instruction that, if plaintiff received his injuries as the result of some occurrence which careful men in the situation of defendant's agents would not have reasonably anticipated, then such occurrence is what, in law, is termed an "accident," and defendant was not liable, was misleading; an accident being something unexpected and unavoidable. Hunt v. Metropolitan St. R. Co., 103 S. W. 1088, 1089, 126 Mo. App. 79.

In an action on a policy of accident insurance, which provided for a reduction of the indemnity in case of any of the losses specified in certain parts of the policy, which included death where the "accidental injury" resulted from an intentional act, the word "injury" includes fatal injuries. Continental Casualty Co. v. Morris, 102 S. W. 773–775, 46 Tex. Civ. App. 394.

Where defendant negligently ordered decedent to work on the roof of a building immediately beneath an iron band on a smokestack, where he was likely to be struck by the band in case it should fall, and negligently directed a fellow servant to loosen

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the band without disconnecting guy wires attached to it, the fact that the bolt which held the band broke earlier than was anticipated by the servant ordered to loosen it did not make the prior negligence the less the proximate cause of decedent's death, since the intervening, premature breaking of the bolt was pure "accident," defined to be an unexpected event, or one occurring without expectation or foresight. Troll v. St. Louis Portland Cement Co., 140 S. W. 963, 965, 160 Mo. App. 501.

Where plaintiff had knowledge that its furnace was working badly, and that normal results could not be relied on, at the time it contracted to supply defendant's requirements of steel castings for the remainder of the year, the subsequent necessity to shut down its plant for repairs was not an "accident" or an unavoidable cause of delay, within a custom or usage among manufacturers of steel castings that all contracts are subject to the contingency of "accidents" and unavoidable delays. Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77, 80, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713.

The reciprocal demurrage law provides that the period during which the movement of freight is suspended by accident, or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee is delayed by inclement weather, making loading or unloading impracticable, or by any cause not within the power of the shipper or consignee to prevent, shall be added to the free time allowed. Held, that the clause "any cause not within the power of the shipper or consignee to prevent," and the term "accident," are to be broadly construed, and include all causes not reasonably within the power of the carrier to prevent. Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co., 124 N. W. 819, 821, 110 Minn. 25, 19 Ann. Cas. 1088; Gray v. Minneapolis & St. L. R. Co., 124 N. W. 1100, 110 Minn. 527.

The word "accident," used in Pen. Code 1901, §§ 24, 179, defining excusable homicide, is used in its general sense and meaning, and when used to express a result produced by human action is generally, if not universally, understood to mean a thing done or disaster caused or produced without design or intention; hence an instruction in a murder case that, if defendant shot the officer while unlawfully resisting arrest, then the shooting, though accidental, was murder in the second degree was erroneous as allowing conviction of murder in the absence of intent. Stokes v. Territory (Ariz.) 127 Pa. 742, 745.

If accused did not intend to shoot at decedent at all, and his pistol was discharged involuntarily by reason of his stumbling, the act would be an "accident." Lewis v. Commonwealth, 131 S. W. 517, 519, 140 Ky. 652.

Casualty synonymous

An instruction in an action for damages for negligently destroying plaintiff's wheat stacks by fire that if the jury believed that the fire which destroyed plaintiff's grain was the result of "mere 'accident' or casualty," and not of negligence by defendant, they should find for defendant was not erroneous; the word "casualty" being synonymous with "accident." Webb v. Baldwin, 147 S. W. 849, 851, 165 Mo. App. 240.

Absence of negligence

An "accident," as the term is used in personal injury actions against a railroad, means an injury which occurs without being caused by the negligence of either the railroad company or the injured person. Alabama Great Southern R. Co. v. Brown, 75 S. E. 330, 331, 138 Ga. 328.

Where there is culpable negligence, the result cannot be legally an "accident"; and it was not error to instruct that a pure accident must be unmixed with a want of ordinary care by either party. Fisher Motor Car Co. v. Seymour & Allen, 71 S. E. 764, 9 Ga. App. 465.

An "accident," as defined by legal authorities, for which no liability exists, is one which is the result of an unknown cause, or is the result of an unusual and unexpected event happening in such an unusual manner from a known cause that it could not be reasonably expected or foreseen, and that it was not the result of any negligence. Cornwell v. Bloomington Business Men's Ass'n, 163 Ill. App. 461, 467.

The word "accident" is ordinarily used to define that which happens unexpectedly or without design, regardless of the fault of any person; but it is error to instruct to find for defendant if the injuries alleged in the petition were caused by an accident, unless they are further instructed that they must find that defendant's negligence was not a proximate cause of the injury. Hankins v. Reimers, 125 N. W. 516, 517, 86 Neb. 307.

A charge that plaintiff was not entitled to recover if the loss of his eye was the result of an accident, was abstractly correct, the term "accident " as used meaning "inevitable" in the sense that it could not have been prevented by the exercise of the care which the master was required to exercise. Pace v. Louisville & N. R. Co., 52 South. 52, 57, 166 Ala. 519.

The employer's liability act (Burns' Ann. St. 1901, § 7083) makes a corporation liable for injuries to a servant from the negligence of any person to whose order or direction the injured party was bound to and did conform. Held that, where a carpenter employed by a corporation was instructed by the superin-

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tendent to hold a block against the end of a piston rod while the superintendent hammered on the block in an endeavor to move the rod, and a glancing blow struck the carpenter, it was a mere "accident," for which the corporation was not liable. Rainbow Coal & Mining Co. v. Martin, 74 N. E. 902, 903, 35 Ind. App. 658.

The word "accident," in its most commonly accepted meaning, denotes an effect that takes place without one's foresight or expectation; an effect which proceeds from an unknown cause or an unusual effect of a common cause, and therefore not expected; chance; casualty; contingency. An occurrence resulting in personal injuries to a driver, caused by his team becoming frightened and caused to run away by reason of the negligence of an employé of a railroad, was not an "accident" within such definition. Southern Ry. Co. v. Hill, 54 S. E. 113, 116, 125 Ga. 354 (citing 1 Cyc. p. 227).

In an action for injuries in an automobile accident, an instruction that defendant was not liable if her automobile struck plaintiff by accident, and defining "accident" to be such an unexpected catastrophe as occurred without any one being to blame for it, viz., without any one being guilty of negligence in doing or permitting to be done or omitting to do the particular thing that caused the casualty, correctly defined accident. Vesper v. Lavender (Tex.) 149 S. W. 377, 380.

As negligence

The meaning of the word "accident" includes the result of human fault held to be actionable negligence. It is not used, ordinarily, as synonymous with "mere accident," or "purely accidental," or any similar term, but as the opposite thereof. Ullman v. Chicago & N. W. Ry. Co., 88 N. W. 41, 42, 46, 112 Wis. 150, 56 L. R. A. 246, 88 Am. St. Rep. 949.

An instruction that by the term "accident" is meant the infliction of the injury sued on is not objectionable as implying an actual wrong from the use of the word "infliction." Kortendick v. Town of Waterford, 125 N. W. 945, 946, 142 Wis. 413.

Transaction not synonymous

The word "transaction" is not synonymous with "accident." Excelsior Clay Works v. De Camp, 80 N. E. 981, 983, 40 Ind. App. 26 (citing Lake Shore & M. S. R. Co. v. Van Auken, 1 Ind. App. 492, 27 N. E. 119).

Affray or altercation

An "accident" is an event that takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of a known cause, therefore not expected (Webster's Dict.). Therefore, where one strikes another and in so doing bruises his knuckles, or breaks the skin of his hand, it is not an "accident" within the meaning of that word as used in an accident insurance policy. Fidelity & Casualty Co. of New York v. Stacey's Ex'rs, 143 Fed. 271, 274, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955.

Appendicitis

Where a policy of insurance provides that "loss of life by accident," as used in the policy, shall be deemed to mean death from bodily injuries, not intentionally inflicted by the assured, which independently of all other causes are effected solely and exclusively by external, violent, and accidental means, the question whether appendicitis, which caused the death of an insured, was caused by an accident, or was the result of a diseased condition existing prior to the accident, was properly submitted to the jury, where testimony of physicians testifying as experts was conflicting. New Amsterdam Casualty Co. v. Shields, 155 Fed. 54, 56, 85 C. C. A. 122.

Bite of dog

The bite of a dog is an "accident," and should be classed under the "accident provisions" of an accident insurance policy. Farner v. Massachusetts Mut. Acc. Ass'n, 67 Atl. 927, 928, 219 Pa. 71, 123 Am. St. Rep. 621.

Blood poisoning

A death resulting from a self-inflicted knife cut made by an insured while trimming a corn, which was followed by blood poisoning, is one from an "accidental, external, and violent" injury, within the meaning of an accident policy. Nax v. Travelers' Ins. Co., 130 Fed. 985.

Blood poisoning resulting from accident is a part of the "accident," within an accident policy providing that peritonitis, carbuncles, ulcers, and other denominated ills, not including blood poison, shall be deemed illnesses within the policy, no matter what may have brought them on. Continental Casualty Co. v. Mathis, 150 S. W. 507, 510, 150 Ky. 477.

Bodily injury or strain

The "injury" in an accident policy against loss by bodily injury effected by external violence and "accidental" means, is an injury to the person of the insured traceable exclusively to the "accident"; and every result traceable to the accident, no matter how remote in time, is potentially caused at the time of the accident. Hatch v. United States Casualty Co., 83 N. E. 398, 399, 197 Mass. 101, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290.

An accident policy, insuring against loss of business time resulting from bodily injuries through "external, violent, and accidental means," covered loss of business time by disease proximately caused by a bodily injury occurring through external, violent, and accidental means. The element of volition

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being wholly absent, the fact that during a period of unconsciousness there was a distinct and long-continued force applied, which compressed the tissues and blood vessels surrounding the bones, and thereby caused the inflammation, marks the case as one of "accident." Ætna Life Ins. Co. v. Fitzgerald, 75 N. E. 262, 263, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Ann. Cas. 551.

An accident policy provided indemnity for loss of time from the effect of "personal bodily injury caused solely by external, violent, and 'accidental' means." The insured while bowling strained his side, and his physician found a tenderness of the muscles of the front and back of the abdomen on the right side, which could be ascertained by the touch; and in a few days the insured developed appendicitis, caused directly by the irregular working of the muscles and parts of the body around the abdominal region, which resulted from the strain, and insured was disabled from work for four months. Held, in an action for disability benefits, that there was no "personal bodily injury caused solely by external, violent means," and that insured could not recover. Lehman v. Great Western Accident Ass'n (Iowa) 133 N. W. 752, 753, 754, 42 L. R. A. (N. S.) 562.

An accident policy insured one against "bodily injuries sustained through external, violent, and 'accidental' means, independently of all other causes." Insured received an accidental injury to his leg, causing an abrasion of the skin. An infection started at that place, and he died 15 days later from blood poisoning. Held, that the death was the result of bodily injuries, independently of all other causes. French v. Fidelity & Casualty Co. of New York, 115 N. W. 869, 873, 135 Wis. 259, 17 L. R. A. (N. S.) 1011.

A policy insuring against disability or death "resulting directly and independently of all other causes from bodily injuries sustained through external, violent, and 'accidental' means" does not render the insurer liable for the death of the insured from rupture of the heart, the walls of which had been weakened by what is known as "fatty degeneration"; the immediate inciting cause of the rupture being either overexertion in assisting to carry a burden or deep breathing following such exertion, neither of which was "accidental." Shanberg v. Fidelity & Casualty Co., of New York, 158 Fed. 1, 4, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206.

The strain of the muscles of the back, caused by lifting heavy weights in the course of business, is an "injury by 'accident' or violence, occasioned by external or material causes operating on the person of the insured," within an accident policy. Horsfall v. Pacific Mut. Life Ins. Co., 72 Pac. 1028, 1029, 32 Wash. 132, 63 L. R. A. 425, 98 Am. St. Rep. 846.

Chloroform

Death from chloroform, administered by physicians preparatory to a surgical operation, resulting from defects of the heart and other organs, is "accidental" within an accidental benefit certificate stipulating for the payment of a specified sum in case of the death of insured by accident. Belle v. Travelers' Protective Ass'n of America, 135 S. W. 497, 501, 502, 155 Mo. App. 629.

Disease

Kidney disease produced in a servant by handling infected rags in the discharge of her duties is within an employer's liability policy, insuring against loss from liability on account of bodily injuries "accidentally" suffered. Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York, 78 S. W. 320, 323, 104 Mo. App. 157.

Death resulting from disease which follows as a natural consequence, though not the necessary consequence, of physical injury which is accidental, is an "accidental death," within the terms of an accident insurance policy; the death being deemed the proximate result of the injury, and not of disease as an independent cause. Delaney v. Modern Accident Club, 97 N. W. 91, 95, 121 Iowa, 528, 63 L. R. A. 603.

Fish bone

A benefit certificate, limiting the right of recovery to cases of death by "external, violent, and accidental" means, is intended to avoid liability upon a fraudulent claim of indemnity for bodily injuries, based solely upon insured's testimony, and injuries caused by means coming from outside the body are "external," so that death caused by a fish bone lodging in the rectum was by "external, violent, and accidental" means, within the policy though death resulted directly from blood poisoning, which would not have resulted except for the bone; the lodging of the bone in the rectum being an "accident." Jenkins v. Hawkeye Commercial Men's Ass'n, 124 N. W. 199, 200, 147 Iowa, 113, 30 L. R. A. (N. S.) 1181 (citing Healey v. Mutual Acc. Ass'n of the Northwest, 25 N. E. 52, 133 Ill. 556, 9 L. R. A. 371, 23 Am. St. Rep. 637; Paul v. Travelers' Ins. Co., 20 N. E. 347, 112 N. Y. 472, 3 L. R. A. 443, 8 Am. St. Rep. 758; American Accident Co. v. Reigart, 23 S. W. 191, 94 Ky. 547, 21 L. R. A. 651, 42 Am. St. Rep. 374; Maryland Casualty Co. v. Hudgins [Tex.] 72 S. W. 1047).

Inflammation of eye

An inflammation of the eye caused by the splashing of water from a tub in which the person was washing clothing, resulting in the loss of the eye, is "accidental" within an accident policy, insuring against the loss of the sight of an eye by "accident." Sullivan v. Modern Brotherhood of America, 133 N.

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W. 486, 489, 167 Mich. 524, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116.

Injuries or death caused by third persons

Where insured died from blood poisoning from infection received in an altercation with another, his death was the direct result of bodily injuries sustained through "external, violent, and accidental means," within the terms of an accident policy. Carroll v. Fidelity & Casualty Co. of New York, 137 Fed. 1012, 1013, 1014.

A person who is unexpectedly shot by another without cause or provocation is injured by "external, violent, and accidental means," within a policy insuring against such injuries. American Accident Co. of Louisville v. Carson, 36 S. W. 169, 170, 99 Ky. 441, 34 L. R. A. 301, 59 Am. St. Rep. 473.

A beneficiary in an accident policy sought to recover the full amount of insurance for loss of life by "accident" after the insured had been shot by a burglar and had died. Under a title "Special Indemnities" the policy provided that it did not exclude indemnity for loss by accident produced by "shooting" and other enumerated causes. Some of those causes were sports involving conscious participation on the part of the assured. Others excluded such participation. The policy also provided under this title that, in case of loss covered by this title, the company should pay one-half of the ordinary accident indemnity for such loss. It is held that the policy, construed as a whole as favorably to the insured as reasonably may be without distorting the intended meaning of words, and with due reference to the rule of "noscitur a sociis," entitled the beneficiary to recover only one-half, and not the whole amount, of ordinary accident indemnity. Bader v. New Amsterdam Casualty Co., 112 N. W. 1065, 1066, 102 Minn. 186, 120 Am. St. Rep. 613.

Medical treatment

When an injury is caused by means insured against, and medical treatment administered is rendered necessary by the nature of the injury, the death of the insured, if caused by the injury and the medical treatment, was "accidental," within a policy insuring against death caused by "external, violent, and accidental means." Gardner v. United Surety Co., 125 N. W. 264, 266, 110 Minn. 291, 26 L. R. A. (N. S.) 1004.

Poison

Since the word "accidental" is descriptive of means which produce effects which are not their natural and probable consequences, where insured died as the result of his hand coming in contact with poison ivy while he was cutting a branch in the woods near a city, his death was "accidental" within the policy. Dent v. Railway Mail Ass'n, 183 Fed. 840, 843.

Rupture of the heart

A policy insuring against disability or death "resulting directly and independently of all other causes from bodily injuries sustained through 'external, violent, and accidental means,'" does not render the insurer liable for the death of the insured from rupture of the heart, the walls of which had been weakened by what is known as "fatty degeneration," the immediate inciting cause of the rupture being either overexertion in assisting to carry a burden, or deep breathing following such exertion, neither of which was "accidental." Shanberg v. Fidelity & Casualty Co. of New York, 158 Fed. 1, 4, 5, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206.

Scalding water

An allegation in a petition on an accident policy that the injury resulting in the death of insured was caused by the accidental falling of scalding water into his ear sufficiently showed that the death was produced by "external, violent, and accidental means," within the terms of the policy, without an express allegation to that effect. Driskell v. United States Health & Accident Ins. Co., 93 S. W. 880, 881, 117 Mo. App. 362.

Suicide

If one in a fit of delirium or other condition of irresponsibility, without intention to take his own life, does some act from which his death ensues, such death is by "accident," not by "suicide." Cady v. Fidelity & Casualty Co. of New York, 113 N. W. 967, 970, 134 Wis. 322, 17 L. R. A. (N. S.) 260.

Sunstroke

The death of a person by sunstroke, caused by his exposure to the sun and humid atmosphere on a hot day while pursuing his usual avocation in his ordinary way, is not caused by sunstroke due to "external, violent, and accidental means," within an accident policy insuring against death by sunstroke due to external, violent, and accidental means. Bryant v. Continental Casualty Co. (Tex.) 145 S. W. 636, 637.

ACCIDENT (In Equity)

"Accident" is known in equity as an unforeseen occurrence affecting a person injuriously, and not due to his own negligence. Engler v. Knoblaugh, 110 S. W. 16, 20, 131 Mo. App. 481.

ACCIDENT (In Practice)

"Accident or surprise" embraces not only various forfeitures due to accidents in the popular sense, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of negligence or

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misconduct. State ex rel. Hartley v. Innes, 118 S. W. 1168, 1170, 137 Mo. App. 420.

"'Accident' is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter, under the circumstances, to retain. And the chief point is that, because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is in good conscience entitled to relief that will restore those relations to their original character and place him in his former position." The fact that petitioner resided in Italy and was prevented from attending trial by the sickness and death of his father were accidental causes of his absence, so as to entitle him to a new trial. Massucco v. Tomassi, 62 Atl. 57, 60, 78 Vt. 188; State ex rel. Hartley v. Innes, 118 S. W. 1168, 1170, 137 Mo. App. 420; Ludwig v. Walker, 111 N. Y. Supp. 1102, 1103, 59 Misc. Rep. 62.

Where a creditor, who attached the interest in land descending to the debtor on the ancestor dying intestate, knew of proceedings to probate the ancestor's will, which disinherited the debtor, but took no steps to become a party thereto, and the will was admitted to probate, the creditor's failure to contest the probate was not the result of "'accident,' mistake, or unforeseen cause," within the statute authorizing the granting of a new trial, where, by reason of accident, mistake, or unforeseen cause, judgment was rendered against the applicant for a new trial. Seward v. Johnson, 62 Atl. 569, 570, 27 R. I. 396.

Where in a suit for divorce no subpœna was ever served on plaintiff's son, and, though it was discovered before the trial that he was absent and could not be found, the fact was not called to the court's attention, nor any application made for a continuance until after the court had disclosed its determination of the matter, plaintiff was not entitled to a new trial for "accident" or surprise, though the boy, who was a material witness for plaintiff, had been with him until within a few days of the trial, had disappeared, and was subsequently located in another state as a military recruit. Clemans v. Western, 81 Pac. 824, 826, 39 Wash. 290.

The discovery and disclosure by a juror, after the trial was begun, that he entertained a prejudice growing out of an accident that occurred in his father's family, revived in his mind by the testimony given in the case, and which unfitted him to sit as an impartial juror, something, too, which was not known and could not have been foreseen by the court, the parties, or the counsel, is an "accident," and justified the court in discharging the jury from rendering a verdict. State v. Hansford, 92 Pac. 551, 554, 76 Kan. 678, 14 L. R. A. (N. S.) 548.

ACCIDENT INSURANCE

See Life and Accident Insurance.

Employer's liability insurance may from its very nature appropriately be classified with and peculiarly belongs to what is commonly known and designated as "accident insurance," inasmuch as such insurance has for its primary purpose indemnification against the effects of accidents resulting in bodily injury or death. State v. Ætna Life Ins. Co., 69 N. E. 608, 610, 69 Ohio St. 317.

ACCIDENT WHILE PERFORMING OPERATION

A rider attached to a physician's accident policy extended the same to cover injuries known as septic wounds, caused by "accident while performing operation pertaining to business of insured," etc. Held, that such clause did not limit the insurer's liability to accidents occurring while the physician was in the act of performing an operation or administering treatment to a patient, but extended as well to the preparation of medicine to be taken by the patient as a part of a continuous course of treatment. Central Accident Ins. Co. v. Rembe, 77 N. E. 123, 126, 220 Ill. 151, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann Cas. 155.

ACCIDENTAL AND UNCONTROLLABLE EVENT

Rev. Civ. Code, art. 2754, makes carriers liable for loss of goods carried unless they can prove that such loss was occasioned by an "accidental and uncontrollable event." The court says that it seems these words were used in the same sense as "cas fortuit," "force majeure," or "fortuitous event," as defined in the Code of 1825, which was that which happens by a cause or force which we cannot resist, and the "force majeure," or "superior force," is an accident which human prudence can neither foresee nor prevent. These various phrases are held to be the equivalent of the common-law phrase, "the act of God," and the holding is that a carrier is liable unless he can show that the loss was occasioned by an "act of God," as used in that sense. The words are also the equivalent of "inevitable accident," by which, according to Story on Bailments, "is meant any accident produced by any physical cause which is irresistible, such as loss by lightning or storms, by perils of the seas, by an inundation or earthquake, or by sudden death or illness. By 'irresistible force' is meant such an interposition of hu-

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man agency as is, from its nature and power, absolutely uncontrollable." The word "uncontrollable" qualifies the event as one which cannot be restrained or prevented. Lehman, Stern & Co. v. Morgan's L. & T. R. & S. S. Co., 38 South. 873, 874, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

ACCIDENTAL CAUSE

Other accidental causes, see Other.

An "accidental or unavoidable cause which cannot be anticipated or avoided by the exercise of due diligence and foresight," and which will legally excuse an interstate carrier of live stock for confining such stock in cars for a period longer than 28 consecutive hours without unloading for rest, water, and feeding, under the statute, is one which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case, and as would have been exercised by a man of ordinary prudence under such circumstances. An accident occurring to a train through the negligence of the transportation company is not such a cause; nor is mere press of business, or the sidetracking of the train to allow for the passing of other trains, the meeting or passing of which could have been anticipated when the transportation was begun, or the lack of facilities for unloading or feeding. United States v. Southern Pac. Co., 157 Fed. 459, 461; Chicago, B. & Q. R. Co. v. United States, 194 Fed. 342, 344, 114 C. C. A. 334.

ACCIDENTAL INJURY

See Accident—Accidental.

ACCIDENTAL MEANS

See External, Violent and Accidental Means.

See, also, Accident—Accidental.

"Accidental means" are those which produce effects which are not the natural and probable consequences of the act. "An effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of such means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means." In an action on an accident policy, proof that plaintiff suffered lesion of a blood vessel of the lungs while assisting to lift a heavy mail sack, and that such lesion subsequently entirely healed, held sufficient to establish a prima facie case that the injury was caused by external violence and accidental means, within the terms of the policy. Young v. Railway Mail Ass'n, 103 S. W. 557–562, 126 Mo. App. 325 (quoting 4 Cooley, Briefs Ins. pp. 3156, 3157).

Where insured, in an accident policy indemnifying only for injury or death arising from physical bodily injury through external, violent, and accidental means, died as a result of physical exertions in climbing steps at a hotel carrying heavy satchels, because of the rarefied condition of the atmosphere, he died from doing what he intended to do, though the result was not anticipated, and his death was not the result of accidental means. Schmid v. Indiana Travelers' Acc. Ass'n, 85 N. E. 1032, 1034, 42 Ind. App. 483.

ACCOMMODATE—ACCOMMODATION

See Equal Accommodations; Facilities and Accommodations; Place of Public Accommodation; Proper Accommodations; Reasonable Accommodations.

The word "accommodation," as used in an agreement permitting the construction of a switch necessary for the accommodation of a railroad company, means "convenience." Reeser v. Philadelphia & R. Ry. Co., 64 Atl. 376, 377, 215 Pa. 136.

ACCOMMODATION BILL OR NOTE

An "accommodation bill" or note is one to which the accommodating party has put his name, without consideration, to accommodate some other party, who is to issue it and is expected to pay it. Brown Carriage Co. v. Dowd, 71 S. E. 721, 724, 155 N. C. 307.

ACCOMMODATION INDORSEMENT

An "accommodation indorsement" is the execution of commercial paper, without consideration, to lend credit to the accommodated party. Waller v. Gorman Mercantile Co. (Tex.) 141 S. W. 833.

ACCOMMODATION INDORSER

An "accommodation indorser" is one who indorses a bill or note in order to enable another to obtain credit or money on it. Citizens' Commercial & Savings Bank of Flint v. Platt, 97 N. W. 694, 695, 135 Mich. 267.

An "accommodation indorser" is defined by Gen. St. 1902, § 4199, to be one who indorses without receiving value to lend his credit to some other person, he being exempt from suit at the hands of the accommodated person, but as to other persons his liability is the same as an indorser for value without reference to the question of notice of the accommodation character of his indorsement. Edward Knapp & Co. v. Tidewater Coal Co., 81 Atl. 1063, 1065, 85 Conn. 147.

The provision in Act April 11, 1848 (P. L. 536), authorizing a married woman to make any contract in furtherance of the general power granted in a preceding section, but declaring that she shall not become "accommodation indorser," maker, guarantor, or surety for another, applies only to technical contracts of indorsement, guaranty or

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suretyship included in the words of the act. Herr v. Reinoehl, 58 Atl. 862, 863, 209 Pa. 483.

Under Negotiable Instrument Law (Laws 1904, c. 102) § 63, providing that "a person placing his signature on an instrument otherwise than as maker, drawer or acceptor, is deemed to be an 'indorser,' unless he clearly indicates by appropriate words his intention to be bound in some other capacity," one who became the payee of a note, and indorsed the same, to enable the maker to negotiate and discount it for his own benefit, is liable merely as an "accommodation indorser." Mechanics' & Farmers' Sav. Bank v. Katterjohn, 125 S. W. 1071, 1073, 137 Ky. 427, Ann. Cas. 1912A, 439.

ACCOMMODATION MAKER

Under L. O. L. § 5862, defining an "accommodation maker" as one who has signed a negotiable instrument without receiving value, but providing that such person is liable to a holder for value, notwithstanding the holder knew him to be only an accommodation party, and section 6023, defining a person "primarily liable" as one who is absolutely required to pay a negotiable instrument, and sections 5952, 5953, providing for the discharge of a negotiable instrument by payment, and that a person secondarily liable shall be discharged by indulgence of the maker, an accommodation maker is primarily liable, and is not discharged, notwithstanding an indulgence to parties secondarily liable. Murphy v. Panter, 125 Pac. 292, 293, 62 Or. 522.

ACCOMMODATION OF INDORSERS

A note executed by a corporation receiving the benefits thereof, and indorsed by stockholders before delivery to the payee, demanding their indorsement, is not made for the "accommodation of indorsers," within Negotiable Instrument Act (Laws 1904, c. 102) § 115, providing that notice of dishonor need not be given to an indorser, where the instrument was made for his accommodation, and notice of dishonor must be given to hold them liable. First Nat. Bank v. Bickel, 137 S. W. 790, 792, 143 Ky. 754.

ACCOMMODATION PAPER

Notes were executed to relieve the payee's financial embarrassment; the payee leaving automobiles with the maker as security, with the understanding that he could sell them and apply the proceeds on the notes. It was agreed that the notes might be renewed, if necessary, and that if the automobiles were redelivered to the payee, it would return the notes. Held, that the notes were "accommodation paper." Citizens' Bank v. Fredrickson, 120 N. W. 462, 463, 83 Neb. 755.

ACCOMMODATION PARTY

An "accommodation party," as defined by the Negotiable Instruments Law, "is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Bradley Engineering & Mfg. Co. v. Heyburn, 106 Pac. 171, 172, 56 Wash. 628, 134 Am. St. Rep. 1127 (quoting Negotiable Instruments Law [Laws 1899, pp. 346, 352, c. 149] § 29); Weant v. Southern Trust & Deposit Co., 77 Atl. 289, 293, 112 Md. 463 (quoting Negotiable Instruments Act [Code Pub. Gen. Laws 1904, art. 13] § 48); Cellers v. Meachem, 89 Pac. 426, 428, 49 Or. 186, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997 (quoting B. & C. Comp. § 4431); Morris County Brick Co. v. Austin, 75 Atl. 550, 551, 79 N. J. Law, 273 (quoting Negotiable Instruments Act [P. L. 1902, p. 589] § 29); English v. Schlesinger, 105 N. Y. Supp. 989, 990, 55 Misc. Rep. 584 (quoting Negotiable Instrument Law [Laws 1897, p. 728, c. 612] § 55). First Nat. Bank v. Bickel, 137 S. W. 790, 792, 143 Ky. 754.

ACCOMMODATION TRAIN

An "accommodation train" is a train equipped to carry passengers as well as freight. In its arrangements, the safety of passengers is as much looked to as the carriage of freight. It usually has two or more coaches for passengers, and separate compartments or coaches for the races, and a baggage compartment or car, etc., and runs on a regular schedule, and subordinates its freight business to the passenger business so far as necessary to make connections with other passenger trains on its own line and those on connecting roads, and it stops opposite stations for the convenient ingress and egress of passengers. White v. Illinois Cent. R. Co., 55 South. 593, 595, 99 Miss. 651; Thacker v. Same (Miss.) 55 South. 595.

ACCOMPLICE

At common law, an "accomplice" includes all participes criminis, whether they be principals in the first or second degree, or mere accessories before or after the fact. People v. Coffey, 119 Pac. 901, 903, 161 Cal. 433, 39 L. R. A. (N. S.) 704.

To constitute an "accomplice," one must be so connected with a crime that at common law he might himself have been convicted, either as the principal or as an accessory before the fact. People v. Bright, 96 N. E. 362, 365, 203 N. Y. 73, Ann. Cas. 1913A, 771.

An "accomplice," in relation to his use as a witness, means any criminal connection of the witness with the matter in trial, either as a principal, accomplice, accessory, receiver of stolen property, etc. Newton v. State, 138 S. W. 708, 713, 62 Tex. Cr. R. 622.

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The word "accomplice," as used in the statute providing that a person may not be convicted of a crime on the uncorroborated testimony of an accomplice, means an accomplice in the commission of the offense charged and under investigation. People v. Ruef, 114 Pac. 54, 70, 14 Cal. App. 576.

One of several equally concerned in the commission of a felony or one connected in some way with the crime charged. Boyd v. Commonwealth, 132 S. W. 423, 424, 141 Ky. 247.

One who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime is an "accomplice." An accessory after the fact is not an accomplice. State v. Phillips, 98 N. W. 171, 173, 18 S. D. 1, 5 Ann. Cas. 760 (quoting Whart. Cr. Ev. 440). One may be an "accomplice" by being present and joining in the criminal act, by aiding and abetting another in its commission, or advising and encouraging its commission; but knowledge and voluntary action are essential in order to impute guilt, as one may unconsciously assist in forwarding the criminal scheme without being an accomplice. State ex rel. Webb v. District Court, 95 Pac. 593, 597, 37 Mont. 191, 15 Ann. Cas. 743.

An "accomplice" is one who, with criminal intent, acts with others, and participates in the commission of a crime. Knowledge that a crime has been committed, and concealment of such knowledge, does not make one an accomplice, unless he aided or participated in the offense. State v. Dalton, 118 Pac. 829, 65 Wash. 663; Davis v. State, 130 S. W. 547, 549, 96 Ark. 7; Martin v. State, 83 S. W. 390, 392, 47 Tex. Cr. R. 29.

The general test to determine whether a witness is or is not an "accomplice," whose testimony must by the express provisions of Rev. Laws 1905, § 4744, be corroborated to warrant a conviction, is: Could he himself have been indicted for the offense, either as principal or accessory? And, if he could not, then he is not an accomplice. State v. Gordon, 117 N. W. 483, 484, 105 Minn. 217, 15 Ann. Cas. 897.

The term "accomplice," while ordinarily designating a witness, and not accused, includes all who participate in committing a crime, whether as principal, aider and abettor, or accessory before the fact; the test for determining whether one is an accomplice being whether he could be convicted as a principal, aider or abettor, or accessory before the fact, and, if he could not, he is not an accomplice. Levering v. Commonwealth, 117 S. W. 253, 257, 132 Ky. 666, 136 Am. St. Rep. 192, 19 Ann. Cas. 140.

The word "accomplice" includes principals and accessories, and all persons connected with the crime by an unlawful act or omission on their part transpiring either before, at the time, or after the commission of the offense, and whether or not they were present and participated in the commission of the crime or not. McCue v. State (Tex.) 103 S. W. 883, 885; Jones v. State, 129 S. W. 1118, 1119, 59 Tex. Cr. App. 559; Pace v. State, 124 S. W. 949, 952, 58 Tex. Cr. R. 90; Johnson v. State, 125 S. W. 16, 58 Tex. Cr. R. 244.

A person present at the commission of a crime, but who took no part therein, and entreated and commanded the person who committed it not to do so, is not an accomplice. Brinegar v. State, 118 N. W. 475, 476, 82 Neb. 558. Nor is one coerced, by fear of danger to life or limb, to join with another in the commission of a crime. Henderson v. State, 63 S. E. 535, 5 Ga. App. 495.

The mere presence of one when a crime is committed does not make him an "accomplice"; but to do so he must have knowingly, voluntarily, and with common intent united with the principal in the commission of the crime. Hicks v. State (Tenn.) 149 S. W. 1055, 1056; Bush v. State (Tex.) 151 S. W. 554.

One who merely overheard a brief portion of the conversation of persons about taking some one out of jail, which they subsequently did, afterwards killing him, but who was not a party to their enterprise and had no portion or part in it, was not an "accomplice," though, over his protest and against his wishes, they took from the house where he was working the gun with which they did the killing. Chandler v. State, 131 S. W. 598, 603, 60 Tex. Cr. R. 329.

Under Pen. Code 1895, art. 79, defining an "accomplice" as one who is not present at the commission of an offense, but who, before the act is done, advises or encourages another to commit the offense, etc., in order to be an accomplice one must be in some way connected with the crime charged, it not sufficing that he may have been connected with a defendant in a prior transaction, even though violative of law; and hence mere participants with accused in a gambling game, concerning which he was charged with falsely testifying, were not accomplices. Warren v. State, 132 S. W. 136, 137, 60 Tex. Cr. R. 468.

The word "accomplice," in Code Cr. Proc. 1895, art. 781, requiring a corroboration of the testimony of an accomplice in order to convict, means a person who, either as a principal, accomplice, or accessory, is connected with a crime by unlawful act or omission transpiring either before, at the time, or after the commission of the offense, whether he was present and participated in the crime or not; and while, in misdemeanor cases, all parties are principals, a witness in a misdemeanor case may be an accomplice. Williams v. State, 110 S. W. 63, 64, 53 Tex. Cr. R. 396.

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Though, in a strictly legal sense, there can be no accomplice in a misdemeanor case, there can be no conviction in such a case on the testimony of a confessed actor and participant with defendant in the crime, equally guilty with him, without other testimony than that of one who had no personal knowledge concerning defendant's participation; "accomplice" as used in Code Cr. Proc. 1895, art. 781, as to corroboration of accomplice's testimony, having a distinct and different meaning from its technical definition as given in Code Cr. Proc. 1895, art. 79, and including principals, assessories, and all persons who are particeps criminis and connected with the crime by unlawful act or omission transpiring before, at the time of, or after, commission of the offense, and whether such person was present or participating in the crime or not. Huffman v. State, 123 S. W. 596, 57 Tex. Cr. R. 399.

One jointly indicted with accused, but not connected with the commission of the offense, is not an "accomplice," within Cr. Code Prac. § 241, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated. Ochsner v. Commonwealth, 109 S. W. 326, 328, 128 Ky. 761, 33 Ky. Law Rep. 119.

Accessory after the fact

An accessory after the fact is not an "accomplice." Bradley v. State, 58 S. E. 1064, 1065, 2 Ga. App. 622.

Accessory before the fact

In Texas, there are no accessories before the fact defined as such; they being termed "accomplices." Strong v. State, 105 S. W. 785, 52 Tex. Cr. R. 133.

Detectives and officers

The purchaser of whisky sold in violation of the local option act, which declares that he is not an "accomplice," does not become such because he was a detective employed to ferret out violations of the act. Martmer v. State, 84 S. W. 830, 831, 47 Tex. Cr. R. 424 (citing Steele v. State, 19 Tex. App. 425; O'Brien v. State, 6 Tex. App. 665; White's Ann. Pen. Code 1901, arts. 74, 79; Chenault v. State, 81 S. W. 971, 46 Tex. Cr. R. 351); Terry v. State, 79 S. W. 320, 46 Tex. Cr. R. 75.

Officers engaged in ascertaining whether an unlawful business was being carried on were not rendered incompetent to testify, as having procured the violation of law by soliciting an illegal sale of beer. State v. Gibbs, 123 N. W. 810, 811, 109 Minn. 247, 25 L. R. A. (N. S.) 449.

An "accomplice" is one who knowingly and voluntarily, with a common intent with the principal offender, unites with him to commit the crime, and one who was furnished money by the police to play at a crap game in order to procure evidence for a prosecution was not an accomplice of one prosecuted for maintaining the gaming table. State v. Lee, 128 S. W. 987, 994, 228 Mo. 480.

One who feigned participation in a larceny of ore which he was employed to watch, in order to assist in the detection of accused, was not an "accomplice." State v. Smith, 117 Pac. 19, 20, 33 Nev. 438.

Principal distinguished

A principal must either be present when the crime is committed, or he must do some act during the time of its commission which connects him with it. Parties who act together in the commission of an offense are principals. Where parties agree to commit an offense together, but do not act together, the one who actually commits it is the "principal," while the other, not present at the commission, and not in any way aiding in its commission, as by keeping watch or securing the safety of the principal, is an "accomplice." O'Quinn v. State, 115 S. W. 39, 44, 55 Tex. Cr. R. 18.

In abortion

The woman on whom the abortion was attempted to be committed is not an "accomplice," and corroboration of her testimony is not essential. State v. Stafford, 123 N. W. 167, 168, 145 Iowa, 285.

A sister of a woman upon whom an abortion was performed was not an "accomplice" whose uncorroborated testimony would not support a conviction, solely because, through sisterly affection, she went with her to the doctor's office, where she did not consent to the abortion, but did all in her power to prevent it. Greenwood v. State, 105 Pac. 371, 373, 3 Okl. Cr. 247.

In adultery

In a prosecution for adultery, the female with whom defendant is charged to have committed the offense is an "accomplice," on whose testimony defendant cannot be convicted unless corroborated so as to connect defendant with the offense charged, as required by law. State v. Brown (Iowa) 121 N. W. 513; Jackson v. State, 101 S. W. 807, 51 Tex. Cr. R. 220.

In bribery

An "accomplice" is an associate in the commission of a crime; a participator in the offense, whether as principal or accessory. Consequently one who did not advise or encourage the accused to receive a bribe, but who merely assisted in securing the money which should be paid to him with a view to exposing him, and who did as a matter of fact voluntarily expose the transaction, is not an "accomplice" in the crime. People v. Bunkers, 84 Pac. 364, 367, 2 Cal. App. 197.

Mere silence in the presence of a crime, or the mere failure to inform the officers of the law when one has learned of the com-

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mission of a crime, does not make one an "accomplice." On a prosecution for bribery, the charge being that defendant, a state senator, paid another senator a sum of money to vote for a certain bill, a witness testified that during the early part of the session of the Legislature defendant and other senators were together, when one of them suggested that they combine to make money by receiving money for the defeat or passage of bills, and that defendant so far acted on the suggestion as to make a memorandum of senators whom he thought would join such an arrangement, and that witness, after the matter had been discussed by the others for a few moments, left the room and did not return. Held, the witness was not an accomplice. Butt v. State, 98 S. W. 723, 727, 81 Ark. 173, 118 Am. St. Rep. 42.

Rem. & Bal. Code, § 2320, provides that every person who shall give, offer, or promise a reward to any person executing any of the functions of a public officer with intent to influence him with respect to his acts, shall be punished, etc., and section 2321 provides that every executive officer who shall ask or receive any reward on an agreement or understanding that his official acts shall be influenced thereby shall be punished, etc. Held, that where defendant, a chief of police, was indicted, under section 2321, for asking, accepting, and receiving a bribe from two others to influence his official action so as to permit the bribe givers to operate certain disorderly houses, it being charged that the three conspired to conduct such houses in violation of law, the bribers, not having conspired to bribe defendant and not being punishable under section 2321, were not "accomplices" of the defendant within the rule as to corroboration of accomplice testimony. State v. Wappenstein, 121 Pac. 989, 999, 67 Wash. 502.

In a prosecution for bribing a prospective witness in a robbery prosecution, in which accused was counsel for the defendant, a witness, who testified that accused gave him money and told him to give it to the person claimed to have been robbed, and not to be quite so sure who robbed him when the case was tried, was accused's "accomplice" if a crime was committed, so that accused could not be convicted on the accomplice's testimony, unless corroborated by some other evidence tending to connect him with the crime. People v. Kathan, 120 N. Y. Supp. 1096, 1099, 1100, 136 App. Div. 303.

Relator went to S., and engaged him in a conversation concerning H., who was a juror, stating that relator wanted to see H. to ascertain if he could do something for him with reference to a case he had coming up for trial. S. replied that H. was a square sort of a fellow, whereupon relator stated that he was willing to make it right with any of the boys who stayed by him, and S. then stated that he would not say anything to any one except H., that he would have to tell him. Held, that such facts did not indicate that S. agreed to act as relator's agent to communicate with H., but rather that he refused to be a party to relator's purpose to influence H., and that S. was therefore not an "accomplice." State ex rel. Webb v. District Court, 95 Pac. 593, 597, 37 Mont. 191, 15 Ann. Cas. 743.

In burglary

A witness did not become an "accomplice" in a burglary through knowledge that the goods had been stolen, and through going with one of the burglars to get goods stolen in the burglary where the latter had placed them. State v. Dalton, 118 Pac. 829, 65 Wash. 663.

The fact that the proprietor of a barber shop which was burglarized and the owner of the building agreed not to take any steps toward a prosecution because of payments of money made to them by accused did not render them "accomplices." Davis v. State, 107 S. W. 855, 856, 52 Tex. Cr. R. 332.

Defendant advised another and his wife to burglarize a house, and pursuant thereto the husband broke into the house, and thereafter made arrangements whereby he and his wife drove to the house and got the goods; the wife holding the horse while her husband put the goods in the wagon. This burglary had been planned between the husband and wife for some time prior to its consummation. A few nights afterward the husband went to the house again and selected more goods, and on the next night brought them home. The goods were wet, and the wife assisted him in drying them, and she also put away some of the goods. The wife knew that the goods had been stolen. Held, that the wife was an "accomplice" of her husband in the transaction, within Code Cr. Proc. § 399, providing that a conviction cannot be had on an accomplice's testimony, unless corroborated. People v. Holden, 111 N. Y. Supp. 1019, 1020, 127 App. Div. 758.

In conspiracy

In a prosecution of a president of a union for conspiracy, a witness who was a member, and attended two meetings, and heard what accused there said, but did not participate in unlawful acts shown, was not an "accomplice." People v. Yannicola, 117 N. Y. Supp. 381, 133 App. Div. 885.

In gambling

Under the rule that an accomplice must unite in the commission of the crime and must be an associate therein, one participating in a gambling game operated by another in violation of Rev. Codes, § 8416, punishing one operating gambling games, is not an "accomplice." State v. Wakely, 117 Pac. 95, 99, 43 Mont. 427.

Under Pen. Code 1895, art. 79, defining an "accomplice" as one who is not present at

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the commission of an offense, but who, before the act is done, advises or encourages another to commit the offense, etc., in order to be an accomplice one must be in some way connected with the crime charged, it not sufficing that he may have been connected with a defendant in a prior transaction, even though violative of law; and hence mere participants with accused in a gambling game, concerning which he was charged with falsely testifying, were not accomplices. Warren v. State, 132 S. W. 136, 137, 60 Tex. Cr. R. 468.

In homicide

A witness saw accused put strychnia in capsules, which she knew he intended to give to his wife to kill her, and saw her take them, knowing that they would kill her, but did not inform her of their contents, or take steps to prevent her taking them. Held, that the witness was not an "accomplice," not having advised or assisted in its commission, and occupying no relation to her which would make her a participant in the crime because of failure to endeavor to save her life. Levering v. Commonwealth, 117 S. W. 253, 257, 132 Ky. 666, 136 Am. St. Rep. 192, 19 Ann. Cas. 140.

The statute provides that every person who abets, procures, commands, or counsels any other person or persons to commit any crime shall be deemed an "accomplice" and equally guilty with the principal offender. Held, that where one actually inflicted a mortal wound, but another was present, abetting, procuring, commanding, or counseling him, the latter was an accomplice, and equally guilty. State v. Adams, 65 Atl. 510, 511, 6 Pennewill (Del.) 178.

In incest

An "accomplice" is one who unites in the commission of a crime and who participates in the criminality of the act, and a female with whom the offense of incest is committed by force and against her will is not an "accomplice," and her testimony does not require corroboration as a matter of law. Gaston v. State, 128 S. W. 1033, 1034, 95 Ark. 233.

A girl less than 16 years of age, who, under physical and moral coercion, has maintained incestuous relations with her father, is not an "accomplice" in the crime. Bridges v. State, 113 N. W. 1048, 1050, 80 Neb. 91.

If accused's illegitimate daughter voluntarily had intercourse with him, she was an "accomplice" to the crime of incest. Wadkins v. State, 124 S. W. 959, 961, 58 Tex. Cr. R. 110, 137 Am. St. Rep. 922, 21 Ann. Cas. 556.

If prosecutrix consented to sexual intercourse with a relative within the prohibited degree, she was an "accomplice" to the crime of incest. Skidmore v. State, 123 S. W. 1129, 57 Tex. Cr. R. 497, 26 L. R. A. (N. S.) 466.

In liquor sales and disorderly houses

A purchaser of spiritous liquor from one who sells it in violation of law participates in the unlawful sale and is therefore an "accomplice." State v. Ryan, 75 Atl. 869, 872, 1 Boyce (Del.) 223. But one who purchases liquor sold without the seller being licensed is not an "accomplice," and his testimony for the state is not to be received as that of an accomplice. State v. Wright, 133 S. W. 664, 152 Mo. App. 510.

The keeper of a disorderly house who enters into a criminal agreement with a public officer to pay certain money at stipulated times as a consideration for carrying on his business and selling liquor without a license is an "accomplice" within the meaning of the law; and, on the trial of the officer for that offense, it is not error to so instruct. State v. Routzahn, 115 N. W. 759, 760, 81 Neb. 133, 129 Am. St. Rep. 675.

In perjury

On the trial of a defendant charged with perjury in giving false testimony in a proceeding for naturalization of an alien, the applicant for citizenship is not an "accomplice" in such sense as to require the jury to be cautioned in respect to his testimony, where it does not appear that defendant gave the false testimony at the instigation of such applicant. Holmgren v. United States, 156 Fed. 439, 444, 84 C. C. A. 301 (quoting and adopting the definition in People v. Bolanger, 11 Pac. 799, 71 Cal. 17).

In a proceeding under Laws 1905, p. 1849, c. 689, § 7, making it a felony to take a false oath before a deputy state superintendent of elections, certain electors swore that they did not reside where defendant testified they resided before the deputy, and where they were falsely registered. Held, that they were not "accomplices" as to defendant, so as to need corroboration. People v. Ellenbogen, 99 N. Y. Supp. 897, 901, 114 App. Div. 182.

In rape

In a prosecution for rape committed on defendant's daughter while under the age of consent, a letter from her husband to defendant was introduced, which demanded that defendant transfer all his property to the husband and leave the country. Held, that neither the daughter nor her husband was an "accomplice," within the rule as to testimony of accomplices. Smith v. State, 100 S. W. 924, 926, 51 Tex. Cr. R. 137.

In receiving stolen goods

"The thief who steals property, and the person who afterwards receives it from him, knowing it to be stolen, are guilty of separate and distinct offenses, and, unless more

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than this be shown, neither is an 'accomplice' in the offense of the other." State v. Scott, 113 N. W. 758, 759, 136 Iowa, 152. See State v. Feinberg, 124 N. W. 208, 145 Iowa, 329; State v. Shapiro, 115 S. W. 1022, 1025, 216 Mo. 359.

Where the facts, considered together, were such as of necessity to carry notice to a witness, on a trial for burglary in which larceny was committed, that the property offered for sale by accused had been stolen, the witness, buying the property, was chargeable with knowledge that it had been stolen, and the fact that he denied such knowledge did not prevent him from being an "accomplice." Johnson v. State, 125 S. W. 16, 18, 58 Tex. Cr. R. 244.

ACCOMPLISH

ACCOMPLISH BY MEANS OF FORCE AND FEAR

"A robbery 'accomplished by means of force and fear' must have been accomplished 'against the will' of the person robbed." Hence an indictment, having charged that the robbery was "from the person and immediate presence of one R., and by means of force and fear, and by threatening to shoot and kill him," and that defendants feloniously took a certain sum from the possession of said R., was sufficient, and the insertion of the words "and against his will" was unnecessary and not prejudicial. State v. La Chall, 77 Pac. 3, 5, 28 Utah, 80 (citing State v. Patterson, 42 La. Ann. 934, 8 South. 529; People v. Riley, 75 Cal. 98, 16 Pac. 544).

ACCORD

Payment distinguished, see Payment.

The amendment by Rev. Civ. Code 1903, § 1177, of Code 1877, § 859, and of Comp. Laws 1887, § 3483, defining an "accord" to be an agreement to accept in extinction of an obligation something different from "or less than" that to which the person agreeing to accept is entitled, by striking the quoted words, in effect restored the common-law rule that no agreement to accept less than the amount to which one is entitled, where the payment is to be made in money, is a defense to suit to recover the amount of the original claim, and hence an agreement to accept $80 in satisfaction of a $160 debt is no defense to an action for the larger sum, less credits. Eggland v. South, 118 N. W. 719, 720, 22 S. D. 467.

ACCORD AND SATISFACTION

"Accord and satisfaction" is a method of discharging a cause of action by substituting an agreement in satisfaction thereof, and an execution of that agreement, and an accord, to discharge a cause of action, must be executed, which is the satisfaction and consists in the actual performance of the agreement of accord and acceptance of performance in satisfaction of the original cause of action, though where the accord, and not the performance thereof, is accepted in satisfaction of the demand, and the agreement to accept is based on a sufficient consideration, the demand is extinguished, and cannot be the foundation of a new action. Carter v. Chicago, B. & Q. R. Co., 119 S. W. 35, 36, 136 Mo. App. 719.

"Accord and satisfaction" is a new contract founded on a new consideration, possessing all the elements of a contract, and finally closes the matter covered by it; and, unless there is a well-understood compromise of any and all demands arising out of the transaction between the parties, there is no valid accord and satisfaction. Barrett v. Kern, 121 S. W. 774, 780, 141 Mo. App. 5.

An agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions on this account, in an "accord and satisfaction." Houston Bros. v. Wagner, 114 Pac. 1106, 1107, 28 Okl. 367.

To constitute an "accord and satisfaction," there must be a good consideration for and execution of the agreement, intention to settle claims admitted or in dispute, and mutuality of binding force. An agreement does not operate as an "accord and satisfaction" if there was fraud or a mutual mistake as to indebtedness recited in the agreement. Brooklyn Heights R. Co. v. Brooklyn City R. Co., 135 N. Y. Supp. 990, 1003, 151 App. Div. 465. The agreement must have been entered into by the parties understandingly and with unity of purpose. Matheney v. City of El Dorado, 109 Pac. 166, 167, 82 Kan. 720, 28 L. R. A. (N. S.) 980.

To constitute an "accord and satisfaction" in law, dependent upon the offer of the payment of a less sum than that claimed, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such a character that the creditor is bound to understand such offer. Rose v. American Paper Co., 85 Atl. 354, 355, 83 N. J. Law, 707.

An "accord and satisfaction" under Rev. St. c. 84, § 59, providing that "no action shall be maintained on a demand settled by a creditor * * * in full discharge thereof by the receipt of money or other valuable consideration, however small," is an executed agreement whereby one gives and another receives, in satisfaction of a demand, liquidated or unliquidated, money or other valuable consideration, however small. To constitute an "accord and satisfaction," it is necessary that the money should be offered in satisfac-

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tion of the claim, and the offer accompanied with such acts and declarations as amount to a condition that acceptance shall satisfy the particular claim, and that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition. Fuller v. Smith, 77 Atl. 706, 708, 107 Me. 161.

An agreement between two persons, one of whom has a right of action against the other, that the latter shall do or give, and the former accept, something in satisfaction of the right of action different from, and usually less than, what may be legally enforced, when executed and satisfaction has been made, is an "accord and satisfaction." Miller v. Electrical Supply & Construction Co., 103 Pac. 290, 291, 46 Colo. 221.

The receipt of money by a creditor, accompanied by a letter from the debtor stating the amount of his liability and its application on the amount the creditor claims to be due, without assenting to the debtor's claim, is not an "accord and satisfaction." Sampson v. Northwestern Nat. Life Ins. Co., 123 N. W. 302, 304, 85 Neb. 319.

An "accord and satisfaction" may be established by circumstances and conduct, and it is not essential that the debtor declare in terms, in making a tender, that it is in full payment of the claim. The silence of a debtor after he is notified that the creditor will not accept a tender in full payment, but will only credit it on account, may be considered in determining whether there was an "accord and satisfaction." Bahrenburg v. Conrad Schopp Fruit Co., 107 S. W. 440, 442, 128 Mo. App. 526.

A debtor, in contemplation of bankruptcy, offered his creditor 30 per cent. in settlement, and the creditor accepted the same and closed the account. Held an "accord and satisfaction." Melroy v. Kemmerer, 67 Atl. 699, 700, 218 Pa. 381, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888 (citing Ebert v. Johns, 55 Atl. 1064, 206 Pa. 395; Cumber v. Wane, 1 Smith, Lead. Cas. *357; Fuller v. Kemp, 33 N. E. 1034, 138 N. Y. 231, 20 L. R. A. 785; Dawson v. Beall, 68 Ga. 328; Curtiss v. Martin, 20 Ill. 557, 578; Engbretson v. Seiberling, 98 N. W. 319, 122 Iowa, 522, 64 L. R. A. 75, 101 Am. St. Rep. 279; Rice v. London & Northwest American Mort. Co., 72 N. W. 826, 70 Minn. 77; Pettigrew Mach. Co. v. Harmon, 45 Ark. 290).

Where the business of a partnership was the cultivation of rice, and one of the partners died before the maturity of the crop, and after the crop was harvested on demand of the executors of the deceased partner there was an equal division of the rice, but no undertaking to construe the contract or make a final settlement, such transaction did not amount to an "accord and satisfaction" which would estop the executors from denying that the survivor was entitled to one-half of the crop. Huger v. Cunningham, 56 S. E. 64, 67, 126 Ga. 684.

The fact that a county received dividends from the receiver of an insolvent bank in which the county's funds were deposited and credited the amount received against the amount due from the bank did not constitute an "accord and satisfaction" which would be a defense to the liability of sureties on the bank's bond to the county to secure such deposits. Johnson County v. Chamberlain Banking House, 113 N. W. 1055, 1056, 80 Neb. 96.

An agreement under which a creditor foregoes one half of his claim in consideration of the debtor paying the other half out of his wages to be earned in future is not an "accord and satisfaction" where it appears that the assignment of the wages from the debtor to the creditor was never presented to or accepted by the debtor's employer, who continued to pay the wages to the debtor after the execution of the paper as before. Citizens' Nat. Bank v. Marks, 34 Pa. Super. Ct. 310, 314.

Where an employer discharged an employé hired for a fixed term before the termination thereof, an acceptance by the employé of payment for what was due him up to the time of his discharge was not an "accord and satisfaction." Stewart & Co. v. Stephens, 67 S. E. 199, 201, 7 Ga. App. 453.

Consideration

Acceptance by a creditor on a liquidated demand of less than the entire amount is not an "accord and satisfaction," unless paid as a compromise of a demand disputed in good faith; but if there be a bona fide dispute as to the amount due, the dispute may be the subject of a compromise, so that payment of a specified sum may operate as a "satisfaction" of the entire claim. Jackson v. Security Mut. Life Ins. Co., 84 N. E. 198, 199, 233 Ill. 161 (citing and adopting Ostrander v. Scott, 43 N. E. 1089, 161 Ill. 339; Davidson v. Burke, 32 N. E. 514, 143 Ill. 139, 36 Am. St. Rep. 367; Fire Ins. Ass'n v. Wickham, 12 Sup. Ct. 84, 141 U. S. 564, 35 L. Ed. 860).

An agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an "accord and satisfaction," unless it be actually executed by the payment of the money, or the giving of additional security, or the substitution of another debtor, or some other new consideration. Phinizy v. Bush, 59 S. E. 259, 265, 129 Ga. 479; Bowen v. E. A. Waxelbaum & Bro., 58 S. E. 784, 786, 2 Ga. App. 521.

An agreement by the terms of which one party agrees to pay the other a sum of money and each agrees to release the other from all obligations on a breach of contract of marriage is not enforceable as an "accord and satisfaction" against the party promising to pay, when the plaintiff shows no right

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nor advantage yielded up by reason of the agreement. Conard v. Bare, 29 Ohio Cir. Ct. R. 153, 154.

Where coal of a certain grade is sold and delivered to a purchaser, and a liquidated indebtedness arises for the contract price, a settlement between the parties, whereby a portion of the purchase price is discharged by reason of the inferior quality of the coal, is a valid "accord and satisfaction," and supported by sufficient consideration. Missouri & Illinois Coal Co. v. Consolidated Coal Co. of St. Louis, 105 S. W. 682, 684, 127 Mo. App. 320.

Rev. Codes 1905, § 5269, provides that an "accord" is an agreement to accept in extinguishment of an obligation something different from or less than that which the person agreeing to accept is entitled to. Section 5270 declares that, though the parties to an accord are bound to execute it, it does not extinguish the obligation until it is fully executed, and section 5271 declares that acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called "satisfaction." Held, that a computation of the amounts mutually due between the parties and an agreement that they should offset each other, though one sum was less than the other, did not constitute an "accord and satisfaction," in the absence of a showing that there was any consideration for the agreement or that it was executed, or that there was any dispute as to the amount due. Webster v. McLaren, 123 N. W. 395, 396, 19 N. D. 751.

Insurance claims

Plaintiff, the holder of a benefit certificate for $1,000 in defendant order on the life of her husband, received a draft drawn on defendant's treasurer for $796.64, on the back of which she indorsed and signed a receipt for such amount "in full under this certificate," "but I accept the above amount under protest, $796.64." Held, that such receipt did not constitute an "accord and satisfaction" of plaintiff's claim under the certificate as a matter of law. Mitterwallner v. Supreme Lodge, Knights and Ladies of the Golden Star, 95 N. Y. Supp. 1090, 1094, 109 App. Div. 70.

A release not under seal, given by a beneficiary in a mutual benefit certificate in consideration of receiving a part of the amount of the certificate, is a mere receipt in full of the society's liability, and the acceptance by the beneficiary thereof is a discharge only of so much of the debt as is equal in amount to the sum received. Farmers' & Mechanics' Life Ass'n v. Caine, 79 N. E. 956, 959, 224 Ill. 599.

In employer's liability insurance policies, the premium was based on the compensation to employés, and it was provided that if the compensation exceeded the approximate estimate in the schedule thereinafter given, the employer should pay the additional premium earned, and if less, the insurance company should return the unearned premium. The insurance company requested of the employer a statement of the wages paid to employés during the year covered by the policies, which was furnished, showing that the full premiums due according to the policies had not been paid. On demand therefor the employer paid the additional premiums without dispute, and thereafter the insurance company claimed that there was a balance still due, and that the statement of wages was erroneous. Held, that no controversy having arisen at the time of the payment of the additional premiums, such payment did not operate as an "accord and satisfaction." New Amsterdam Casualty Co. v. Mesker, 106 S. W. 561, 565, 128 Mo. App. 183.

Retention of check

Where there was an honest dispute as to the amount due under a contract, and the owner sent a check to the contractor in full payment, and the contractor retained the check for several months, and then used it, there was an "accord and satisfaction." Policastro v. Pitske, 120 N. Y. Supp. 743, 744, 65 Misc. Rep. 524.

Where a voucher and letter showed that a check sent to a broker in payment of his commissions, was in full payment of the account, the retention of the check, unaccompanied by any explanation, operated as an "accord and satisfaction." Goodloe v. Empson Packing Co., 122 S. W. 771, 772, 145 Mo. App. 574.

A debtor sent the creditor a check, accompanied by a letter stating that the check was in full of account. The creditor's bookkeeper made out a statement of the account as shown by the creditor's books, and credited the check, leaving a balance due. He then took the statement to the debtor, stating that it showed the amount due and that the check had been credited, and requested a check for the balance. The debtor then stated that he did not owe anything, and renewed the statement when the bookkeeper stated that the check had been merely credited on account. Held not to justify an inference that the condition on which the check was sent was waived by the debtor, so as to prevent a retention of the check from being an "accord and satisfaction." Canton Union Coal Co. v. Parlin & Orendorff Co., 74 N. E. 143–145, 215 Ill. 244, 106 Am. St. Rep. 162.

The cashing by a creditor of a check containing the words "paid in full," signed by the debtor, is not an "accord and satisfaction," where there is no genuine dispute between the parties as to the amount due. Caravia v. Levy, 119 N. Y. Supp. 160, 161.

Where a debtor remits by mail a sum less than the amount due, but which he in good faith believes to be all that is due or

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claimed by the creditor, the fact that he marks the check upon the margin "In full to date," or in the account which he renders describes it as "Check to balance in full," does not constitute it a payment made in settlement of a disputed claim; and the acceptance of such check by the creditor is not an "accord and satisfaction." Canadian Fish Co. v. McShane, 114 N. W. 594, 595, 80 Neb. 551, 14 L. R. A. (N. S.) 443, 127 Am. St. Rep. 791.

The remittance of a check accompanied by a statement to the effect that it was for the correct balance, and that no more would be paid, followed by acceptance of the check, does not constitute an "accord and satisfaction." American Forwarding & Mercantile Co. v. Lindsay Chair Co., 129 Ill. App. 548, 550, 551.

Where one has an unliquidated demand and the debtor sends a check to his attorney with a receipt to be signed by the creditor, and the latter receives the check, though protesting that a much larger sum is due him, and signs a receipt under seal containing the stipulation that in consideration of the amount of the check he releases the creditor from all claims and demands whatsoever, the receiving and retaining of the sum offered and the signing of the receipt constitute a good "accord and satisfaction" binding on the creditor, though he entered on the receipt the letters "E. & O. E.," meaning "errors and omissions excepted." T. B. Redmond & Co. v. Atlanta & Birmingham Air Line Ry., 58 S. E. 874, 876, 129 Ga. 133.

Defendants purchased goods from plaintiffs by sample, delivery to be made in three allotments. The first allotment was received and used; but defendants, claiming that the goods were defective, refused to receive the other allotments, and sent a check for the amount due on the first allotment, which was to be in full satisfaction and settlement of all claims by them and of all disputes and matters between plaintiffs and defendants, and returned the rest of the goods that had been delivered. Plaintiffs accepted the check and credited the amount on defendants' account as part payment. Held, that there was a genuine and unquestioned dispute between the parties, and hence the acceptance and retention of the check constituted a complete "accord and satisfaction," since the acceptance of the check involved the acceptance of the conditions imposed. Schwartz v. Hirsch, 107 N. Y. Supp. 796, 798, 56 Misc. Rep. 618.

Where the buyer of rubber sent the sellers a check "in settlement" of the invoice, stating that the balance was ascertained under the salesman's warranty that the rubber would not shrink more than 40 per cent., the sellers' retention of the check was not an "accord and satisfaction," where they credited the buyer's account with the amount of the check and in acknowledging receipt thereof stated that a specified sum remained due, and demanded payment thereof; they denying, before and after receiving the check, that such warranty was made. Windmuller v. Goodyear Tire & Rubber Co., 107 N. Y. Supp. 1095, 1096, 123 App. Div. 424.

Cases of goods purchased of plaintiff by defendant having been delivered February 14, 1906, two of the cases were returned on the succeeding day as not the goods ordered. On May 29th defendant sent plaintiff a check on which he indorsed the words: "The amount of this check, $481, in payment of all bills to date." Plaintiff, on receiving the check, struck out the indorsement without notice to defendant, deposited the check to his credit, and collected the money. He also wrote a note to defendant, saying that defendant still owed $1.60 for interest and that he had credited the amount of the check against defendant's account, but said nothing as to the cases returned. Held, that such check constituted an "accord and satisfaction," relieving defendant from any liability for the goods returned and of all claims, except as to the $1.60 interest. Smith v. Bronstein, 107 N. Y. Supp. 765, 766.

Plaintiffs shipped eggs to defendant, pursuant to a sale to defendant's agent at an agreed price. Defendant refused to accept all the eggs, contending that the sale related only to eggs shipped from a certain point. Several letters and telegrams were interchanged, in which plaintiffs insisted that the sale included all eggs, and defendant refused to admit this, and offered to sell the eggs in dispute for plaintiff. This he finally did, and remitted the proceeds by letter, stating that the remittance was in full for the eggs in dispute. Plaintiffs retained the remittance. Held, that there was a bona fide dispute, so that plaintiff's acceptance of the money constituted an "accord and satisfaction." D. N. Lightfoot & Son v. Edward Hurd & Co., 88 S. W. 128, 129, 113 Mo. App. 612.

Under Revisal 1905, §§ 2337, 2338, providing that the certification of a check at the instance of the holder is equivalent to an acceptance, and discharges the maker and indorsers from liability thereon, an acceptance by certification of a check for a less sum than the amount due, and containing the statement that it is in full, is binding on the creditor, in the absence of fraud or other misconduct of the debtor. Drewry-Hughes Co. v. Davis, 66 S. E. 139, 151 N. C. 295.

Where a check for less amount than the contract price of certain corn sold was sent to the creditor without any condition as to acceptance, with a statement of a set-off that would balance the account, acceptance of the check did not constitute an "accord and satisfaction." McKinnon v. Holden, 123 N. W. 439, 440, 85 Neb. 406.

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One of the essential requirements of an "accord and satisfaction" is that there be a meeting of minds between the parties. A buyer of a motor at an agreed price received, pursuant to an independent transaction, an auto starter which was defective. He sent to the seller a check for a part of the agreed price, accompanied by a letter stating that the auto starter was so defective that a new one had to be purchased, and that he was compelled to deduct the price of a new one from the price of the motor. The seller used the check, and within two days notified the buyer that he must pay the balance of the agreed price. Held, that there was no "accord and satisfaction," precluding a recovery for the balance. Bowery Bay Bldg. & Imp. Co. v. Rossiter, MacGovern & Co., 99 N. Y. Supp. 922, 923, 113 App. Div. 652 (citing Nassoiy v. Tomlinson, 42 N. E. 715, 148 N. Y. 326, 51 Am. St. Rep. 695, Eames Vacuum Brake Co. v. Prosser, 51 N. E. 986, 157 N. Y. 289).

There was no "accord and satisfaction" where plaintiff, having done work for defendants, and returned to them a check for less than the amount claimed therefor, which they had sent plaintiff, and which had written on it "Account in full to date," its attorney called on them, saying that he had come to effect a settlement, whereupon they handed him the same check, saying that it belonged to plaintiff, and he took it away with him, together with the voucher, on which was written, "Corrections on this voucher not recognized; if not acceptable, return check"—but on the same day wrote them that he had forwarded the check to plaintiff, with instructions to credit defendant's account therewith, and that he awaited plaintiff's further advice about proceeding to collect the balance. Federal Printing Co. v. Garrick Press, 99 N. Y. Supp. 809, 810, 51 Misc. Rep. 56.

An employé deposited with his employer $150 to secure the faithful performance of his duties, and, on the termination of his employment, demanded its return, but the employer claimed a misappropriation of $83.66, and paid $66.34 by check, reciting that it was in full, less the money misappropriated. The check was retained and suit brought for the difference. Held, that the retention of the check did not constitute an "accord and satisfaction," as the employer yielded no part of his claim and suffered no detriment by paying only what he admitted to be due. Demeules v. Jewel Tea Co., 114 N. W. 733, 734, 103 Minn. 150, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315.

Defendants owed a mortgage on which a balance of $78,000 was due, which also provided for payments in installments of $7,000 a year. Defendants, on or about the date the balance matured, sent plaintiffs a check for $7,000, "being installment of principal under terms of mortgage due June 27, 1907." Plaintiffs stated that they would apply it to the payment in full of balance of the mortgage, but insisted that the entire balance was due and should be paid. Held, that the payment was for an installment of the principal only, and did not, therefore, constitute an "accord and satisfaction." McDonald v. Potter, 107 N. Y. Supp. 915, 57 Misc. Rep. 206.

Sale distinguished

See Sale.

Satisfaction of entire debt

Payment of a part of a demand entirely liquidated is not a legal "satisfaction" of the whole debt, although the creditor receives the smaller sum in full discharge of the full demand, and gives a receipt accordingly. Gussow v. Beineson, 68 A. 907, 76 N. J. Law, 209; Snow v. Griesheimer, 77 N. E. 110, 111, 220 Ill. 106; Nixon v. Kiddy, 66 S. E. 500, 501, 66 W. Va. 355; Morrill v. Baggott, 57 Ill. App. 530, 533; Dorman v. Arkin, 120 N. Y. Supp. 757, 758.

Acceptance of an amount to which a party is clearly entitled does not constitute an "accord and satisfaction" where there is no claim of facts showing an accord and satisfaction under Civ. Code, § 1180, providing that part performance, when expressly accepted in writing in satisfaction, extinguishes the obligation. Chrystal v. Gerlach, 125 N. W. 633, 637, 25 S. D. 128.

Where a claim is unliquidated or in dispute, and the creditor has tendered a less sum than is claimed upon the condition that if it be accepted it must be in entire satisfaction of his claim, his acceptance of the claim is an "accord and satisfaction." Hillestad v. Lee, 97 N. W. 1055, 1056, 91 Minn. 335 (citing Marion v. Heimbach, 64 N. W. 386, 62 Minn. 215); Freeman v. Tiffany Studios, 113 N. Y. Supp. 64, 65, 128 App. Div. 868; Frye v. Hubbell, 68 Atl. 325, 328, 74 N. H. 358, 17 L. R. A. (N. S.) 1197; Canton Union Coal Co. v. Parlin & Orendorff Co., 74 N. E. 143–145, 215 Ill. 244, 106 Am. St. Rep. 162.

A contract for the sale of a tract of land bound the purchaser to pay a specified sum per acre, according to the amount of land found by a survey. The contract also provided that the deed of the land should be left at a certain bank to be delivered when possession was given and the residue of the purchase price paid. Upon the completion of the survey, the purchaser computed the amount due, and in payment thereof deposited with the bank certain notes which he held against the vendor computing interest up to the time of deposit, and also deposited the balance of the purchase price, and received from the bank the deed. Subsequently, on meeting the purchaser, and being informed of the amount deposited, the

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vendor disputed the purchaser's calculation, but shortly thereafter he drew from the bank the money to his credit and received the notes. Held, that the act of the purchaser in depositing the notes and the money was a tender in full of the amount due under the contract, and the acceptance by the vendor of such amount by receiving it from the bank was a settlement of the entire claim, and operated as a "satisfaction" thereof which he could not dispute, even though the amount so accepted was less than he was entitled to. Carter v. Carter, 107 S. W. 467, 468, 129 Mo. App. 467.

ACCORDING TO

ACCORDING TO THE COURSE OF COMMON LAW

The phrase "according to the course of the common law," as interpreted by textwriters and judges, means a judicial determination of a controversy after due notice to the interested parties and an opportunity given to be heard. State ex rel. Engelhard v. Weber, 105 N. W. 490, 492, 96 Minn. 422, 113 Am. St. Rep. 630 (citing 2 Words and Phrases, p. 1331).

ACCORDING TO THE ESTABLISHED GRADE

An ordinance providing for the curbing of a street "according to the established grade" refers to the grade previously established, and special tax bills issued for the work are not invalid on the ground that the matter of the grade is left to the city engineer. City of Excelsior Springs v. Ettenson, 96 S. W. 701, 704, 120 Mo. App. 215.

ACCORDING TO THE GRADE

Code, § 785, provides that when improvements have been made on a lot "according to the grade" of the street on which it abuts, and such grade is thereafter changed so as to damage such property, the city shall pay the owner the amount of such damage. Held, that the improvement of a lot "according to the grade" of the adjacent street did not require that the foundations of the building erected thereon should be exactly at grade, or at any invariable elevation above or below it, but that when the building was constructed with reference to the grade of the street, plaintiff was entitled to recover damages sustained to the property by a subsequent change of the grade. Stevens v. City of Cedar Rapids, 103 N. W. 363, 128 Iowa, 227.

ACCORDING TO LAW

See Returnable According to Law.

An affidavit filed under Burns' Ann. St. 1908, § 8351, making any person, not being licensed under the laws of the state, who shall sell spirituous liquors, guilty of a misdemeanor, alleging that accused unlawfully sold beer, not then having a license to sell liquors "according to" the laws of the state, was not defective for using the words quoted, instead of the word "under," as used in the statute; the affidavit being sufficient to inform accused of the offense charged. The phrases "according to" the laws, and "under" the laws, may not be in every sense synonymous; but their meaning, as used in this connection, is so far identical as fully to meet the requirements of good criminal pleading. Skelton v. State, 89 N. E. 860, 861, 173 Ind. 462.

A claim is proved "according to law" when it is proven duly, regularly, lawfully, etc. A claim evidenced by a final decree in equity is a claim proved "according to law," within the statute providing that, if any personal representative refuses to pay over what he has in his hands to a creditor of decedent whose claims have been proved according to law, etc., he may be decreed guilty of unfaithful administration, so that suit may be brought on his bond. Williams v. Starkweather, 66 Atl. 67, 69, 28 R. I. 145.

Where, on appeal from the board of commissioners in drainage proceedings, the court refused to confirm the report and referred the case back to the commissioners to proceed "according to law," pending which the statute conferring jurisdiction was repealed without a saving clause, the order of the commissioners in dismissing the proceedings constituted proceeding "according to law" in accordance with the court's direction. Zintsmaster v. Aiken, 90 N. E. 82, 173 Ind. 269.

An order in favor of judgment creditors that the sheriff proceed to cause the lands to be appraised, advertised, and sold "according to law" would be construed to mean such a sale as the plaintiffs and the other judgment creditor defendants had the right to demand, and that means a sale of the interest their debtor had in the land. Jewett v. Feldheiser, 67 N. E. 1072, 1074, 68 Ohio St. 523.

Under Code Pub. Gen. Laws 1904, art. 93, §§ 36, 341, declaring that all acts done by any executor "according to law," before any revocation of his letters, shall be valid, and providing that, on the court deciding against the probate of a will, the letters testamentary shall be revoked, and the power of the party under the letters shall cease, the power of an executor continues, notwithstanding the actual filing of a caveat to revoke the probate of the will, and a sale by an executor under a power in the will, made before the filing of the caveat, though not ratified until thereafter, is valid; such being an "act done according to law." Pacy v. Cosgrove's Ex'r, 77 Atl. 1114, 1117, 113 Md. 315.

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ACCOUNT

See Bank Account; Book of Account; Continuous Account; Copy of Account; Failed to Account; For Account of; Force Account; Full, True and Detailed Account; Just and True Account; Long Account; Mutual Accounts; Open Account; Outstanding Accounts; Running Account; Statement of Account; Stock, Fixtures and Accounts; To Apply on Account; To Balance Account.

As memorandum within Statute of Frauds, see Memorandum.

Itemize an account, see Itemize.

ACCOUNT (In Commercial Law)

The word "account" has various meanings, and is used in a variety of ways and senses; an account arises out of contract or some fiduciary relation. Its ordinary commercial usage is to refer to a claim or demand growing out of the sale of goods, performance of services, and the like. When used alone, without words of limitation, extension, qualification, or explanation, it is sometimes equivalent to the word "claim" or "demand," when referring to an indebtedness arising out of contract or some fiduciary relation. Donley v. Bailey, 110 Pac. 65, 68, 48 Colo. 373.

The word "account" has no clearly defined meaning. In its primary meaning, an "account" is some matter of debt or credit, or of a demand in the nature of a debt or credit, between the parties, arising out of a contract or fiduciary relation, or from some duty imposed by law, and is not required to be in any particular form, or necessarily to contain detailed information. The word is flexible in meaning, depending somewhat on the surrounding circumstances and connection in which it is used. It may include no more than a list or catalogue of items, whether of debts or credits. State v. Illinois Cent. R. Co., 92 N. E. 814, 832, 246 Ill. 188; Sharp v. Zeller, 38 South. 449, 451, 114 La. 549 (quoting and adopting definition in Bouv. Law Dict., Rawle's Revision).

"The word 'account' has no inflexible technical meaning, being defined by Webster to mean a registry of pecuniary transactions, a written or printed statement of business dealings of debits and credits, and also of other things subjected to a reckoning or review" (quoting and adopting Preston Nat. Bank of Detroit v. George T. Smith Middlings Purifier Co., 60 N. W. 981, 102 Mich. 462). "An 'account' is a list or statement of monetary transactions, such as payments, losses, sales, debits, credits, etc., in most cases showing a balance or result of comparison between items of an opposite nature; e. g., receipts and payments." Frutig v. Trafton, 83 Pac. 70, 71, 2 Cal. App. 47 (quoting and adopting Purvis v. Kroner, 23 Pac. 260, 18 Or. 414, and citing 1 Words and Phrases, p. 86).

"The primary idea of 'account'—'computatio'—whether we look to the proceedings of courts of law or equity, is some matter of debt and credit, or demands in the nature of debt and credit, between parties." By commercial metonymy, it may describe the business or dealings between parties which require the keeping of an "account" thereof. By the Century Dictionary it is defined as a course of business dealings or relations requiring the keeping of records. It has been said that it has no defined legal meaning; that it has various meanings and shades of meaning, and is used in various ways, having a wide and varied signification without inflexible technical meaning. Britton v. Marks, 93 N. Y. Supp. 828, 829, 105 App. Div. 85 (quoting and adopting definition in Whitwell v. Willard, 42 Mass. [1 Metc.] 216, 217, and citing 1 Words and Phrases, p. 86).

A claim for money paid a physician for services to a decedent, and for money paid for an invalid chair for his use, is an "account" within the six-year statute as to accounts. Hildebrand v. Kinney, 87 N. E. 832, 834, 172 Ind. 447, 19 Ann. Cas. 788.

An "account" which may be referred under Code Civ. Proc. § 282, is an account in the ordinary acceptation of that term—that is, charges and credits between parties—and hence an action against a county for breach of a contract to share penalties recovered for listing property omitted from taxation is not referable. Pierson v. Minnehaha County, 134 N. W. 212, 217, 28 S. D. 534, 38 L. R. A. (N. S.) 261.

An assignment by a trustee in bankruptcy of all of the uncollected accounts and the books containing same belonging to said estate does not transfer a right of action against a carrier for injuries by a delay in a shipment as the word "account," as used, means a claim for goods sold or services rendered, and it will also be presumed from the fact that the trustee received but $35 for the property transferred, and the claim against the carrier amounted to $1,151, that it was not intended to transfer such claim. Blue Grass Canning Co.'s Assignee v. Illinois Cent. R. Co. (Ky.) 119 S. W. 769, 770.

As debt or demand

Under Rev. St. 1908, § 3162, providing that creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at the rate of 8 per cent. per annum on money due on "account" from the date when the same became due, the claim of a broker of a contract sum for finding a lessee of property is within the term "account." Donley v. Bailey, 110 Pac. 65, 68, 48 Colo. 373.

The word "account," in Code Civ. Proc. § 454, providing that the items of an ac-

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count need not be set forth in a pleading, but the party relying thereon must furnish the same to the other party on demand, includes a claim for work and materials for the construction of a vessel. Jensen v. Dorr, 116 Pac. 553, 555, 159 Cal. 742.

Storage accounts against whisky in bond are assessable as "accounts," under Ky. St. § 4058, requiring accounts to be listed for assessment; a taxable "account" being an existing enforceable demand not evidenced by a writing signed by the person to be charged, arising out of a contract, express or implied, or enforceable against property of value, and the fact that the account is not enforceable or matured when the tax is assessed being immaterial, if it has an existing value. Commonwealth v. Kentucky Distilleries & Warehouse Co., 136 S. W. 1032, 1039, 143 Ky. 314.

Manner of keeping

The law does not require an "account" to be kept in any particular language. Books of account, in order to be admissible in evidence, are not required to be in any particular language, or to conform to any particular system of bookkeeping, so long as they conform to the provisions of the statute regulating the reception of such books in evidence. Cather v. Damerell, 99 N. W. 35, 36, 4 Neb. (Unof.) 490.

An "account" by an agent of moneys coming into his hands belonging to the principal for disbursement, in order to satisfy the agent's duty to account, must consist of a detailed statement. Muir v. Kalamazoo Corset Co., 119 N. W. 589, 592, 155 Mich. 441.

An "account" has been defined as a written statement of pecuniary transactions; a detailed statement of demands in the nature of debit and credit between parties, arising out of contract or some fiduciary relation. 1 Am. & Eng. Ency. Law (2d Ed.) p. 434. Another text-book says an "account" is no more than a list of items, whether debits or credits; an exhibit of charges and credits growing out of mutual dealings presented in such form as to facilitate the determination of the balance due by simple calculation; that the term has no clearly defined legal meaning, but the primary idea is that of debit and credit. 1 Cyc. p. 362. The conclusion from these definitions is that giving the dates of various transactions is not indispensable to an account, though dates are usually affixed in stating a bill of debits and credits. Kneisley Lumber Co. v. Edward B. Stoddard Co., 88 S. W. 774, 779, 113 Mo. App. 306.

Number of items

The term "account" covers any item of indebtedness by contract, express or implied. Dees v. Self Bros., 51 South. 735, 736, 165 Ala. 225.

As paper containing statement

A monthly statement of account, showing charges, credits, and the balance due, constitutes an account," within the meaning of Burns' Ann. St. 1908, § 368. Wills v. Mooney-Mueller Drug Co. (Ind. App.) 97 N. E. 449, 450.

An "account" is a statement of the receipts and payments of an executor, administrator, or other trustee of the estate confided to him. Mersereau v. Bennett, 115 N. Y. Supp. 20, 22, 62 Misc. Rep. 356.

Claims not founded on contract

A claim for damages resulting from personal injuries is in no sense an "account" made up of items, within Comp. Laws 1897, § 2754, providing that every account against a village shall exhibit in detail all the items making up the amount claimed and the true date of each. Hunter v. Village of Ithaca, 97 N. W. 712, 713, 135 Mich. 281.

As merchants' accounts

"Accounts," "claims," and "debts" belonging to a mercantile business are not ordinarily used to embrace money in bank, but to designate the accounts, claims, and debts against customers. Wyatt v. Norris, 66 S. E. 1016, 1017, 66 W. Va. 667.

ACCOUNT (Action Of)

An action to recover the amount of certain assessments made by a casualty association against a member is not an "action on account" between the parties, authorizing a bill of particulars. Stone v. Hudson Val. Ry. Co., 95 N. Y. Supp. 220, 221, 47 Misc. Rep. 5.

A suit before a justice to recover usurious interest on three separate loans is not a "suit on account" in which, under Wilson's Rev. & Ann. St. 1903, § 4312, the correctness of the amount being duly verified and not denied on oath, the court could properly direct a verdict for plaintiff. American Nat. Bank of Tishomingo v. Roberts, 116 Pac. 774, 775, 29 Okl. 221.

ACCOUNT CURRENT

"An 'account current' is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is or can be ascertained, from which it follows that such an account comes under the terms of an open account in so far as it is running, unsettled, or unclosed." Where supplies of coal for a vessel were ordered and delivered at different times, a bill being rendered after each delivery, the several charges do not constitute a running account, but each constitutes a separate and distinct cause of action, and to entitle the seller to a lien for any item under the New York statute notice thereof must have been filed within 30 days after such item was furnished, or suit to enforce the lien must

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have been instituted within that time. The Golden Rod, 153 Fed. 171, 173, 82 C. C. A. 345 (quoting and adopting definition in 1 Cyc. p. 363).

ACCOUNT FOR

Laws 1893, p. 136, entitled "An act to compel custodians of public funds to 'account for' interest on such funds under their control," and providing that such custodians shall be entitled to retain 25 per cent. of the interest on such funds as extra compensation for their duties in making the funds bear interest, which they are required to do, is invalid in so far as such provision in favor of the custodians is concerned, on the ground that it is not expressed in the title. The words "to account for" in the title, do not necessarily mean to pay over. City of Chicago v. Wolf, 77 N. E. 414–416, 221 Ill. 130.

ACCOUNT FOR SERVICES

The phrase "account for services," as used in the mechanic's lien law (Sayles' Ann. Civ. St. 1897, art. 3339b), contemplates that the account to be filed should embrace some reference to the property on which labor and services were performed, and the amount due for the same. Merchants' & Planters' Bank v. Hollis, 84 S. W. 269, 270, 37 Tex. Civ. App. 479.

ACCOUNT OF

See On Account of.

ACCOUNT RENDERED

An account rendered is an "account stated" when its correctness is expressly or impliedly assented to. To constitute an "account stated," the debtor and creditor must mutually agree as to the allowance or disallowance of their respective claims, and there must be proof of their express or implied assent to the account rendered before one may not impeach it except for fraud or mistake. Carlisle v. Norris, 129 N. Y. Supp. 585, 587, 144 App. Div. 690.

An "account rendered" is one drawn up in form and delivered by the creditor to the debtor as an exhibition of the creditor's demand, and is not the less an account because it starts with a balance claimed, and does not consist of distinct items. Little v. McClain, 118 N. Y. Supp. 916, 918, 134 App. Div. 197.

ACCOUNT STATED

An "account stated" is, in effect, an admission of indebtedness. Stagg & Conrad v. St. Jean, 74 Pac. 740, 741, 29 Mont. 288.

An "account stated" is an acknowledgment of an existing condition of liability of the parties, from which the law implies a promise to pay the balance thus acknowledged to be due; the words "stated" and "settled," as applied to accounts, being sometimes used as synonymous. State v. Illinois Cent. R. Co., 92 N. E. 814, 837, 246 Ill. 188.

An "account stated" is an agreement between persons who have had previous transactions, fixing the amount due in respect thereto, and a promise to pay the balance. Borders v. Gay, 65 S. E. 788, 6 Ga. App. 734; Allen-West Commission Co. v. Hudgins, 86 S. W. 289, 291, 74 Ark. 468.

"Open account" is used in opposition to "account stated," wherein the account is closed by the assent to its correctness by the party charged. An "account stated" is one consisting of many items based on agreements as to each item as to the price and time of payment. Wroton Grain & Lumber Co. v. Mineola Box Mfg. Co. (Tex.) 95 S. W. 744, 745 (citing McCamant v. Batsell, 59 Tex. 363; Abb. Law Dict.; Whittlesey v. Spofford, 47 Tex. 13).

To constitute an "account stated," there must be proof that there was an account, that either the account in full or a summary thereof, or the balance due, or claimed to be due, was actually rendered or came into the possession or knowledge of the party sought to be charged, and that such party, either expressly or by long acquiescence therein, admitted the amount claimed to be due and expressly or impliedly promised to pay the same. Joshua Hendy Iron Works v. Brenneman, 185 Fed. 183, 188.

To make an "account stated," the indebtedness must refer to a subsisting debt, and there must be a mutual examination of the account, a balance struck, and an agreement that the balance is correct and will be paid; a party relying thereon being required to prove that the account was presented, and by mutual agreement it was accepted as correct, and that the debtor promised to pay the amount so stated. McAveigh v. Pelham Park R. Co., 120 N. Y. Supp. 102, 103; Doubleday, Page & Co. v. Shumaker, 113 N. Y. Supp. 83, 87, 60 Misc. Rep. 227; Charlesworth v. Whitlow, Lake & Co., 85 S. W. 423, 74 Ark. 277 (citing Anderson, Law Dict. pp. 16, 17).

It is not necessary that an acknowledgment of the correctness of an account, to constitute an account stated, should be either in writing or made in express words, since an "account stated" is an account rendered by one to another showing a balance due and an acknowledgment of such indebtedness by the debtor either expressly or by failure to deny the account within a reasonable time. Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co., 168 Fed. 770, 775; Alexander v. Scott, 129 S. W. 991, 994, 150 Mo. App. 213.

In an action upon the bond of a town treasurer to recover an amount shown as in his hands by reports made by him, interest is properly allowed upon the ground that such reports constituted an "account stated." Town of Cicero v. Grisko, 144 Ill. App. 564.

The presentation by a city officer of his accounts to an auditing board does not create an account stated between the city and

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the officer, since an "account stated" arises from an agreement of the parties, and an auditing board is without power to contract for the city. City of Syracuse v. Roscoe, 123 N. Y. Supp. 403, 410, 66 Misc. Rep. 317.

A stipulation that on a specified date there was an open account between plaintiff and defendant, showing credits to plaintiff for trucking done for defendant to the amount of $364.65, and that on that date defendant debited plaintiff's account with an equal sum, did not amount to an "account stated." Export Trucking Co. v. G. W. Sheldon & Co., 119 N. Y. Supp. 209, 210.

Acquiescence or silence as implying

An "account stated" is an account in writing examined and accepted by both parties, which acceptance need not be expressed, but may be implied from the circumstances. Leinbach v. Wolle, 61 Atl. 248, 211 Pa. 629 (quoting Story, Eq. Jur. § 526).

An "account stated" rests upon a promise to pay, expressed or implied, and where liability had been long and persistently denied on the ground that the indebtedness, whatever it was, had been satisfied by a subsequent transfer of property, the failure of the person charged to object to the correctness of a statement of account sent him, or to make any reply, does not imply a promise to pay, or convert the account into an "account stated." Columbia River Packing Co. v. Tallant, 133 Fed. 990, 994.

An "account stated" cannot be based on bills for goods sold, made out to defendant long after the sale of the goods to a third person, merely because defendant retained them without objection, especially where bills covering the same claims had been rendered to the purchaser at the time of the transactions. Brush & Stephens Co. v. Ross, 99 N. Y. Supp. 796, 797, 51 Misc. Rep. 44.

Where a customer of a broker protests against overcharges of interest whenever accounts are rendered to him, such "accounts rendered" will not be presumed to have become "accounts stated." Lowenstein v. Bache, 41 Pa. Super. Ct. 552, 556.

Where a repairer renders accounts for the work done and materials furnished, and the owner of the vessels accepts the accounts and uses them to obtain its pay from the government, to which they were chartered, upon assurances of correctness, and an examination of the accounts by the agents of the government follows, the "accounts" will be deemed "stated" between the parties, and a recovery for the full amount allowed without reduction for a commission claimed by the respondent. Morse Dry Dock & Repair Co. v. Munson S. S. Line, 155 Fed. 150, 160.

Balance

An "account stated" exists where an account is rendered by one person to another, showing a balance due from the one to the other, and the balance is acknowledged to be due by the person against whom it appears, or where persons who have previously transacted agree upon the balance due from one to the other. Johnson v. Gallatin Valley Milling Co., 98 Pac. 883, 884, 38 Mont. 83; Western Newspaper Union v. Segerstrom Piano Mfg. Co., 136 N. W. 752, 754, 118 Minn. 230.

Conclusiveness

An instrument which is the result of an agreement relating to past transactions, acknowledging an indebtedness and promising to pay it, is, in effect, an "account stated," on which an action may be based, and, in the absence of fraud, error, or mistake in its execution, is conclusive between the parties. Noyes v. Young, 79 Pac. 1063, 1065, 32 Mont. 226.

Mutual demands required

An "account stated" must be based upon previous dealings and transactions between the parties, and while it is not necessary, in order to support a count upon account stated, to show the nature of the original debt, or to prove the specific items constituting the account (Jacksonville, M. P. Ry. & Nav. Co. v. Warriner, 35 Fla. 197, 16 South. 898), it must appear that at the time of the accounting there had been previous transactions and dealings between the parties of and concerning which an account was stated. Daytona Bridge Co. v. Bond, 36 South. 445, 447, 47 Fla. 136.

An "account stated" is not created by the mere written demand by one person on another, who acknowledges his liability and agrees to pay the demand, which may have grown out of dealings with a third party, for which the party against which the demand is preferred may believe himself liable, but can be created only where the demand is based upon antecedent transactions between the parties, out of which the relation of debtor and creditor has arisen. Fisse v. Blahke, 105 S. W. 689, 692, 127 Mo. App. 422 (citing Missouri Pac. R. Co. v. B. F. Coombs & Bro. Commission Co., 71 Mo. App. 299; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Bambrick v. Simms, 14 S. W. 935, 102 Mo. 158; Stenton v. Jerome, 54 N. Y. 480; Austin v. Wilson, 11 N. Y. Supp. 565; Vanbebber v. Plunkett, 38 Pac. 707, 26 Or. 562, 27 L. R. A. 811).

An "account stated" will be sufficient if the accounts are all on one side, providing the amount is agreed to by the parties. W. F. Parker & Son v. Clemons, 68 Atl. 646, 647, 80 Vt. 521.

An "account stated" may consist of a single item. Stein v. Stein, 125 N. Y. Supp. 244, 245, 140 App. Div. 306.

To constitute an "account stated," it is not necessary that there should be mutual

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accounts; but if one party holds an account against the other showing the amount due, and the other party agrees to it and promises, either expressly or impliedly, to pay it, there is an account stated. Jasper Trust Co. v. Lampkin, 50 South. 337, 338, 162 Ala. 388, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 33.

New promise or obligation implied

An "account stated" involves a promise, express or implied, to pay a real indebtedness agreed upon as due. The consideration which places such promise on the plane of a contract is the agreement of one party, for the agreement of the other, that a certain amount, and that only, is due on the matters embraced in the settlement, wherefrom the law raises a new obligation on the part of the one against whom the balance stands, to pay that balance. Ivy Coal & Coke Co. v. Long, 36 South. 722, 724, 139 Ala. 535.

"An 'account stated' is an account balanced and rendered, with an assent to the balance, express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance." The cause of action upon an account stated is based entirely upon an agreement that the amount sought to be recovered was found to be due after a mutual adjustment of the accounts between the parties, and that there was then either an express or implied promise to pay it. The right to a recovery depends in no way upon the obligation originally created when the items of indebtedness arose, and for that reason it is unnecessary in such an action to set forth in the complaint or prove upon the trial the subject-matter of the original debt. Hall v. New York Brick & Paving Co., 88 N. Y. Supp. 582, 583, 95 App. Div. 371 (quoting Volkening v. De Graaf, 81 N. Y. 268); Fox v. Patachnikoff, 132 N. Y. Supp. 840, 841, 75 Misc. Rep. 113; Vernon v. English, 124 N. Y. Supp. 675, 676.

An "account stated" is an agreed balance of accounts, and implies an admission that the account is correct and that the balance is due, and it establishes prima facie the accuracy of the items without other proof, and is a new contract on which an action lies. Vance v. Supreme Lodge of Fraternal Brotherhood, 114 Pac. 83, 85, 15 Cal. App. 178.

Rendering as creating

An "account rendered" becomes an "account stated" only when it has been examined, and the balance admitted, without having been paid. McGraw v. Traders' Nat. Bank, 63 S. E. 398, 400, 64 W. Va. 509.

An "account rendered" becomes an "account stated" when its correctness is assented to, which assent may be either express or implied, and may exist when one party presents an account to another which the other retains without making objection within a reasonable time. Little v. McClain, 118 N. Y. S. 916, 919, 134 App. Div. 197. It then becomes subject to impeachment only for fraud or mistake. Gillett v. Chavez, 78 Pac. 68, 72, 12 N. M. 353.

Tort claim

An unliquidated claim for a tort is not provable as an "account stated" upon the theory that the defendant promised to settle the tort at a stipulated sum; the doctrine of account stated applying solely to mercantile transactions, where, if an account is rendered by one person to another, showing a balance due, the indebtedness thus expressed is acknowledged by the person against whom the balance appears. Pudas v. Mattola (Mich.) 138 N. W. 1052, 1053.

ACCOUNTANT

As officer, see Officer.

ACCOUNTING

See Party Accounting.

As special proceeding, see Special Proceeding.

ACCOUNTING OFFICER

The board of public works of the city of Indianapolis was an "accounting officer," for the purpose of allowing claims against the city for repairing streets, within Burns' Ann. St. 1908, § 2586, imposing a penalty on one who knowingly makes or presents for payment to the treasurer or other accounting officer of a city any false claim, etc., for the purpose of procuring its allowance out of the city treasury, though the city comptroller could, in its discretion, refuse to approve warrants issued by the board; it being necessary for the claimant to first present his claim to the board for allowance, so that the willful presentation to it of a false claim for work done in repairing streets, for the purpose of procuring its allowance against the city, was an offense within the statute. Brunaugh v. State, 90 N. E. 1019, 1021, 173 Ind. 483.

ACCOUNTS RECEIVABLE

"Accounts receivable" of a debtor are amounts owing him on open account. National Bank of Newport, N. Y., v. National Herkimer County Bank of Little Falls, 32 Sup. Ct. 633, 635, 225 U. S. 178, 56 L. Ed. 1042.

ACCRETION

To land

"Accretion" is the gradual and imperceptible accumulation of land on the bank of a water course or body of water. McCoy v. Paxton (Iowa) 135 N. W. 1091, 1092.

"'Accretion,' generally speaking, is the product of gradual and imperceptible deposit on the shore of earth, sand, or sediment, brought by contiguous waters, wheth-

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er resulting from natural or artificial causes, or both combined." Western Pac. Ry. Co. v. Southern Pac. Co., 151 Fed. 376, 396, 80 C. C. A. 606.

"Accretion" is the increase or growth of property by external accessions as by alluvium naturally added to land situated on the bank of a river, or on the seashore; "alluvium" is applied to the most recent sedimentary deposits, such as occur in the valleys of large rivers, an imperceptible deposit usually of mingled sand and mud resulting from the action of fluviatile currents; and the term "reliction" is applied to land made by the gradual and imperceptible withdrawal of the water by which it was covered. Wilson v. Watson, 138 S. W. 283, 284, 144 Ky. 352, Ann. Cas. 1913A, 774.

"Accretion" is the process of gradual and imperceptible addition to riparian land, made by water to which the land is contiguous, and the addition is imperceptible if its progress is not perceptible, although the fact of the addition may be perceptible after a long lapse of time. In re Broadway in Borough of the Bronx, 122 N. Y. Supp. 281, 283, 137 App. Div. 652.

An "accretion" to land is the imperceptible increase thereto on the bank of a river by alluvion, occasioned by the washing up of sand or earth, or by dereliction, as when the river shrinks back below the usual water mark; and land so formed belongs to the owner of the land immediately behind it. Fowler v. Wood, 85 Pac. 763, 775, 73 Kan. 511, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534 (quoting and adopting the definition in Lammers v. Nissen, 4 Neb. 245).

"Accretion" is the imperceptible accumulation of land by natural causes, and the owner of the property to which the addition is made becomes the owner of such ground, as, where land is bounded by a stream of water which changes its course gradually by alluvial formation, the owner of the land holds the same boundary, including the accumulated soil. Sun Dial Ranch v. May Land Co., 119 Pac. 758, 762, 61 Or. 205; Stockley v. Cissna, 104 S. W. 792, 798, 119 Tenn. 135 (citing Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 157, 49 L. Ed. 372; Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186).

"In order to constitute 'accretion,' it is not necessary that the formation be indiscernible by comparison at two distinct points of time. It is true that it is an addition to riparian land, gradually and imperceptibl made by the water to which the land is c tiguous; but the true test as to wh gradual and imperceptible, in the se the rule, is that, though the witness see from time to time that progress h made, they could not perceive it w process was going on." Under t land is "accretion," in the legal sen it may have been rapidly formed, as where 124 acres were washed from one side of a stream and joined to the land on the other side within less than three years, perceived by no one while the process was going on. Nix v. Pfeifer, 83 S. W. 951, 953, 73 Ark. 199 (quoting and adopting definition in Wallace v. Driver, 33 S. W. 641, 61 Ark. 429, 31 L. R. A. 317).

Where land bordering on a body of water is lost by "erosion," which is the gradual and imperceptible wearing away of the land by the natural action of the elements, the state succeeds to the ownership thereof; where the land is added by "accretion," which is such a slow and gradual deposit of articles that its progress cannot be measured though its results may be discerned from time to time, the new land formed belongs to the owner of the upland to which it attaches; but where lost by "avulsion," which is the sudden or violent action of the elements, the effect and extent of which is perceptible while it is in progress, the boundaries do not change. In re City of Buffalo, 99 N. E. 850, 852, 206 N. Y. 319.

Where the change in the channel of a river is made insensibly, by gradual and imperceptible washing away of one shore and formation in like manner upon the other shore it is said to be by erosion and "accretion." State v. Muncie Pulp Co., 104 S. W. 437, 451, 119 Tenn. 47.

"Accretion" is the gradual accumulation by alluvial formation, and, where a boundary river changes its course gradually in such manner, the boundary remains the varying center of the channel. James v. State, 72 S. E. 600, 602, 10 Ga. App. 13 (citing Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372).

In determining whether a riparian proprietor has title to land in controversy by accretion, the length of time in which it is in course of formation is not important; for, if it is formed by gradual, imperceptible deposit of alluvion, it is "accretion," but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not "accretion," and the boundary line remains as before the change of the channel. McCormack v. Miller, 144 S. W. 101, 102, 239 Mo. 463.

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ACCRUE

See Debt Accruing to Territory; Payable as It Accrues.

"Accrue," as defined by Webster, is something that accrues to or follows the property of another. When used as a verb, it is defined as meaning "to increase; to augment." It is given as synonymous with "result, proceed, arise, issue, follow, flow, and ensue; to be added; to be derived, be gained, accumulate." Black defines the word "accruing" as meaning "inchoate; in process of maturing; that which may or will at a future time ripen into a vested right, an available demand, or an existing cause of action." Ercanbrack v. Faris, 79 Pac. 817, 818, 10 Idaho, 584 (citing 1 Cyc. p. 503; 1 Words and Phrases, p. 101).

"Accrue" is not synonymous with the verb "contract," but is defined by Webster as "to increase; to augment; to come to by way of increase; to arise or spring as a growth or result; to be added as increase, profit, or damage, especially as the produce of money lent." Leman v. Chipman, 117 N. W. 885, 887, 82 Neb. 392.

Where the idea of planting a crop on a plantation under administration is conceived by the administrator long after the harvest of the crop growing when decedent died, and the crop is planted and harvested without authority from the court, the crop is not anything that "accrues" to the succession, within Rev. Civ. Code, art. 873. Maxwell-Yerger Co. v. Rogan, 51 South. 48, 50, 125 La. 1.

As arise or become enforceable

"A cause of action 'accrues' from the time the right to sue for the breach attaches." Walker v. Bowman, 111 Pac. 319, 320, 27 Okl. 172, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839 (quoting 1 Words and Phrases, p. 101).

The "accrual of a cause" of action, within the statute of limitations, means the right to sue, and when one person may sue another a cause of action has "accrued." Port Arthur Rice Milling Co. v. Beaumont Rice Mills (Tex.) 143 S. W. 926, 928.

A cause of action does not "accrue" until the party owning it is entitled to begin and prosecute an action thereon. It accrues at the moment when he has a legal right to sue on it, and no earlier. Thus where a check drawn September 17, 1896, was payable 90 days after date, the drawer had the whole of December 16, 1896, in which to pay the same, and limitations did not begin to run until the next day, and no suit could be brought thereon until such next day. Jocque v. McRae, 105 N. W. 874, 142 Mich. 370.

Rev. St. 1895, art. 1194, subd. 25, provides that a foreign corporation may be sued in an county where the cause of action "accrued." A contract between plaintiff and a foreign corporation was made in a certain county, and by its terms the corporation agreed to furnish machines to plaintiff, which he was to sell on commission in such county, and the machines were to be ordered and the freight on them paid by the plaintiff. Held, that an action to recover commissions was properly brought in such county. The word "accrued," as used in the statute, can have but one meaning, and that is "arose." Bay City Iron Works v. Reeves & Co., 95 S. W. 739, 740, 43 Tex. Civ. App. 254.

Code, § 3447, authorizes actions on notes within 10 years after the causes of action "accrue," and section 3452 provides that, when a cause of action has been barred by the laws of any country where the defendant has previously resided, such bar shall be the same in Iowa as if it had arisen under the provisions of the chapter, except that the sections shall not apply to a cause of action "arising within this state." Held, that a cause of action "accrues" when by maturity of the note and default in payment the holder may sue thereon, but it "arises" and has its origin in the transaction which ...ght the obligation into existence, the ...ords not being synonymous, so that M., a resident of Michigan, executed ...which he sent to his father in Iowa ...n receipt of which the father mail... draft for the face of the note as a ...ontract was made in Iowa, and ...action "arose" there within sec... ...abran v. Moran, 123 N. W. 202, ..., 451, 30 L. R. A. (N. S.) 898.

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A cause of action on a contract for the payment of money "accrues," within Code Civ. Proc. § 21, at the time of the maturity of the obligation, on default in payment and in the state and county where the obligor at the time resides and may be summoned. Hays Land & Investment Co. v. Bassett, 116 Pac. 475, 476, 477, 85 Kan. 48.

Under the provision of Interstate Commerce Act that claims for the recovery of damages shall be filed with the Interstate Commerce Commission "within two years from the time the cause of action 'accrues' and not after," as applied to the claim of a shipper to recover damages on the ground that the published and filed rate of a railroad company under which he made a shipment was unjust and unreasonable, the cause of action "accrued" when the shipment terminated and complainant became liable for the freight, and not when he actually paid it. Arkansas Fertilizer Co. v. United States, 193 Fed. 667, 671.

Where a fire policy, stipulating that insurer should be subrogated to the extent of any payment to all right of recovery by insured for loss resulting from fire caused by the act of another, was issued prior to Sess. Laws 1903, p. 404, providing that the liability imposed on railroad companies for damages by fire caused by the operation of their roads shall not pass by assignment or subrogation to any insurance company issuing a policy on the property, but not affecting any right which has "accrued," the mere fact that a fire occurred after the passage of the act did not prevent the insurance company paying a loss from insisting on its right to be subrogated to the rights of the owner against the railroad company causing the fire; the right accruing by virtue of the contract, and the word "accrued" meaning any right that has arisen. British American Assur. Co. v. Colorado & S. R. Co., 125 Pac. 508, 512, 52 Colo. 589, 41 L. R. A. (N. S.) 1202.

As become due and payable

Under the statute requiring a mechanic's lien to be filed within four months after the indebtedness accrued, an indebtedness "accrued" when the work was completed. Rodefeld v. Winklemann, 136 S. W. 4, 5, 156 Mo. App. 130.

Sayles' Ann. Civ. St. 1897, art. 3339c, providing that all wages, if service is by agreement performed by the day or week, shall be due and payable weekly, or if by the month shall be due and payable monthly, did not prevent day laborers from contracting that their wages should be due and payable the 10th of the succeeding month, so that, such contract having been made, the filing of a claim of lien therefor within 30 days after the due date was sufficient to fix the lien, within article 3339b, requiring such filing within 30 days after the indebtedness "shall have accrued." Sparks v. Crescent Lumber Co., 89 S. W. 423, 424, 40 Tex. Civ. App. 222.

An indebtedness for material "accrues," within Rev. St. 1899, § 4207, requiring an original contractor to file his lien account within six months after the indebtedness shall have accrued, when it becomes completed by the materialman furnishing the last material under the contract. E. R. Darlington Lumber Co. v. James T. Smith Bldg. Co., 114 S. W. 77, 78, 134 Mo. App. 316.

The word "accrued," as used in the mechanic's lien law, providing that a lien must be filed within a specified time after the indebtedness shall have accrued, refers to the time when the work is finished, or, in the case of a running account, the time when the last item is finished. Big Horn Lumber Co. v. Davis, 84 Pac. 900, 904, 14 Wyo. 455, 7 Ann. Cas. 940.

Within Civ. Code 1901, par. 989, requiring claims against counties to be presented within six months after the last item of the account accrues, the last item of the account "accrues" at the time such last item of service is performed, and the six months limitation runs from that time, and not from the time when a demand is made for allowance of such account. Cochise County v. Wilcox (Ariz.) 127 Pac. 758, 760.

As increase

The word "accrue" means "to grow," and in that sense rent accrues from day to day. Carley v. Liberty Hat Mfg. Co., 79 Atl. 447, 449, 81 N. J. Law, 502, 33 L. R. A. (N. S.) 545.

In a will which provides that on the death of any of the testatrix's children without leaving issue the income of a child so dying was to be divided equally among the surviving children of the testatrix, the issue of any of the children who might then be dead to take between them the part which their parents would have taken if living, "such accruing shares to be regarded in all respects as parts of their original shares, both as to the enjoyment and transmissions thereof," the word "accrue" means to come by way of increase; to be added as increase. In re Mifflin's Estate, 81 Atl. 129, 131, 232 Pa. 25.

ACCRUED RENT

Where a lease required payment of rent on the 1st of the month in advance, and also provided that in case of fire the landlord should on notice forthwith repair, unless the damage was such that the landlord should decide to rebuild, in which case the term should cease, and the "accrued rent" be paid up to the time of the fire, and, the premises having been destroyed on the 10th of the month, the landlord decided to rebuild, the lessee could not recover from the landlord the rent paid in advance for the

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part of the month after the fire. Brunswick-Balke-Collender Co. of New York v. Wallace, 119 N. Y. Supp. 287, 288, 65 Misc. Rep. 27.

ACCRUED RIGHT

Where judgment was obtained and docketed for personal property taxes pursuant to the provisions of sections 57 and 58, c. 132, Laws 1890, and became a lien upon the property in question before the Revised Codes of 1895 took effect, such lien was a "right accrued," which by the express provisions of the statute was continued, notwithstanding the repeal of the law under which the lien was acquired. Hagler v. Kelly, 103 N. W. 629, 631, 14 N. D. 218 (overruling Gull River Lumber Co. v. Lee, 73 N. W. 430, 7 N. D. 135).

The right to redeem from a tax sale made under chapter 132, Laws 1890, was a "right accrued," and was perpetuated as it existed under that act, including the provisions for terminating and exercising the right, by the saving provisions contained in section 2686, Rev. Codes 1895, notwithstanding the repeal of the 1890 revenue laws by the Revised Codes of 1895. Blakemore v. Cooper, 106 N. W. 566, 571, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574.

ACCRUING TO MY ESTATE

Testamentary disposition of property "accruing to my estate" covers property added to the estate, such as a plantation purchased by the executor. Gully v. Neville (Miss.) 55 So. 289, 292.

ACCUMULATE—ACCUMULATION

Civ. Code, § 169, declares that the "accumulations" of a wife while she is living separate from her husband are her separate property. Held, that property of the husband by him put in possession of the wife and acquired by her by adverse possession during the marriage while living separate from her husband is an accumulation, and is not subject to execution for the husband's debts, accumulations of property generally meaning any property which a person acquires and retains without regard to the means by which it is obtained. Union Oil Co. v. Stewart, 110 Pac. 313, 316, 158 Cal. 149, Ann. Cas. 1912A, 567.

Of estates or funds

Where a will provided that shares of a corporation should be held in trust and the income paid to the beneficiaries, and the corporation went out of business, the carrying of that part of the price of the sale of the assets represented by the betterments and good will of the company to the corpus of the estate did not violate the provisions of Laws 1897, c. 417, § 4, against the "accumulation of income." In re Stevens, 95 N. Y. Supp. 297, 315, 46 Misc. Rep. 623.

Directions to testamentary trustees to transfer stock to remaindermen at the end of the trust period, with any "accumulations" thereon, do not operate and cannot be construed as directions to "accumulate." "The words may be considered as indicating that the company was expected to continue its policy of using from its earnings and betterments, and increasing its business capacity, and retain a portion of its surplus earnings to meet business emergencies. What the testatrix intended was that such 'accumulations and earnings' should pass to the remaindermen upon a transfer of the stock at the end of the trust period." In re Stevens, 95 N. Y. Supp. 297, 315, 46 Misc. Rep. 623.

In insurance

Defendant life insurance company having issued a policy to H. for the benefit of his wife while the policy was in force, in 1867 issued to the wife a dividend certificate, reciting that she was entitled to $12 in the accumulations of the insurance company, subject to its rights under the charter, and redeemable at the discretion of the trustees. Held, that the word "accumulation," as used in the certificate, implies a "rolling up" or adding of interest or income to the principal, and that the certificate was not necessarily a mere script dividend to be rebated on premium when called for, and not to draw interest. Hazelton v. New York Life Ins. Co., 124 N. W. 1014, 1016, 141 Wis. 639.

ACCUMULATED DAMAGES

A will provided for the payment of part or the whole of the accumulation of a trust to the beneficiary, in the discretion of the trustees. In other provisions of the will, the testator treated both the principal and income of this trust as a single fund, for purposes of investment and distribution upon the death of the beneficiary. Held, that by the use of the word "accumulation" the testator did not intend to limit the discretionary payments to the beneficiary to payments out of the income, but that, in their discretion, the trustees might make payments of principal. Shattuck v. Stickney, 97 N. E. 774, 776, 211 Mass. 327.

"Accumulated damages," also denominated "enhanced damages," are engrafted on a common-law recovery by the statute in the nature of a penalty, and statutes of this sort, which merely accumulate the measure of recovery in actions otherwise primarily existing at common law, are not regarded as penal in the sense that the rule of strict construction applies to them. Casey v. St. Louis Transit Co., 91 S. W. 419, 425, 116 Mo. App. 235.

ACCURATE

ACCURATE CROSS-SECTION

A contract for the excavation of a bulkhead, the inner line of which was about 9 feet inshore from an established bulkhead line, and the base of which was to be 15

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feet below mean low-water mark with allowance to the contractor for whatever he might excavate within an extra foot in each direction, specified that no payment should be made for excavation beyond those limits, "except where known loose rock is shown in the cross-sections above the top grade of the indicated rock, at a line ten feet westerly of and parallel to the bulkhead line, allowance will be made and paid for to a positive line which is forty-five degrees to the horizontal," and specified, as to "typical sections," that they were given as a guide only and to show approximately what the contractor might expect to encounter in the prosecution of the "work," and represented the "typical sections" as information upon (1) "the existing rock bottom which was the top of the loose rock; (2) the corresponding theoretical sections to be obtained, meaning the so-called nine-foot and fifteen-foot lines; and (3) the corresponding limiting lines to which payment will be made when it is impossible to produce the theoretical sections; and that all material was to be measured by comparison of 'accurate cross-sections.'" The points at which the 45-degrees lines should commence could not be ascertained before the work commenced. Held, that the "corresponding theoretical sections" meant the 10-foot and 16-foot lines; that the "typical" cross-sections could not be regarded as the "accurate cross-sections"; that "work" had a double meaning, and, for the purpose of fixing the beginning points of the 45-degree lines, did not begin until the blasting began, when the junctions between the loose rock and the ledge rock became "known," so as to be "indicated" upon the cross-sections made by the city after the work was completed; and that work to such junctions was necessitated and contemplated by the contract. R. G. Packard Co. v. City of New York, 137 N. Y. Supp. 9, 13, 151 App. Div. 941.

ACCURATE RECORDS

The requirement of an Insurance policy that the insured shall keep "accurate records" will not be construed to accomplish a forfeiture for mere slight accidental omissions, or because the books kept do not come up to the highest standard of perfect or accurate book keeping. Ætna Ins. Co. v. Johnson, 56 S. E. 643, 645, 127 Ga. 491, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461 (citing Everett-Ridley-Ragan Co. v. Traders' Ins. Co., 48 S. E. 918, 121 Ga. 228, 104 Am. St. Rep. 99; Liverpool & London & Globe Ins. Co. v. Ellington, 21 S. E. 1006, 94 Ga. 785; Pelican Ins. Co. Co. v. Wilkerson, 13 S. W. 1103, 53 Ark. 353; Western Assur. Co. v. Altheimer Bros., 25 S. W. 1067, 58 Ark. 565).

ACCURATELY RUN

The words "accurately run," as used in an act providing for a commission to appoint a surveyor to run and mark the boundary line between certain counties, requires the surveyor to accurately run and thoroughly mark the line, are directory only, and a line so surveyed and marked constitutes the legal boundary between the county, though it did not in fact accurately coincide with the fortieth parallel of north latitude. Trinity County v. Mendocino County, 90 Pac. 685, 688, 151 Cal. 279.

ACCUSE—ACCUSED—ACCUSATION

Convicted as including accusation, see Convicted—Conviction.

Nature of accusation, see Nature.

The term "accusation," as used in reference to trials in courts having jurisdiction of misdemeanor cases, is but the equivalent of an information at common law. Wright v. Davis, 48 S. E. 170, 173, 120 Ga. 670 (quoting Gordon v. State, 29 S. E. 446, 102 Ga. 679).

There is a marked difference between an "accusation" in a city court and an "indictment," which would furnish reasons for allowing an accusation to be amended, while an indictment cannot be except by the grand jury itself. The indictment is found upon the oaths of a grand jury, whereas an accusation in a city or a county court is based upon the affidavit of the prosecutor. An "accusation" is the equivalent of the common-law "information." Goldsmith v. State, 58 S. E. 486, 487, 2 Ga. App. 283.

Under Pen. Code 1895, art. 25, providing that the words "accused" and "defendant" therein refer to one who in a legal manner is held to answer for an offense at any stage of the proceedings, or against whom complaint in a lawful manner is made, charging an offense including all proceedings from the order of arrest to final execution, a defendant is not "accused" until charged with an offense. Brown v. State, 118 S. W. 139, 144, 55 Tex. Cr. R. 572.

Under the statute providing that, in cases where the punishment is necessarily at hard labor, the number of peremptory challenges shall be 12 for the "accused" and 6 for the state, the word "accused" is to be taken as intended to refer to one or more than one, so that 6 peremptory challenges are allowable to the state and 12 to each of the defendants, where there are several on trial. State v. Caron, 42 South. 960, 962, 118 La. 349.

To "accuse" is to charge with, or to declare to have committed, a crime or offense. Such charge may be made judicially or by public process. The filing of an affidavit before an officer having jurisdiction to receive it, and to issue process upon it, is a mode of accusation of the highest character. An information charging, in effect, that the defendants conspired together to commit the crime of blackmailing "by filing an affi-

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davit" before a magistrate accusing a certain person of a certain crime punishable by law, with intent to extort money from him, is good under a statute providing that whoever accuses any person of any crime punishable by law with intent to extort money from such person is guilty of blackmailing. Utterback v. State, 55 N. E. 420, 421, 153 Ind. 548 (citing Stand. Dict.).

ACETIC ACID

The term "acetic acid," in paragraph 1, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151, is not limited to the article scientifically known by that name, but is intended as a general commercial designation of a class of articles which are commercially so known, and includes the substance known as "acetic acid anhydrid." George Lueders & Co. v. United States, 140 Fed. 970.

ACID

See Boracic Acid; Bromofluorescic Acid; Carbonic Acid; Phtalic Acid; Stearic Acid; Tannin or Tannic Acid.

So-called red oil or oleic acid, which is not used otherwise than as soap stock, is held not to be within the provision in Tariff Act July 24, 1897, c. 11, § 2, of oils commonly used in soap making, fit only for such uses, but to be dutiable as an "acid not specially provided for," under section 1, Schedule A. par. 1. Edward Hill's Sons & Co. v. United States, 143 Fed. 361, 362.

ACKNOWLEDGE — ACKNOWLEDGMENT

See Public Acknowledgment; Signed and Acknowledged.

"'Acknowledge' means to own or admit the knowledge of; to recognize as a fact or truth; * * * to own or recognize in particular character or relationship. (Webster, Dict.) As the Psalmist said: 'I acknowledge my transgressions.' Job in his sorrow said: 'In all thy ways acknowledge Him.' Thus a man acknowledges a secret marriage; he admits it. One who has done wrong may 'acknowledge' his fault, and thus confess his error." Townsend v. Meneley, 74 N. E. 274, 275, 37 Ind. App. 127 (citing City of Evansville v. Summers, 9 N. E. 81, 108 Ind. 189; Bishop v. State ex rel. Griner, 48 N. E. 1038, 149 Ind. 223, 39 L. R. A. 278, 63 Am. St. Rep. 270).

As judicial act

See Judicial Act.

Of debt

See, also, New Promise.

Payment is regarded as an "acknowledgment" of an existing obligation, and from such acknowledgment a promise to pay may be implied. Whether payment be a part of the principal or the interest, it is an "acknowledgment" of an existing indebtedness, from which the promise to pay will be implied. A payment of interest on a note constitutes a sufficient "acknowledgment" to pay to toll the statute of limitations, and where a sufficient payment on a note secured by a mortgage was made to take the note out of the statute of limitations the payment was effective to prevent the mortgage securing the debt from being barred. MacMillan v. Clements, 70 N. E. 997, 998, 33 Ind. App. 120.

A recognition of the debt and an admission that the writer is the debtor of the person addressed is a sufficient "acknowledgment" of the debt to take the case out of the statute of limitations. Willis v. Wileman, 102 N. Y. Supp. 1004, 1005, 53 Misc. Rep. 462.

A statement by a debtor that to settle a claim of the creditor he will turn over to the creditor a claim, provided a receipt in full is given, is simply an offer to compromise, and is not such an express "acknowledgment of an existing debt" as will take the case out of the statute of limitations. Marcum's Adm'x v. Terry, 142 S. W. 209, 146 Ky. 145, 37 L. R. A. (N. S.) 885.

A letter written by an agent to his principal, stating, "I have used the money and I want to turn out my property to make you all right," constitutes a sufficient "acknowledgment" by the agent of the existence of a debt in favor of the principal to satisfy Comp. Laws 1897, § 9740, requiring acknowledgments of debts to be in writing in order to postpone the running of limitations. Jewell v. Jewell's Estate, 102 N. W. 1059, 1063, 139 Mich. 578.

A claim filed against decedent's estate, consisting of a statement of expenditures made by defendant for decedent, and a balance due after deducting a sum in favor of decedent, is not an "acknowledgment of indebtedness" to decedent, reviving a barred cause of action. Visher v. Wilbur, 90 Pac. 1065, 1067, 5 Cal. App. 562.

The inclusion by a bankrupt in his schedules of a debt barred by limitations constitutes an "acknowledgment of the debt" in writing, taking the claim out of the statute of limitations, under Code Civ. Proc. N. Y. § 395, as between the bankrupt and the creditor, precluding the bankrupt from subsequently objecting to allowance of the claim, no other creditor being interested; but the claim is entitled to share in the distribution only in case the estate proves sufficient to pay in full all the legitimate expenses of administration, and all the other proved and allowed claims. In re Currier, 192 Fed. 695, 696.

Where limitations have run as against an indorser of a note, his liability is not

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revived by a letter to the holder of the note, stating that he is unable to pay the note, but offering to buy it for some small sum that he can afford to pay, such offer is not an "acknowledgment" of an existing debt. Connecticut Trust & Safe Deposit Co. v. Wead, 65 N. E. 261, 172 N. Y. 497, 92 Am. St. Rep. 756.

Under Rev. Codes, § 4078, providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the statute of limitations unless in writing, signed by the person to be charged thereby, a clear and definite acknowledgment of the existence of a contract and liability which has not at the time been barred by limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt, and fixes a new date from which the statute begins to run. Where one owed another a note and mortgage overdue but not barred by limitations, and wrote the other telling him of a prospective sale of mining property he had in view, saying, "Now, if I can make this deal, will try and get enough money down to liquidate the mortgage you hold against the property," the letter constituted an "acknowledgment of a continuing contract" within the statute and set a new date from which limitations began to run, the quoted words constituting a condition that the debtor proposed to place upon the sale of the property and demand from the purchaser, rather than a condition as to payment of the debt to the creditor, and did not negative an implied promise to pay at some time even if the sale should not be made. Dern v. Olsen, 110 Pac. 164, 167, 18 Idaho, 358, 21 Ann. Cas. 1912A, 1.

A letter from a debtor to creditor stating that, as soon as he could, the former would arrange a "proposition about this insurance," written in response to the creditor's letter reminding him that he had promised to insure his life for the creditor's benefit, a letter stating that the debtor was anxious to relieve himself of his indebtedness, and would "strive to do his best as early as possible," but that his prospects of making money were not "rosy," etc., are insufficient to constitute such an acknowledgment under Code Civ. Proc. § 395, as takes the debts out of the statute of limitations. Zinn' v. Stamm, 136 N. Y. Supp. 737, 741, 152 App. Div. 76.

Of deed or mortgage

Rapalje defines an "acknowledgment" to be the act of one by whom a deed has been executed, in declaring before a competent court or officer that it is his act or deed. De Wolfskill v. Smith, 89 Pac. 1001, 1004, 5 Cal. App. 175.

"'Acknowledgment' is a proceeding provided by statute whereby a person who has executed an instrument may, by going before a competent officer or court and declaring it to be his act and deed, entitle it to be recorded or received in evidence without further proof of execution, or both." When an "acknowledgment" is prescribed by statute, without declaring of what it shall consist, it is meant that the person executing the instrument must appear before a duly authorized officer and state that he executed it. Under Act Feb. 5, 1841, providing for the registration of deeds upon the "acknowledgment" of the party or parties before the chief justice of the county, a certificate attached to a deed, which merely shows that the officer saw the grantor in a deed sign it, is not an "acknowledgment" entitling the deed to record. Punchard v. Masterson, 101 S. W. 204, 205, 100 Tex. 479 (quoting and adopting the definition in 1 Cyc. p. 512).

Sayles' Ann. Civ. St. 1897, art. 2312, provides for the introduction of every instrument which is permitted or required to be recorded, and which has been recorded after being "'acknowledged in the manner provided by the laws' in force at the time of its registration." Held, that the certificate of acknowledgment itself must be formal and by an officer having authority. Bledsoe v. Haney, 122 S. W. 455, 457, 57 Tex. Civ. App. 285.

Of relation of parent and child

Tax Law (Laws 1896, p. 869, c. 908) § 221, exempts from the transfer tax property passing to a child to whom a decedent for not less than 10 years prior to such transfer stood in the "mutually acknowledged relation of a parent," provided such relationship began at or before the child's fifteenth birthday, and was continuous for 10 years thereafter. Legatees were nieces of testator, and had lived with him and his wife for a longer period than that required by the statute, had married from his house upon his consent, which was asked to the marriages, and had been supported and educated at his expense. Their mother was dead, but their father was still living, and, while their relationship with their uncle and aunt was affectionate, yet it was never characterized nor acknowledged as that of parent and child. The legatees always referred to testator and his wife as "uncle" and "aunt," and the latter referred to the former as nieces, and testator, in his will, designated the legatees as nieces, and not as children. Held, that there was no "mutually acknowledged relation of parent," such as to exempt the transfer from taxation. In re Deutsch's Estate, 95 N. Y. Supp. 65, 68, 107 App. Div. 192.

"Acknowledgment" by a putative father of his illegitimate offspring may be established by evidence the same as any other fact. Townsend v. Meneley, 74 N. E. 274, 275, 37 Ind. App. 127.

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ACQUAINTED

See Made Acquainted.

ACQUAINTANCE

See Intimate Acquaintance.

ACQUIESCE—ACQUIESCENCE

The term "acquiescence" may be defined as "quiescence" under such circumstances as that assent may be reasonably inferred therefrom. Grafton v. Patrick, 58 S. E. 1, 2, 77 S. C. 420, 122 Am. St. Rep. 586.

A charge that, if the jury believed that a boundary line, the location of which was involved in an action, was in dispute, and that the adjoining owners caused it to be established and acquiesced in the line as established, the plaintiff would be deemed the owner of all lands up to such line was a correct statement of the law; the word "acquiescence" not necessarily meaning only momentary acquiescence. Cooper v. Slaughter (Ala.) 57 South. 477, 481.

Where a traveling salesman took an order for his principals for flour, to be filled by shipment of one car each month for five months from date of order, and the sellers wrote the buyers on receipt of the order, thanking them for same and complaining of the length of time allowed to move the flour, but saying nothing as to a limitation on the salesman's authority, and stating that they would be willing to allow 45 days in which to order out the goods, but could not afford to have it understood that the buyers could have five months in which to order the goods out, the mere fact of the buyers' ordering the flour shipped after the receipt of the sellers' letter was not an "acquiescence" in the new terms suggested by the sellers. J. B. Brennan & Son v. Dansby & Dansby, 95 S. W. 700, 702, 43 Tex. Civ. App. 7.

As approval

In an action for divorce, the court found that plaintiff had persistently refused to have reasonable sexual intercourse with defendant, but that defendant at all times acquiesced in such refusal. Held, that the term "acquiesced" as so used did not mean approval, but rather "submission." Mayr v. Mayr, 118 Pac. 546, 549, 161 Cal. 134.

As assent or consent

The term "acquiescence" means "quiescence" under such circumstances that assent may be reasonably inferred therefrom. Grafton v. Patrick, 58 S. E. 1, 2, 77 S. C. 420, 122 Am. St. Rep. 586. "To rest apparently satisfied without objection; a silent or passive assent." Farr v. Semmler, 123 N. W. 835, 838, 24 S. D. 290.

"Acquiescence" is tantamount to assent, and may even cut off a defense. Edwards v. Cooper, 79 N. E. 1047, 1054, 168 Ind. 54.

The word "consent" is sometimes treated as synonymous with "assent," "acquiescence" and "concurrence." Bartle v. Bartle, 112 N. W. 471, 473, 132 Wis. 392 (citing 2 Words and Phrases, p. 1349).

The "acquiescence" by complainant in defendant's assertion of water rights, necessary to bar him from the discretionary remedy of injunction, must be such as proves his assent to the acts of the defendant and to the injuries to himself which have flowed from those acts. Verdugo Canon Water Co. v. Verdugo, 93 Pac. 1029, 1030, 152 Cal. 655 (citing Lux v. Haggin, 4 Pac. 919, 10 Pac. 674, 69 Cal. 271).

To establish a right to use an irrigation ditch by prescription, the right must have been asserted with the knowledge and acquiescence of the landowner, but "acquiescence," which commonly means an affirmative consent, in addition to knowledge of the hostile claim, need not be shown independently of knowledge; and, if the owner has knowledge which the law imputed to him, and takes no steps to prevent the adverse claimant from his continuous enjoyment of the right, he is deemed to have acquiesced in such use. Silva v. Hawn, 102 Pac. 952, 955, 10 Cal. App. 544.

Delay

By "acquiescence" complainant lost her right to enjoin defendant from running a bottling factory in violation of a covenant restricting the use of land, where for several years she did not seek to enforce it, but did not lose the right to enjoin an extension of the business. Leaver v. Gorman, 67 Atl. 111, 113, 73 N. J. Eq. 129.

Where defendant vendee returned to plaintiff vendor part of the goods purchased together with a check, informing plaintiff that such check was intended to balance the account in full, and plaintiff accepted the check, giving defendant all other credits claimed, except that for the goods returned, which were of a fixed value, but failed to inform defendant of its refusal to take back the returned goods until more than a month thereafter, such delay amounted to an "acquiescence" in the return of the goods, precluding recovery therefor. Chamberlain Medicine Co. v. Elk Drug Co., 99 N. Y. Supp. 850, 807, 114 App. Div. 255.

As estoppel

It may be stated as a general rule that, if a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it to believe that he consents to its being committed, he cannot afterwards be heard to complain of the act. This, it has been said, is the proper sense of the term "acquies-

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cence," which in that sense may be defined as "quiescence," under such circumstances as that assent may be reasonably inferred from, and is no more than an instance of the law of estoppel by words or conduct. After condition broken, a mortgagee is not estopped to enforce his mortgage on a horse against one who had traded for the horse from one other than the mortgagee, without notice of the mortgage, because he had seen the horse in possession of such other, and heard the horse had been traded several times, and had taken no steps to give notice of his mortgage other than to record it. Grafton v. Patrick, 58 S. E. 1, 2, 77 S. C. 420, 122 Am. St. Rep. 586.

When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Wagg v. Herbert, 92 Pac. 250, 266, 19 Okl. 525.

"Acquiescence" in the wrongful act of another, such as will operate to preclude equitable relief, must be not only with knowledge of the wrongful acts, but also of their injurious consequences, and the same must last for such an unreasonable length of time as to make it inequitable to enforce the remedies of equity against the wrongdoer." Royce v. Carpenter, 66 Atl. 888, 892, 80 Vt. 37.

Knowledge implied

"'Acquiescence' and 'waiver' are always questions of fact; there can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough; there must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. 'Acquiescence' exists where a person, who knows that he is entitled to impeach a transaction or enforce a right, neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer he has waived or abandoned his right." Where neither plaintiff nor those under whom she claimed had any knowledge that defendant's building extended onto plaintiff's lot until just prior to the commencement of plaintiff's action to recover the strip in controversy, complainant could not be held to have lost her right by acquiescence in defendant's occupation. Connell v. Clifford, 88 Pac. 850, 851, 39 Colo. 121 (quoting and adopting definitions in Pence v. Langdon, 99 U. S. 578, 581, 25 L. Ed. 420; Scott v. Jackson, 26 Pac. 898, 899, 89 Cal. 262, citing Brown v. Cockerell, 33 Ala. 38, 47); Dague v. Grand Lodge, Brotherhood of Railroad Trainmen, 73 Atl. 735, 738, 111 Md. 95.

Ratification distinguished

"Ratification" and "acquiescence" are not synonymous. The latter term is but evidence to be considered in determining the existence of the former. It is only when silence or acquiescence becomes the basis or authority on which another parts with something valuable or incurs a liability that the doctrine applies. The doctrine is that in such case the party is estopped to assert the truth because its assertion would work a fraud on him whose conduct has been influenced thereby. To "acquiesce" is to forbear opposition or complaint, while to "ratify" is to make valid or to confirm. We may acquiesce in an act without approving it. Austin v. Jones, 41 South. 408, 411, 148 Ala. 659.

"Acquiescence" of a principal in the unauthorized acts of his agent implies ratification. Technically, perhaps, there is this distinction between ratification by silence and estoppel arising therefrom. Ratification acts by conferring the necessary power on the agent, while estoppel acts by preventing the denial of the fact that the agent was originally clothed with the necessary power; but, by whatever name it may be called, its effect is the same. Hall v. New York, N. H. & H. R. Co., 65 Atl. 278, 280, 27 R. I. 525.

ACQUIESCENCE IN JUDGMENT

On judgment for plaintiff, defendant did not, by paying the costs, "acquiesce in the judgment," within Code Prac. art. 567, providing that one against whom judgment has been rendered cannot appeal if he has acquiesced in the same by executing it voluntarily, where defendant did not intend to acquiesce in the judgment, and paid the costs under belief that it would not affect his right to appeal. Sims v. Jeter, 55 South. 877, 129 La. 262.

ACQUIESCENCE WITH KNOWLEDGE

"Acquiescence with knowledge" is not synonymous with "contributory negligence." An averment in a petition that the injury occurred without fault of the plaintiff is insufficient. Hesse v. Columbus, S. & H. R. Co., 50 N. E. 354, 355, 58 Ohio St. 167, 169.

ACQUIRE

The word "acquire," within a proposition to issue bonds to acquire electric works, has a broad meaning, including both purchase and construction. Clark v. City of Los Angeles, 116 Pac. 722, 729, 160 Cal. 30.

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The word "acquire," as used in a statute providing that where a person transacts business as a trader without disclosing the name of his principal all the property, stock, money, and choses in action used or acquired in such business shall be liable for his debts, means obtain, procure, to get as one's own; and the proceeds of a policy of insurance on goods of the trader for an undisclosed principal is obtained and procured in such business and is applicable to the payment of his debts. Meridian Land & Industrial Co. v. Ormond, 35 South. 179, 180, 82 Miss. 758.

Under Rev. St. 1895, arts. 2967, 2968, declaring that all property of the husband "owned or claimed" by him before marriage, and that "acquired" afterwards by gift, devise, or descent, shall be his separate property, and all property "acquired" by the husband or wife during the marriage, except that "acquired" by gift, devise, or descent, shall be the common property of the husband and wife, ownership resting in adverse possession for 10 years, existing in part before marriage and in part after marriage, is community property; the word "acquired" denoting all property coming to husband or wife during coverture by title, other than by gift, devise, or descent. Sauvage v. Wauhop, 143 S. W. 259, 263.

ACQUISITION

See New Acquisition.

Where the general purpose of an irrigation act, as indicated by the caption, is to provide means for the "acquisition" and conveyance of water to be used for the several purposes mentioned in the act, a statement in the caption that one of the purposes of the act is to provide for the acquisition of the right to the use of water does not, when considered with the whole of the caption, prohibit an incorporation in the act of a provision conferring the right of eminent domain over land. The expression, "to provide for the acquisition of the right to the use of water," does not convey the idea that the right of eminent domain, or the power to condemn water owned exclusively as private property, as distinguishable from the riparian rights of the owner of land upon streams or water courses, was intended to be conferred, and no such right is given in the act. Borden v. Trespalacios Rice & Irrigation Co. (Tex.) 82 S. W. 461, 465.

Act Feb. 20, 1908 (25 St. at Large, p. 1431), is entitled "An act to provide for free bridges across the Congaree and Broad rivers between Columbia township, in Richland county and the county of Lexington, the acquisition thereof by Columbia township, and the issue of bonds, if approved by the electors of Columbia township, for the purpose of such acquisition." Section 7 of the act declares that authority is given to build or purchase and to maintain such bridges, etc. Held, that the word "acquisition," as used in the title, meaning the act of getting or obtaining something already in existence or that may be brought into existence through the means employed to acquire it, included the acquiring of a bridge by construction as well as by purchase; and hence the act was not unconstitutional as containing matter not expressed in its title, in that it authorized the construction of new bridges as well as the purchase of those already in existence. Verner v. Muller, 71 S. E. 654, 656, 89 S. C. 117.

ACQUIT—ACQUITTAL

See Autrefois Acquit; Former Acquittal.

The arbitrary discharge of a jury before verdict without the consent of accused, and without the existence of circumstances, justifying the discharge, is not a judgment of "acquittal," within Code Cr. Proc. § 332, enumerating pleas that may be interposed to an indictment, and a former conviction or acquittal which may be pleaded in bar is a conviction or acquittal on the merits. People ex rel. Stabile v. Warden of City Prison of City of New York, 95 N. E. 729, 733, 202 N. Y. 138.

Where the jury are discharged in the absence of and without the consent of the defendant or his counsel, the discharge operates as an "acquittal," and bars further prosecution. Vela v. State, 95 S. W. 529, 530, 49 Tex. Cr. R. 588 (citing Jones v. State, 12 South. 274, 97 Ala. 77, 38 Am. St. Rep. 150); Allen v. State, 41 South. 593, 52 Fla. 1, 120 Am. St. Rep. 188, 10 Ann. Cas. 1085 (citing 12 Cyc. p. 270; People v. Grant [N. Y.] 4 Parker, Cr. R. 527; State v. Wamire, 16 Ind. 357; Teat v. State, 53 Miss. 439, 24 Am. Rep. 708; Helm v. State, 6 South. 322, 66 Miss. 537; State v. McKee [S. C.] 1 Bailey, 651, 21 Am. Dec. 499; Cooley's Const. Lim. [7th Ed.] p. 467; McCreary v. Jackson Lumber Co., 41 South. 822, 823, 148 Ala. 247; Bryant v. Cadle, 104 Pac. 23, 18 Wyo. 64; Bashore v. Mooney, 87 Pac. 553, 555, 4 Cal. App. 276; Horn v. Metzger, 84 N. E. 893, 234 Ill. 240; Van Horn v. Stuyvesant, 100 N. Y. Supp. 547, 551, 50 Misc. Rep. 432). But there was no "acquittal" where the jury, while the court was at recess, returned a verdict written upon the indictment, gave the indictment to the clerk, and then dispersed, if there had been no consent on the part of defendant or his counsel that the verdict might be so returned, though the verdict would not support a conviction. Cowart v. State, 41 South. 631, 632, 147 Ala. 137.

As discharge

"Acquit" means to discharge. Sherman v. Sherman, 122 N. W. 439, 443, 23 S. D. 486. The discharge of a person under indictment, when not brought to trial as provided in Code Cr. Proc. §§ 220, 221 (Gen. St. 1901, §§ 5665, 5666), amounts to an "acquit-

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tal" of the offense charged. State v. Dewey, 85 Pac. 796, 797, 73 Kan. 735.

The word "acquittal" is said to be an equivocal word. One is acquitted if, after he has been arraigned, and trial has been begun upon a valid indictment or information, he is discharged by a competent court before verdict. State v. Keerl, 85 Pac. 862, 865, 33 Mont. 501 (citing the definitions in 1 Words and Phrases, p. 114).

To say that one accused of crime was "discharged" is not equivalent to saying that he was "acquitted." The word "acquitted" in the legal sense means acquitted by a jury, but there are various ways by which a man may be "discharged" from his imprisonment, without putting an end to the suit. Graves v. Scott, 51 S. E. 821, 822, 104 Va. 372, 2 L. R. A. (N. S.) 927, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480. A discharge by a United States commissioner is not equivalent to an "acquittal." Williams v. State, 82 N. E. 790, 791, 169 Ind. 384.

ACRE

See God's Acre; Per Acre.

ACROSS

A city ordinance providing that trains shall not be allowed to stand or remain "across" any street longer than a certain time is not violated by allowing a train to stand so that the head end reaches slightly into the street, but not in such a way as to obstruct public travel. Crowley v. Chicago, St. P., M. & O. Ry. Co., 99 N. W. 1016, 1017, 122 Wis. 287.

ACROSS THE SEAL

Rev. St. 1895, art. 2284, providing that the officer taking depositions shall seal them in an envelope "and shall write his name 'across the seal,'" was sufficiently complied with, where the notary's signature, while not extending literally across the edge of the lap or cover forming the seal, extended across and over that portion of the cover containing the mucilage forming the seal. Texas & P. Ry. Co. v. Felker, 90 S. W. 530, 531, 40 Tex. Civ. App. 604.

ACT

See Authentic Act; Cease to Act; Constituted by the Act; Failure to Act; Governmental Act; Improper Act; In the Act of; Judicial Act; Lawful Act; Malicious Act; Ministerial Act; Official Act; Oppressive Act; Overt Act; Quality of Act; Same Act; Taken in the Act; This Act; Unlawful Act; Voluntary Act; Wrongful Act.

Nature of Act, see Nature.

Other acts, see Other.

Willful act, see Willful—Willfully.

An "act" denotes affirmative action or performance, and an expression of will or purpose, as distinguished from "omission," which denotes a negative and inaction. Randle v. Birmingham Ry., Light & Power Co., 53 South. 918, 921, 169 Ala. 314.

A juror who was summoned, but who was excused without having been sworn, had not "acted," within Revisal 1905, § 1967, disqualifying a tales juror who has acted as a grand, petit, or tales juror within two years. Burnett v. Roanoke Mills Co., 67 S. E. 30, 33, 152 N. C. 35.

Failure to record a mortgage given to secure a note for the payment of which another is surety is an "act" which increases the surety's risk and discharges him from liability, though no actual loss is shown, under a statute which provides that a surety is discharged from liability by any "act" of the creditor increasing the surety's risk. Cloud v. Scarborough, 59 S. E. 202, 203, 3 Ga. App. 7.

The federal statute declaring that every receiver appointed by a federal court may be sued in respect to any "act" of his without leave of court, does not authorize the bringing of a suit to condemn a crossing over the right of way of a railroad company in the hands of a receiver without leave of the court. The receiver's refusal to agree on a crossing at a point and in the manner insisted upon by the petitioner, which the receiver considered as detrimental to the property in his custody, does not constitute an "act" by the receiver within the statute. Buckhannon & N. R. Co. v. Davis, 135 Fed. 707, 711, 68 C. C. A. 345.

Where a federal court granted a preliminary injunction restraining the officers of a state from enforcing a state statute fixing rates to be charged by railroads for the carriage of passengers within the state pending suits by the railroad companies to determine the constitutionality of such statute, and by its order required such companies to issue coupons to purchasers of tickets calling for the difference between the rates charged and the statutory rate, to be repaid in case the statute was sustained, the selling of tickets in conformity to such order was "an act done * * * in pursuance of * * * an order * * * of a court of the United States," within the meaning of Rev. St. § 753, and, where an agent is adjudged guilty of a crime and imprisoned for such act by the state authorities, the federal court is authorized by such section to discharge him on a writ of habeas corpus. Ex parte Wood, 155 F. 190, 195.

ACT (In Legislation)

See Codifying Act; Curative Act; Declaratory Act; Healing Act; Legislative Act; Organic Act; Passage of Act; Private Act; Public Act; Supplemental Act; Under this Act.

Unconstitutional act, see Unconstitutional.

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"Acts," as used in Rev. St. Mo. 1889, § 6606, declaring that all acts of a general nature, revised and amended and re-enacted at the session of the Legislature at which such statutes were adopted, should be construed as repealing all prior laws relating to the same subject, did not include parts of acts, so that Laws 1887, p. 281, §§ 2, 3, not being repugnant to the rest of the act as amended by Rev. St. 1889, § 8187, were not repealed either expressly or by necessary implication. State ex rel. Wagner v. Patterson, 105 S. W. 1048, 1051, 207 Mo. 129.

The word "act" as used in the general enacting clause of article 5, § 58, of the Constitution of Oklahoma, relating to the time when acts passed by the Legislature shall become effective, means a bill passed by the Legislature as to which all of the required formalities have been performed, and refers to the entire statute enacted. Norris v. Cross, 105 Pac. 1000, 1007, 25 Okl. 287.

Sess. Laws Colo. 1901, p. 116, § 1, imposes a fee on every domestic corporation, and declares: "But this act shall not apply to corporations not for pecuniary profit or corporations organized for * * * benevolent purposes." Sections 2–10, pp. 117–121, require the payment of various fees, and each section contains a proviso that nothing therein contained shall apply to corporations not for pecuniary profit. Section 11, p. 121, provides that all corporations shall file annual reports showing the amount of the capital stock actually paid and how paid, etc., and makes the officers and directors of the corporation liable for a failure to make annual reports. Held, that section 11, when considered in connection with previous legislation on the subject embodied in Laws 1897, p. 157, does not apply to a mutual fire insurance company engaged solely in the business of the mutual insurance of the property of its members, and the word "act" in the quoted clause in section 1 must be construed to refer to the whole act, and cannot be construed to mean "section," so as to refer only to section 1. Steck v. Prentice, 95 P. 552, 553, 43 Colo. 17.

ACT CHARGED

Though the time be stated in an information for incest, the prosecutor has the right to select, among all the acts of the kind which he could prove to have been committed between the parties within the period alluded to and within the jurisdiction, any one of those acts before evidence has been introduced as the "act charged" in the information. In other words, until evidence of some such act has been given the charge in the information is floating and contingent, aimed as much at one as at another, and at no one act in particular, and it remains for the evidence to point the charge to a particular act intended. But when evidence has been introduced tending directly to the proof of one act, and for the purpose of procuring a conviction upon it, from that moment that particular act becomes the "act charged." What has till then been floating and contingent has now become certain and fixed. People v. Jenness, 5 Mich. 305, 327.

ACT CONSTITUTING CRIME

The phrase "act constituting the crime," as used in Code Cr. Proc. § 275, requiring an indictment to contain a plain and concise statement of the act constituting the crime, means a statement of the manner in which it is alleged to have been committed. People v. Foster, 112 N. Y. Supp. 706, 709, 60 Misc. Rep. 3.

ACT DONE ACCORDING TO LAW

See According to Law.

ACT OF BANKRUPTCY

Admission of insolvency

A resolution passed by the directors of a corporation and the stockholders, reciting that the corporation was unable to pay its debts and was willing to be adjudged a bankrupt on that ground, being properly made by the governing body of the corporation, was sufficient to constitute an "act of bankruptcy," under Bankr. Act July 1, 1898, c. 541, § 3a, providing that an act of bankruptcy may consist in the admission of the alleged bankrupt in writing of his inability to pay his debts and of his willingness to be adjudged a bankrupt on that ground. In re American Guarantee & Security Co. of California, 192 Fed. 405, 408.

Where a Circuit Court appointed receivers of the property of a corporation, and granted an injunction restraining its officers and agents from commencing or prosecuting any proceeding "involving in any way the property or property rights" of the corporation, or incumbering or embarrassing the same, the subsequent adoption by the directors of a resolution confessing its insolvency and stating its willingness to be adjudged a bankrupt was a violation of the injunction, and unauthorized, and did not constitute such an admission by the corporation as constitutes an "act of bankruptcy." In re Hudson River Electric Power Co., 173 Fed. 934, 943.

Assignment for benefit of creditors

The owner of a city lot which she had contracted to convey for $50,000 died, leaving the same to the bankrupt, subject to certain legacies. Prior to bankruptcy the bankrupt conveyed the lot to K. to secure a debt due to him, amounting to $17,500, and later assigned to K. "so much" of the bankrupt's interest in the property in excess of the amount due to K. as might be required to pay all the bankrupt's creditors in full, whose claims amounted to $11,000, authorizing K. to use so much of the bankrupt's interest in the property for the payment of the cred-

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itors as was necessary for that purpose. Held, that such assignment was not a "general assignment" for the benefit of creditors, under Bankr. Act 1898, § 3, c. 541, making a general assignment for the benefit of creditors an "act of bankruptcy" without any reference to the question of solvency or intent, and was therefore valid. Fidelity Trust Co. v. Kline, 70 Atl. 151, 152, 74 N. J. Eq. 445.

A general assignment for the benefit of creditors, is an "act of bankruptcy." Rogers v. Abbot, 92 N. E. 472, 473, 206 Mass. 270, 138 Am. St. Rep. 394. But to constitute such an act by a corporation, some corporate act purporting to transfer all the corporation's property must at least be shown. In re Federal Lumber Co., 185 Fed. 926, 929.

A "general assignment," constituting an "act of bankruptcy" under the bankrupt act, means the ordinary common-law general assignment made voluntarily by the grantor and those which in many states, being regulated by statute, are known as "statutory general assignments." In re Spalding, 139 Fed. 244, 245, 71 C. C. A. 370.

An assignment of all of a debtor's property to an assignee, to convert into money and apply to the discharge of debts owing to such creditors as assented thereto and agreed to accept the dividend thereunder in full of their claims, is a "general assignment for the benefit of creditors," such as constitutes an "act of bankruptcy" under the bankruptcy act. Courtenay Mercantile Co. v. Finch, Van Slyck & McConville, 194 Fed. 368, 371, 114 C. C. A. 328. An assignment of all of a debtor's property to an assignee to convert into money and apply to the discharge of debts owing to such creditors as assented thereto and agreed to accept the dividends thereunder in full of their claims, is a "general assignment for the benefit of creditors," constituting an "act of bankruptcy" under the bankrupt act; it being unnecessary that the assignment should be valid as to dissenting creditors. In re Courtenay Mercantile Co., 186 Fed. 352, 354.

A stockholders' resolution, authorizing the directors, through a committee, to advertise and sell the corporate property at auction at not less than a stated price, and to pay the corporate debts with proceeds, with power to declare such sale off in a certain contingency, was not a "general assignment," constituting an "act of bankruptcy." In re Hartwell Oil Mills, 165 Fed. 555, 556.

Concealment of property

Under the bankruptcy act, providing that acts of bankruptcy by any person shall consist of having conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to delay or defraud his creditors, or any of them, a petition alleging that the bankrupt did deny and conceal ownership of a particular bank, so that the creditors, by virtue of deposits carried by them in the bank, were, by the acts and declarations of the bankrupt, misled into the belief that the bank belonged to another, and that within four months the petitioner concealed the assets of the bank by turning the same over to the executrices of decedent, to be by them administered as his property, sufficiently alleged concealment of property with intent to defraud creditors, and constituted an "act of bankruptcy." In re Glazier, 195 Fed. 1020, 1021.

Failure to discharge lien

Bankr. Act July 1, 1898, c. 541, § 3a (3), 30 Stat. 546 declares that an "act of bankruptcy" occurs when a person has suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and has not, at least five days before sale or final disposition of any property affected by such preference, vacated or discharged the same. Held, that such provision includes all liens obtained by legal proceedings valid under state laws. In re Crafts-Riordon Shoe Co., 185 Fed. 931, 932. The consummation of an "act of bankruptcy" under the statute is not the date of an actual sale of the bankrupt's property under an execution; the act being completed five days before the day of such sale if at that time the bankrupt had failed to dissolve the levy. In re National Hotel & Café Co., 138 Fed. 947, 948. Failure of an insolvent to discharge a preference obtained by a creditor by the recovery of a judgment and the levy of an execution thereunder at least five days before the sale of the property levied on constitutes an "act of bankruptcy" within the above-cited statute, although no affirmative action was taken by the debtor to aid the creditor in securing such preference. In re Rung Furniture Co., 139 Fed. 526, 527, 71 C. C. A. 342. But merely suffering an attachment or execution to be levied is not an "act of bankruptcy"; failure to discharge the lien of the execution before it becomes an indissoluble preference and an imminent probability that the lien will ripen into such preference being essential. In re R. L. Radke Co., 193 Fed. 735, 738; In re Vetterman, 135 Fed. 443, 444.

An attachment having been levied on the property of an alleged bankrupt, petitioner's intestate executed an officer's receipt and obtained the property as the debtor's surety, which he then delivered to the debtor, taking a mortgage note as security. After waiting until four months from the date of attachment had almost expired, the surety filed a petition in bankruptcy against the debtor, because he had not removed the attachment. Held, that the debtor's failure did not constitute an "act of bankruptcy"; it not appearing that there had been any sale or final disposition of the property. In re Windt, 177 Fed. 584, 586. But by failing

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to file a voluntary petition in bankruptcy to vacate an attachment lien before expiration of four months after the attachment one does commit an "act of bankruptcy." In re Putman, 193 Fed. 464, 473.

Where a validly created and subsisting lien for more than four months before the filing of a petition in involuntary bankruptcy of the debtor is enforced within the statutory four months and while the debtor is insolvent, the mere failure of the debtor, while insolvent, to vacate or discharge the lien within the statutory period, and at least five days before a sale or final disposition of the property affected, does not constitute an "act of bankruptcy," within the bankruptcy act since priority obtained by reason of the lien is obtained when the lien attaches. Colston v. Austin Run Mining Co., 194 Fed. 929, 934, 114 C. C. A. 565.

Misappropriation of corporate assets

A petition in involuntary bankruptcy showed an "act of bankruptcy" under the bankruptcy act, by transferring assets to hinder or defraud creditors, where it alleged that, within four months before the petition was filed, the bankrupt permitted its sole stockholders to appropriate portions of its property to their own use. In re R. L. Radke Co., 193 Fed. 735, 738.

Preferences

The giving of a mortgage by an insolvent, subsequently and within four months adjudged a bankrupt, to secure money borrowed at the time for the purpose of preferring certain of his creditors, where the lender knew or had reason to believe that such was his purpose, was an "act of bankruptcy," under the bankruptcy act. In re Pease, 129 Fed. 446, 447. A mortgage made by an insolvent, and recorded within four months prior to the filing of a petition in bankruptcy against him, if given with intent to prefer a creditor, constitutes an "act of bankruptcy." In re Edelman, 130 Fed. 700, 701, 65 C. C. A. 665.

Where an insolvent after the return of a verdict against him in legal action, but before the entry of judgment, executed a mortgage to a creditor to secure the debt, the preference thus given over the judgment creditor is presumed to have been intentional so as to be an "act of bankruptcy." In re Smith, 176 Fed. 426, 429.

The fact that an application by an insolvent corporation to a state court for the appointment of a receiver for its property was not authorized by the laws of the state does not prevent such application from constituting an "act of bankruptcy." To constitute an "act of bankruptcy" it is not essential that the application should be made on the ground of insolvency, at least where the application is by a corporation for the purpose of winding up its affairs and liquidating its indebtedness. Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 834, 101 C. C. A. 39. But appointment of a receiver on the ground that defendant had conveyed property and was threatening to make further conveyances in fraud of the plaintiff's rights did not constitute an "act of bankruptcy" on the part of the defendant as one made under the laws of the state "because of insolvency," within the meaning of the bankruptcy act, there being in fact no statute of the state conferring power on a court to appoint a receiver for the property of an individual on the ground of insolvency. In re Spalding, 139 Fed. 244, 245, 71 C. C, A. 370.

While it is not an "act of bankruptcy," for which a firm may be adjudged a bankrupt, that one of its members, out of his individual estate, prefers one of his own, or one of the firm's, creditors, a member who applies his whole separate estate to the payment of a creditor of the firm commits an "act of bankruptcy," which may be made the basis of a petition by other firm creditors to have him individually adjudged a bankrupt. Mills v. J. H. Fisher & Co., 159 Fed. 897, 899, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656.

Payments made by bankrupts to advertising agents to keep the bankrupts in business, not larger than payments which their firm had been previously making, could not be regarded as "acts of bankruptcy." A transfer of a partner's interest in an insolvent firm to the continuing partner for his note for $200, the transaction amounting merely to a formal way of retiring, the partner's interest, which was of no value, was not a fraud on the individual partner's creditors and did not constitute an individual "act of bankruptcy"; nor did the continuing partner's preference of firm creditors by the payment of firm assets, the firm being insolvent. In re Perlhefter, 177 Fed. 299, 302.

A preferential payment by a bankrupt while insolvent, first disclosed at the reference before the master some seven months after its occurrence, was unavailable as an "act of bankruptcy." In re Perlhefter, 177 Fed. 299, 302. And there must have been an actual fraudulent intention which impeaches the bona fides of the transaction. In re McLoon, 162 Fed. 575, 576.

Transfer of property by a debtor with intent to prefer creditors does not constitute an "act of bankruptcy," unless he is insolvent. In re Kassel, 195 Fed. 492, 115 C. A. 402. Two things are essential: First, that the alleged bankrupt has transferred a portion of his property to one or more creditors with intent to prefer such creditors; second, that such transfer was made while the alleged bankrupt was insolvent—and these two must concur. In re American Pub. Co., 79 Pac. 762, 763, 15 Okl. 177.

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A solvent debtor who mortgages his stock in trade to secure a debt, and who permits his secured creditor to obtain a preference through legal proceedings, does not commit an "act of bankruptcy" within Bankr. Act July 1, 1898, c. 541, § 3, subds. 2, 3, 30 Stat. 546, making insolvency of the debtor at the time of the transfer with intent to prefer a creditor over others or at the time he permits a creditor to obtain a preference through legal proceedings essential to constitute acts of bankruptcy, and a petition to revise an order denying an involuntary petition in bankruptcy based on such acts is properly denied, where it shows the solvency of the alleged bankrupt at the time of the mortgage and preference. Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 277, 116 C. C. A. 636.

A conveyance or transfer of property by a debtor with intent to hinder, delay or defraud his creditors, or any of them, constitutes an "act of bankruptcy," although he may have been solvent when the conveyance or transfer was made. In re Larkin, 168 Fed. 100, 101.

The payment by an insolvent saloonkeeper, at various times within four months prior to the filing of a petition in involuntary bankruptcy against him, of considerable sums of money to two creditors, in part on account of current expenses of his business and in part on account of antecedent debts, while another large creditor was paid nothing during such time, constituted an "act of bankruptcy." In re Foley, 140 Fed. 300, 302. Where a verbal agreement under which a bank held a debtor's deed was ineffective, the grantor, by permitting it to remain in the bank's possession with power to use it as an effective muniment of title, when in fact it had only the naked legal title, was attempting a constructive fraud on his other creditors, and the transaction constituted an "act of bankruptcy." In re Donnelly, 193 Fed. 755, 761.

Where a debtor, while solvent, made an equitable assignment of insurance policies to be issued as security for certain loans then made to him, but failed to make an actual delivery and assignment of the policies to the creditor until after loss, when he was insolvent, the assignment thereof at that time did not constitute an "act of bankruptcy," as a transfer of his property while insolvent with intent to prefer certain of his creditors. Wilder v. Watts, 138 Fed. 426, 433, 434.

The lending of money to a contractor by his surety to pay labor claims, and the taking of security therefor, at a time when the contractor was insolvent and within four months prior to his bankruptcy, constituted an "act of bankruptcy." United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 58, 102 C. C. A. 623.

Receivership or Trusteeship

The provision in the bankruptcy act that an "act of bankruptcy" takes place when, because of insolvency, a receiver or trustee has been put in charge of a person's property under the laws of the state, is not limited to cases in which a receiver or trustee has been appointed under the laws of the state providing for administration of insolvents' estates. The appointment of a receiver in a judgment creditor's suit against an alleged bankrupt in a state court, because of the debtor's insolvency, among other things, constituted an "act of bankruptcy." In re Spalding, 134 Fed. 507, 508.

The last-mentioned provision of the bankruptcy act does not mean exclusively that a trustee must have been put in charge by order of a court, but embraces as well a case where liquidating trustees have been elected by an insolvent company or corporation, as provided by the statute under which it is organized. In re Hercules Atkin Co., 133 Fed. 813, 815. And a corporation organized under the laws of Connecticut commits an "act of bankruptcy," where, because of its insolvency, its stockholders sign an agreement for its dissolution, pursuant to Pub. Acts Conn. 1903, pp. 160, 161, c. 194, §§ 29–34, and transferring its property to its directors, as trustees, to wind up its affairs. In re C. H. Bennett Shoe Co., 140 Fed. 687, 688.

Proceedings in a state court wherein receivers for an alleged insolvent corporation were appointed by consent of both parties constituted an "act of bankruptcy." In re Pickens Mfg. Co., 158 Fed. 894, 895.

The appointment by a state court of a receiver for an insolvent domestic corporation at the suit of a stockholder is an "act of bankruptcy." Roberts Cotton Oil Co. v. F. E. Morse & Co., 135 S. W. 334, 337, 97 Ark. 513. But an appointment was held not to constitute an "act of bankruptcy" by a corporation, where winding up of the corporate affairs was not asked, and it did not appear that the appointment was made because of insolvency. In re Boston & Oaxaca Min. Co., 181 Fed. 422.

An order of a state court appointing a receiver for a corporation on a petition charging insolvency does not constitute an "act of bankruptcy," where by an amendment of the order of the state court made after the filing of the petition in bankruptcy it appears that it was not made on a finding of insolvency within the meaning of the bankruptcy act. In re Golden Malt Cream Co., 164 Fed. 326, 328, 90 C. C. A. 258.

Where a suit in equity was brought by creditors to wind up a corporation and for the appointment of a receiver, the bill alleging that it was unable to meet its obligations as they matured and that it would be to the advantage of creditors and stockholders that its affairs be wound up, but that it was sol-

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vent, the filing of an answer by the corporation, admitting such allegations and joining in the request for a receiver, did not constitute an "act of bankruptcy." In re Edward Ellsworth Co., 173 Fed. 699, 701.

A resolution adopted by the board of directors of a corporation authorizing an attorney to represent the corporation generally in any bankruptcy proceedings pending or that may be brought, and in his discretion to agree to the appointment of receivers, did not constitute an "act of bankruptcy" on the part of the corporation. In re Southern Steel Co., 169 Fed. 702, 705.

The superior court of Massachusetts is a court of general equity jurisdiction, and if it exceeded its jurisdiction in appointing a receiver on account of insolvency, the excess was of the kind remediable only by appeal, and would not render the proceedings void, so that the appointment of a receiver by such superior court for that reason was sufficient to constitute an "act of bankruptcy." Beatty v. Anderson Coal Min. Co., 150 Fed. 293, 295, 80 C. C. A. 181.

ACT OF GOD

See Vis Major.

An "act of God" is that which is occasioned exclusively by the violence of nature; by that kind of force of the elements which human ability could not have foreseen or prevented. It is an act of nature which implies entire exclusion of all human agency. It is called a disaster with which the agency of man has nothing to do. It is defined to be a natural necessity which could not have been occasioned by the interference of man, but proceeds from physical causes alone. Kuhnis v. Lewis River Boom & Logging Co., 98 Pac. 655, 51 Wash. 196 (quoting 1 Words and Phrases, p. 118).

What is known in law as the "act of God" is an accident or unexpected occurrence, due directly and exclusively to natural causes, without human intervention; the resulting injury or damage not having been produced or contributed to by the hand of man. If a resulting injury is in part produced by the wrongful or negligent act of any person, such person will be held liable therefor. Amend v. Lincoln & N. W. R. Co., 135 N. W. 235, 236, 91 Neb. 1 (citing 1 Words and Phrases, p. 118). "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great drought, lightning, earthquakes, sudden death, and illness have been held to be 'acts of God.'" American Locomotive Co. v. Hoffman, 54 S. E. 25, 27, 105 Va. 343, 6 L. R. A. (N. S.) 252, 8 Ann. Cas. 773; Southern Ry. Co. in Kentucky v. Smith, 102 S. W. 232, 233, 125 Ky. 656.

A carrier of live stock is not liable for injury thereto resulting from the "act of God," which term includes weather conditions. McCampbell, Figg & Burnett v. Louisville & N. R. Co., 150 S. W. 987, 988, 150 Ky. 723.

Inevitable or unavoidable accident

In Central of Georgia Ry. Co. v. Hall, 52 S. E. 679, 683, 684, 124 Ga. 322, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128, the court discusses at great length the definition of "act of God," and the distinction between an "act of God" and an "unavoidable accident," but without arriving at any conclusion of its own, except that, to relieve a carrier from liability on the ground that the injury was caused by an act of God, the carrier must itself be free from any fault contributing to the injury. In the course of the discussion the court makes the following citations: Forward v. Pittard, 1 Term. R. 27–33; Pandorf v. Hamilton, L. R. 17 Q. B. 670; Nugent v. Smith, L. R. 1 Com. Pl. Div. 423 et seq.; Hays v. Kennedy, 41 Pa. 378, 80 Am. Dec. 627; Coggs v. Bernard, 1 Smith's Lead. Cas. (8th Ed.) 422 et seq.; Stroud's Jud. Dict.; Bouv. Law Dict.; Black's Law Dict.; Anderson's Law Dict., words "Acts of God," "Common Carrier," and citations; 3 Wood's Ry. Law, 1574; 2 Kent's Com. 598; 5 Thomp. Neg. 6456; Story, Bailm. (9th Ed.) § 25; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Story, Bailm. §§ 25, 511; 2 Kent's Com. 597; Backhouse v. Sneed, 1 Mur. 173; Ewart v. Street (S. C.) 2 Bailey, 157, 23 Am. Dec. 131; Smyrl v. Niolon (S. C.) 2 Bailey, 421, 23 Am. Dec. 146; Central Line of Boats v. Lowe, 50 Ga. 509; Doster v. Brown, 25 Ga. 24–26, 71 Am. Dec. 153; Cannon v. Hunt, 38 S. E. 983, 113 Ga. 501–509; Young v. Waldrip, 18 S. E. 23, 91 Ga. 765; Richmond & D. R. Co. v. White, 15 S. E. 802, 88 Ga. 805; Carr v. Houston Guano & Warehouse Co., 31 S. E. 178, 105 Ga. 268; McArthur v. Sears (N. Y.) 21 Wend. 190; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; New Brunswick Steamboat & Canal Transp. Co. v. Tiers, 24 N. J. Law, 697, 64 Am. Dec. 394; Broom's Legal Maxims (8th Ed.) 229, 230. The term comprehends inevitable accident, without the interference of man and public enemies. Cain v. Atlantic Coast Line R. Co., 54 S. E. 244, 247, 74 S. C. 89; Lehman, Stern & Co. v. Morgan's L. & T. R. & S. S. Co., 38 South. 873, 874, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

An "act of God" within Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415, exempting railway companies from penalty for permitting employés to work overtime in case of "act of God," etc., is something which occurs exclusively by the violence of nature, and is an act which implies entire exclusion of all human agencies. United States v. Kansas City Southern R. Co., 189 Fed. 471, 476 (citing 1 Words and Phrases, pp. 118–126).

Rev. Civ. Code 1870, art. 2754, makes carriers liable for loss of goods carried un-

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less they can prove that such loss was occasioned by "accidental and uncontrollable events." The court says that it seems these words were used in the same sense as "cas fortuit," "force majeure," or "fortuitous event," as defined in Code 1825, which was that which happens by a cause or force which we cannot resist, and the "force majeure" or "superior force" is an accident which human prudence can neither foresee nor prevent. These various phrases are held to be the equivalent of the common-law phrase "the act of God," and the holding is that a carrier is liable unless he can show that the loss was occasioned by an "act of God," as used in that sense. The words are also the equivalent of "inevitable accident" by which, according to Story on Bailments, "is meant any accident produced by any physical cause which is irresistible, such as loss by lightning or storms, by perils of the seas, by an inundation or earthquake, or by sudden death or illness. By 'irresistible force' is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable." The words "accident per se" mean an unforeseen and unexpected event, and the word "uncontrollable" further qualifies the event as one which cannot be restrained or prevented. Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co., 38 South. 873, 874, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

As irresistible, superhuman cause

Loss by "act of God" is such irresistible disaster as results from natural causes, and is in no sense attributable to human agency. McKinley v. C. Jutte & Co., 79 Atl. 244, 245, 230 Pa. 122, Ann. Cas. 1912A, 452; Ohlen v. Atlanta & W. P. R. Co., 58 S. E. 511–515, 2 Ga. App. 323.

By the term "act of God" is meant those events and accidents which proceed from natural causes and cannot be anticipated and guarded against or resisted, such as unprecedented storms or freshets, lightning, earthquake, etc. City of McCook v. McAdams, 106 N. W. 988, 989, 76 Neb. 1.

An "act of God" is such inevitable accident as cannot be prevented by human care, skill, or foresight, and results from natural causes such as lightning, floods, etc. Klair v. Philadelphia, B. & W. R. Co. (Del.) 78 Atl. 1085, 1096; Carpenter v. Baltimore & O. R. Co., 64 Atl. 252, 253, 6 Pennewill (Del.) 15 (quoting and adopting definition in McHenry v. Philadelphia, W. & B. R. Co. [Del.] 4 Har. 448).

An "act of God" comprehends all misfortunes and accidents arising from unavoidable necessity and which human prudence cannot foresee and prevent. Illness, being beyond the power of man to control or prevent, is an "act of God," and where a person is afflicted with consumption he is warranted in refusing to perform a contract to marry. Grover v. Zook, 87 Pac. 638, 640, 44 Wash. 489, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192 (citing Story, Bailm. 25, 511; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458).

As without negligence

"Loss by the 'act of God' may be said to include all losses resulting immediately from natural causes, without the intervention of man, and which cannot be foreseen and prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ." Southern Ry. Co. in Kentucky v. Smith, 102 S. W. 232, 233, 125 Ky. 656 (quoting and adopting the definition in 5 Thomp. Neg. § 6456).

Where a carrier retained in its possession cotton received for transportation for a period of 11 days, without forwarding the same, and on the eleventh day the cotton was destroyed by a cyclone, which practically destroyed the town from which the cotton was to be shipped, the carrier was guilty of negligence in failing to transport the cotton within a reasonable time, and was therefore precluded from claiming that the cotton was destroyed by an "act of God" in defense of an action for loss thereof. Alabama Great Southern R. Co. v. Quarles & Couturie, 40 South. 120, 121, 145 Ala. 436, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308.

Destruction by public authorities

Destruction of a building by municipal authorities on the ground that it was not safe did not constitute an "act of God," within a provision in a lease that, in case the building on the leased premises should be destroyed or rendered untenantable by the "elements or act of God," the lessor should rebuild the same. Kirby v. Wylie, 70 Atl. 213, 215, 108 Me. 501, 21 L. R. A. (N. S.) 129, 129 Am. St. Rep. 451.

Fire

Fire is not "an act of God." Keeling v. Schastey & Vollmer, 124 Pac. 445, 446, 18 Cal. App. 764; McKinley v. C. Jutte & Co., 79 Atl. 244, 245, 230 Pa. 122, Ann. Cas. 1912A, 452.

Floods

The term "act of God," as applicable to floods, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. Sloss-Sheffield Steel & Iron Co. v. Mitchell, 52 South. 69, 72, 167 Ala. 226.

Where the overflow of an artificial canal into which a city has diverted a natural stream is caused by a rainfall so unprece-

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dented and extraordinary as to have been beyond reasonable anticipation and such as had not been known to occur for a long series of years, the damage is held in law to have been caused by the "act of God," and no liability attaches to any one therefor; but where the rainfall has irregularly and infrequently occurred several times in a particular locality within the memory of man, and each time has caused heavy freshets, it is a thing which can reasonably be expected to occur again, and hence is not to be classed as the "act of God," so as to discharge the city from liability for the insufficiency of the canal to carry the volume of water. Willson v. Boise City, 117 Pac. 115, 116, 20 Idaho, 133, 36 L. R. A. (N. S.) 1158.

The threatened inundation of a carrier's tracks from an impending and unprecedented flood of water, which finally culminated in great disaster to railroads and shipments, and interrupted all kinds of transportations for several days, could properly be called an "act of God," and afforded sufficient excuse for a carrier's refusal to accept goods for shipment. Gray v. Wabash R. Co., 95 S. W. 983, 985, 119 Mo. App. 144.

Freezing

Cold weather in the month of December is not an "act of God" which will excuse a live stock carrier from performance of its contract. Texas & P. Ry. Co. v. Coggin & Dunaway, 99 S. W. 1052, 1053, 44 Tex. Civ. App. 423.

Hurricane

Under hire of a vessel to carry any lawful merchandise, including petroleum and its products, between specified ports, including Atlantic ports of North and South America and the West Indies, a hurricane in Jamaica, and the hirer's consequent inability to procure merchantable fruit for carriage, did not constitute an "act of God," excusing the hirer from liability for the charter hire. Monsen v. American Importing & Transportation Co., 97 N. E. 891, 211 Mass. 387.

Perils of the sea

"'Perils of the sea' is sometimes construed as equivalent to an 'act of God'; but it has grown to have a wider signification and the expression is generally construed to denote those accidents at sea peculiar to navigation arising from irresistible forces or overwhelming power, which do not happen by the intervention of man, and cannot be guarded against by the ordinary exertions of human skill and prudence." Cook v. Southeastern Lime & Cement Co., 146 Fed. 101, 102.

Rain

"Nothing less than a fortuitous gathering of circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence, care, and diligence constitutes an 'act of God' which will excuse the discharge of the duty." Rain overflowing the roadbed of a railroad, washing away part of its embankment from under the crossties, cannot be considered an "act of God," so as to relieve the railroad from liability for failure to furnish drainage to properly carry away the water, unless so far outside the range of human experience that the duty of exercising reasonable care did not require the railroad to anticipate and provide against it. Gulf, C. & S. F. Ry. Co. v. Boyce, 87 S. W. 395, 397, 39 Tex. Civ. App. 195.

Snow

"A snowstorm of such violence as to prevent the moving of trains is an 'act of God.'" Black v. Chicago, B. & Q. R. Co., 46 N. W. 428, 430, 30 Neb. 197; Ward v. Chicago, St. P., M. & O. Ry. Co., 137 N. W. 995, 92 Neb. 183.

Snow fell in defendant's railroad yards to a level depth of almost a foot, and was blown by an unusually high wind into drifts three to five feet high, which became packed around the switch points, so that they could not be operated, and defendant, though it worked a large number of extra men in the yards throughout the night, was unable to clean out the switches so as to permit trains to move, and the train on which a passenger arrived that evening was stalled some 600 feet or more from the depot. The tracks and yards were in perfect condition and capable of being used if not obstructed by snow and ice. Held, that the obstruction by the snowstorm was an "act of God," so as to relieve defendant from liability to the passenger for nondelivery. Cormack v. New York, N. H. & H. R. Co., 90 N. E. 56, 57, 196 N. Y. 442, 24 L. R. A. (N. S.) 1209, 17 Ann. Cas. 949.

Storm

A storm which could not have been guarded against by any care reasonably to be expected is an "act of God." Gulf, C. & S. F. Ry. Co. v. Texas Star Flour Mills (Tex.) 143 S. W. 1179, 1182.

ACT OF NEGLIGENCE

See Negligent.

ACT OF OWNERSHIP

See Fitful Acts of Ownership.

Exercise of "acts of ownership" of land means inclosure, cultivation, and the like. McLeod v. Lloyd, 71 Pac. 795, 799, 43 Or. 260 (citing Garner v. Marshall, 9 Cal. 268).

ACT OF SIMPLE TOLERATION

"Acts of simple toleration," within the law of adverse possession, "are those which a good neighbor tolerates, although infringing upon his rights as owner, because they

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are not sufficiently serious to amount to a usurpation in the proper sense of the term and not worth while putting a stop to." In determining title by prescription, it is important to observe the distinction between such acts and acts which are hostile in their character. John T. Moore Planting Co. v. Morgan's L. & T. R. & S. S. Co., 53 South. 22, 39, 126 La. 840 (quoting and adopting the definition in Dalloz, Codes Annotes, art. 2232).

ACT OF SUPERINTENDENCE

See Superintendence.

ACT TO BE DONE

The phrase "act to be done," as used in Rev. Codes Mont. § 5653, providing that one who indemnifies another against an act to be done by the latter is liable jointly with the person injured by such act, "implies upon the part of the indemnitee an agreement or obligation to do the act or make the omission constituting the tort, as if the phrase were an act required (or demanded or requested) to be done by the indemnitee; that is, the indemnitor gives a bond, in consideration of which the indemnitee agrees to or is induced to act or refrain from acting, to the injury of a third person." Northam v. Casualty Co. of America, 177 Fed. 981, 984.

ACTE DE NOTORIÉTÉ

An "acte de notoriété" is the deposition of witnesses taken before a notary, establishing the identity and genealogy of a person accompanied by official certificates from the registers of births, marriages, and deaths. Succession of Derigny, 55 South. 552, 553, 128 La. 853.

ACTING

See Direct Acting Engine.

ACTING INDECENTLY

See Indecently Acting.

ACTING JUDGE

In a criminal case, the regular judge of the circuit disqualified himself, and called in another judge who tried the case. The other judge allowed accused until the first day of the next regular term in which to file his bill of exceptions. Previous to that time, his term as judge expired and a successor was elected. Held, that the regular judge who had disqualified himself from trying the case could sign the bill of exceptions already settled and agreed upon as the "acting judge" of the court where the case was heard, under Rev. St. 1899, § 731 (Ann. St. 1906, p. 726), providing that where the judge who heard the case has gone out of office before signing the bill of exceptions, and such bill is agreed to be true by the parties or their attorneys, or shown to the judge to be correct, it shall be signed by the succeeding or acting judge of the court where the case was heard. State v. Morris, 132 S. W. 590, 591, 230 Mo. 631.

A judge appointed to hold a term of court in the absence of the regular judge, who was disabled by sickness, was the "acting judge," with all the powers of the regular judge, and was the proper person to sign a bill of exceptions at the term over which he presided in a case tried before the regular judge at the prior term. Ranney v. Hammond Packing Co., 110 S. W. 613, 614, 132 Mo. App. 324.

ACTS IN AMENDMENT THEREOF

St. 1901, c. 205, which was a special act, entitled "An act relative to the grade crossings of" a railroad and street railway "at Chace's Crossing in the city of Taunton," allowed the street railway company to become a party to consolidated petitions regarding certain crossings, contained full provisions as to the abolition of Chace's Crossing, though none as to others, and concluded: "In all other respects the proceedings under said petitions and the rights of the parties in interest shall be as specified in said chapter 428 and in the acts in amendment thereof and in addition thereto." Held, that the statute meant that the provisions relative to Chace's Crossing should not affect the rights of the parties at other crossings, but that they should be left to be governed by general laws; the words "acts in amendment thereof and in addition thereto" including all general legislation affecting that chapter that had been or might afterwards be enacted, and hence such act did not preclude proceedings under subsequent general laws. In re Crossman, 92 N. E. 1016, 1017, 207 Mass. 58.

ACTS IN AN OFFICIAL FUNCTION

A person employed by the United States as an assistant statistician in the Department of Agriculture, in the performance of the duties with which he is charged by the rules of the department, "Acts for the United States in an official function," within the meaning of Rev. St. § 5451, making it a criminal offense to bribe any such person to induce him to do or to omit to do any act in violation of his lawful duty.—United States v. Haas, 163 Fed. 908, 910.

ACTIO

The Latin "actio," in the civil law, meant both the proceeding to enforce the right and the right itself. Wynn v. Tallapoosa County Bank, 53 South. 228, 237, 168 Ala. 469.

ACTION

Under a provision of the laws of a benefit insurance society that any person feeling aggrieved at the "action" of a council in failing to pay benefits may appeal, the fail-

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ure of the council to pay a benefit constitutes an "action" from which an appeal may be taken, and does not prevent the beneficiary from appealing, so as to justify an action at law without exhausting this remedy. King v. Wynema Council, No. 10, Daughters of Pocahontas, Improved Order of Red Men of Delaware (Del.) 82 Atl. 1076, 1078.

ACTION—ACTION AT LAW

See Cause of Action; Chose in Action; Civil Action—Case—Suit—etc.; Commencement of Action; Criminal Action; Debt (Action of); During Pendency of Action; Equitable Action; Foundation of Action; Hard Action; Joint Cause of Action; Judicial Action; Limitation of Actions; Local Action; Mortgage Action; New Action; Ordinary Action; Party to Suit or Proceeding; Penal Action; Personal Action; Petitory Action; Popular Action; Proper Action; Qui Tam Action; Real Action; Right of Action; Subject (of Action); Transitory Action; Trespass (Action of); With Intent of Bringing Action.

All actions or proceedings, see All.
Any action, see Any.
Any and all actions, see Any.
Any other action, see Any Other.
Contested action, see Contest.
Continuance of action, see Continuance.
Discontinuance of action, see Discontinuance.
Every action, see Every.
Object of action, see Object.
Other action, see Other.
Such action, see Such.
See, also, Proceeding; Special Proceeding; Suit.

An "action" is the means that the law has provided to put a cause of action into effect. McAndrews v. Chicago, L. S. & E. Ry. Co., 162 Fed. 856, 858, 89 C. C. A. 546.

An "action" is a means of redress of the legal wrong described by the words "cause of action." Scheuing v. State (Ala.) 59 South. 160, 161.

The word "action" is defined as "a civil proceeding taken in a court of law to enforce a right"; as "the form of a suit given by law for the recovery of that which is one's due; the lawful demand of one's right"; as "the means by which men litigate with each other"; as "the act of three parties, the plaintiff, the defendant, and the court"; as "a demand for or a presentation of one's rights in a court of justice"; and as "the judicial means of enforcing a right." Wynn v. Tallapoosa County Bank, 53 Southn. 228, 237, 168 Ala. 469.

An "action" is an ordinary proceeding by which one party prosecutes another for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offense, and there are two kinds of actions, civil and criminal. In re Burnette, 85 Pac. 575, 576, 73 Kan. 609; Maben v. Rosser, 103 Pac. 674, 678, 24 Okl. 588; In re Droege, 90 N. E. 340, 342, 197 N. Y. 44; Harris v. Weiss, 105 N. Y. Supp. 8 (quoting Code Civ. Proc. § 3333). The term includes all the formal proceedings in a court pertaining to the demand of a right made by one party of another. Cape v. Cape, 124 S. W. 869, 136 Ky. 625.

An "action" is a lawful demand of one's right in a court of justice. A "civil action" is a like demand by a person of a civil right. State v. One Bottle of Brandy, 43 Vt. 297; Giant Powder Co. v. Oregon Western Ry. Co., 103 Pac. 501, 502, 54 Or. 325 (quoting 1 Words and Phrases, p. 129); In re Oliver's Guardianship, 83 N. E. 795, 796, 77 Ohio St. 474.

The term "action," as defined by Code Civ. Proc. §§ 3471, 3479, means a proceeding instituted in a court by one or more parties against another or others to enforce or protect a right, to redress or prevent a wrong, or to punish a public offense. State ex rel. Carleton v. District Court of Lewis and Clarke County, 82 Pac. 789, 790, 33 Mont. 138, 8 Ann. Cas. 752.

The term "actions and proceedings," as used in Laws Wis. 1905, c. 295, conferring on the superior court of Lincoln county jurisdiction concurrent with the circuit court in all civil actions and proceedings at law and in equity, with certain exceptions, embraced all exercise of judicial or quasi judicial power of courts, whether conferred by statute, common law, or equitable rules. Wisconsin River Imp. Co. v. Pier, 118 N. W. 857, 859, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

Rev. Codes 1899, § 5582, provides that when an action has been dismissed for want of jurisdiction, or because not regularly transferred, the costs must be adjudged against the party attempting to institute or bring up the action. Held, that the word "action" was not used in its technical sense, but means any form of proceeding instituted in court. Tracy v. Scott, 101 N. W. 905, 907, 13 N. D. 577.

In section 5623 of the statute (Comp. Laws 1909), which provides that several causes of action may be united in the same petition, where they arise out of the same transaction, or transactions connected with the same subject of action, the term "cause of action" means a redressible wrong. Its elements being the wrong and the relief provided. The "subject of action" is a primary right and its infringement. The term "transaction" is used in the first clause with reference to, and expressive of, all the acts, or groups of related acts, which go to make up one entire project, system, or deal, referred to as a "transaction," and in the latter

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clause it is used to include and encompass only such acts, or groups of acts, as in themselves constitute separate, redressible wrongs; and such wrongs (transactions) are connected with the same "subject of action" whenever they affect, grow out of, or constitute separate infringements of, the same primary right. Stone v. Case, 124 Pac. 960, 963-966, 34 Okl. 5, 43 L. R. A. (N. S.) 1168.

Rev. St. c. 83, § 94, provides that when a writ fails of sufficient service, etc., or is abated, or the action is otherwise defeated for any matter of form, the plaintiff may commence a new action within six months after the abatement or determination of the original suit. As originally enacted as section 11, c. 62, Laws 1821, it provided that any action which should be actually declared on, and in which the writ purchased therefor should fail of a sufficient service, etc., or when such writ should be abated, or the action avoided by demurrer or otherwise, for informality of proceedings, the plaintiff might commence another action upon the same demand and thereby save the limitation thereof. Section 8 of that chapter provided that any action of the case or debt, etc., which should be actually declared upon in a proper writ, returnable according to law within six years after the cause accrued, should be deemed and taken to be duly commenced within the meaning of that act. Held, that chapter 83, § 94, does not apply to a case where an action was dismissed because the writ was made returnable at a term other than the first term after its issuance, contrary to law, since the word "action," as used in section 11, had the same meaning as in section 8, where it was defined as one declared upon in a proper writ returnable according to law, which meaning has not been changed by any subsequent provision; and while the words "proper writ" did not mean one that could not be abated or defeated for any matter of form, but merely meant one adapted to the cause of action, the words "returnable according to law" were definite and explicit and not subject to judicial construction, and hence the word "writ," as used in section 94, means a writ returnable according to law. Densmore v. Hall, 84 Atl. 983, 985, 109 Me. 438.

The term "action," as used in the rule that the circuit court can, especially by legislative authority, exercise at chambers any power not requiring the trial of an action, strictly so called, does not include proceedings, classed for some purposes with actions, commenced by common-law writs. In re Potter, 112 N. W. 1087, 1089, 133 Wis. 1.

"Actions at law" include those cases where the relief sought consists in the direct recovery of real or personal property, or some amount of money only. Van de Wiele v. Garbade, 120 Pac. 752, 753, 60 Or. 585.

A petition filed under the provisions of Tucker Act March 3, 1887, c. 359, against the United States on a construction contract, is not an "action at law." Conners v. United States, 141 Fed. 16, 18, 72 C. C. A. 272.

Accounting

Proceeding to compel a guardian to account is not an "action" within the statute of limitations, nor do the filing of exceptions to the account by the ward and the hearing thereon constitute an "action" within the statute. Whitfield v. Burrell, 118 S. W. 153, 156, 54 Tex. Civ. App. 567.

An action by persons, who subscribed a bonus to induce defendant to construct and operate a factory, to recover their subscriptions because of breach of defendant's contract, is an "action at law," not a "suit in equity," though an accounting is prayed. Akins v. Hicks, 83 S. W. 75, 109 Mo. App. 95.

Appeal or error

The words "action" and "cause of action" are not ordinarily applicable to writs of error. The right to prosecute a writ of error from a Circuit Court of Appeals without giving security for costs is not given by Act July 20, 1892, providing for the prosecution of suits or "actions" in forma pauperis, as that act does not apply to appellate proceedings. Bradford v. Southern Ry. Co., 25 Sup. Ct. 55, 57, 195 U. S. 243, 49 L. Ed. 178.

Application for writ of review

An application for a writ of review, as authorized by the act entitled "An act regulating special proceedings of a civil nature," is an "action," within Ballinger's Ann. Codes & St. § 4793, providing for one form of action for the enforcement of rights, etc., which shall be called a "civil action." State ex rel. Spokane Terminal Co. v. Superior Court for Spokane County, 82 Pac. 878, 879, 40 Wash. 453.

Bastardy proceeding

A prosecution under the Kansas bastardy act responds in all essential respects to the definition of an "action" as found in the statute providing that an action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Poole v. French, 80 Pac. 997, 998, 71 Kan. 391.

Case synonymous

An affidavit of merits on a motion for change of venue read, "Deponent has fully and fairly stated his defense to said 'action' and all the facts relative 'thereto' to his counsel." Held, that "action" is synonymous to "case"; hence the clause should be construed to read, "and all the facts relative to the 'action,' i. e., 'case.'" Larocque

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v. Conhaim, 92 N. Y. Supp. 99, 101, 45 Misc. Rep. 234 (citing Bouv. Law Dict. and Black's Law Dict. sub verba "Case").

As cause of action

Code 1907, § 2496, providing that all "actions" on contracts, expressed or implied, and all personal actions, except for injuries to the reputation, survive in favor of and against the personal representatives, does not include "causes of action" or "rights of action." Wynn v. Tallapoosa County Bank, 53 South. 228, 237, 168 Ala. 469.

Condemnation proceedings

Jurisdiction of "'civil actions' and proceedings at law" includes condemnation proceedings. Wisconsin River Imp. Co. v. Pier, 118 N. W. 857, 859, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

Correction of judgment

Rev. St. 1895, art. 3358, provides that every action, other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years after the right to bring the same shall have accrued. Held, that the word "action" meant the prosecution of some demand in a court of justice, including all proceedings taken in such a court to fix a right given either by statute or substantive law, and therefore included a proceeding to correct a clerical error in a judgment previously rendered in the same court. Rogers v. Waggoner (Tex.) 149 S. W. 561, 562.

Criminal prosecution

Local Option Law § 16, authorizes criminal prosecutions for violations thereof. Section 19 provides for a civil action for damages against violators. Section 13 provides that all actions brought and all right of actions accrued before a repeal of the law shall remain and continue to exist as if no repeal had taken place. Held, that "action" includes both civil and criminal actions, and hence that a sentence imposed after such repeal on a person previously convicted was not invalid. In re Adler, 136 N. W. 1120, 1121, 171 Mich. 263.

The word "actions," as used in Gen. St. 1901, § 1261, requiring a foreign corporation to file its consent that actions may be commenced against it by service of process on the Secretary of State, includes both civil and criminal actions as defined by sections 4431–4436. State v. International Harvester Co. of America, 99 Pac. 603, 604, 79 Kan. 371.

"Actions," as used in Rev. St. 1899, § 3237, authorizing fees to a prosecuting attorney for judgments upon any proceedings of a criminal nature otherwise than by indictment or information for his services in all actions which it shall be made a duty by law to prosecute or defend, means suits in court upon which judgment may be rendered, and does not authorize the payment of a fee for his attendance at the preliminary examination in felony cases. Hill v. Butler County, 94 S. W. 518, 519, 195 Mo. 511.

Disbarment proceedings

A proceeding in the circuit court to disbar an attorney is not an "action," within Pub. Acts 1905, p. 484, No. 318, providing that, whenever in any action at law in the circuit court the issue raised on a demurrer shall be decided adversely to the demurrant, the decision may be reviewed forthwith by certiorari. In re Radford, 123 N. W. 546, 547, 159 Mich. 91.

Election contest

A proceeding to contest an election is not an "action at law," but is a purely statutory proceeding unknown to the common law, and therefore one in which a writ of error is not a writ of right, and the only method of bringing the record to the Supreme Court for review is an appeal, as provided in the election law. Devous v. Gallatin County, 91 N. E. 102, 103, 244 Ill. 40, 18 Ann. Cas. 422.

Equity proceedings

B. & C. Comp. § 4946, authorizing the district attorney to maintain an "action" against a lessee of a county road to have the lease declared forfeited for failure to comply with its provisions, does not limit the attorney to an "action at law" but he may sue in equity to cancel the lease. In a legal sense "action," "suit," and "cause of action" are convertible terms. Tillamook County v. Wilson River Road Co., 89 Pac. 958, 959, 49 Or. 309 (citing Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; and Anderson's and Bouvier's Law Dictionaries).

An action to set aside a fraudulent deed as a cloud on plaintiff's title, is not an "action," within Ky. St. 1903, § 11, authorizing a person owning and in possession of land to institute an equitable action to quiet his title, though the object is the same and plaintiff's possession is not a prerequisite. Cawood v. Howard (Ky.) 113 S. W. 109, 110.

A decree of dismissal, without prejudice to any "action at law," rendered by a federal court on sustaining a demurrer to the complaint in equity on the ground that plaintiff was not entitled to the relief prayed for, is a bar to a subsequent suit in a state court setting up a like equitable cause of action; the quoted words meaning a cause of action at law, notwithstanding the Code abolishes different forms of action. Smith v. Cowell, 92 Pac. 20, 22, 41 Colo. 178.

The word "action," in Rev. Laws, c. 13, § 32, conferring on the tax collector authority to collect a tax by maintaining an "action" in his own name against the person assessed therefor in the same manner as for

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his own debt, is used in its comprehensive sense as meaning the pursuit of a right in the courts of justice, without regard to the form of legal proceedings, and not in the narrow signification in which it is sometimes employed to indicate a specific remedy at law, and a tax collector may sue in equity to enforce a trust for unpaid taxes created by a common-law assignment for the benefit of creditors in trust for preferred claims including taxes. City of Boston v. Turner, 87 N. E. 634, 637, 201 Mass. 190 (citing Cohens v. Virginia, 6 Wheat. 264–407, 5 L. Ed. 257; Valentine v. City of Boston, 37 Mass. [20 Pick.] 201; Inhabitants of Bridgton v. Bennett, 23 Me. 420–425). That Code 1906, § 4256, provides for a recovery of taxes by "action," does not confine the remedy to courts of law, in view of sections 4738, 4742, and 4743, giving the revenue agent authority to sue in either a court of law or equity. Delta & Pine Land Co. v. Adams, 48 South. 190, 194, 93 Miss. 340.

Forcible entry

The action of forcible entry is an "action at law," authorized by Ind. T. Ann. St. 1899, c. 28. Sharrock v. Kreiger, 98 S. W. 161, 164, 6 Ind. T. 466.

Foreclosure of lien or contract

The attempt of a foreign corporation, assignee of a chattel mortgage, to foreclose it in this state by proceedings commenced under the agreement for sale contained in the mortgage, or by a proceeding not commenced in a court of justice, but under the statute, whereby the property is to be taken and sold at public auction by a public officer, who is to make return of his doings and dispose of the proceeds as required by statute and so end the proceedings, is not available to an individual under the statute preventing the corporation from maintaining an "action" in this state on a contract made here, since the proceeding to foreclose the mortgage is not an action, within the meaning of the statute; the word "action" meaning the demand of a right in a court of justice. Herald & Globe Ass'n v. Clere Clothing Co. (Vt.) 84 Atl. 23, 26.

The word "action," defined by Rev. Code Civ. Proc. § 12, as being an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, does not include a proceeding to foreclose a mortgage by advertisement, because no right is litigated between the parties, nor is the power of a court of law or equity invoked. Stevens v. Osgood, 100 N. W. 161, 18 S. D. 247 (citing Hall v. Bartlett [N. Y.] 9 Barb. 297).

Mandamus

"A mandamus proceeding is regarded as an 'action' respecting the right to costs; the relator for that purpose being treated as the party plaintiff." State ex rel. Wunderlich v. Kalkofen, 113 N. W. 1091, 1093, 134 Wis. 74.

An independent proceeding commenced by an original writ, such as mandamus, is an "action" under St. 1898, § 2595. State ex rel. Milwaukee Medical College v. Chittenden, 107 N. W. 500, 507, 127 Wis. 468. A proceeding by mandamus to compel public officers to perform an official act is an "action," within Rev. St. 1898, § 2918, which provides that costs shall be allowed of course to the plaintiff in an action in the circuit court on a recovery in certain specified cases, and section 2920, which declares that costs shall be allowed of course to the defendant in the actions mentioned in the two preceding sections, unless the plaintiff was entitled to costs therein. State ex rel. Risch v. Board of Trustees of Policemen's Pension Fund, 98 N. W. 954, 959, 121 Wis. 44.

A mandamus proceeding is a special proceeding, and not an "action," under Rev. Codes 1905, §§ 6741–6743, and is not triable de novo on appeal; section 7229 allowing a new trial only in actions. State v. Fabrick, 112 N. W. 74, 75, 16 N. D. 94.

Mandamus will not lie to reinstate a resident to membership in a foreign corporation doing no business in the state, though Code Civ. Proc. § 1780, allows him to maintain an "action" against it; a proceeding for mandamus being a special proceeding, and not an action. People ex rel. Ruman v. National Slavonic Society of United States of America, 129 N. Y. Supp. 603, 604, 144 App. Div. 574.

Motion for judgment

A motion by a lessor for a judgment for rent is an "action at law," within Code 1887, § 3299 (Va. Code 1904, p. 1740), authorizing defendant in an action on a contract to file a plea of set-off. Newport News & O. P. Ry. & Electric Co. v. Bickford, 52 S. E. 1011–1013, 105 Va. 182 (citing Reed & McCormick v. Gold, 45 S. E. 868, 102 Va. 37).

Objections to bankrupt's discharge

A creditor who objects to the discharge of a bankrupt may prosecute his objections in forma pauperis, by virtue of Act July 20, 1892, c. 209, which gives any citizen entitled to commence "any 'suit' or 'action' in any court of the United States" such right on making the required showing. Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute, and fall within the accepted definition of a "suit" or an "action." In re Guilbert, 154 Fed. 676, 677 (citing Words and Phrases, ad verba).

Partition

A proceeding for leave to issue execution on a judgment charging land with owelty in partition is an "action," within the

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statute of limitations. Ex parte Smith, 47 S. E. 16, 18, 134 N. C. 495.

Probate and administration proceedings

A suit to contest a will is an "action at law" within the rule that the Supreme Court will not weigh conflicting evidence to determine whether the jury found against the weight of the evidence, but will only examine the record to show if there was any evidence to support the verdict. Sayre v. Trustees of Princeton University, 90 S. W. 787, 794, 192 Mo. 95.

Gen. St. 1901, § 4432, defines an "action" as an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Section 4771 provides that a husband and wife shall be incompetent to testify for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have joint interest in the action. Held, that section 4771 does not disqualify a husband from testifying before the probate court in a proceeding to establish a will in which his wife is named as a legatee; the proceedings before the probate court not being an "action." Lanning v. Gay, 78 Pac. 810, 70 Kan. 353.

An action under Code Civ. Proc. § 2653a, to set aside the probate of a will, is not an "action" within sections 3228, 3229, relating to costs, but is within section 3230, authorizing the court in its discretion to award costs to any party, and the court may award costs to any litigant, including the unsuccessful plaintiff. Senter v. Petheram, 118 N. Y. Supp. 347, 348, 64 Misc. Rep. 294.

Under Ky. St. § 469, declaring "action," as used in the statutes, to include all proceedings in any court of the commonwealth, and section 2522, providing that an action for relief not otherwise provided for can only be commenced within ten years from its accrual, a proceeding to probate a nonresident's will must be commenced within ten years after testator's death, regardless of whether the will was previously probated in the state of testator's domicile, in the absence of any statute expressly limiting the time within which wills may be probated, since the probating of a will, if not an "action," is at least a proceeding to obtain relief. Foster v. Jordan, 113 S. W. 490, 492, 130 Ky. 445.

Gen. St. 1902, § 705, providing that, in actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased relevant to the matters in issue may be received in evidence, the word "actions" as so used should be construed to include a judicial settlement of executors' accounts, so that, on an objection that one of the executors had not charged in the account as an asset of the estate an indebtedness alleged to be owing by him to the testator, declarations of the testator in his lifetime with reference to the executor's indebtedness to him were admissible. Mulcahy v. Mulcahy, 81 Atl. 242, 243, 84 Conn. 659.

A proceeding by the sheriff in the county court to require the personal representatives of a deceased taxpayer to list property omitted from assessment, is not an "action" within the meaning of the statute prohibiting the bringing of any action, other than to settle the estate, against a decedent's estate within six months of the qualification of its personal representative; but the proceeding is merely a manner of assessing property, and is not in essence judicial. Commonwealth ex rel. Cummins v. Ryan's Ex'r, 104 S. W. 727, 728, 126 Ky. 649.

A petition filed in 1894 by a ward for the appointment of an auditor to state an account against a deceased guardian resulting in an adjudication against the guardian's estate, and a sale of realty by order of the orphans' court, entered in 1900, to pay the indebtedness, is not an "action" within Act Feb. 24, 1834 (P. L. 77) § 24, providing that no debts of a decedent, except those secured by mortgage or judgment, shall remain a lien on the realty longer than five years after his decease, unless an action therefor be commenced and duly prosecuted against his personal representatives within five years after his decease; and hence no title passed under the sale in question. Smith v. Ribblett, 82 Atl. 245, 246, 233 Pa. 300.

Proceeding distinguishable

A "proceeding" is not an "action," as the term is used in the Code of Civil Procedure, to which no such thing as a proceeding is known, so that a demurrer on the ground of another "proceeding" pending between the same parties for the same cause raises no question of law. Queens County Water Co. v. O'Brien, 115 N. Y. Supp. 495, 499, 131 App. Div. 91.

Provisional remedies

A proceeding to secure a temporary restraining order and for the appointment of a receiver is not an "action," within Wilson's Rev. & Ann. St. 1903, § 4202, providing that "an action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Martin v. Harnage, 110 Pac. 781, 782, 26 Okl. 790, 38 L. R. A. (N. S.) 228.

Scire facias

A proceeding by scire facias to correct a judgment, the entry of which omitted to show that it was against a certain party for a certain sum, is not an "action" to correct

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a judgment within Rev. St. 1895, art. 3358, providing that every action other than for the recovery of realty for which no limitations are otherwise prescribed shall be brought within four years next after the right to bring same shall have accrued. Coleman v. Zapp (Tex.) 151 S. W. 1040, 1042.

There can be no doubt that scire facias has been regarded in law as an "action" or suit. McLellan v. Lunt, 14 Me. 254, 258 (citing Co. Litt. 291, a; St. 4 and 5 Anne, c. 16, § 17; St. 53 Geo. III. c. 127, § 5).

A proceeding upon a writ of scire facias to revive a judgment is not an "action," but simply a continuance of a former suit. Bick v. Tanzey, 80 S. W. 902, 904, 181 Mo. 515.

Rev. St. 1899, § 3748, as amended by Laws 1907, p. 320, provides that any action or proceeding which the plaintiff in a judgment might have thereon may be maintained in the name of an assignee. Held that, though scire facias to revive a judgment is not an "action," it is a "proceeding," and may therefore be maintained in the name of an assignee. Reyburn v. Handlan, 147 S. W. 846, 847, 165 Mo. App. 412.

Special and statutory proceedings

See, also, Special Proceeding.

A suit in equity to restrain defendants from polluting a water course was an "action," and not a "special proceeding," within Code Civ. Proc. § 394, providing that whenever an action is brought by a county or a city against residents of another county or city, or a corporation doing business in the latter, the action must be, on motion of the defendant, transferred for trial; the term "special proceeding" being limited to a proceeding in a court which under the common law and equity practice was neither an action at law nor a suit in equity. Yuba County v. North American Consol. Gold Min. Co., 107 Pac. 139, 140, 12 Cal. App. 223.

The word "action," as used in a statute of limitations, includes a special proceeding like certiorari. People ex rel. McCabe v. Snedeker, 94 N. Y. Supp. 319, 321, 106 App. Div. 89. Certiorari is an "action" within a statute defining an "action" to be a proceeding to enforce a right, redress a wrong, etc. State ex rel. Milwaukee Medical College v. Chittenden, 107 N. W. 500, 507, 127 Wis. 468.

Under a statute providing that an appeal to the district court from an order of the board of county commissioners disallowing a claim shall be tried the same as appeals from justices' courts, an appeal from the disallowance of a claim is not a "special proceeding" in the district court, but is an "action," and its judgment is reviewable in the Supreme Court, within Const. art. 6, § 2, conferring on the Supreme Court jurisdiction to review final judgments in civil cases. Washington County v. Murray, 100 Pac. 588, 589, 591, 45 Colo. 115.

An appeal from a revocation by the State Board of Medical Examiners of a physician's license to a district court is a special proceeding within Rev. Codes, §§ 8079, 8080, defining an "action" as an ordinary proceeding by one party against another to enforce or protect a right, redress or prevent a wrong, or punish a public offense, and declaring every other remedy a "special proceeding." State ex rel. Gattan v. District Court of Second Judicial District, 101 Pac. 961, 39 Mont. 134.

A proceeding by a client against his attorney, pursuant to Code Civ. Proc. § 66, authorizing the court on the petition of the client or attorney to determine and enforce the lien of the attorney, is not an "action," but a special proceeding. Cartier v. Spooner, 103 N. Y. Supp. 505, 507, 118 App. Div. 342.

Suit synonymous

The words "action" and "suit," as used in statutes of limitation, are generally synonymous. Whitfield v. Burrell, 118 S. W. 153, 156, 54 Tex. Civ. App. 567. See also Jellison v. Swan, 74 Atl. 920, 922, 105 Me. 356.

In a legal sense "action" and "suit" are convertible terms. Tillamook County v. Wilson River Road Co., 89 Pac. 958, 959, 49 Or. 309 (citing Bouvier's Law Dict. and Anderson's Law Dict.); Messenger v. Board of Com'rs of Converse County, 117 Pac. 126, 130, 19 Wyo. 309.

Rev. St. 1874, c. 68, § 11, providing that notice of proceedings by an abandoned spouse to sell the property of the delinquent spouse for family support shall be given "as in ordinary actions," and that anything done under "the order or decree of the court" shall be valid, as if done by the party owning the property, authorizes service by publication as in chancery, notwithstanding the use of the word "action"; that word in a comprehensive sense being synonymous with "suit," and being used interchangeably therewith to mean any legal proceeding in a court for the enforcement of a right, so that the words "ordinary actions" did not contemplate personal service as in a strictly legal action. Brand v. Brand, 96 N. E. 918, 920, 252 Ill. 134.

ACTION AGAINST AN EXECUTOR AND LEGATEES

An action against one who had been discharged as executor, and the legatees to whom the estate had been distributed, wherein it was alleged that such executor took possession of the property, caused an inventory to be made, and that the inventory amounted to a designated sum, was an "action against an executor and legatees," within Rev. Code Civ. Proc. § 486, subd. 2, for-

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bidding a party to such an action to testify as to a transaction with decedent. Jones v. Subera, 126 N. W. 253, 258, 25 S. D. 223.

ACTION AGAINST RAILROADS

The proviso of Revisal 1905, § 424, that "actions against railroads" shall be tried in the county where the cause arose or in a county where the plaintiff resided when the cause arose or an adjoining county, applies only to actions in which a railroad is the sole defendant, and not to actions in which it is joined with an individual defendant. Smith v. Patterson, 74 S. E. 923, 924, 159 N. C. 138.

ACTION AGAINST STATE

See Suit against the State.

ACTION ARISING UNDER THE PATENT LAWS

A suit for an injunction and accounting and for alleged infringement of a patent by the sale of the patented article without license is an "action arising under the patent laws," of which a Circuit Court of the United States has jurisdiction, though the determination of the question of infringement may also involve the construction or validity of a license under which defendant claims the right to sell. Victor Talking Mach. Co. v. The Fair, 123 Fed. 424, 426, 61 C. C. A. 58.

ACTION CONDICTIO INDEBITI

Where a contractor for a public improvement substituted a cheaper material than that specified, and thereby made an improper profit, the public commission in charge of the improvement was entitled to recover such profit, under La. Civ. Code, art. 2301 (2279), providing that he who receives what is not due to him, whether through error or knowingly, obliges himself to restore it, and article 2302 (2280), declaring that he who has paid through mistake, believing himself a debtor, may reclaim what he has paid, in an "action condictio indebiti," and was not limited to the remedy of an "action quanti minoris." Drainage Commission of New Orleans v. National Contracting Co. of New York, 136 Fed. 780, 784 (citing Laurent, Droit Civil Français [Paris Ed. 1878] vol. 20, p. 371, § 348; Supplement to the Annotated Code Napoléon of Fuzier-Herman [Paris, 1903] p. 1616; note to article 1377 Code Napoléon [corresponding to article 2302 (2280) of the Louisiana Civil Code]; Dictionnaire du Digeste, vol. 1, p. 100.)

ACTION EX DELICTO

An action to recover damages for the negligent injury of a person while a passenger on a street car is an "action ex delicto," and not on the contract of carriage, and the plaintiff may join as defendants the street railroad company and an employé, where their joint negligence is alleged to have been the cause of the injury; and in such case the cause of action is not separable for the purpose of removal. Knuth v. Butte Electric Ry. Co., 148 Fed. 73, 74, 75 (citing Atlantic & P. R. R. v. Laird, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. Ed. 485; Guardian Trust & D. Co. v. Fisher, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367; Doremus v. Root, 94 Fed. 760; Little v. Giles, 118 U. S. 596, 608, 7 Sup. Ct. 32, 30 L. Ed. 269; Walker v. Collins, 167 U. S. 57, 60, 17 Sup. Ct. 738, 42 L. Ed. 76; Warax v. Cincinnati, N. O. & T. P. Ry. Co., 72 Fed. 637.)

ACTION FOR DAMAGES

An action against a county for damages for the cutting by its road supervisor, acting under its commissioners, of an embankment built by plaintiff to impound water for his mill, is not an action for the taking of private property without compensation, though subsequent to the construction of the embankment the public road was so changed as to run across and along the embankment, but is an "action for damages," within Rev. St. 1895, art. 790, providing that no county shall be sued unless the claim on which the suit is founded shall have been first presented to the county commissioners' court for allowance, and it shall have neglected to allow the same, so that the presentation of a claim for the damages and the refusal of the commissioners' court to allow it are conditions precedent to a right to sue. Bogue v. Van Zandt County, 138 S. W. 1065, 1066.

ACTION FOR DECEIT OR FRAUD

See, also, Actionable Fraud; Judgment for Fraud.

An "action for deceit" is based on fraud, and to sustain it there must not only have been false representations, but, contrary to the rule in suits for rescission, they must have been made fraudulently and intentionally, or so recklessly and without concern as to their truthfulness as to be the equivalent of actual fraud. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 Fed. 888, 891, 892.

Under Rem. & Bal. Code, § 3697, prohibiting the reduction of the capital stock of a corporation, except as provided by sections 3704–3706, the impairment of the capital stock of a corporation in a manner not authorized is a fraud, and an action against the president of a corporation for selling capital stock to the corporation and receiving pay therefor from the funds of the corporation is an "action for fraud," within Rem. & Bal. Code, § 159, subd. 4, limiting the time for the commencement of such actions. Union Trust Co. v. Amery, 120 Pac. 539, 540, 67 Wash. 1.

In order to sustain an "action for fraud and deceit," it must be shown that the representations made were false and were known to be false by the party making them, or that they were representations of facts which the party claimed to know the truth

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about when in fact he had no knowledge whatever upon the subject. Ames v. Thren, 125 Ill. App. 312, 317.

The essential elements necessary to constitute a cause of "action for deceit" are (1) representations; (2) falsity; (3) scienter; (4) deception; and (5) injury—though to these elements should be added the qualifications that the representations should have been intended to influence the action of the person injured by them. Greene v. Mercantile Trust Co., 111 N. Y. Supp. 802, 805, 60 Misc. Rep. 189.

"To create a right of 'action for deceit' there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur: (a) It is untrue in fact. (b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff does act in reliance on the statement, in the manner contemplated or manifestly probable, and thereby suffers damage." Whitehurst v. Life Ins. Co. of Virginia, 62 S. E. 1067, 1068, 149 N. C. 273 (quoting Pollock, Torts).

"Deceit" which will afford a cause of "action in tort" does not require that the acts complained of shall have grown out of a contractual relation, and hence the action is cognizable in the superior court. Ashe v. Gray, 88 N. C. 190, 192.

The elements of an "action for fraud and deceit" are representation, falsity, scienter, deception, and injury. Foster v. Obereich, 82 N. E. 858, 230 Ill. 525.

To support an "action for deceit," there must have been a statement untrue in fact, the person making it must have either known that it was untrue, or have been culpably ignorant, it must have been made with intent that the other party should act upon it, and he must have so acted to his damage. Whitehurst v. Life Ins. Co. of Virginia, 62 S. E. 1067, 1068, 149 N. C. 273.

Where a vendee of land was deceived by false representations of the vendor that the land was not incumbered, he could recover in an "action for deceit," although he had not removed the incumbrance, and although his title had not been swept away by it. Hahl v. Brooks, 72 N. E. 727, 728, 213 Ill. 134.

In order to maintain an "action for deceit" it must appear that false representations alleged were knowingly made with intent to deceive. American Educational Co. v. Taggert, 124 Ill. App. 567, 570.

ACTION FOR MONEY HAD AND RECEIVED

See Money Had and Received.

ACTION FOR PENALTY OR FORFEITURE

See Suit for Penalty or Forfeiture.

ACTION FOR PERSONAL INJURY

See Personal Injury.

ACTION FOR RECOVERY OF MONEY

An action, brought by leave of court against a receiver for the allowance of a claim to be paid in due course of administration of the property in his hands, is not an "action for money only," as affecting the right to a jury trial. Webb v. Stasel, 88 N. E. 143, 144, 80 Ohio, 122.

The words "action for the recovery of money only," as used in Wilson's Rev. & Ann. St. 1903, § 4715, providing that defendant in an action for the recovery of money only may before trial serve on plaintiff an offer in writing to allow judgment against him for the sum specified therein, and if plaintiff fails to obtain judgment for more than was offered by defendant he shall pay defendant's costs from the time of the offer, do not include a proceeding by a railroad company to condemn land for its right of way and to assess the damages to the landowner; the condemnation proceeding being a special proceeding instituted in a particular and special manner, different from that in bringing an ordinary action for the recovery of money. Blackwell, E. & S. W. Ry. Co. v. Bebout, 91 Pac. 877, 882, 19 Okl. 877, 14 Ann. Cas. 1145.

An action by a trustee in bankruptcy to recover from a creditor of the bankrupt the value of property transferred as a preference contrary to the bankruptcy act, the trustee asking for a money judgment only, is an "action for money," within Code Civ. Proc. § 968, subd. 1, providing that an issue of fact must be tried by jury in all actions in which the complaint demands judgment for a sum of money only. Stern v. Mayer, 91 N. Y. Supp. 292, 293, 99 App. Div. 427.

In an action against a bank for money deposited by a third person under contract with plaintiff, the bank paid the money into court, and the third person, claiming the deposit, was substituted as defendant. Plaintiff recovered judgment, and the judgment recited that plaintiff was entitled to the fund in possession of the clerk and directed him to pay the same. Held, that the action was for the recovery of specific personal property, within Ballinger's Ann. Codes & St. § 6506, providing that the bond, on appeal from a final "judgment for the recovery of money" shall be in a penalty double the amount of damages recovered, and in other cases the bond shall be in such penalty as the judge shall prescribe, and the third person, appealing from the judgment, need not execute a bond in double the amount of the judgment. Pierson v. Peirce, 84 Pac. 731, 732, 42 Wash. 164.

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Municipal Court Act § 2, cl. 4, provides that the court shall have jurisdiction of causes of action designated as of the fourth class, which shall include all civil actions, quasi criminal actions excepted, "for the recovery of money only," when the amount claimed, exclusive of costs, does not exceed $1,000. Section 40 provides that in actions of the fourth class the statement of plaintiff's claim, if the suit be for a tort, shall consist of a brief statement of its nature, and such further information as will reasonably inform defendant of the nature of the case. Held, that the phrase "for the recovery of money only" included actions for personal injuries, in which money damages only were demanded. Maiss v. Metropolitan Amusement Ass'n, 89 N. E. 268, 269, 241 Ill. 177.

ACTION FOR THE RECOVERY OF REAL ESTATE

See, also, Suit for Land; Suit for the Recovery of Real Property.

A suit is not necessarily one for the "recovery of real estate" because such recovery will follow as an incident to the plaintiff's success. Tex. Rev. St. 1895, art. 3358, prescribing a limitation of four years for "actions other than for the recovery of real estate," for which no limitation is otherwise prescribed, applies to a suit for the cancellation of instruments purporting to surrender a coal mining lease, even though as a result of such cancellation complainant might recover possession of the land; and, while such statute does not govern in suits in equity in the federal courts, yet, where such a suit was brought more than four years after the execution of the instruments and the abandonment of work under the lease, the statute will be applied by analogy, and the suit held barred by laches. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 Fed. 217, 235.

An action to quiet title is not an "action to recover possession of land; within the statute of limitations. Lowenstein v. Sexton, 90 Pac. 410, 412, 18 Okl. 322. B. & C. Comp. §§ 3128, 3146, providing that any "action for the recovery of land sold for taxes" shall be commenced within three years from the recording of the tax deed, do not apply to suits to quiet title or determine an adverse claim to land. Mount v. McAulay, 83 Pac. 529, 47 Or. 444.

A suit by which a county sought to subordinate the legal title to certain land held by the county judge and his vendee to the county's alleged superior equitable title thereto on account of the judge's fiduciary relationship was an "action to recover land" within the general statute of limitations, and was not barred by the four-year statute applicable to a suit to cancel or remove the legal title as an impediment to plaintiff's right to recover. Bell County v. Felts (Tex.) 120 S. W. 1065, 1072. But an action to forfeit a land contract, and thereby remove a cloud from the title to the land, is not an "action to recover possession" of land. Smith v. Stiles, 123 Pac. 448, 450, 68 Wash. 345.

An action of trespass to try title is an "action to recover real estate," and the fact that a supplemental petition attacks a deed through which defendant claims, on the ground that it was executed for the purpose of defrauding creditors, does not change the character of the suit. Rutherford v. Carr, 87 S. W. 815, 816, 99 Tex. 101.

A suit for the specific performance of a contract to convey an interest in mining claims is not one "for the recovery of possession of, quieting title to, or for the enforcement of liens upon real estate," within the meaning of such words as used in a constitutional provision requiring such suits to be commenced in the county in which the real estate or any part thereof is situated, and the superior court of a county other than that in which the claims are situated has jurisdiction of such a suit. Wood v. Thompson, 90 Pac. 38, 39, 5 Cal. App. 247.

An action to recover royalties due for oil and gas is not an "action to recover real estate," within Civ. Code Prac. § 62, providing for venue of actions to recover real property, etc., though issues involve title to land, and the judgment that may be rendered may settle rights of parties by way of estoppel. Central Kentucky Natural Gas Co. v. Stevens, 120 S. W. 282, 283, 134 Ky. 306.

An "action" to reform a deed as to the description for mutual mistake is not within a statute providing a limitation of five years for actions for the recovery of real estate, but is within another statute authorizing an action to reform a contract, which because of mistake does not express the intent of the parties. Hart v. Walton, 99 Pac. 719, 721, 9 Cal. App. 502.

Burns' Ann. St. 1908, § 295, cl. 4, providing the time within which an "action" may be brought "for the recovery of real estate" sold by a guardian, applies to a suit to set aside a guardian's sale of real estate where the purchaser is in possession, and the relief asked cannot be granted without disturbing his possession and depriving him of the enjoyment of his property. Sell v. Keiser, 96 N. E. 812, 814, 815, 49 Ind. App. 101.

An action to establish trusts in land, which, would as a matter of law, entitle the plaintiff to be placed in possession, was, in part at least, an "action for the recovery of real property," and its possession, within Code Civ. Proc. § 318, providing that no action for the recovery of real property or the possession thereof can be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was possessed of the property within five years. Bradley Bros. v. Bradley (Cal.) 127 Pac. 1044, 1046.

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Where one acting under erroneous legal advice, and believing that she was not entitled to hold certain real estate belonging to her deceased husband as her homestead, surrendered all homestead rights therein and subsequently brought a suit to set aside such surrender and have her homestead rights in the property declared, such suit was an "action to recover real property," within Code Civ. Proc. § 318, relating to limitations on such actions. Daniels v. Dean, 84 Pac. 332, 334, 2 Cal. App. 421.

ACTION FOR RECOVERY OF TAXES.

An action to recover interest on county deposits was not an "action to recover taxes," but to recover a mere county debt against the depository, as affecting the jurisdiction of the county court. Carroll County Bank v. State, 128 S. W. 1042, 1043, 95 Ark. 194.

ACTION FOR USE AND OCCUPATION

An "action for use and occupation" depends upon the existence or the implication of a contract whereby the relation of landlord and tenant may be created. Ettlinger v. Degnon-McLean Contracting Co., 85 N. Y. Supp. 394, 42 Misc. Rep. 215.

ACTION FOR THE VIOLATION OF A LAW

Acts 1887, p. 225, No. 127, providing that in all "actions" against railway companies "for the violation of any law," regulating the transportation of freight or passengers, the plaintiff, if successful, shall recover a reasonable attorney's fee, to be taxed according to the costs, refers to actions against railroad companies for violation of statutory regulations of the state in regard to transportation of freight and passengers, for to hold it applicable to all actions against railroads in the carriage of freight or passengers, whether or not any statute was violated, would doubtless render it unconstitutional. Kansas City Southern Ry. Co. v. Marx, 80 S. W. 579, 580, 72 Ark. 357.

ACTION FOR WRONGS DONE TO THE PERSON.

A husband's action for loss of services of his wife through injuries not resulting in death is not for wrongs done to the person within Act Feb. 24, 1834 (P. L. 78) § 28, giving to personal representatives the right to prosecute actions in which their decedent was a party plaintiff, except "actions for * * * wrongs done to the person"; the quoted phrase not being used to describe a type of action, but referring to actions for injuries to the person of the plaintiff decedent. Smith v. Lehigh Val. R. Co., 81 Atl. 554, 555, 232 Pa. 456.

ACTION HEREAFTER BROUGHT

The provisions of Act April 22, 1908, c. 149, 35 Stat. pt. 1, p. 65, relating to the liability of common carriers by railroad to their employés, are prospective only in their operation, and the phrase "actions hereafter brought," as used in section 3, does not apply to an action by an employé for an injury received before the statute was enacted. Winfree v. Northern Pac. Ry. Co., 164 Fed. 698, 699.

ACTION IN PERSONAM.

See In Personam.

ACTION IN REM

See In Rem.

ACTION INTER PARTES

The expression "action or suit inter partes," referring to the jurisdiction of the federal courts in regard to probate matters, means not mere controversies which arise on an application to probate a will, but an independent controversy between the parties. Miller v. Weston, 199 Fed. 104, 107.

The rule that where a state law, statutory or customary, gives to the citizen of a state, in an "action or suit inter partes," the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states or aliens, will enforce such remedies, includes only independent controversies inter partes, and not mere controversies which may arise on an application to probate a will, because the state law provides for notices, or to dispute the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceedings; that is, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect. O'Callaghan v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 734, 50 L. Ed. 101.

ACTION OF ACCOUNT

See Account (Action of).

ACTION OF TORT

See Tort.

ACTION ON THE CASE

See Case (Action of).

ACTION ON CONTRACT

See, also, Action Ex Delicto.

Breach of official duty

An action against a sheriff for damages for nonperformance of official duty and to recover a penalty imposed by law for its nonperformance is not an "action on contract," within a Code provision giving justice's courts civil jurisdiction in actions arising on contract for the recovery of money only if the sum claimed does not exceed $300. Oppenheimer v. Regan, 79 Pac. 695, 697, 32 Mont. 110.

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Carriers

An action against a carrier for breach of contract to transport freight, evidenced by a bill of lading signed by the carrier and shipper and stipulating for the transportation of freight on terms specified, is an "action on contract in writing" within Rev. St. 1895, art. 3356, § 1, declaring that actions for debt founded on any contract in writing may be brought in four years. Davies v. Texas Cent. R. Co., 133 S. W. 295, 298.

Foreclosure of mortgage

The phrase "actions founded upon contracts," in Wilson's Rev. & Ann. St. 1903, § 1692, providing that actions founded upon contracts may be maintained by and against executors and administrators in all cases and in the same courts in which the same might have been maintained by and against their respective testators and intestates, includes an action to foreclose a mortgage, since the purpose of a foreclosure suit is to procure a legal determination of the existence of the lien, or ascertainment of its extent, and to subject to sale the property pledged for its payment, which lien arises out of contract. McClung v. Cullison, 82 Pac. 499, 500, 15 Okl. 402.

Insurance

An action against an insurance company to recover a premium paid, on the ground that the policy delivered did not conform to the oral contract of insurance made with the soliciting agent, is not an "action on a contract in writing" for the payment of money, within the statute of limitations. Mutual Life Ins. Co. v. Summers, 120 Pac. 185, 192, 19 Wyo. 441.

Judgment

An action on a judgment is an "action on a contract," so that a counterclaim may be interposed thereto, under Code Civ. Proc. § 501, subd. 2, permitting any cause of action on a contract to be interposed by way of counterclaim in a contract action. Knight v. Rothschild, 117 N. Y. Supp. 26, 29, 132 App. Div. 274.

Under How. Ann. St. 1882, § 8058, providing that in all personal actions arising upon contract, a writ of garnishment may issue an action on a foreign judgment is an "action on contract." Wattles v. Wayne Circuit Judge, 76 N. W. 115, 116, 117 Mich. 662, 72 Am. St. Rep. 590 (quoting and adopting definition in Story, Contracts, § 2).

Refusal to honor check

The wrongful refusal of a bank to honor a check, drawn by a depositor who has sufficient funds to his credit to meet the same, in consequence of which the depositor's credit is impaired and he is rendered insolvent, is not a positive personal wrong, such as slander, but is a breach by the bank of its contract with the depositor, and is consequently, as an "action arising out of contract," assignable, and passes to the depositor's assignee for the benefit of creditors under an assignment of all his property and choses in action. Robinson v. Wiley, 74 N. E. 923, 924, 188 Mass. 533.

Sale of real estate

An action for damages for fraud inducing a purchase of real estate is not an "action upon contract for the sale of real estate," within St. 1893, § 1562 (Wilson's Rev. & Ann. St. 1903, § 1872), providing that the probate court shall not have jurisdiction of any action upon contract for the sale of real estate. Newell v. Long Bell Lumber Co., 78 Pac. 104, 14 Okl. 185.

Separation agreements

An action by a wife to enforce a contract made between her and her husband while they were living apart and a divorce suit instituted by her was pending, whereby, in consideration of the settlement of the divorce suit and for the purpose of adjusting the differences between the parties, the husband agreed that if the wife should at any time thereafter leave him, or be unable to live with him for any good cause, she should receive, on account of her contingent right of dower, and in full for the support of herself and all such minor children as during their minority remained with her, out of the estate of the husband a certain sum of money each month, is an "action on a contract," and not one for divorce or alimony, and attorney's fees under the statute are not recoverable by plaintiff. Woodruff v. Woodruff, 91 S. W. 265, 121 Ky. 784.

ACTION ON MORTGAGE

An action for a deficiency on a chattel mortgage, after foreclosure and sale, is not an "action on a mortgage," jurisdiction of which is denied to the Municipal Court by Laws 1902, p. 1533, c. 580, § 139, since the liability arises as a matter of law out of the foreclosure, and not out of the provision of the mortgage that the mortgagor shall be liable for a deficiency. Wilcox v. Perez, 101 N. Y. Supp. 391, 115 App. Div. 693.

ACTION ON A NOTE

A declaration contained two special counts, in effect declaring on a note, and also contained the consolidated common counts. The special pleas all began by stating that the causes of action in the several counts were the same as contained in the special counts, and the evidence all related to the special counts. Defendant, the guarantor of the note, pleaded failure of consideration, and contended that there was a contemporaneous written agreement with the note, and referring to it, which was specially pleaded by plaintiff. It was held that the suit was an "action on a note," within Starr & C. Ann. St. 1896, c. 98, § 9, declaring that in such actions defendant may plead fail-

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ure of consideration. Ewen v. Wilbor, 70 N. E. 575, 578, 208 Ill. 492.

ACTION QUASI IN REM

See Quasi In Rem.

ACTION TRIED WITHOUT A JURY

ACTIONABLE FRAUD

See, also, Action for Deceit or Fraud; Fraud.

There was an "actionable fraud" where the agent of the seller of property obtained defendants' signatures to a subscription list and notes for the purchase of the property on a misrepresentation that three certain responsible persons who had signed the list would sign the notes, the agent knowing that such persons would not sign, and secretly intending to obtain the signatures of insolvent persons in their stead. City Deposit Bank v. Green, 115 N. W. 893, 896, 138 Iowa, 156.

One commits "actionable fraud" where, with a view to influence the conduct of another, he willfully leads him into a false belief, and the other acts accordingly, to his injury. Gewin v. Shields, 52 South. 887, 888, 167 Ala. 593.

The elements of "actionable fraud" are representations, falsity, knowledge, deception, and injury. Mussiller v. Rice, 116 N. Y. Supp. 1028–1030.

Where the owner of a house built from old lumber put together in a defective manner, and painted over so as to cover the defects, induced an old woman, with defective eyesight, to trade for the property in reliance upon his fraudulent representations as to the character of the house, he was guilty of "actionable fraud," though a careful inspection would have disclosed that it was composed in part of old material. Pope v. Florea, 152 S. W. 96, 97, 167 Mo. App. 595.

ACTIONABLE INJURY

Other actionable injury, see Other.

ACTIONABLE MISREPRESENTATION

See Misrepresentation.

ACTIONABLE NEGLIGENCE

See, also, Negligence.

"Actionable negligence" is an act or omission of duty which is the proximate cause of an injury. J. S. Young Co. v. State, 83 Atl. 345, 347, 117 Md. 247. A failure of duty, the omission of something which ought to have been done, or the doing of something, which ought not to have been done. Toppi v. McDonald, 112 N. Y. Supp. 821, 825, 128 App. Div. 443. But it is not necessary that the result thereof be foreseen, if such result is the probable consequence of defendant's acts. Murphy v. Chicago Great Western Ry. Co., 118 N. W. 390, 392, 140 Iowa, 342. It is not a mere failure to act with ordinary prudence. Freeman v. Nathan (Tex.) 149 S. W. 248, 254. "Actionable negligence" consists in a breach of a duty owing from one to another, by reason of which the latter is injured. Indianapolis Traction Terminal Co. v. Pressell, 77 N. E. 357, 359, 39 Ind. App. 472 (citing Salem-Bedford Stone Co. v. O'Brien, 12 Ind. App. 217, 40 N. E. 430; Faris v. Hoberg, 38 N. E. 1028, 134 Ind. 269, 39 Am. St. Rep. 261; Thiele v. McManus, 28 N. E. 327, 3 Ind. App. 132); Creason v. St. Louis, I. M. & S. Ry. Co., 130 S. W. 445, 447, 149 Mo. App. 223. It is predicated on what reasonably prudent men would or should have been able to anticipate from a view of the situation before the accident. MacRae v. Chelsea Fibre Mills, 130 N. Y. Supp. 339, 343, 145 App. Div. 588. "Actionable negligence" is an omission to use that degree of care, diligence, and skill, which it is one's legal duty to use for another's protection, which omission, by a natural and continuous sequence, causes unintended damages to such other. Pullman Co. v. Caviness, 116 S. W. 410, 411, 53 Tex. Civ. App. 540; Birmingham Belt R. Co. v. Drake, 56 South. 53, 54, 1 Ala. App. 354; Leighton v. Wheeler, 76 Atl. 916, 918, 106 Me. 450; Tennessee Coal, Iron & R. Co. v. Smith, 55 South. 170, 171, 171 Ala. 251; Wheeling & L. E. R. Co. v. Harvey, 83 N. E. 66, 71, 77 Ohio St. 235, 19 L. R. A. (N. S.) 1136, 122 Am. St. Rep. 503, 11 Ann. Cas. 981 (quoting and adopting Buch v. Amory Mfg. Co., 44 Atl. 809, 69 N. H. 257, 76 Am. St. Rep. 163); Bahr v. National Safe Deposit Co., 84 N. E. 717, 718, 234 Ill. 101.

"Actionable negligence" is "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a provident and reasonable man would not do; and an action may be brought if thereby mischief is caused to a third party not intentionally" (quoting and adopting the definition in Blythe v. Waterworks, 25 L. J. Ex. 213). It is "the inadvertent failure of a legally responsible person to use ordinary care, under the circumstances, in observing or performing a noncontractual duty implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." Whisenhant v. Southern Ry. Co., 49 S. E. 559, 560, 137 N. C. 349.

There can be no "actionable negligence," in the absence of a duty owing from him who is charged with the wrong. Thayer v. Smoky Hollow Coal Co., 96 N. W. 718, 721, 121 Iowa, 121.

"Actionable negligence" is the neglect of a legal duty. To bring a case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations, in

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the nature of a trust, a moral obligation only, not recognized or enforced by law. Accordingly, where the only relation between the parties is contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done, and the mere violation of a contract, where there is no general duty, is not the basis of such an action. Glenn v. Hill, 109 S. W. 27, 30, 210 Mo. 291, 16 L. R. A. (N. S.) 699 (citing Dustin v. Curtis, 74 N. H. 266, 67 Atl. 220, 11 L. R. A. [N. S.] 504, 13 Ann. Cas. 169).

The test of "actionable negligence" is, not what might have prevented a particular accident, but what reasonably prudent and careful men would have done in the discharge of their duties under the circumstances. Davenport v. Oceanic Amusement Co., 116 N. Y. Supp. 609, 611, 132 App. Div. 368; Steinbrenner v. M. W. Forney Co., 127 N. Y. Supp. 620, 622, 143 App. Div. 73.

"Actionable negligence" involves the existence of a duty, the omission to exercise ordinary care in connection therewith, and injury resulting in consequence thereof. Linick v. A. J. Nutting & Co., 125 N. Y. Supp. 93, 96, 140 App. Div. 265; Sonsmith v. Pere Marquette R. Co., 138 N. W. 347, 353, 173 Mich. 57; Dustin v. Curtis, 67 Atl. 220, 221, 74 N. H. 266, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169 (citing Buch v. Amory Mfg. Co., 44 Atl. 809, 69 N. H. 257, 260, 261, 76 Am. St. Rep. 163; Pittfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 53 Atl. 807, 71 N. H. 522, 531, 60 L. R. A. 116); Booker v. Southwest Missouri R. Co., 128 S. W. 1012, 1017, 144 Mo. App. 273; Davison v. Royal Amusement Co., 129 S. W. 241, 243, 144 Mo. App. 564; Conway v. Louisville & N. R. Co., 119 S. W. 206, 208, 135 Ky. 229; Briscoe v. Henderson Lighting & Power Co., 62 S. E. 600, 604, 148 N. C. 396, 19 L. R. A. (N. S.) 1116; Wabash R. Co. v. Reynolds, 84 N. E. 992, 995, 41 Ind. App. 678; McGhee v. Norfolk & S. Ry. Co., 60 S. E. 912, 913, 147 N. C. 142, 24 L. R. A. (N. S.) 119; Southern Ry. Co. v. Williams, 38 South. 1013, 1014, 143 Ala. 212 (quoting Akers v. Chicago, St. P., M. & O. R. Co., 60 N. W. 669, 58 Minn. 540). "There can be no 'actionable negligence,' except where there is a failure to perform some legal or contractual duty." St. Louis Southwestern R. Co. of Texas v. Anderson (Tex.) 125 S. W. 628, 629; Cowles v. New York, N. H. & H. R. Co., 66 Atl. 1020, 1021, 80 Conn. 48, 12 L. R. A. (N. S.) 1067, 10 Ann. Cas. 481; United States Express Co. v. Everest, 83 Pac. 817, 819, 72 Kan. 517. Absence of distinct intention to produce the damage which follows is an essential element. Richmond v. Missouri Pac. Ry. Co., 113 S. W. 708, 710, 133 Mo. App. 463 (citing Bindbeutal v. Street Ry. Co., 43 Mo. App. 463). An injury is not actionable which would not have resulted from the act of negligence except for the interposition of an independent cause. Western Union Telegraph Co. v. Schriver, 141 Fed. 538, 550, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; Hauser v. Western Union Telegraph Co., 64 S. E. 503, 504, 150 N. C. 557 (citing Brewster v. Elizabeth City, 137 N. C. 392, 49 S. E. 885); Fenn v. Clark, 103 Pac. 944, 945, 11 Cal. App. 79. To constitute "actionable negligence" there must be a duty or obligation which defendant is under to protect plaintiff from injury, failure to discharge that duty, and injury resulting therefrom. Langenfeld v. Union Pac. R. Co., 123 N. W. 1086, 1088, 85 Neb. 527.

"'Actionable negligence,' or negligence which constitutes a good cause of action, grows out of a want of ordinary care and skill in respect to a person to whom the defendant is under an obligation or duty to use ordinary care and skill. The owner of land and of buildings assumes no duty to one who is on his premises by permission only, and is a mere licensee, except that he will refrain from willful or affirmative acts which are injurious." Means v. Southern California Ry. Co. (Cal.) 77 Pac. 1001, 1003, 144 Cal. 473, 1 Ann. Cas. 206 (citing Gibson v. Leonard, 143 Ill. 182, 189, 32 N. E. 182, 183, 17 L. R. A. 588, 36 Am. St. Rep. 376).

"Actionable negligence" is a breach of duty owed by defendant to plaintiff, but the duty may be general and owing to everybody, or it may be particular and owing to a single individual by reason of his peculiar position, and a duty owing to everybody does not become the foundation of an action until an individual is placed in a position giving him the right to insist on its performance. Upp v. Darner, 130 N. W. 409, 410, 150 Iowa, 403, 32 L. R. A. (N. S.) 743, Ann. Cas. 1912D, 574.

"'Actionable negligence' is the failure to discharge a legal duty to the person injured. If there be no duty, there is no negligence. Even if defendant owed a duty to some one else, but did not owe it to the person injured, no action will lie." Wickenburg v. Minneapolis, St. P. & S. S. M. Ry. Co., 102 N. W. 713, 714, 94 Minn. 276 (quoting and adopting definition in Akers v. Chicago, St. P., M. & O. Ry. Co., 58 Minn. 540, 60 N. W. 669).

The legal conception of "actionable negligence," for which recovery may be had, is such an omission to use the degree of care for the protection of another from injury as should have been used under the circumstances, and which in a natural and continuous sequence causes damage to the latter. Cresswell v. Wainwright, 134 N. W. 594, 599, 154 Iowa, 167.

"Negligence" is not "actionable" unless some legal duty has been neglected, tending

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to the result in continuous and natural sequence, so that one of ordinary prudence would foresee that the result would naturally follow. Blevins v. Erwin Cotton Mills Co., 64 S. E. 428, 431, 150 N. C. 493. "To constitute 'actionable negligence' there must be not only causal connection between the negligence complained of and the injury suffered, but the injury suffered must be a natural and unbroken sequence—without intervening efficient cause—so that, but for the negligence of defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate, efficient—cause of the injury." Crowley v. City of West End, 43 South. 359, 149 Ala. 613, 10 L. R. A. (N. S.) 801 (citing Western Railway of Alabama v. Mutch, 11 South. 894, 97 Ala. 194, 21 L. R. A. 316, 38 Am. St. Rep. 179; Mobile & O. R. Co. v. Christian Moerlein Brewing Co., 41 South. 17, 146 Ala. 404; Decatur Car Wheel & Mfg. Co. v. Mehaffey, 29 South. 646, 128 Ala. 242; Cooley, Torts, § 69; Shearman & Red. Neg. § 26; Wharton, Neg. 26).

"Negligence" and "actionable negligence," even under the turntable doctrine, are distinguishable terms, since carelessness does not always involve liability, which attaches only when there has been a violation of duty by the party charged toward the party injured. Hight v. American Bakery Co., 151 S. W. 776, 782, 168 Mo. App. 431.

"Actionable negligence" is not a habit of mind, but action or inaction contrary to the practice of reasonable men under the circumstances. A receiver of a national bank may maintain a suit against the directors in behalf of creditors and stockholders to recover sums alleged to have been lost to the bank through the misconduct or negligence of defendants, and it is not a necessary condition precedent that violations of the banking act should have been previously adjudged in a suit brought by the comptroller. Allen v. Luke, 141 Fed. 694, 697.

A want of caution to avoid injury where the duty to exercise caution is incumbent, and a reckless or heedless use of a dangerous agency, in a location where the peril from its use is obvious, constitute breaches of duty, which in causing injury may become "actionable negligence." Tudor v. Bowen, 67 S. E. 1015, 1017, 152 N. C. 441, 30 L. R. A. (N. S.) 804, 136 Am. St. Rep. 836, 21 Ann. Cas. 646.

"Actionable negligence" by an employer consists in a failure to exercise that reasonable degree of care which he owes under the circumstances to his employés. Watson v. New York Contracting Co., 111 N. Y. Supp. 277, 279, 127 App. Div. 134; Black's Adm'r v. Virginia Portland Cement Co., 51 S. E. 831, 832, 104 Va. 450. It is nothing but a breach of the duty to exercise reasonable care. It is not a breach of a guaranty of the character of a place or of appliances. Armour & Co. v. Russell, 144 Fed. 614, 615, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602.

To constitute "actionable negligence" there must be, not only causal connection between the negligence complained of and the injury suffered, but the connection must be a natural and unbroken sequence. A complaint alleging that defendant railroad violated an ordinance prohibiting a railroad from blocking any public street for more than five minutes at a time, whereby plaintiff's team, when near the crossing, became frightened and ran away, injuring plaintiff, was demurrable, as not showing any causal connection between the violation of the ordinance and the injuries. Wilson v. Louisville & N. R. Co., 40 South. 941, 942, 146 Ala. 285, 8 L. R. A. (N. S.) 987.

If the character of an act or omission is doubtful, the best test of "actionable negligence," where available, is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the circumstances, and if the care exercised rises to or above that standard there is no negligence, but if it falls below it there is negligence. Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 176 Fed. 237, 240, 100 C. C. A. 41, 20 Ann. Cas. 1200.

While the law imposes different degrees of care based on relations existing between the parties, an injury resulting from a failure to observe such degree of care constitutes "actionable negligence," regardless of the degree of such negligence; degrees of negligence being important only as fixing the character or quantum of damages to be awarded. Western Union Telegraph Co. v. Catlett, 177 Fed. 71, 74, 100 C. C. A. 489.

Simple or slight "negligence" of defendant after knowledge of plaintiff's peril is "actionable," but defendant's knowledge of plaintiff's peril does not make wanton all subsequent negligence contributing to plaintiff's injury, as the subsequent negligence may be either slight, gross, reckless, or wanton. Southern Ry. Co. v. Hyde, 51 South. 368, 370, 164 Ala. 162.

Anticipation of danger is an element of "actionable negligence" only when the character of the act is doubtful, it being of no moment whether the negligent actor could have reasonably anticipated the presence of the person injured at the time and place if the conditions are such as to impose a duty in respect to the public which was not complied with. Western Union Telegraph Co. v. Catlett, 177 Fed. 71, 74, 100 C. C. A. 489.

A carrier was not guilty of "actionable negligence" in permitting goods to be injured by the elements after arrival and pending removal by the consignees, where the latter had been notified of the arrival

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of the goods, had paid the freight, and had permitted a portion of the goods to remain on the carrier's uninclosed platform or shed, according to custom. Stone & Co. v. Clyde S. S. Co., 51 S. E. 894, 895, 139 N. C. 193.

"If ordinary care is exercised in the constructing and maintaining of bridges, there can be no liability. * * * The fact that a bridge gives way and a traveler is injured is not of itself sufficient to charge the county, for it must appear that the county trustees were guilty of 'actionable negligence.'" Board of Com'rs of Wabash County v. Pearson, 22 N. E. 134, 135, 120 Ind. 426, 16 Am. St. Rep. 325 (citing and adopting State ex rel. Winterburg v. Demaree, 80 Ind. 519; Patton v. Board of Com'rs of Montgomery County, 96 Ind. 131; Board of Com'rs of Howard County v. Legg, 11 N. E. 612, 110 Ind. 479; Board of Com'rs of Porter County v. Dombke, 94 Ind. 72).

ACTIONABLE NUISANCE

See, also, Nuisance.

An "actionable nuisance" is defined by Cooley on Torts, vol. 2, p. 1174, as "anything wrongfully done or permitted, which injures or annoys another in the enjoyment of his legal rights." To constitute a nuisance, it is not necessary that the annoyance should be of a character to endanger health, but it is sufficient if it occasions what is offensive to the senses and which renders the enjoyment of life and property uncomfortable. The mere construction of a large excavation for surface water on defendant's premises near plaintiff's residence does not create a nuisance because it may make plaintiff's place unhealthy, the unsanitary conditions not having arisen and no immediate danger appearing, there being no stagnant water, and no insect pests having been produced. Sanders v. Miller, 113 S. W. 996, 998, 52 Tex. Civ. App. 372.

ACTIONABLE PER SE

See, also, Libel.

Any language published of a person that tends to degrade him or bring him into ill repute or to destroy the confidence of his neighbors in his integrity or to cause other like injury is "actionable per se." Stewart v. Codrington, 45 South. 809, 812, 55 Fla. 327.

ACTIVE

The word "active," as used in a petition in an action for personal injuries alleging that before being injured plaintiff was a sound, healthy, and active woman, is a comparative term, and she was entitled to recover damages for such injury as aggravated a previously diseased physical condition. Green v. Houston Electric Co., 89 S. W. 442, 445, 40 Tex. Civ. App. 260.

ACTIVE MEMBER

The by-laws of a police relief association required $2 per annum as dues from active members, and $8 per annum from those who had honorably left the force, and also made a distinction as to sick benefits between active and retired members of the force. The rules of the board of police commissioners, which had authority to define plaintiff's status, required plaintiff, though on the pension roll, to be subject to call by day or night. Held, that plaintiff was entitled to pay dues and receive sick benefits as an "active member" of the force. Nickerson v. Providence Police Ass'n, 57 Atl. 1057, 1058, 26 R. I. 40.

ACTIVE SERVICE

The term "active service," as used in the Constitution and Military Code, means service in time of war or public danger. State v. Peake, 135 N. W. 197, 201, 22 N. D. 457, 40 L. R. A. (N. S.) 354.

"Active service," within Act No. 181, of 1904, § 21, providing that members of the militia ordered into "active service" of the state by any proper authority shall not be liable civilly or criminally for any act or acts done by them while on duty, but shall be liable only to court-martial or inquiry prescribed by military law, contemplates the ordering of the troops into active service by the Governor, and a member of the militia is not removed from the jurisdiction of the civil courts by the fact that he is a member in good standing and thus in a form of "active service." State v. Josephson, 45 South. 381, 382, 120 La. 433.

ACTIVE TRUST

See, also, Passive Trust.

An "active trust" is one requiring the performance by the trustee of active and substantial duties in respect to the management of the trust fund for the beneficiaries and vesting some powers of discretion in the trustee. Kimball v. Blanchard, 64 Atl. 645, 647, 648, 101 Me. 383.

Where a deed of trust gives in terms to a trustee the entire control and management of certain particularized assets, the trust created thereby is held to have been an "active trust." Bay State Gas Co. of Delaware v. Rogers, 147 Fed. 557, 566.

An "active" and not a "passive" trust is created by a deed of trust to sell and reinvest, and to pay to the grantor the income and such part of the principal as the trustee may deem proper, and after her death the principal over to her issue or such persons as she may designate by her will. Newton v. Jay, 95 N. Y. Supp. 413, 418, 107 App. Div. 457.

An "active trust" is said to exist when the trustee is not merely a passive depositary of the estate, but is required to take active

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measures to carry into effect the general intention of the creator of the trust. A will devising improved city real estate to M. to hold in trust for 10 years, providing that he manage it, keep it in repair and insured, pay taxes and assessments against it, and lease such part thereof as he may not occupy himself, for such time and rental as he may deem best, and, in case of destruction of any of the improvements, use the proceeds of insurance and reconstruct the same, and that during such time he shall quarter-annually make certain payments to certain persons, and at the end of said 10 years, and when all the charges mentioned had been paid, should convey to himself the real estate, creates in him for 10 years an active trust. Matthern v. Rankin, 81 N. E. 1024, 1026, 228 Ill. 318 (citing Anderson's Law Dict. p. 1057).

An "active trust" was created where the property was devised to a trustee to sell and convey, and invest the proceeds as he deemed best, and he was further authorized to hold, manage, control, care for, lease, and reinvest during a period of five years, and to pay the income to the children of testatrix. Harris v. Ferguy, 69 N. E. 844, 845, 207 Ill. 534.

A conveyance of property in trust to pay the grantor such part of the income and of the body of the estate for his support as the trustee might deem proper, then to pay over to the grantor's devisees or heirs, after his death, such part of the trust estate as had not been consumed by him, reserving the right to dispose of the remainder by will, failing which, the property was to pass under the statutes of the descent and distribution, was not a "dry" but an "active trust." Coleman v. Fidelity Trust & Safety Vault Co. (Ky.) 91 S. W. 716.

The trust created by a will providing that the income and interest arising from testatrix's estate shall be held by her executors for the benefit of her son, to be expended by them for him as he may need from time to time, and, in case he marries and has issue, then to use and expend the income, and, if necessary, the principal, from time to time for his and their support and comfort, is an "active trust." Parker, Holmes & Co. v. Bushnell, 67 Atl. 479, 480, 80 Conn. 233.

Testatrix devised one-sixth of her estate in trust, the annual income of which was to be paid one-fifth to her son and four-fifths to his four children. On the death of the son, the portion then remaining was to go to the four children, share and share alike, or the survivor of them. Title and complete control of the trust estate was given to the trustees; they being authorized, not only to collect the rents and receive profits, but to execute deeds, leases, and other instruments, according to their discretion, and without orders of court. Held, that the trust was an "active trust," and could not be terminated by the children of the son before his death. Olsen v. Youngerman, 113 N. W. 938, 940, 136 Iowa, 404.

A will provided: "I direct my trustees to divide my estate into six equal shares, instead of into five shares, as in the sixth paragraph of my will provided. I direct that the first five shares be disposed of as in the sixth paragraph provided. I give and devise the six shares unto my executors in trust, nevertheless, to collect the rents and income thereof, and to apply the net income thereof to the use and benefit of my son, M., during his life, and at his death or at my death, if he shall die in my lifetime, I give the principal of said share to my other descendants in equal shares per stirpes." Held, that the will created an "active trust" under subdivision 3, § 76, Real Property Law (Laws 1896, c. 547). McNaboe v. Marks, 99 N. Y. Supp. 960, 961, 51 Misc. Rep. 207.

ACTIVELY EMPLOYED

Defendant was appointed by the Secretary of the Interior as the disbursing member of a board of three commissioners to negotiate Indian treaties at $8 per day and traveling expenses, exclusive of subsistence, to continue at the pleasure of the Secretary of the Interior for the time being. Defendant was directed to proceed from his home in Nebraska to the agency in Washington without unnecessary delay, his salary to begin on the day of his departure from home. The instructions given the board required a study of the special needs of the Indians in each case, and the formation of agreements which would best promote their welfare and weekly reports. Defendant paid himself and the other commissioners at the rate of $8 a day for the time that they were under instructions, or were holding themselves in readiness to obey instructions on vouchers reciting actual employment during such period. These vouchers were uniformly accepted without question, except for periods during which the commissioners were absent from their post on leave. Held that, under the rule of contemporaneous construction, the phrase "actually employed" should not be construed as equivalent to "actively employed," and hence the salary was not limited to days on which the commissioners were actually engaged in the performance of active duty. United States v. Hoyt, 158 Fed. 162, 167.

ACTOR

The rule that each party to a proceeding under Pol. Code, §§ 3414, 3415, to determine the right to purchase state lands, is an "actor" and must state in his pleading facts sufficient to show that he has some right to the land better than that of the adverse party, applies to one who is admitted as an intervener as well as to the original parties. Moran v. Bonynge, 107 Pac. 312, 314, 157 Cal. 295.

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ACTUAL

Apparent synonymous, see Apparent.

ACTUAL AGENCY

An "agency" is either actual or ostensible. It is actual when the agent is really employed by the principal, and it is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him. Weidenaar v. New York Life Ins. Co., 94 Pac. 1, 6, 36 Mont. 592 (citing Civ. Code, §§ 3073, 3075 [Rev. Codes, §§ 5416, 5418]).

ACTUAL ATTENDANCE

Under a statute providing that criers and bailiffs "shall be deemed to be in actual attendance when they attend upon the order of the courts," "actual attendance" exists when an officer is actually present "upon the order of the court," but the issuing of a personal order directed to the officers requiring them to attend is unecessary; the opening of court by the marshal under the written order of the judge pursuant to Rev. St. § 672, being sufficient. Kelly v. United States, 41 Ct. Cl. 246, 250.

ACTUAL AUTHORITY

"Actual authority" of an agent is such as the principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess. Weidenaar v. New York Life Ins. Co., 94 Pac. 1, 7, 36 Mont. 592 (citing Civ. Code, § 3092 [Rev. Codes, § 5431]).

ACTUAL BIAS

"Actual bias," defined by Pen. Code, § 1073, as a state of mind in reference to the case, or either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of a party, may consist of an opinion as to the guilt or innocence of defendant, based on some knowledge or information of the facts embraced in the charge, or of the evidence to be produced, or, the juror having no such knowledge or information, may consist of a preconceived opinion concerning defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case. People v. Riggins, 112 Pac. 862, 864, 159 Cal. 113.

"'Actual bias,' as defined by the Oregon statute, is the existence of a state of mind on the part of the juror in reference to the action or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." State v. Miller, 81 Pac. 363, 364, 46 Or. 485.

ACTUAL BONA FIDE RESIDENT

See Actual Residence—Actual Resident.

The term "actual bona fide resident," within Const. art. 197, requiring that one offering to vote shall be an actual bona fide resident of the precinct for at least six months immediately preceding the election means more than the word "resident," and means a person who has an abode at which he actually lives; and where a person has had no habitual abode, but has lived and worked in different places, his actual residence in one of them cannot be extended by intendment. One who left Louisiana in October, 1910, moving to Arkansas, where he secured employment and has ever since lived and worked, intending to remain there for an indefinite time, is not an "actual bona fide resident" of Louisiana. State ex rel. Hodges v. Joyce, 54 So. 934, 128 La. 438. And a person moving with his wife and child from the state into Mississippi and there residing, and who have never moved back but had an intent to return, is not an "actual bona fide resident" of the precinct of the parish from which he removed. State ex rel. Fleming v. Joyce, 49 South. 219, 221, 123 La. 633.

"An actual bona fide resident," within Rev. St. 1901, par. 3114, providing that no suit for divorce shall be maintained unless the plaintiff has been an actual bona fide resident of the territory for one year, is a person who is in Arizona to reside permanently with no idea of having or seeking a permanent home elsewhere. Mere quarrels between spouses in which both were partly at fault, and after which they continued to reside under the same roof, there being no physical violence nor any serious mental distress, were not such cruelty as justified the wife in abandoning her home in Texas and establishing a separate domicile in Arizona; so that she did not, by remaining in Arizona more than one year, acquire an "actual bona fide residence." Sneed v. Sneed (Ariz.) 123 Pac. 312, 314, 40 L. R. A. (N. S.) 99.

ACTUAL CAPITAL STOCK

There is a wide distinction between authorized capital stock of a corporation and its "actual capital stock." Authorized capital may never become actual capital, while "actual capital" is the amount of its authorized capital that has been bona fide subscribed for and paid. Stemple v. Bruin, 49 South. 151, 153, 57 Fla. 173.

ACTUAL CASH VALUE

Rev. St. 1898, § 1943a, provides that no fire insurance company shall issue any policy limiting the amount to be paid in case of loss below "the actual cash value of the property if within the amount of the insurance for which premium is paid." Held, that such provision should be construed as re-

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ferring to the "actual cash value" of the property "destroyed," and not to the property insured. Newton v. Theresa Village Mut. Fire Ins. Co., 104 N. W. 107, 109, 125 Wis. 289.

Burns' Ann. St. 1908, § 3269, regulating the liability of a township for the value of animals killed or injured by dogs, and providing that the stock must be valued at the "actual cash value" on the market when the damages were sustained, means the highest "actual cash price" which animals would bring in the market for any and all uses to which they were adapted, on the date of their injury. Wea Tp., Tippecanoe County v. Cloyd, 91 N. E. 959, 961, 46 Ind. App. 49.

ACTUAL AND CONTINUED CHANGE OF POSSESSION

In statute of frauds

Civ. Code, § 3440, provides that a sale of personal property shall be conclusively presumed to be fraudulent as against the seller's creditors, where there is no immediate delivery and actual and continued change of possession. Held that, where liquor stored in a barn was sold by a debtor to plaintiff, the delivery of a key to the barn was mere evidence of a constructive delivery and possession, and was not an actual change of possession required by such section, the word "actual" as so used, meaning "existing in act, and truly and absolutely so; really acted or acting; carried out; as opposed to potential, possible, visual or theoretical." Guthrie v. Carney, 124 Pac. 1045, 1048, 19 Cal. App. 144.

ACTUAL COST

The phrase "actual cost," as used in St. 1890, c. 428, §§ 3–7, providing for the abolition of grade crossings by a railroad company, declaring that commissioners were to decide what alterations were necessary, and providing that the company should pay a specified per cent. of the actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages for the taking of the land necessary to carry out the alterations that have been ordered, means "cost of what is described, though, where damages are incurred in taking land to carry out the report of the commissioners, counsel fees and extra work done by selectmen paid by a town in defending or settling a claim for such damages for land taken for the purpose of abolishing grade crossings have been held to be included." Interest paid on money borrowed by the railroad company to make the alterations is not a part of the actual cost. In re Directors of Old Colony R. Co., 70 N. E. 62, 63, 185 Mass. 160.

ACTUAL DAMAGES

"Actual damages" are such as are recoverable at law from a wrongdoer by the injured party as a matter of right as compensation for the actual loss sustained by him by reason of the wrong. Birmingham Waterworks Co. v. Kelley, 56 South. 838, 841, 2 Ala. App. 629. The term means "substantial," as distinguished from "nominal," damages. Blow v. Joyner, 72 S. E. 319, 320, 156 N. C. 140.

The term "actual damages" is synonymous with "compensatory damages." Green v. Western Union Telegraph Co., 49 S. E. 165, 168, 136 N. C. 489, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349 (citing Newell, Defamation, Slander & Libel, 839).

"Actual damages" include not only pecuniary losses but physical pain and mental suffering. The wounding of a man's feelings is as much actual damage as physical injury to his person; the only difference being that one is internal and the other external, the one mental the other physical. Ammons v. Southern Ry. Co., 52 S. E. 731, 733, 140 N. C. 196 (citing Osborn v. Leach, 47 S. E. 811, 135 N. C. 628, 66 L. R. A. 648; McNeill v. Durham & C. R. Co., 47 S. E. 765, 135 N. C. 683, 67 L. R. A. 227; Head v. Georgia Pac. R. Co., 7 S. E. 217, 79 Ga. 358, 11 Am. St. Rep. 434; Hale, Damages, § 261).

The expression "actual damages" is not necessarily limited to pecuniary loss, or loss of ability to earn money. Some of the decisions treat it as including damages by reason of pain and suffering. Georgia S. & F. R. Co. v. Wright, 61 S. E. 718, 719, 130 Ga. 696 (citing Head v. Georgia Pac. Ry. Co., 7 S. E. 217, 79 Ga. 358, 360, 11 Am. St. Rep. 434; Mabry v. City Electric Ry. Co., 42 S. E. 1025, 116 Ga. 624, 625, 59 L. R. A. 590, 94 Am. St. Rep. 141; Central R. Co. v. Senn, 73 Ga. 712; Coleman v. Allen, 5 S. E. 204, 79 Ga. 647, 11 Am. St. Rep. 449; Macon Ry. & Light Co. v. Vining, 48 S. E. 232, 120 Ga. 515).

Sess. Laws 1901, c. 249, providing that only actual damages may be recovered for the publication of a libel in a newspaper in good faith and under a mistake or misapprehension of the facts where a full and fair retraction is published as therein required, defines "actual damages" as all damages which the plaintiff shall show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever. This definition includes only such damages as at common law were known as special damages, and excludes those known as general damages, and thus violates Bill of Rights, § 18, providing that any person suffering injuries in person, reputation, or property shall have remedy by due course of law. Hanson v. Krehbiel, 75 Pac. 1041, 1042, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422.

"'Actual damages' include all damages except that class of damages known as vindictive, punitive, or exemplary damages.

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'Actual damages' is the synonym of 'compensatory damages.' Damages are said to be compensatory when they are such as measure the actual loss, while punitive or vindictive damages exceed the loss or injury actually sustained and are given as a kind of punishment to the defendant with a view of preventing similar wrongs in the future." Comer v. Age-Herald Pub. Co., 44 South. 673, 675, 151 Ala. 613, 13 L. R. A. (N. S.) 525 (citing Newell, Defamation, Slander & Libel, p. 842).

Assault

Where the evidence in an action for an assault shows rough treatment of plaintiff by defendant, his confinement in a cold jail, and consequent illness and loss of time, there is such a showing of "actual damage" as to entitle plaintiff to exemplary damages, though the money extent of the actual damage is not shown or found. McConathy v. Deck, 83 Pac. 135, 34 Colo. 461, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896.

Libel

As used in a libel law providing that, before any proceedings shall be brought for the publication in a newspaper of a libel, plaintiff shall serve a written notice on defendant, specifying the article and the statements which he alleges to be false, and that, if it appears on trial that the article was published in good faith, that its falsity was due to an honest mistake in fact, and that there were reasonable grounds for believing that the article was true, and that within ten days after the service of notice a fair and full retraction was published, plaintiff shall recover only actual damages, the term "actual damages" means compensatory damages, and includes pecuniary loss, direct or indirect, or special damages, damages for physical pain and inconvenience, damages for mental suffering, and damages for injury to reputation. It does not include punitive damages. Osborn v. Leach, 47 S. E. 811, 813, 135 N. C. 628, 66 L. R. A. 648.

"Actual damages" being all damages other than punitive, Act Feb. 20, 1899 (Gen. Acts 1898-99, p. 32), amending Code 1896, § 1441, so as to require notice to the publisher of a newspaper before action for libel published in the paper, and providing that if it shall appear at the trial that the article was published in good faith, that its falsity was due to mistake or misapprehension, and that a retraction was published, plaintiff shall recover only actual damages, does not contravene Bill of Rights, § 13, guaranteeing every person a remedy for any injury done him. Comer v. Age-Herald Pub. Co., 44 South. 678, 675, 151 Ala. 613, 13 L. R. A. (N. S.) 525.

Wrongful Attachment

The term "actual damages," as applied to wrongful attachments, is not limited to such damages as can be definitely determined as the actual loss which the debtor would incur by reason of the attachment, and which loss could be determined or computed; but includes an undetermined loss and damage, which is no less actual by reason of its indeterminate character; such as damage to reputation, damage to pride and to feeling, and damages of that character, some of which, it is true, are more or less sentimental. As distinguished from punitive damages, there may be two classes of actual damages: (1) Where the actual loss is definitely determined and the other where it is indeterminable in character. While damages for mental pain and suffering may be and sometimes are recognized as actual and distinguished from punitive damages, still they are to a certain extent indefinite, and their value must in all cases be fixed by the jury, in view of all the facts and circumstances surrounding the case. Ott v. Press Pub. Co., 82 Pac. 403, 404, 40 Wash. 308 (citing Levy v. Fleischner, 40 Pac. 384, 12 Wash. 15).

ACTUAL DEFENDANTS

In a suit by a stockholder of a corporation against the corporation and others to recover profits secretly made by promoters, the defendants from whom a recovery is really sought are "actual defendants." Groel v. United Electric Co. of New Jersey, 61 Atl. 1061, 1064, 70 N. J. Eq. 616.

ACTUAL DELIVERY

Under Rev. St. 1895, art. 4926, permitting minors owning cattle separate from their fathers or guardians to have a separate mark and brand, and section 4942, providing that title to cattle running on the range shall pass by sale of the mark and brand, where a father marks and brands cattle for his infant children, who are too young to be capable of accepting "actual delivery," and records the brands, there is an "actual delivery" within the meaning of article 2546, making "actual delivery" essential to a parol gift, notwithstanding the father still continues to manage and control the cattle. Coke & Reardon v. Ikard, 87 S. W. 869, 870, 39 Tex. Civ. App. 409.

Plaintiff's intestate, who held a note executed by his mother secured by mortgage, on the day of his death wrote a friend, requesting him to return the note to the mother, and to arrange to have the mortgage withdrawn so that the property would be clear. Indorsed on the face of the note in decedent's handwriting was the word "paid," followed by his signature and the date. Immediately after writing his friend, decedent suicided, and the note and mortgage were not returned to the mother until after decedent's death. Held, that "actual delivery" of the note and mortgage was not made by decedent to his friend so as to constitute a gift to the mother. Wittman v. Pickens, 81 Pac. 299, 300, 33 Colo. 484.

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ACTUAL EARNINGS

See Based on Actual Earnings.

ACTUAL EVICTION

An "actual eviction" exists where a lessor wrongfully enters upon the leased premises, and by affirmative acts deprives the lessee of the beneficial use thereof, either in whole or in part. Dolph v. Barry, 148 S. W. 196, 198, 165 Mo. App. 659; Lawrence v. Edwin A. Denham Co., 114 N. Y. Supp. 859, 860.

"Actual eviction" arises where by act of a landlord or through a title paramount the tenant is actually deprived of the use of a material part of the premises. Lawrence v. Katcher, 117 N. Y. Supp. 876, 879.

An "actual eviction" exists where the physical expulsion of a tenant is effected. Jackson v. Paterno, 108 N. Y. Supp. 1073, 1076, 58 Misc. Rep. 201.

ACTUAL EXPENSE

"Actual expense," in Sess. Laws 1899, pp. 405, 406, § 1, providing that the sheriff shall be allowed, in addition to his salary, the actual and necessary expense for care of each prisoner, means the actual outlay or payment of money for benefits furnished the prisoners. Mombert v. Bannock County, 75 Pac. 239, 241, 9 Idaho, 470.

ACTUAL FORCE

As related to the commission of robbery, "actual force" is applied to the body, while "constructive force" is by threatening words or gestures and operates on the mind. Tones v. State, 88 S. W. 217, 220, 48 Tex. Cr. R. 363, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455.

ACTUAL FRAUD

As Fraud, see Fraud.

Civ. Code Cal. § 1572, defines "actual fraud" as "the suggestion as a fact of that which is not true by one who does not believe it to be true," or "the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true." Nash v. Rosesteel, 94 Pac. 850, 852, 7 Cal. App. 504; Muller v. Palmer, 77 Pac. 954, 957, 144 Cal. 305; Krasilnikoff v. Dundon, 97 Pac. 172, 174, 175, 8 Cal. App. 406.

A statement to plaintiff, to induce him to execute a release, while he was in a weak physical condition from personal injuries, by defendant railroad company's claim agent, to the effect that plaintiff would be able to work in two or three weeks, and would have no scars, if palpably false, was an act fitted to deceive, constituting "actual fraud," within this section. Edmunds v. Southern Pac. Co., 123 Pac. 811, 812, 18 Cal. App. 532.

"'Actual fraud' is established by competent proof of corrupt purposes, wicked or unlawful intent to cheat another or others." Where certain of the stock of a corporation was issued to "dummy" directors who purchased for the corporation the property of a firm without ever seeing it at an amount equal to the whole capital stock of the corporation, which was issued in payment thereof, after which, under a secret oral agreement, the corporation paid to the firm in cash the actual value of the assets so transferred, the only thing acquired by the corporation being the good will of the firm, which was worth little or nothing, such facts were sufficient to establish "actual fraud" in the organization of the corporation. Hobgood v. Ehlen, 53 S. E. 857, 859, 141 N. C. 344.

The expression "actual fraud" includes any device by which the stock of a corporation passes to a stockholder without payment in full, either in cash or by property purchased "to the amount of the value thereof," and an intentional overvaluation of property on the understanding that a portion of the stock issued should be returned for distribution among the directors voting for the purchase, without payment by them, is such a device and falls within the definition of "actual fraud." Easton Nat. Bank v. American Brick & Tile Co., 60 Atl. 54, 55, 69 N. J. Eq. 326.

Rev. Codes 1905, § 5293 (part of the chapter on Contracts), reads as follows: "'Actual fraud' within the meaning of this chapter consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true. (2) The suppression of that which is true by one having knowledge or belief of the fact. * * * (5) Any other act fitted to deceive." In view of this, it was held in an action to rescind a conveyance of real estate brought by the grantor against the grantee, where the consideration received was stock in a corporation the character, condition, and value of whose assets were known only to the grantee, and could not be ascertained by the grantor, that the suggestion as a fact that the stock was of a certain value, to induce the trade, and without which the transaction would not have been consummated, made by one who in the nature of things must have known it to be untrue, constituted fraud which might entitle the grantor to a rescission of the transfer. Liland v. Tweto, 125 N. W. 1032, 1037, 19 N. D. 551.

Where the applicant for a life insurance policy made untrue statements as to his age, knowingly, for the fraudulent purpose of obtaining membership in a lodge, it constituted a case of "actual fraud," not a mere innocent or unintentional breach of warranty or condition. Taylor v. Grand Lodge, A. O. U.

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W., of Minnesota, 105 N. W. 408, 410, 96 Minn. 441, 3 L. R. A. (N. S.) 114.

"Actual fraud" means fraud according to the common conscience and not according to the idea of the parties to the conveyance. Thus where decedent, the owner of a farm, being threatened with a suit on a claim for labor which he insisted had been paid, to make himself execution-proof conveyed the land, which was worth $1,800, to defendant without consideration except that defendant assumed a $600 mortgage, it being agreed between decedent and defendant at the time that on the settlement of the claim for labor the property should be reconveyed to decedent, the conveyance was fraudulent as against decedent's creditors, though decedent believed in good faith that he did not owe the claim against him. Lynch's Adm'r v. Murray (Vt.) 83 Atl. 746, 748.

It was "actual fraud" for a person to prevail upon plaintiff to deed his land to her without consideration, falsely pretending that suits were about to be brought which would result in plaintiff's liability for certain indebtedness as a stockholder in a company, and that his land might be taken for the debt, and that she would upon demand reconvey the land which she subsequently refused to do. Chamberlain v. Chamberlain, 95 P. 659, 660, 7 Cal. App. 634.

Under a statute defining "actual fraud" as existing where one party to a contract, with intent to deceive the other, or induce him to contract, positively asserts in a manner not warranted by the information of the person making it that which is not true, though he believes it to be true, a seller is guilty of "actual fraud" where he makes false representations as to the kind or quality of the goods sold which are relied on by the purchaser, though the seller believed the representations to be true. McCabe v. Desnoyers, 108 N. W. 341, 343, 20 S. D. 581.

A sale to a corporation by a promoter and director, for $18,250,000, payable in stock of the corporation, of stock in other corporations purchased by him for $8,250,000, was void because a director cannot sell property to his company for a price in excess of its real value, and also because it violated corporation act (P. L. 1896, p. 293) § 48, providing that nothing but money shall be considered as payment of any part of the capital stock, except that property necessary for the corporation's business may be taken in payment of stock to the amount of the value thereof, and that, in the absence of actual fraud in the transaction, the directors' judgment as to the property's value shall be conclusive, since the conscious and intentional overvaluation of the stock in the other corporations was "actual fraud." Tooker v. National Sugar Refining Co. of New Jersey, 84 Atl. 10, 15, 80 N. J. Eq. 305.

Under Wilson's Rev. & Ann. St. 1903, § 14, c. 15, art. 1, par. 743, defining "actual fraud" by a party to a contract as the suggestion as a fact of that which is not true, by one who does not believe it to be true, or the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, and defining deceit as the suggestion as a fact, of that which is not true, by one who does not believe it to be true, or the assertion as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true, a party is guilty of fraud and deceit, where, with intent to induce another to enter into a contract, he makes a positive assertion which is material in a manner not warranted by his information, or where he is not shown to have had reasonable grounds for believing it to be true, where the assertion so made is not true, even though believed by the party making it. In such case the definite assertion as a fact of that which is untrue concerning that of which the party has no knowledge is tantamount to the assertion of something which the party knows to be untrue. Garvin v. Harrell, 113 Pac. 186, 188, 27 Okl. 373, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744.

ACTUAL KNOWLEDGE

"Actual notice" and knowledge are not always synonymous, but upon proof of sufficient acts the law will presume that a person has information equivalent in its legal effects to actual knowledge. Dunlap v. Gibson, 112 Pac. 598, 83 Kan. 757, 31 L. R. A. (N. S.) 1071.

The word "notice," as used in a provision in the bankruptcy act, that judgment of discharge does not bar such debts as have not been duly scheduled with the name of the creditor, if known, unless such creditor has notice or actual knowledge of the bankruptcy proceedings, etc., means the same as "actual knowledge." The terms are merely convertible. Fields v. Rust, 82 S. W. 331, 333, 36 Tex. Civ. App. 350. Knowledge of bankruptcy proceedings on the part of a creditor of the bankrupt, which is not acquired until after discharge, though in time to prove his claim and to move to revoke the discharge, is not the "actual knowledge" of the proceedings in bankruptcy. Birkett v. Columbia Bank, 25 Sup. Ct. 38–40, 195 U. S. 345, 49 L. Ed. 231.

Where, in an action by an indorsee of a note given by the maker for the purchase of a horse, the maker relied on the fraud, an instruction that if the note was obtained by fraud the burden was on the indorsee to show that he had no actual knowledge of the fraud at the time of the purchase, and that the words "actual knowledge" do not mean that the indorsee must have known the truth of

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the fraud, if any, but mean that if the indorsee had such knowledge of the fraud as showed a belief in the existence of the fraud there could be no recovery, was not erroneous, though the better practice is not to undertake to define the word "knowledge." Link v. Jackson, 147 S. W. 1114, 1115, 164 Mo. App. 195.

ACTUAL LOSS

The words "actual loss" in Rev. St. 1898, § 3490, providing that, where an "actual loss" has been produced to any party by one adjudged guilty of contempt, the court shall order a sufficient sum to be paid by him to such party to indemnify him, etc., means loss recoverable in an action and do not include costs and expenses of prosecuting the contempt proceedings. My Laundry Co. v. Schmeling, 109 N. W. 540, 549, 129 Wis. 597.

ACTUAL MARKET VALUE

The best test of "actual market value" is a sale on a market under circumstances calculated to elicit full and free bidding by intending purchasers. Opinions as to what a thing would bring are necessarily less convincing as to its value than the fact of what it did bring. Francis v. Million (Ky.) 80 S. W. 486, 487.

Customs Administrative Act, § 19, provides that the words "value" or "actual market value," whenever used in the act or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value, or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale. United States v. Park & Tilford, 152 Fed. 142, 143, 81 C. C. A. 360.

ACTUAL MILITARY SERVICE

The terms "actual service" and "active service," as used in the Constitution and Military Code, mean service in time of war or public danger, and the words "when in actual service in time of war or public danger," in Const. § 8, apply to the militia only. State v. Peake, 135 N. W. 197, 201, 22 N. D. 457, 40 L. R. A. (N. S.) 354.

ACTUAL AND NECESSARY EXPENSES

A statute which provides for the payment of "actual and necessary expenses" of county officers, when absent from their residences in performance of their official duties, includes an allowance for board. Corker v. Pence, 85 Pac. 388, 392, 12 Idaho, 152.

ACTUAL NECESSITIES

An agreement between a legatee in a will, which gave her the income of testator's estate and such further sum as her necessities might require, and the executor, provided that the legatee should have a specified sum per year and the use of the dwelling house, and in case "her actual necessities" required it a further allowance. Held, that the quoted phrase referred to the necessities mentioned in the will, and the agreement was not invalid as depriving the legatee of rights given by the will. Hull v. Hull, 112 N. W. 1126, 1128, 149 Mich. 500.

ACTUAL NEGLIGENCE

Since degrees of negligence are not recognized in Colorado, the term "actual negligence," as used in a bill of lading exempting the carrier from loss caused by acts of its servants, not amounting to willful misconduct or actual negligence, should be construed as a stipulation for exemption from ordinary negligence, and invalid. Adams v. Colorado & S. R. Co., 113 Pac. 1010, 1011, 49 Colo. 475, 36 L. R. A. (N. S.) 412.

ACTUAL NOTICE

See, also, Actual Knowledge.

"Actual notice" is information concerning a fact directly and personally communicated to the party, and it may also be said to be that which consists of express information of a fact. Metcalf v. Mutual Fire Ins. Co., 112 N. W. 22, 24, 132 Wis. 67 (citing 5 Words and Phrases, p. 4840).

"Actual notice" is that which consists in express information of a fact, and a notice is regarded as actual when the party sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having means of knowing it. Parker v. Maslin, 116 Pac. 227, 228, 85 Kan. 130.

"Actual notice" does not mean that which, in metaphysical strictness, is actual in its nature, because it is seldom that ultimate facts can be communicated in a manner so direct and unequivocal as to exclude doubts as to their existence or authenticity. Actual notice means, among other things, knowledge of facts and circumstances so pertinent in character as to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. Nordman v. Rau, 119 Pac. 351, 352, 86 Kan. 19. 38 L. R. A. (N. S.) 400, Ann. Cas. 1913B, 1068; Creek Land & Improvement Co. v. Davis, 115 Pac. 468, 470, 28 Okl. 579.

"Actual notice," when proven, is as sufficient as constructive notice, and exists where the party to be affected by it is proved to have actual knowledge of the fact, where the knowledge is brought directly home to him, and whenever the party is put upon inquiry amounting to a duty which would, in the exercise of ordinary diligence and understanding, lead to the knowledge of the requisite fact. Missouri, K. & T. Ry. Co. of Texas v. Wood (Tex.) 152 S. W. 487, 493.

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"Actual notice" is defined by Rev. Codes, § 5116, as consisting of express information of a fact. Patnode v. Deschenes, 106 N. W. 573, 576, 15 N. D. 100.

Constructive notice distinguished

"Constructive notice" is that which is imputed by law, while "actual notice" is that which consists in express information of a fact, and a notice is deemed actual when the party sought to be affected by it knows of the existence of the particular fact in question, or is conscious of having means of knowing it. Where on the hearing of a motion under Gen. St. 1909, § 6448, by a defendant to reopen a judgment by default on service of summons by publication, it appears that certain facts are communicated to defendant in time to enable him to come in and defend, but the facts communicated were indefinite and might reasonably have been understood by one unacquainted with business to refer to another proceeding pending in another state involving the same property, the question whether defendant had "actual notice," as distinguished from "constructive notice," was one of fact to be determined by the court on the evidence. Parker v. Maslin, 116 Pac. 227, 228, 85 Kan. 130.

Agency

"The term 'actual notice,' within the rule that the acts of a general agent are binding on the principal even after revocation of the agency where there has been no attempt to give notice of such revocation to persons who had dealt with him unless they are charged with actual notice of such revocation, is intended to be understood in its strictly legal, technical sense, and is not to be confounded with actual knowledge, which is by no means a synonym or interchangeable term. Notice is actual when one either has knowledge of a fact or is conscious of having the means of knowledge, although he may not use them. It may be either 'express notice,' or simply 'implied notice'; notice communicated by direct and positive information from persons cognizant of the fact, or notice such as arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact." Burch v. Americus Grocery Co., 53 S. E. 1008, 1009, 125 Ga. 153.

Conveyance or claim of title

One who purchases lands with knowledge of facts which would put a prudent man on inquiry which if prosecuted would be to notice of rights claimed adversely to his vendor is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the actual notice he would have received. Cooper v. Flesner, 103 Pac. 1016, 1020, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29.

"Notice is 'actual' when the purchaser knows of the existence of the adverse claim, or perhaps when he is conscious of having the means of knowledge, and yet does not use them; and it is immaterial whether his knowledge results from direct information, or is gathered from facts and circumstances." Clark v. Sayers & Lambert, 47 S. E. 312, 318, 55 W. Va. 512.

Under the laws of Massachusetts which provide that no unrecorded conveyance of real estate shall be valid and effectual except against the grantor and persons having "actual notice" thereof, it is not necessary, in order to render such conveyance valid against a subsequent purchaser, that he should have positive and certain knowledge of its existence, but the notice is sufficient if it is such as men usually act upon in ordinary affairs of life. McLaughlin v. Shepherd, 32 Me. 143, 146, 52 Am. Dec. 646 (citing Curtis v. Mundy, 44 Mass. [3 Metc.] 405; Pomroy v. Stevens, 52 Mass. [11 Metc.] 244; Jackson v. Sharp, 9 Johns. [N. Y.] 168, 6 Am. Dec. 267; Jackson v. Burgott, 10 Johns. [N. Y.] 471, 6 Am. Dec. 349; Day v. Dunham, 2 Johns. Ch. [N. Y.] 190; Le Neve v. Le Neve, 3 Atk. 654; Taylor v. Stibbert, 2 Ves. 440; Hiern v. Mill, 13 Ves. 120; 1 Story, Com. Eq. Jur. § 397; 4 Kent's Com. 169–174).

Under Gen. St. 1909, § 1672, providing that no conveyance of real estate shall be valid except as between the parties and as to those who have actual notice, until it is deposited for record, "actual notice" may be express, when it consists of knowledge actually brought personally home, or it may be implied, when it consists of knowledge of facts so informing that a reasonably cautious person would be led by them to the ultimate fact; and in the latter case the known fact must be sufficiently specific to impose the duty to investigate further and must furnish the natural clue to the ultimate facts. Faris v. Finnup, 113 Pac. 407, 408, 84 Kan. 122.

Defective condition of highway

Under the rule that to recover against a township for injuries caused by a defect in a highway the trustee must have had "actual notice" of the defect more than five days before the injury, it is not necessary that such notice should be in writing, or that any particular formality should attend the giving of it. Actual knowledge of the defect is the equivalent of actual notice. Erie Tp. v. Beamer, 79 Pac. 1070, 1071, 71 Kan. 182.

Retirement of partner

Within the rule of law that "actual notice" must be given to persons dealing with a partnership, of the retirement of a partner, so as to relieve the retiring partner of liability, one who sells his business, which he has conducted under a firm name, to another, such other continuing the business under the same name, must give actual notice of the sale to those who have dealt with him.

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Publication of the sale in a newspaper, and changing the name of the proprietor on the sign at the place of business, is not actual notice. Werner Co. v. Calhoun, 46 S. E. 1024, 1026, 55 W. Va. 246.

ACTUAL OCCUPANCY

Laws 1885, p. 482, c. 283, § 9, declaring that the forest commission shall have the "care, control, and superintendence" of the forest preserve, and Laws 1900, p. 62, c. 20, § 220, subd. 1, declaring that it shall have the "care, control and supervision" thereof, do not place the commission in the "actual occupancy" of the wild and vacant lands within the preserve. People ex rel. Turner v. Kelsey, 89 N. Y. Supp. 416, 96 App. Div. 148.

ACTUAL OCCUPANT

Ordinarily the "occupant" or "actual occupant" of land is one in actual possession. "'Actual occupancy' is defined as an open, visible occupancy, as distinguished from the constructive possession which follows the legal title. 'Actual possession' has practically the same meaning. It means possession in fact, effected by actual entry upon the premises and actual occupancy." Parsons v. Prudential Real Estate Co., 125 N. W. 521, 523, 86 Neb. 271 (quoting from Cutting v. Patterson, 85 N. W. 172, 82 Minn. 375).

A mere trespasser, claiming no title or interest in the property, and having no duty to pay taxes, is not an "actual occupant" within Laws 1903, c. 75, § 34, on whom personal service of notice must be had to vest the court with jurisdiction to confirm a tax sale. Parsons v. Prudential Real Estate Co., 125 N. W. 521, 523, 86 Neb. 271.

ACTUAL PAYMENT

The requirement in an insurance policy of "actual payment" of premium does not exclude all other methods of payment which are not made in cash. The premium may be paid by the credit of the insured if so accepted. Penn Mut. Life Ins. Co. of Philadelphia v. Norcross, 72 N. E. 132, 137, 163 Ind. 379.

ACTUAL POSSESSION

See, also, Pedis Possessio; Real Possession.

"'Actual possession' of land consists in subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use. * * * Justice * * * requires * * * that the extent of the claim should be clearly defined, and that the possession should be open, notorious, and continuous." Gordon v. Ross-Higgins Co., 162 Fed. 637, 641, 89 C. C. A. 429.

"Actual possession" means possession in fact, effected by actual entry upon the premises and actual occupancy. Parsons v. Prudential Real Estate Co., 125 N. W. 521, 523, 86 Neb. 271.

Within the rule that to constitute adverse possession it is necessary that the possession must be actual, etc., "actual" means real, visible. Bradbury Marble Co. v. Laclede Gaslight Co., 106 S. W. 594, 599, 128 Mo. App. 96.

"Actual possession" means the corporeal detention of the property, when used in relation to adverse possession. Wallace v. Sache, 118 N. W. 360, 361, 106 Minn. 123.

The term "actual possession," as used in Pen. Code 1895, art. 425, providing that any person leaving the dead carcass or body of any horse, etc., which died in the actual possession of such person in any public road, or within 50 yards thereof, shall be fined, etc., applies to cases where the animal dies while he was actually being used by the owner; that is, in his manual possession at the time of his death, which refers to cases where one is riding or driving a horse or other animal on some public highway, and such horse or other animal becomes sick and dies on or near such road or highway, and, where a horse turned into a pasture of about ten acres died within ten feet of the public road, the horse, though in the possession of the owner, was not within his "actual possession," as contemplated by the statute. Ogg v. State, 87 S. W. 348, 349, 48 Tex. Cr. R. 231.

As possession

See Possession.

Constructive possession distinguished

"'Actual possession,' as a legal phrase, is put in opposition to the other phrase, 'possession in law' or 'constructive possession.' Actual possession is the same as pedis possessio or pedis positio, and these mean a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real, demonstrative act done. It is the contrary of a possession in law, which follows in the wake of title." People ex rel. Turner v. Kelsey, 89 N. Y. Supp. 416, 418, 96 App. Div. 148 (citing Churchill v. Onderdonk, 59 N. Y. 134).

A possessory right to enable a settler to segregate and hold a portion of the public land can only be acquired by "actual," as distinguished from "constructive," possession, by which is meant a subjection of the land to the will and dominion of the claimant; and this is usually evidenced by a substantial inclosure, by cultivation, occupation, or some other proper and appropriate use, according to the locality of the property. Hinchman v. Ripinsky, 3 Alaska, 543, 557.

"'Actual possession' exists where a thing is in the immediate occupancy of the party. 'Constructive possession' is that which exists in contemplation of law without actual personal occupation." Brown v. Volkening, 64 N. Y. 76, 80.

In a controversy between adjoining landowners as to an intervening strip of land, an

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instruction that one cannot be in "constructive possession" and another in "actual possession" of the same piece of land at the same time was proper. Crouch v. Colbert, 84 S. W. 992, 111 Mo. App. 93.

" 'Constructive possession' is a fiction of law; 'actual possession' is a tangible fact. Actual possession means the corporeal detention of the property when used in relation to adverse possession." One who, through another, has cultivated and cropped land sold for taxes, is in "actual possession" within the statute as to service of the redemption notice. Wallace v. Sache, 118 N. W. 360, 361, 106 Minn. 123.

Acts of ownership

The occupation of pine land by annually making turpentine on it is such an "actual possession" as will oust a constructive possession by one claiming merely a superior paper title. Richbourg v. Rose, 44 South. 69, 75, 53 Fla. 173, 125 Am. St. Rep. 1061, 12 Ann. Cas. 274.

The mere cutting of timber and selling to others the right to do so and herding of cattle on land does not amount to "actual possession," though done under color and actual claim of title. Crain v. Peterman, 98 S. W. 600, 601, 200 Mo. 295.

By "actual possession" is meant a subjection to the will and dominion of the claimant. A purchaser of land at a mortgage sale who does not actually reside on it, but who exercises control, has possession within the meaning of the statute providing that every person in actual, open, and notorious possession of lands under color of title in good faith, who shall for seven years continue in possession, shall be held to be the legal owner. Olson v. Howard, 80 Pac. 170, 171, 38 Wash. 15 (quoting and adopting Coryell v. Cain, 16 Cal. 567).

Evidence of the collecting of money for a trespass, preventing other trespasses, and posting fire notices on a tract of 3,500 acres of wild forest land, where the amount of money collected, the circumstances of the several trespasses, and the extent of the notice posting do not appear is insufficient to establish "actual possession." The execution of two leases of five acres each for camping purposes out of a tract of 3,500 acres of forest lands to persons who had occupied the property prior to the leases apparently under the owner's grantors, and who only occupied it at intervals, and did not cultivate or fence it, where neither the plaintiff nor its predecessor in title appeared to have knowledge of any fact tending to establish adverse possession in another, even if constituting actual possession of the leased portions, was not "actual possession" of the rest of the tract. Saranac Land & Timber Co. v. Roberts, 109 N. Y. Supp. 547, 548, 558, 125 App. Div. 333, 344.

"Actual possession," to ripen into prescriptive title, consists in exercising domination over the land and exercising acts of ownership with sufficient continuity to acquaint the owner that an adverse title is being asserted, and so the filling in of the shore front of land bordering on the sea, and the cultivation of grass thereon, is sufficient "actual possession" to show an adverse holding. Dodge v. Lavin, 83 Atl. 1009, 1012, 34 R. I. 409.

Cultivation, inclosure or improvement

Neither actual occupation, cultivation, nor residence is necessary to constitute "actual possession" of property, where the property is so situated as not to admit of permanent useful improvement, and the continued claim of the party is evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. McCaughn v. Young, 37 South. 839, 842, 85 Miss. 277.

To constitute "actual possession" of land, it is only necessary to put it to such use or exercise such dominion over it as it is reasonably adapted to in its present state. Alabama State Land Co. v. Matthews, 53 South. 174, 175, 168 Ala. 200.

To constitute "actual possession" of land, there must be such an appropriation of the land by the claimant as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment, an appropriation manifested by either inclosing, cultivating, improving, or adapting it to such uses as it is capable of. Lofstad v. Murasky, 91 Pac. 1008, 1009, 152 Cal. 64.

As timbered swamp lands may be actually possessed by the construction of roads or canals, or by removing the trees, they are no exception to the rule, and a mere payment of taxes, tracing of boundary lines, marking of trees, and watching for trespassers do not constitute "actual possession" of the land and the timber thereon. Albert Hanson Lumber Co. v. Baldwin Lumber Co., 52 South. 537, 538, 126 La. 347.

Occupancy or residence

"Actual possession" exists when a thing is in the immediate occupancy of a party. Warner v. Johnson, 21 N. W. 483, 484, 65 Iowa, 126.

"Actual possession," or "possession in fact," as used in referring to the right to maintain an action to quiet title, exists when the thing is in the immediate occupancy of the party or his agent or tenant, and the terms are synonymous with "pedis possessio." Southern Ry. Co. v. Hall, 41 South. 135, 136, 145 Ala. 224.

In trespass quare clausum fregit, plaintiff testified that he made an arrangement with a third person to hold the premises, as

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tenant, without fixing the time of the year in which the arrangement was made or the time the third person took possession. There was no evidence of any trespass after March of that year. Held insufficient to show that the trespass was committed while plaintiff was in the "actual possession" of the property. Gordner v. Blades Lumber Co., 56 S. E. 695, 696, 144 N. C. 110 (citing Morris v. Hayes, 47 N. C. 93).

In Code Civ. Proc. § 2245, providing that petitioner in forcible entry and detainer must prove actual possession at the time of entry, etc., "actual possession" means a subjection to the will and dominion of the claimant. It "exists when a thing is in one's immediate occupancy," and it is evidenced by circumstances which vary according to the locality and character of the property. "Generally any overt acts, indicating dominion, and a purpose to occupy and not to abandon the premises, will satisfy the requirements as to possession." It is possession "required by the character and situation of the lands." It intends that the land is "in the immediate control or power of the party." Town of Oyster Bay v. Jacob, 96 N. Y. Supp. 620, 622, 109 App. Div. 613 (citing Anderson's Law Dict.; Allaire v. Ketcham, 35 Atl. 900, 55 N. J. Eq. 168; Omaha & Florence Land & Trust Co. v. Parker, 51 N. W. 139, 33 Neb. 775, 29 Am. St. Rep. 506).

Personal property

Where a heap of scrap iron on a railroad right of way was pledged by the owner and sold by the pledgee on default in payment by the pledgor, and the pledgor absconded, he had no such "actual possession" of the iron as entitled his creditors as against the purchaser to attach it, under Code, § 2906, providing that no sale or mortgage or personal property where the vendor or mortgagor retains actual possession thereof is valid against the existing creditors without notice, such "actual possession" being real possession, that which is true, positive, and certain, and not that which is theoretical or constructive only. Dysart Sav. Bank v. Weinstein, 132 N. W. 18, 19, 152 Iowa, 260.

Determination of what constitutes "actual possession" within Rev. St. 1887, § 3021, providing that a sale of personal property is fraudulent when not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property transferred, is not governed by any fixed rule, but is purely a question of fact to be determined by the jury, or the court in case the jury is waived, from all the evidence in each particular case. Rapple v. Hughes, 77 Pac. 722, 725, 10 Idaho, 338.

ACTUAL PURCHASE OR SALE

Under Rev. Laws, c. 99, § 4, providing that whoever on credit or margin employs another to buy or sell securities for his account, intending that there shall be no actual purchase or sale, may recover from the person so employed any payment made, or the value of anything delivered, on account thereof, if the person employed had reasonable cause to believe that said intention existed; but he shall not have such right if, for his account, the person employed makes, in accordance with the terms of the employment, an "actual purchase or sale" of said securities, the meaning of which words is made somewhat more plain by section 6, providing that, in an action for such recovery, settlements without the completion of the purchase or sale of securities shall be prima facie evidence of an intention that there should be no actual purchase or sale, a defendant in such a case does not make out a defense by merely showing purchases and sales of stock on the stock exchange, and settlements by the adjustment of balances through the clearing house; but he must prove in addition that as a result of the purchases he or his agents had within his or their immediate control certificates of the particular stock to an amount equal to that purchased at all times ready to deliver to the plaintiff if called for by him, or in cases of sales similar certificates ready to deliver to the purchasers. Fiske v. Doucette, 92 N. E. 455, 457, 206 Mass. 275.

ACTUAL REBELLION

"Actual rebellion or insurrection," in its ordinary acceptation, means a resistance to the established order of things. State v. McDonald (Ala.) 4 Port. 449, 457.

ACTUAL RESIDENCE—ACTUAL RESIDENT

See, also, Actual Bona Fide Resident.

Whether a person is an "actual resident" of a particular school district, within the meaning of Gen. St. 1894, § 3697, must depend upon the special facts of each particular case. State ex rel. Crosland v. Board of Education of Independent School Dist., 97 N. W. 885, 886, 91 Minn. 268.

Rev. Laws 1905, § 3597, providing for limited divorce, in an action by a married woman, the phrase an "actual resident" of the state at the filing of her complaint applies to a married woman having a legal domicile or established residence in the state as distinguished from one having only a temporary abode therein. Bechtel v. Bechtel, 112 N. W. 883, 884, 101 Minn. 511, 12 L. R. A. (N. S.) 1100.

Legal residence distinguished

Residence and domicile are not necessarily the same. The first is used to indicate the place of dwelling, whether permanent or temporary, the second to define the fixed and permanent residence to which, when absent, one has the intention of returning. This distinction is the same as is sometimes made between actual residence and legal residence or inhabitancy. "Actual resi-

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dence" is not always the legal residence or inhabitancy of a man. A foreign minister actually resides and is personally present at the court to which he is accredited, but his legal residence, inhabitancy, or domicile is in his own country. When a man buys or rents a house and sets up housekeeping with his family with the design of remaining there until he has completed certain work, he becomes an actual resident there, although his domicile is in another county to which he intends to return upon the completion of the job. In re Brannock, 131 Fed. 819, 822 (quoting and adopting definition in Fitzgerald v. Arel, 16 N. W. 712, 18 N. W. 713, 63 Iowa, 104, 50 Am. Rep. 733).

There is a broad distinction between a "legal" and an "actual residence." A legal residence (domicile) cannot, in the nature of things, coexist in the same person in two states and countries. He must have a legal residence somewhere. The succession to movable property, whether testamentary or in case of intestacy, except as regulated by statute; the jurisdiction of the probate of wills; the right to vote; the liability to poll tax and to military duty; and other things all depend on the party's legal residence or domicile. For these purposes he must have a legal residence. The law will, from facts and circumstances, fix a legal residence for him, unless he voluntarily fixes it himself. His "legal residence" consists of fact and intention; both must concur; and, when his legal residence is once fixed, it requires both fact and intention to change it. As contradistinguished from his legal residence, he may have an "actual residence" in another state or country. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purposes above indicated, may be merely ideal, but his actual residence must be substantial. He may not actually abide at his legal residence at all, but his actual residence must be his abiding place. His legal residence subjects him to the duties, and confers upon him the rights and privileges, above mentioned. The residence required by Rev. St. 1895, art. 2978, which provides that no suit for divorce shall be maintained unless the petitioner at the time of suit is an actual bona fide inhabitant of the state, and shall have resided in the county where the suit is filed six months preceding the filing thereof, means the physical presence of the plaintiff within the state and county for the time required, and therefore an actual bona fide inhabitancy in the state, coupled with a constructive residence in the county, is insufficient, and while the domicile of a husband is the domicile of his wife, and so continues notwithstanding the wife's physical absence, so long as the husband is not guilty of an offense which is a cause of divorce, after his commission of such offense by abandoning her, her residence, for the purposes of divorce, depends on her actual residence. Michael v. Michael, 79 S. W. 74, 75, 34 Tex. Civ. App. 630 (quoting and adopting definition in Tipton v. Tipton, 8 S. W. 440, 87 Ky. 243).

ACTUAL SALE

"An 'actual sale' is a transfer of property from one person to another, and includes the actual and complete transfer of the title." Kramer v. Wilson, 90 Pac. 183, 185, 49 Or. 333.

The distinction between an "actual sale" and an executory agreement to sell personalty is that in the former the subject of the contract becomes the property of the buyer the moment the contract is concluded, whether actually delivered, or remaining in the seller's possession, while in the latter it remains the property of the seller until the contract is executed. Idaho Implement Co. v. Lambach, 101 Pac. 951, 956, 16 Idaho, 497.

ACTUAL SEISIN

In Gen. Laws 1896, c. 201, § 14, declaring that a person actually seised of lands as tenant in tail may convey the lands in fee, "actual seisin" means corporal possession with legal title. Paine v. Sackett, 61 Atl. 753, 756, 27 R. I. 300.

ACTUAL SERVICE

The term "actual service," as used in the Constitution and Military Code, means service in time of war or public danger. State v. Peake, 135 N. W. 197, 201, 22 N. D. 457, 40 L. R. A. (N. S.) 354.

ACTUAL SETTLEMENT

"'Actual settlement' means actual residence." Smith v. Florence, 96 S. W. 1096, 1097, 43 Tex. Civ. App. 557 (quoting and adopting definition in Mosely v. Torrence, 12 Pac. 430, 71 Cal. 318).

ACTUAL SETTLER

An "actual settler," as involving title to school land, is one who actually occupies and settles upon the land intending to make it his home. Beaty v. Yell, 133 S. W. 911, 912; May v. Hollingsworth, 80 S. W. 841, 842, 35 Tex. Civ. App. 665.

One who makes his home on public lands is an "actual settler" thereon, within the meaning of the statute permitting such settlers to purchase additional school lands, though his habitation is of such a humble character that it can hardly be called a house. Corrigan v. Fitzsimmons, 111 S. W. 793, 795, 51 Tex. Civ. App. 444.

"An 'actual settler' upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession, for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state." On an issue as to whether defendant was an actual settler on school land at the time of his application to purchase, it appeared that he

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drove onto the land with a wagon filled with household goods and provisions, the wagon having bows, and a sheet stretched over the bows; that that night he ate supper in the wagon and slept in it, and ate breakfast in the wagon next morning, though he did not make any fire; and that the next morning he left the wagon and household goods on the land, and made his application. Defendant was an unmarried man and had no family, and went upon the land for the purpose of making it his home. Held that the evidence was sufficient to show him an "actual settler." Smith v. Florence, 96 S. W. 1096, 1097, 43 Tex. Civ. App. 557 (quoting and adopting definition in Gavitt v. Mohr, 10 Pac. 337, 68 Cal. 506).

Under the proviso of Act Cong. Feb. 8, 1887, § 2, providing that actual settlers shall be excepted from the grant to the New Orleans Pacific Railway Company, mere occupation of land within the grant by "actual settlers" at the time is sufficient. Lisso v. Devillier, 43 South. 163, 164, 118 La. 559.

ACTUAL TAKING

An "actual taking" within a statute prohibiting a chattel mortgagee from selling the property or removing it from the county within five days from the time when the same was actually taken, means a corporal taking out of the possession and control of the mortgagor. Minneapolis Threshing Mach. Co. v. Haug, 117 N. W. 811, 812, 136 Wis. 350.

ACTUAL TRAVELING EXPENSES

Hotel bills incurred by the superintendent of public instruction while staying at a place for the purpose of visiting schools are not a part of the "actual traveling expenses," which, under Gen. St. § 1292, are to be allowed and paid to that officer. State ex rel. Cutting v. La Grave, 42 Pac. 797, 23 Nev. 88.

Laws 1907, c. 74, § 15, par. 14, allowing the court reporter his "actual traveling expenses" in attending the district court away from his official residence, authorizes, in view of a uniform practical construction to that effect of a prior similar statute, an allowance for his board and lodging at the place where the court was held. Van Veen v. Graham County, 108 Pac. 252, 253, 13 Ariz. 167.

ACTUAL VALUE

The terms "actual value," as used in section 29, and "clear value," in section 30, War Revenue Act June 13, 1898, c. 448, 30 Stat. 461, 465, conveys the idea of definite or certain value, something in no sense speculative. Lynch v. Union Trust Co. of San Francisco, 164 Fed. 161, 167, 90 C. C. A. 147.

As salable or cash value

Selling value as actual value, see Selling Value.

The "actual value" of insured property is its salable or cash value. Milwaukee Mechanics' Ins. Co. v. Frosch (Tex.) 130 S. W. 600, 602.

As value

See Value.

ACTUAL WORKING DAYS

An agreement of apprenticeship bound the apprentice to serve for 1,200 "actual working days," which throughout the indenture were referred to as a "term." Held, that such phrase meant that the service should continue through a period within which there are 1,200 days, exclusive of Sundays and holidays, and not to mean 1,200 days on which the apprentice should actually perform work for his master. Robeson v. Whitney, 71 Atl. 255, 256, 76 N. J. Law, 778.

ACTUALLY DISCOVERED

In a parent's action for the death of a minor by being struck by a railroad train, the modification, by striking out the quoted word, of a requested instruction, that the duty of the engineer to make all reasonable effort to avoid striking the boy, did not arise till he "actually" discovered the boy in a position of peril, was not erroneous, since "actually discovered" does not mean more than "discovered." Haddox v. Northern Pac. Ry. Co., 127 Pac. 152, 46 Mont. 185.

ACTUALLY EMPLOYED

Defendant was appointed by the Secretary of the Interior as the disbursing member of a board of three commissioners to negotiate Indian treaties at $8 per day and traveling expenses, exclusive of subsistence, to continue at the pleasure of the Secretary of the Interior for the time being. Defendant was directed to proceed from his home in Nebraska to the agency in Washington without unnecessary delay, his salary to begin on the day of his departure from home. The instructions given the board required a study of the special needs of the Indians in each case, and the formation of agreements which would best promote their welfare and weekly reports. Defendant paid himself and the other commissioners at the rate of $8 a day for the time that they were under instructions, or were holding themselves in readiness to obey instructions on vouchers reciting actual employment during such period. These vouchers were uniformly accepted without question, except for periods during which the commissioners were absent from their post on leave. Held that, under the rule of contemporaneous construction, the phrase "actually employed" should not be construed as equivalent to "actively employed," and hence the salary was not limited to days on which the commissioners were actually engaged in the performance of active duty. United States v. Hoyt, 158 Fed. 162, 167.

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ACTUALLY ENGAGED

An attorney was justified in stating, in an affidavit for a postponement of trial, that he was "actually engaged" in the trial of a case in another court, where it appeared that he was directed the day before to be ready on that morning to try the case in the other court immediately following a case then on trial, though that case was not actually tried because, when reached, the opposite attorney unexpectedly applied for a discontinuance because his client did not appear. Cebrelli v. Bradley, 119 N. Y. Supp. 255, 256, 65 Misc. Rep. 59.

The words "for each day he shall be actually engaged," as used in St. 1898, § 2454, as amended, limiting the compensation of the county judge to $5 per day for each day actually engaged in matters not appertaining to probate business, indicates a legislative intention only to allow for the time actually consumed, and this construction necessitates a splitting up of days and a charge by the hour. Hoffman v. Lincoln County, 118 N. W. 850, 852, 137 Wis. 353.

Under an appointment of defendant by the Secretary of the Interior as an Indian commissioner to study the needs of and negotiate treaties with certain Indian tribes as directed, at a salary of $8 per day and actual traveling expenses, the salary to begin when defendant left his home and to be paid while "actually engaged" in the performance of his duties, he was entitled to salary so long as he remained away from home at the places to which he was assigned, performing such duties as directed and reporting regularly, and not merely for the days on which he was actively engaged in the performance of some duty, and especially where that was the practical construction placed upon the contract by both parties. United States v. Hoyt, 167 Fed. 301, 305, 93 C. C. A. 53.

ACTUALLY EXPENDED

Sum of money actually expended, see Sum of Money.

ACTUALLY PAID

Under a contract of reinsurance, providing that in no event shall the reinsurer be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured by the reinsured company, the expression "actually paid" will be construed to mean "actually payable." Insolvency of the reinsured company, and its inability to pay those it has insured, will not defeat a recovery by its receiver upon the contract of reinsurance. Allemannia Fire Ins. Co. of Pittsburg v. Fireman's Ins. Co. of Baltimore, 28 App. D. C. 330, 338, 14 L. R. A. (N. S.) 1049.

ACTUALLY RECEIVE

Where an individual, who conceived the idea of publishing a history of the Protestant Episcopal Church in this country, obtained from bishops their promises to act as supervising editors of the history of their respective dioceses, and then organized a corporation to publish the history, and transferred to the corporation the agreements with the bishops, and received in consideration thereof stock of the corporation, the agreements, though valuable, were not property within Stock Corporation Law, § 55, prohibiting the issuance of stock except for money, labor done, or property "actually received." Stevens v. Episcopal Church History Co., 125 N. Y. Supp. 573, 582, 140 App. Div. 570.

Under Const. art. 12, § 6, providing that no corporation shall issue stock, except for "money paid" or "property actually received," a contract for the sale of stock, to be paid for in part in cash and in part by the purchaser's notes, payable on a future date, is ultra vires, though the notes are to be indorsed by a solvent indorser and secured by a pledge of the stock, since a note is not the equivalent of "money paid," and since, as between the parties, a note is mere evidence of indebtedness, and is not property "actually received." McCarthy v. Texas Loan & Guaranty Co. (Tex.) 142 S. W. 96, 99.

Under section 39 of article 9 of the Constitution (Williams' Constitution and Enabling Act, § 256), which provides that "no corporation shall issue stock except for money, labor done, or property actually received to the amount of the par value thereof, * * *" the right to use a party's name in organizing a corporation, and a method of refining gasoline, which was not patented, which was in use at a number of other places, and which was the result of a method of construction used by the plaintiff wherever he built refineries, is not property "actually received" to the amount of the par value thereof, for which capital stock of the corporation should be issued. Webster v. Webster Refining Co. of Okmulgee (Okl.) 128 Pac. 261, 262.

ACTUALLY RENDERED

See Services Actually Rendered.

ACTUALLY RIDING AS PASSENGER

Where a beneficiary in an accident policy was a United States railway mail clerk, and was killed while riding in a mail car in the performance of his duties, he was not "actually ling as a passenger in or on any regular passenger conveyance provided by a common carrier," within an accident policy insuring the person named as beneficiary under certain circumstances against loss by accident while actually riding as a passenger in or on any regular passenger conveyance. Wood v. General Acc. Ins. Co. of Philadelphia, 156 Fed. 982; Id., 160 Fed. 926, 927, 88 C. C. A. 108.

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ACTUALLY USED

J. avenue was opened under Laws 1867, p. 953, c. 400, under which act the city acquired only an easement for street purposes, and thereafter proceedings were instituted to acquire land to widen the avenue, when a part of it then in use was abandoned under Laws 1895, p. 2037, c. 1006, § 2, providing that, when the public easement in a street was legally abandoned, the owner regained complete possession thereof, and, after the new street was opened, could occupy the abandoned part. The cemetery association owned the fee in land which was included within the abandoned portion of J. avenue. Held, that the new street was not "opened," within the statute, until there had been an actual physical opening, and hence the abandoned part of the avenue was not exempted from assessment as "land actually used for cemetery," by Laws 1879, c. 301, § 1. In re Jerome Ave., 85 N. E. 755, 758, 192 N. Y. 459.

ACUTE ARTICULAR RHEUMATISM

See Rheumatism.

AD INTERIM RESTRAINING ORDER

See Restraining Order.

AD QUOD DAMNUM

The writ of "ad quod damnum" is a writ issued by and returnable to chancery, commanding the sheriff to inquire by jury what damage will result from the grant of a liberty, fair market, highway, etc. Payne & Butler v. Providence Gas Co., 77 Atl. 145, 165, 31 R. I. 295, Ann. Cas. 1912B, 65.

AD TESTIFICANDUM

See Habeas Corpus ad Testificandum.

AD VALOREM

The phrase "ad valorem," in Const. art. 19, § 27, providing that local assessments shall be ad valorem and uniform, means simply according to value, and an assessment according to the value of the benefits to accrue is within this provision of the Constitution, as well as a statute directing an assessment according to the value of the property benefited. Kirst v. Street Imp. Dist. No. 120, 109 S. W. 526, 529, 86 Ark. 1.

ADAPT—ADAPTED

The verb "adapt" means: "To make suitable; make to correspond; fit or suit; proportion. (2) To fit by alteration; modify or remodel for a different purpose. * * * (3) To make by altering or fitting something else; produce by change of form or character." "Adapted" means "fit or suitable." Century Dictionary. The claims of a patent in issue read as follows: "A clock-controlled time-recorder having automatically-acting time printing means 'adapted' to print regular records in a certain color and irregular records in a certain other color. * * * A clock-controlled time-recorder having automatically-actuated time-printing means 'adapted' to print regular records with an impression of a certain color, and irregular records with an impression of a certain other color." The word "adapted," as used in these claims, evidently refers to the fact that prior clock-controlled time-recorders having automatically-acting time-printing means are not calculated, or so constructed as, to print the time or impress the characters indicating the time, when recording irregular time, on the card or paper in a color different from the imprint or impression thereon recording the regular time. In other words, such printing means are, by changes or additions, or both "adapted" to print "records" of the different classes, "regular time" or "irregular time," in different or distinctive colors; that is, in such colors as will distinguish the one class of recorded time from the other class of recorded time. Dey Time-Register Co. v. W. H. Bundy Recording Co., 169 Fed. 807–810.

Designed synonymous

See Designed.

ADD

Under the food and drugs act (Act June 30, 1906, c. 3915, §§ 7, 8, 34 Stat. 769, 771), an article of food other than confectionery is not deemed to be adulterated merely because it contains a poisonous or deleterious ingredient unless such ingredient has been "added"; that is, unless it is foreign to the natural or normal composition of the article. United States v. Forty Barrels and Twenty Kegs of Coca-Cola, 191 Fed. 431, 433.

A person may be convicted of violating Act May 13, 1909 (P. L. 520), in selling confectionery to which sulphur dioxide has been "added," although he may not know that his merchandise contained the prohibited substance. Commonwealth v. Pflaum, 50 Pa. Super. Ct. 55, 58.

ADDED POISONOUS INGREDIENT

Macaroni, to which a coal tar dye known as "martius yellow" had been added solely as a coloring matter, held to contain an "added poisonous * * * ingredient which may render it injurious to health," within Food and Drugs Act June 30, 1906, c. 3915, § 7, par. 5, 34 Stat. 769, and, when shipped in interstate commerce, to be subject to condemnation and destruction under section 10 of the act; the evidence showing that such coloring matter is a poison which will kill. United States v. 1,950 Boxes of Macaroni, 181 Fed. 427.

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ADDICTED

The word "addicted," as applied to the use of intoxicating liquors which would avoid a policy of life insurance for breach of warranty of the truth of statements in the application, means the habitual or customary use of liquors, and not an occasional or exceptional use. Des Moines Life Ins. Co. v. Clay, 116 S. W. 232, 89 Ark. 230.

ADDITION

See Dividend Additions; In Addition to; Simple Addition; Without Addition or Erasure.

Amendment of a complaint by addition of an averment at the end that the suit was brought on a verified account was not an "addition" to the statement of the cause of action on the account within Code 1907, § 5367, providing that the court must while the case is in progress amend all and every imperfection in form on motion of the party, and permit the addition of new statements of the cause of action which could have been included in the original complaint, etc. Western Newspaper Union v. Judson, 55 South. 1026, 1027, 1 Ala. App. 615.

Act May 29, 1889, § 7, provides that the trustees of a sanitary district shall have power to lay out one or more main channels for carrying off the drainage, together with such adjuncts and additions thereto as may be proper. Act May 14, 1903, enlarging the boundaries of the sanitary district of Chicago, gave the trustees power to provide for the additional territory by constructing one or more channels together with such adjuncts and additions thereto as may be necessary, and shall maintain the same proportion of dilution of sewage through such auxiliary channels. Held, that the words "adjuncts" and "additions" were used as synonymous with "auxiliary channel," and did not mean city sewers connecting with the sanitary district outlet so as to authorize the district authorities to take charge of the building of sewers of municipalities within the district. City of Chicago v. Green, 87 N. E. 417, 422, 238 Ill. 258.

Building

As dwelling, see Dwelling—Dwelling House.

Attached to buildings, see Attach.

The definitions given in dictionaries afford very little assistance in determining the application to a particular structure of the word "addition" as used in a fire insurance policy covering personal property contained in a frame building and addition. The meaning of the term must be extended or limited by reference to other words of description and by the use and purpose contemplated by the parties to contract not inconsistent with the language of the policy and by judicial definitions given in similar cases. A building destroyed by fire which was connected with the frame building mentioned in the policy by a platform 24 feet wide and 26 feet by the sides of the building supported by posts and reached by a runway and from which doors opened into each building, which was erected at the same time and constantly used in connection with the frame building mentioned, was an "addition" within the meaning of the policy. Bickford v. Ætna Ins. Co., 63 Atl. 552, 554, 101 Me. 124, 8 Ann. Cas. 92.

A fire policy described the property insured as a two-story basement and brick building with metal roof, and its "additions adjoining and communicating, including foundations, occupied as a steam laundry." The laundry was in process of construction at the time the policy was written, and consisted of a main building, and in the rear of it, about four feet distant, a boiler room was located. A 2½-inch steam pipe ran from the boiler house to an engine in the center of the main building, being the means by which the power was transmitted from the boiler to the other machinery employed in operating the laundry. The boiler house was joined with the main building by means of framework. The boiler house must be deemed as included in the policy, because of the use of the phrase "adjoining and communicating." Guthrie Laundry Co. v. Northern Assurance Co. of London, 87 Pac. 649, 650, 17 Okl. 571, 10 Ann. Cas. 936 (citing Pettit v. State Ins. Co., 43 N. W. 378, 41 Minn. 299; Marsh v. Concord Mut. Fire Ins. Co., 51 Atl. 898, 71 N. H. 253; Home Mut. Ins. Co. of California v. Roe, 36 N. W. 594, 71 Wis. 33; Cargill v. Millers' & Manufacturers' Mut. Ins. Co. of Minnesota, 22 N. W. 6, 33 Minn. 90; Gross v. Milwaukee Mechanics' Ins. Co., 66 N. W. 712, 92 Wis. 656; Carpenter v. Allemannia Fire Ins. Co., 26 Atl. 781, 156 Pa. 37; Phœnix Ins. Co. v. Martin [Miss.] 16 South. 417; Hannan v. Williamsburgh City Fire Ins. Co., 45 N. W. 1120, 81 Mich. 556, 9 L. R. A. 127; Maisel v. Fire Ass'n of Philadelphia, 69 N. Y. Supp. 181, 59 App. Div. 461; Liebenstein v. Baltic Fire Ins. Co., 45 Ill. 301).

Same—Distinct building.

A policy covering a building and its additions "adjoining and communicating" cannot be construed to include a servant's house 150 feet distant, though the buildings are connected by a system of call bells. North British & Mercantile Ins. Co. v. Tye, 58 S. E. 110, 111, 1 Ga. App. 380.

An insurance policy on a "sawmill and additions thereto" will cover a planing mill, which is an addition to the sawmill and a part thereof, even though there is a space of 18 inches between them, where they communicate directly with each other, and lumber is passed from the sawmill directly into the planing mill, and a short stepladder ex-

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tends from the floor of the sawmill to the second floor of the planing mill, and a large belt, covered by a box, communicates power from one mill to the other. Ferguson v. Lumbermen's Ins. Co., 88 Pac. 128, 130, 45 Wash. 209.

A building detached from the main dwelling, but used as a part of it, is an "addition" within a fire policy on "dwelling and addition." Tate v. Jasper County Farmers' Mut. Ins. Co., 113 S. W. 659, 660, 133 Mo. App. 584.

Where a policy covered building material stacked in a millyard 100 feet from the mill building and its "additions," material burned while piled in an open shed within such radius was covered. Georgia Home Ins. Co. v. Mayfield Planing Mills (Ky.) 119 S. W. 1190.

Where a fire policy described the risk as a "frame building with additions," the word "additions" does not necessarily mean something attached to the building, and, where extraneous evidence showed that it was meant to include outhouses, the policy will be given the broader meaning. Ideal Pump & Mfg. Co. v. American Cent. Ins. Co., 152 S. W. 408, 409, 167 Mo. App. 566.

City or town

Any additions thereto, see Any.

Fixtures

A lease, reserving to the lessor at the end of the term all "alterations, additions and improvements" except movable fixtures, entitles him to such additions as electric light apparatus, gallery, vestibules, dumbwaiters, and toilet rooms. Isman v. Hanscom, 66 Atl. 329, 330, 217 Pa. 133.

ADDITIONAL

See New or Additional.

"Additional" means "added; supplemental; coming by way of addition." Collier v. Smaltz, 128 N. W. 396, 399, 149 Iowa, 230, Ann. Cas. 1912C, 1007.

"Additional" means given with or joined to some other, and embraces the idea of joining or uniting one thing to another, so as to form an aggregate. Kadderly v. City of Portland, 74 Pac. 710, 717, 44 Or. 118 (citing Anderson's Law Dict.; State, to Use of Baird, v. Hull, 53 Miss. 626, 645; Brooks v. Whitmore, 31 N. E. 731, 139 Mass. 356.

ADDITIONAL AMENDMENT

An amendment, though not on the same subject or article, is an "additional amendment" within Const. art. 17, § 2, prohibiting the proposal of any additional amendment or amendments of the Constitution while one is awaiting action of a second Legislature or of the electors. Kadderly v. City of Portland, 74 Pac. 710, 717, 44 Or. 118.

ADDITIONAL BURDEN

See, also, Additional Servitude.

Poles and wires which permanently and exclusively occupy portions of a public street or highway constitute an "additional burden" for which the abutting owner is entitled to compensation in case he is damaged thereby. Bronson v. Albion Telephone Co., 93 N. W. 201, 202, 67 Neb. 111, 60 L. R. A. 426, 2 Ann. Cas. 639 (citing and adopting Jaynes v. Omaha St. Ry. Co., 74 N. W. 67, 53 Neb. 631, 39 L. R. A. 751; Eels v. American Telephone & Telegraph Co., 38 N. E. 202, 143 N. Y. 133, 25 L. R. A. 640; Halsey v. Rapid Transit St. Ry. Co., 20 Atl. 859, 47 N. J. Eq. 380; Western Union Telegraph Co. v. Williams, 11 S. E. 106, 86 Va. 696, 8 L. R. A. 429, 19 Am. St. Rep. 908; Stowers v. Postal Telegraph Cable Co., 9 South. 356, 68 Miss. 559, 12 L. R. A. 864, 24 Am. St. Rep. 290; City of Spokane v. Colby, 48 Pac. 248, 16 Wash. 610; Kester v. Western Union Telegraph Co., 108 Fed. 926).

A telephone line along the margin of a highway is not an "additional burden," entitling the abutting owner to compensation. As stated in Keasly, Electric Wires, p. 153, § 124: "When the property is taken for a public road or street, although technically the fee remains in the abutting owner, yet he cannot interfere with the surface, and it would seem that practically an additional burden, such as would justify an action on his part, should be something which either interfered with or made inconvenient his enjoyment of what remained to him in the land. As to obstructing the road, that would be a matter in which he had no greater right than the public generally, but if the new use impaired his proper use of his own property, in any manner, then, if it could be said to be a use not included within the original grant, it would be a matter for which he would be entitled to compensation." Hobbs v. Long Distance Telephone & Telegraph Co., 41 South. 1003, 1004, 147 Ala. 393, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461 (citing Taggart v. Newport St. Ry. Co., 19 Atl. 326, 16 R. I. 668, 7 L. R. A. 205; Nellis, Surface Railroads, pp. 134, 135; Elliott, Roads & Streets [2d Ed.] pp. 754, 757, §§ 698, 699; Joyce, Electric Law, §§ 306, 336, 341; Keasly, Electric Wires, §§ 103, 112, 113, 124, 145, conclusion on p. 178; Halsey v. Rapid Transit St. Ry. Co., 20 Atl. 860, 47 N. J. Eq. 380; Detroit City Ry. v. Mills, 48 N. W. 1007, 85 Mich. 634; 3 Cook, Corp. [4th Ed.] § 933; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Frazier v. East Tennessee Telephone Co., 90 S. W. 620, 115 Tenn. 416, 3 L. R. A. [N. S.] 323, 112 Am. St. Rep. 856, 5 Ann. Cas. 838.

ADDITIONAL CHARGE

On trial of misdemanor, the judge on request reduced his charge to writing, the jury

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returned into court and asked if they were authorized on conviction to recommend mercy, and the judge informed them orally that they could do so, but that their recommendation was not binding. Held not an "additional charge," within Pen. Code 1895, § 1030, as amended by Acts 1897, p. 41, making it error to give any other or additional charge than that written and read to the jury as provided by the section. Dowling v. State, 67 S. E. 697, 698, 7 Ga. App. 613.

ADDITIONAL COURTS

Const. 1902, § 98, declaring that in a city having a certain population or more the General Assembly may provide such additional courts as the public interests may require, does not authorize Code 1904, § 2639a, in so far as it confers jurisdiction on clerks of corporation courts to admit wills to probate, appoint personal representatives, etc., since, applying the doctrine of ejusdem generis, the "additional courts" which the General Assembly may establish must be similar in grade, dignity, and jurisdiction to existing courts, and that cannot be predicated of a court clothed with the special and limited jurisdiction conferred on the clerks. McCurdy v. Smith, 60 S. E. 78, 80, 107 Va. 757.

ADDITIONAL DUTY

Under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, the "additional duty" provided therein for unusual coverings used "otherwise than in the bona fide transportation" of their contents to the United States, is not a substitute for the usual duty on coverings which accrues by including their cost in the dutiable value of their contents, as also provided in said section; but both duties should be imposed, the latter because the coverings subserve a use in transportation, and the former because they subserve an additional use after transportation. United States v. Park & Tilford, 152 Fed. 142, 143, 81 C. C. A. 360.

ADDITIONAL INSURANCE

In order that other insurance shall constitute "additional insurance" within the meaning of a policy, the property covered by both policies must be the same. Norwich Union Fire Ins. Society v. Cheaney Bros. (Tex.) 128 S. W. 1163.

ADDITIONAL PROOF

The words "additional proof," as used in Code Cr. Proc. § 395, providing that a confession is insufficient to warrant a conviction, without additional proof that the crime has been committed, mean merely any evidence in addition to the confession reasonably tending to prove the crime and thus corroborate the crime, and do not require evidence which is sufficient to convict independent of the confession. People v. Brasch, 85 N. E. 809, 813, 193 N. Y. 46.

ADDITIONAL SCHOOL FACILITIES

The words "additional school facilities," as used in Laws 1897, p. 134, § 1940b, providing that the trustees of any school district may, when advisable, submit to the electors the question whether a tax shall be raised to purchase lots and furnish "additional school facilities," means facilities in addition to or beyond those already possessed by the district, and a tax raised under the statute may be used to pay salaries of teachers where the regular fund is exhausted. State ex rel. Knight v. Cave, 52 Pac. 200, 202, 20 Mont. 468.

ADDITIONAL SERVITUDE

See, also, Additional Burden.

A company proposed to lay water mains along a road where for over a mile there were only 15 houses; the object not being to furnish the houses thereon with water, but to use that road for over a mile to connect with pipes at other points. Held, that the laying of pipes therein was an "additional servitude," since the road was not so improved as would justify the application of the rule which governs streets in cities and towns, though it was within the corporate limits. Baltimore County Water & Electric Co. v. Dubreuil, 66 Atl. 439, 442, 105 Md. 424, 9 L. R. A. (N. S.) 684.

The construction, maintenance, and operation of a telephone system on the streets of a city in such a manner as not to cause unnecessary injury or inconvenience to property owners is not an "additional servitude" for which an abutting owner is entitled to compensation. Kirby v. Citizens' Telephone Co. of Sioux Falls, 97 N. W. 3, 4, 17 S. D. 362, 2 Ann. Cas. 152.

The lines and poles of a telephone system upon a street of a city constitute an "additional servitude," where the fee is in the owner of the abutting property, notwithstanding the city uses the poles for its fire alarm and police signal service while they are still being used by the telephone company, and the same is true of telegraph lines and poles. De Kalb County Telephone Co. v. Dutton, 81 N. E. 838, 839, 840, 841, 228 Ill. 178, 10 L. R. A. (N. S.) 1057, 10 Ann. Cas. 464 (citing Board of Trade Telegraph Co. v. Barnett, 107 Ill. 507, 516, 47 Am. Rep. 453; Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 40 N. E. 1008, 1012, 156 Ill. 255, 269, 29 L. R. A. 485; Carpenter v. Capital Electric Co., 52 N. E. 973, 178 Ill. 29, 43 L. R. A. 645, 69 Am. St. Rep. 286; Postal Telegraph-Cable Co. v. Eaton, 49 N. E. 365, 170 Ill. 513, 39 L. R. A. 722, 62 Am. St. Rep. 390; Doane v. Lake Street Elevated R. Co., 46 N. E. 520, 165 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265; Burrall v. American Telephone & Telegraph Co., 79 N. E. 705, 224 Ill. 266, 8 L. R. A. [N. S.] 1091; Elliott, Roads & Streets [2d Ed.] §§ 705, 706; Lewis, Eminent Domain [2d Ed.] § 131; Jones, Tel-

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egraph & Telephone Companies, §§ 107, 109; Croswell, Electricity, § 110; Randolph, Eminent Domain, § 407; Dillon, Mun. Corp. [4th Ed.] § 698a; Nicoll v. New York & New Jersey Tel. Co., 42 Atl. 583, 62 N. J. Law, 735, 72 Am. St. Rep. 666; Krueger v. Wisconsin Telephone Co., 81 N. W. 1041, 106 Wis. 96, 50 L. R. A. 298; Bronson v. Albion Tel. Co., 93 N. W. 201, 67 Neb. 111, 60 L. R. A. 426, 2 Ann. Cas. 639).

The establishment by a railway company of a system of wires and posts over its right of way is not the imposition of an "additional servitude," within the meaning of that term, authorizing an abutting owner to claim additional compensation. Railroad companies may devote the right of way which they have acquired to any use indispensable to or which will facilitate the fulfillment of the objects of their corporate existence, whether these uses be by grading, constructing of telegraph lines, or other incidental uses requisite for the convenient, safe, and successful conducting of their business and regular running of their trains. City of Canton v. Canton Cotton Warehouse Co., 36 South. 266, 271, 84 Miss. 268, 65 L. R. A. 561, 105 Am. St. Rep. 428.

The operation by a corporation organized for the incorporation of street railway companies of interurban cars on streets of a city with its permission, for carriage of passengers, express, and light freight, is not an "additional servitude" on the streets, and abutting owners are not entitled to compensation therefor; but a street railway company operating on a city's street for the carriage of freight and passengers, interurban trains of three cars each 60 feet in length at a rate of 20 to 30 miles an hour, thereby rendering the use of the street dangerous and causing the house of an abutting owner 60 feet from the track to shake so as to cause the plastering and ceilings and the pictures on the walls to fall, is liable to the abutting owner for the special damages sustained, the operation of cars in such a manner constituting an "additional servitude." A steam railroad when run and operated over and along the public streets of a town or city is an "additional servitude" upon such streets; but a street railway does not constitute an "additional servitude" on the public streets. Kinsey v. Union Traction Co., 81 N. E. 922, 927, 169 Ind. 563 (citing Terre Haute & I. R. Co. v. Scott, 74 Ind. 29; Eichels v. Evansville St. Ry. Co., 78 Ind. 261, 41 Am. Rep. 561; Terre Haute & S. E. R. Co. v. Rodel, 89 Ind. 128, 46 Am. Rep. 164; Chicago & C. Terminal Ry. Co. v. Whiting, H. & E. C. St. R. Co., 38 N. E. 604, 139 Ind. 297, 26 L. R. A. 337, 47 Am. St. Rep. 264).

ADDITIONAL TIME

Code Civ. Proc. § 1173 (Rev. Codes, § 6796), allows 10 days after notice of motion for a new trial in which to prepare, serve, and file the evidence, statement, etc. A finding and decision having been filed August 30, 1905, on September 6th a written stipulation was made that either party might have 30 days "additional" time in which to give notice of intention to move for a new trial, and 90 days "additional" time in which to prepare, serve, and file affidavits, bills of exception, or statements in support of the motion. Appellant gave notice of motion for a new trial October 7th, and all the affidavits were filed January 3, 1906. Held, that appellant was entitled to 30 days in addition to the 4 days of the 10-day period not yet expired when the stipulation was made in which to serve notice of motion for a new trial, and that the 90 days stipulated for in which to file affidavits, bills of exception, or statements, etc., in support of the motion, began to run on the expiration of 10 days after the service of notice, and hence the affidavits were filed in time. Hill v. Ellinghouse, 93 Pac. 345, 347, 36 Mont. 440.

ADDRESS

See Last Known Address; Post Office Address; Residence Address.

To "address" means: "To direct, as words (to any one or any thing); to make, as a speech, petition, etc. (to any one, an audience). To direct speech to; to make a communication to, whether spoken or written; to apply to by words, as by a speech, petition, etc.; to speak to; to accost. To direct in writing, as a letter; to superscribe, or to direct and transmit; as, he addressed a letter." Code 1904, § 3768, subd. 3, provides that courts and judges may issue attachments for contempt and punish them summarily where obscene, contemptuous, or insulting language is "addressed" to a judge for or in respect of any act, or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding. Held that, to render one liable for contempt, the language, whether spoken or written, must be specifically addressed to the judge. Yoder v. Commonwealth, 57 S. E. 581, 584, 107 Va. 823 (quoting and adopting the definition in Webster's Dict.).

ADEEMED

ADEMPTION

"Ademption" is the extinction or satisfaction of a legacy by some act of the testator which is equivalent to a revocation of the bequest or which indicates an intention to revoke. It may be accomplished by a gift to the legatee, or by such disposition of the subject of the bequest as to make the will impossible of the operation. The doctrine does not apply to a devise of realty.

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In re Brown's Estate, 117 N. W. 260, 262, 139 Iowa, 219.

"Ademption" has to do with the subject-matter of bequests and is entirely distinct from an implied revocation of the terms of a will. "Ademption" involves action upon the part of the testator; the doing of some act with regard to the subject-matter which interferes with the operation of the will; that is, he anticipates the gift there made by bestowing it during his lifetime upon the legatee or disposes of the subject-matter in some way which puts it out of the question to follow his directions as set forth in the will. While "implied revocation" is founded upon a presumed and neglected duty upon the part of the testator, or upon a change in his family relations. The reason which lies behind the doctrine as defined both in the common law and in the statutes is that some obvious injustice may be prevented; that some moral duty, which has been overlooked, it is presumed, by the testator may be discharged. In re Jones' Estate, 60 Atl. 915, 923, 211 Pa. 364, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Ann. Cas. 221.

Advancement

A person, who had executed an instrument binding his heirs and representatives to pay $60,000 to a seminary on specified conditions, executed a will reciting that he had promised to give $60,000 to the seminary, and declaring that if the same was not paid before his death it should be paid by his executors in cash or mortgage bonds. Thereafter he delivered $60,000 in bonds to the seminary, under the agreement that it would turn over to him for life the coupons thereon. This arrangement was made, at the suggestion of the seminary, to avoid possible litigation involving the validity of the will. Held, that the transaction was an "ademption" of the legacy to the seminary, within Ky. St. § 4840, providing that an advancement to any person shall be deemed a satisfaction of a bequest contained in a prior will. Louisville Trust Co. v. Southern Baptist Theological Seminary, 147 S. W. 431, 433, 148 Ky. 711.

Satisfaction distinguished

A general legacy may be satisfied, though not strictly adeemed. It is this which distinguishes "ademption" from "satisfaction," one depending on the intention of the testator as inferred from his acts, and the other on the extinction of the thing or fund granted. A general legacy will be deemed satisfied where testator advances to the legatee even a small sum with intent to discharge the legacy or to substitute the advancement for the bequest. In re Brown's Estate, 117 N. W. 260, 262, 139 Iowa, 219.

Of specific legacy

"'Ademption of a specific legacy' arises by the alienation or destruction of the object." In re Black's Estate, 72 Atl. 631, 632, 223 Pa. 382.

The term "ademption" describes the act by which testator pays to his legatee in his lifetime a legacy which by his will he had proposed to give him at his death, or denotes the act by which a specific legacy has become inoperative on account of testator having parted with the subject of it. The alteration in the character of the subject-matter of a specific legacy must be made or authorized by the testator himself after making his will, or it will not operate as an "ademption," and the intention of the testator, if reasonably clear, will largely govern. Rue v. Connell, 62 S. E. 306, 307, 148 N. C. 302.

A particular bequest, although unrevoked, may become practically inoperative, if the testator, in his lifetime, gives to his legatee the specific thing which the will directs to be given after his death, or if the testator so deals with property which is specifically bequeathed to a legatee that, upon his death, execution of his intention in respect to this legatee is impossible. In such case he is said to adeem his bequest, and the practical result necessarily involved in his act is spoken of as an "ademption" of the legacy. Where the law recognizes a power of implied revocation by acts of the testator similar to those which must result in ademption, there may be in some cases, no distinction between ademption and revocation; but in Connecticut, where such implied revocation is forbidden by statute, the clauses of a will containing a bequest are not revoked by acts which may operate as an ademption, but remains as the legal declaration of the testator's intention to be carried out unless the execution after his death is impossible; and so, a present gift or part only of a testamentary bequest or a sale or conveyance to a third party of a part only of property specifically bequeathed does not prevent the execution of the testator's intention as to the remainder, and the ademption is not total but pro tanto. Jacobs v. Button, 65 Atl. 150, 152, 79 Conn. 360.

ADEPS LANÆ ANHYDROUS

As medicinal preparation, see Medicinal Preparation.

ADEQUACY—ADEQUATE

See Inadequacy.

"Adequate" means fully equal to requirements or occasions, commensurate; it does not mean average or graduation. Commonwealth v. Mathues, 59 Atl. 961, 981, 210 Pa. 372.

ADEQUATE CAUSE

"Adequate cause" for the provocation of passion resulting in homicide is such a cause

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as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. An illegal arrest coupled with an assault is adequate cause for the provocation of passion reducing a killing to the grade of manslaughter. Earles v. State (Tex.) 94 S. W. 464, 467. It is not necessary that the anger or passion should be sudden. Gillespie v. State, 109 S. W. 158, 53 Tex. Cr. R. 167.

"Adequate cause," as an element of manslaughter, is constituted by any fact, circumstance, or combination of facts and circumstances which actually produce in one's mind sudden passion, such as anger, rage, sudden resentment, or terror, rendering him incapable of cool reflection. Burns v. State (Tex.) 145 S. W. 356, 362. An assault and battery causing pain or bloodshed constitutes "adequate cause." Bagley v. State (Tex.) 103 S. W. 874, 875.

Where accused killed another under the immediate influence of passion arising in his mind from information given him by his wife to the effect that deceased had used insulting language to her, defendant believing and in good faith acting on the information, such information was to him an "adequate cause" reducing the crime to manslaughter, whether the insults had been in fact offered or not. Melton v. State, 83 S. W. 822, 824, 47 Tex. Cr. R. 451 (citing Jones v. State, 26 S. W. 1082, 33 Tex. Cr. R. 492, 47 Am. St. Rep. 46).

ADEQUATE COMPENSATION

See Just and Adequate Compensation.

ADEQUATE CONSIDERATION

See Valuable Consideration.

An "adequate consideration" is one which must not be so disproportionate as to shock our sense of that morality and fair dealing that should always characterize transactions between man and man. Eaton v. Patterson (Ala.) 2 Stew. & P. 9, 19.

The word "adequacy," as used in an instruction that the adequacy of the consideration was for the parties to consider at the time of making an agreement, and not for the court when it was sought to be enforced, evidently does not refer to the legal sufficiency of the consideration, but to the inducements which operated on the minds of the parties in making the contract. Rosseau v. Rouss, 86 N. Y. Supp. 497, 502, 91 App. Div. 230.

A complaint, in an action for specific performance of a contract to sell real estate, need not allege in hæc verba that the contract is supported by "adequate consideration," but an allegation that the value of the real estate at the time of the contract did not exceed $500, the consideration mentioned in the contract with interest, and that $440 with interest had been paid, and the remainder deposited in court for the vendor, alleges adequate consideration within Civ. Code, § 3391, prohibiting specific performance against a party who has not received an adequate consideration for the contract. Boyd v. Warden, 124 Pac. 841, 843, 163 Cal. 155.

Where a life insurance company, having foreclosed its lien as pledgee of a policy, and applied part of its surrender value to the payment of the debt for which the policy stood as security, sent the residue of such surrender value to the beneficiary and the insured by its check, which was never received by either, the policy was not surrendered to the company by the transaction "for a consideration adequate in the judgment of the holder," within Rev. St. 1899, § 7900, providing that where a policy shall be surrendered to the company for a consideration adequate in the judgment of the holder, the article of which that section is a part shall not be applicable. Burridge v. New York Life Ins. Co., 109 S. W. 560, 566, 211 Mo. 158.

ADEQUATE CROSSING

"By the term 'adequate crossing' is meant one equal to what is required; suitable to the case or occasion; fully sufficient; proportionate to the reasonable requirements. But an adequate crossing does not necessarily mean either an over or an under crossing; it may be either, and the landowner may designate the place."—Guinn v. Iowa & St. L. R. Co., 101 N. W. 94, 95, 125 Iowa, 301.

ADEQUATE OR REASONABLE FACILITIES

"The term 'adequate or reasonable facilities' is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost." Atlantic Coast Line R. Co. v. Wharton, 28 Sup. Ct. 121, 123, 207 U. S. 328, 52 L. Ed. 230; Missouri, K. & T. Ry. Co. v. Town of Witcher, 106 Pac. 852, 25 Okl. 586; Missouri, K. & T. Ry. Co. v. Town of Norfolk, 107 Pac. 172, 176, 25 Okl. 325, 29 L. R. A. (N. S.) 159; St. Louis & S. F. R. Co. v. Reynolds, 110 Pac. 668, 26 Okl. 804, 138 Am. St. Rep. 1003; St. Louis, I. M. & S. Ry. Co. v. State, 111 Pac. 396, 399, 28 Okl. 372.

ADEQUATE PROVOCATION

See, also, Provocation.

"'Legal,' 'lawful,' 'adequate,' and 'reasonable,' when used as adjectives qualifying 'provocation,' are synonymous, and, as a

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general rule, with few exceptions, it takes an assault or personal violence to constitute this provocation." State v. McKenzie, 76 S. W. 1015, 1019, 177 Mo. 699 (quoting with approval from State v. Bulling, 15 S. W. 367, 16 S. W. 830, 105 Mo. 204.

ADEQUATE REMEDY

See Plain, Speedy, and Adequate Remedy; Speedy and Adequate Remedy.

The adequate remedy at law which will deprive a court of equity jurisdiction must be one as certain, complete, prompt, and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. v. Means, 151 Fed. 159, 165, 80 C. C. A. 527; Keplinger v. Woolsey, 93 N. W. 1008, 1009, 4 Neb. (Unof.) 282 (citing and adopting Welton v. Dickson, 57 N. W. 559, 38 Neb. 767, 22 L. R. A. 496, 41 Am. St. Rep. 771; Bankers' Life Ins. Co. of Lincoln v. Robbins, 73 N. W. 269, 53 Neb. 44; Beach, Injunction, § 1016; Washburn, Easements & Servitudes, 747); Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 14, 76 C. C. A. 516, 8 Ann. Cas. 660; Mendenhall v. School Dist. No. 83 of Jewell County, 90 Pac. 773, 775, 76 Kan. 173; Brewster v. Lanyon Zinc Co., 140 Fed. 801, 816, 72 C. C. A. 213 (citing Boyce's Ex'rs v. Grundy, 28 U. S. [3 Pet.] 210, 215, 7 L. Ed. 655; Kilbourn v. Sunderland, 9 Sup. Ct. 594, 130 U. S. 505, 514, 32 L. Ed. 1005; Gormley v. Clark, 10 Sup. Ct. 554, 134 U. S. 338, 349, 33 L. Ed. 909; Davis v. Wakelee, 15 Sup. Ct. 555, 156 U. S. 680, 688, 39 L. Ed. 578; Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125, 129; Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171, 180, 69 L. R. A. 232; Big Six Development Co. v. Mitchell, 138 Fed. 279, 284, 70 C. C. A. 569, 1 L. R. A. [N. S.] 332); Williams v. Neely, 134 Fed. 1, 10, 67 C. C. A. 171, 69 L. R. A. 232 (citing Boyce v. Grundy, 28 U. S. [3 Pet.] 210, 215, 7 L. Ed. 655; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 265, 26 C. C. A. 389, 393); McMullen Lumber Co. v. Strother, 136 Fed. 295, 305, 69 C. C. A. 433; Hayois v. Salt River Valley Canal Co., 71 Pac. 944, 946, 8 Ariz. 285.

Under Comp. Laws 1907, § 294, providing for the disorganization of municipalities, and directing that a court shall "adjudicate" claims against the municipality, which shall be treated as denied, and that any citizen of the municipality at the time of dissolution may defend against any claim filed, or the court may in its discretion appoint some person for this purpose, it is the duty of the court to give notice affording the citizen a hearing before allowing such claims, for while the statute may not in terms require notice, the word "adjudicate" means a solemn and deliberate determination by judicial power of the rights of the parties, and so implies a notice and hearing, and an order allowing such claims on an ex parte hearing without notice is irregular and should be set aside. Nielsen v. Utah Nat. Bank of Ogden (Utah) 120 Pac. 211, 214.

An "adequate remedy" is a full and complete one, accommodated to the wrong to be redressed, and it is not enough that there is some remedy at law, as that remedy must be as practical, efficient, and prompt as a remedy in equity. Sumner v. Staton, 65 S. E. 902, 905, 151 N. C. 198, 18 Ann. Cas. 802. The remedy by appeal or certiorari as to a void judgment is not "adequate" in the sense required to exclude relief by injunction. Worrall v. H. S. Chase & Co., 123 N. W. 338, 340, 144 Iowa, 665.

A remedy hardly seems to be entitled to be termed "adequate" if at the time that it is applied the rights of the complainant have so suffered that there may be nothing of value left to him in the remedy. A suit for damages affords an "adequate remedy," in case of the failure of a railroad company to maintain a station at a certain point at which an individual has a right to have it maintained. Jacquelin v. Erie R. Co., 61 Atl. 18, 24, 69 N. J. Eq. 432. In case of the illegal undervaluation of other taxable property, the payment of the illegal portion of a tax assessed and the prosecution of an action at law to recover it back is neither as prompt nor complete a remedy as a suit to enjoin its collection. Atchison, T. & S. F. Ry. Co. v. Sullivan, 173 Fed. 456, 469, 97 C. C. A. 1.

An action at law against the vendor of the stock of a corporation for damages is not as adequate, nor is it as complete or efficient, as a suit in equity against the vendor and the corporation to rescind the sale, to recover the purchase price, and to relieve the complainant from liability to the corporation on account of the stock. Farwell v. Colonial Trust Co., 147 Fed. 480, 482, 78 C. C. A. 22 (citing Boyce's Ex'rs v. Grundy, 28 U. S. [3 Pet.] 210, 215, 7 L. Ed. 655; Williams v. Neely, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232; Brown v. Arnold, 131 Fed. 723, 727, 67 C. C. A. 125, 129; Wiemer v. Louisville Water Co., 130 Fed. 246, 250; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389).

The privilege, of one whose real property is levied upon under an execution against another, to make a motion in the case in which the execution was issued to release the property from such levy, does not afford him such an "adequate remedy at law" as to cut off any right he would otherwise have to maintain injunction against the sale of the property. Gale Mfg. Co. v. Sleeper, 79 Pac. 648, 70 Kan. 806.

The remedy at law by motion to quash or recall an execution is not necessarily exclusive of a suit to restrain the enforcement of an execution, and to compel the satisfaction of a judgment, as the term "adequate remedy at law" does not mean that injunction shall be denied where there is a remedy

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at law, but that it will be granted if it appears to be a more speedy and efficacious remedy; the remedies by injunction and motion to recall and quash being concurrent. Cline Piano Co. v. Sherwood, 106 Pac. 742, 743, 57 Wash. 239.

ADJACENT

Under a marine policy insuring a dredge, and providing that it was warranted confined to the use and navigation of the waters of New Haven Harbor and "adjacent inland waters," and declaring that any deviation beyond the limits shall avoid the policy, the use of the dredge in an inland water adjacent to Bridgeport Harbor, 17 miles from New Haven Harbor, was a deviation. Kirk v. Home Ins. Co., 86 N. Y. Supp. 980, 981, 92 App. Div. 26.

Code, § 810, provides that the resolution of necessity of a public improvement shall state "whether abutting property will be assessed and what adjacent property is proposed to be assessed therefor." Section 823 gives the owner opportunity to oppose the assessment proceedings. A resolution of necessity provided that "the cost of constructing said sewer to be assessed against property abutting thereon and against adjacent property in accordance with the law governing the same." Held, that the word "adjacent," as used in section 810, was indefinite, the word ordinarily meaning to lie near, close, or contiguous, and even in its strictest meaning no more than lying near, close, or contiguous, but not actually touching, that it did not mean "adjoining" or "abutting," and hence that the resolution failed to sufficiently inform property owners of the lands that would be included in the district for assessment; the other code provisions being merely supplemental to that section, and in no way conflicting with its requirements. Dunker v. City of Des Moines (Iowa) 136 N. W. 536, 537.

As abutting or contiguous

In Rev. St. c. 20, § 8, as amended by Pub. Laws 1907, c. 60, granting authority for the taking of "adjacent" land to enlarge a private cemetery, the word "adjacent" should be construed in its primary meaning of "adjoining" or "contiguous," and not extended to land nearby, but not adjoining. Clark v. Coburn, 78 Atl. 1107, 108 Me. 26, Ann. Cas. 1913B, 167.

The word "adjacent" means contiguous, adjoining, lying close at hand, near. As used in Act March 3, 1875, granting to certain railroad companies the right of way through the public lands to the extent of 100 feet on each side of the central line of the road, with the right to take materials for its construction from the public lands adjacent to the line of the road, it does not include lands which are 20 miles distant from the right of way, but it does include lands within 2 miles. United States v. St. Anthony R. Co., 24 Sup. Ct. 333, 335, 338, 192 U. S. 524, 48 L. Ed. 548.

Superior City Charter (Laws 1891, c. 124) § 119, provides that, before work shall be ordered done on a street in whole or in part at the expense of the abutting or adjacent realty, the board of public works shall determine the benefits and damages which will accrue to each parcel of such realty, the entire cost of the contemplated improvement, and the amount that should be assessed to each parcel as benefits accruing thereto by such contemplated improvements. Held, that such law contemplates improvements of streets beneficial to parcels of realty abutting on or adjacent thereto, such improvements being in front of such parcels, at the expense in whole or in part thereof, the word "abutting" and "adjacent" not being used synonymously, in the absence of anything appearing clearly to the contrary in the law, the word "abutting" meaning a parcel having a street and lot line in common, while the word "adjacent" is used to characterize a parcel not in part bounded by a street line. Northern Pac. R. Co. v. Douglas County, 130 N. W. 246, 248, 145 Wis. 288.

The expression "adjacent" does not at all times mean abutting, but it is usually synonymous with abutting, adjoining, and bordering. In re Bridge Bonds, Ratliff Tp., Johnston County, 128 Pac. 681, 682, 35 Okl. 192 (citing Wormley v. Board of Sup'rs of Wright County, 78 N. W. 824, 108 Iowa, 232).

Adjoining and contiguous distinguished

That which is "adjacent" may be separated by some intervening object; that which is "adjoining" much touch in some part, while that which is "contiguous" must touch entirely on one side. Baxter v. York Realty Co., 112 N. Y. Supp. 455, 456, 128 App. Div. 79 (quoting and adopting the definition in Crabb's English Synonyms).

Sp. Laws 1907, p. 564, § 7, authorizing the acquisition by purchase or condemnation proceedings of such additional lands as may be deemed necessary, "adjoining or adjacent" to the capitol building site, located between designated streets, contemplates that it may be necessary to require various parcels of land within the boundaries, and the purchase or taking of one parcel within the boundaries does not exhaust the power, but other parcels may be acquired, though the word "adjoining," in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent, and though the word "adjacent" means lying near, neighboring. State v. Angus, 75 Atl. 623, 624, 83 Conn. 137.

As in neighborhood of

The word "adjacent" does not include a town 300 miles away; such word being used in connection with a vaudeville service con-

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tract. Gath v. Interstate Amusement Co., 170 Ill. App. 614, 616.

Where petitioner had acquired and paid for all lands lying between its original railroad right of way and the property in question, the title being held by a trust company for the sake of convenience only, defendant's lots were "adjacent" to petitioner's main line of railroad, within the statute providing for condemnation thereof. Michigan Cent. Ry. Co. v. Miller, 137 N. W. 555, 557, 172 Mich. 201.

It is not essential that property, to be adjacent to a river, should be in actual contact therewith. A thing is "adjacent" to another when it lies near or close to it, although it is not in actual contact therewith. Yuba County v. Kate Hayes Mining Co., 74 Pac. 1049, 1050, 141 Cal. 360.

Where a railroad had power to condemn adjacent land for the enlargement of its station and terminal facilities, the term "adjacent" should be construed to mean "lying near," "neighboring," but not necessarily in contact. The word is sometimes said to be synonymous with "adjoining," "near," "contiguous." It has no arbitrary meaning or definition, but its meaning must be determined by the object sought to be accomplished by the provision in which it is used. Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 87 N. E. 933, 939, 239 Ill. 197.

Where the Public Service Commission required the construction of a baggage room and platform "adjacent" to a team track at a junction point, the order did not require that the baggage room and platform be constructed "along and adjoining" the team track; the word "adjacent" being used in the sense of "near to," or "neighboring," so that the order would be complied with, though the baggage room and platform were so constructed as to be some distance from the track, leaving a driveway between them. Bacon v. Boston & M. R. R., 77 Atl. 858, 861, 83 Vt. 528.

Burns' Ann. St. 1894, § 4290, provides that, where land liable to assessment for street improvement is subdivided or platted, "the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order." The first and second 50-foot lots adjacent to a street that had been improved were not of sufficient value to pay for the improvement, and next to those lots was an alley 14 feet wide. Held, the property all being platted, that 36 feet of the lot on the other side of the alley was assessable for the improvement, as the term "adjacent" as ordinarily used means that the property is near the improvement so as to be affected thereby and so as to enjoy the use thereof. but not necessarily touching such improvement. Close v. Twibell, 92 N. E. 377, 379, 47 Ind. App. 290.

The term "lands adjacent thereto," as used in Gen. St. 1894, § 1200, providing for the incorporation of any district, sections or parts of sections not in any incorporated village platted into lots and blocks, also the "lands adjacent thereto," etc., includes only those lands lying so near to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion in the maintenance of a village government. State ex rel. Young v. Village of Gilbert, 120 N. W. 528, 530, 107 Minn. 364.

Gen. St. 1909, § 7594, provides that territory outside the city limits of a second-class city, but adjacent thereto, may be attached to the city for school purposes upon certain application. Held, that the word "adjacent" means "lying near," and territory which does not touch the city limits, but which adjoins the city school district and is so close to the city that the pupils residing therein may conveniently attend the city schools, may be attached if the board deems the annexation to be for the best interest of the city schools and of the residents of the territory seeking to be attached. Board of Education of City of Ottawa v. Jacobus, 112 Pac. 612, 83 Kan. 778.

The words "within the county adjacent," in the act of March 30, 1903, were intended to define a suitable place within a reasonable distance from the city which was especially adapted for hospital purposes. The fact that both city and township may be within one county is not material. The authority is to locate the necessary hospital within the city, or without the city and within the county adjacent thereto, in the convenient neighborhood of and reasonably assessible to the city. The word "adjacent" implies nearness to, but not necessarily actual contact. City of Allentown v. Wagner, 27 Pa. Super. Ct. 485, 493.

A patent granted to a riparian owner on the north shore of Staten Island in 1880, in so far as it includes lands under water to the north of the uplands of an adjoining owner, upon which lands a portion of defendant's erections and fillings is, overlaps to that extent a patent granted to the adjoining owner in 1887, impairs her right of access, and contravenes Public Lands Law, § 75, subd. 5, prohibiting a grant of lands under water to any person other than the owner of "adjacent lands"; the quoted phrase, as used in the statute, including the uplands of the adjoining owner. Dooley v. Proctor & Gamble Mfg. Co., 137 N. Y. Supp. 737, 741, 77 Misc. Rep. 398.

To railroad in grants of timber

Under a grant to a railroad company of the right to cut timber for construction pur-

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poses from the public lands "adjacent" to its line, lands more than three miles from the line of the right of way, measured at right angles thereto, are not adjacent, while those within that limit are adjacent. United States v. Denver & R. G. R. Co., 190 Fed. 825, 849–853.

ADJECTIVE LAW

"Substantive" law is that part of the law which creates, defines, and regulates rights, as opposed to "adjective" or "remedial" law, which prescribes the method of enforcing rights or obtaining redress for their invasion. Mix v. Board of Com'rs of Nez Perce County, 112 Pac. 215, 220, 18 Idaho, 695, 32 L. R. A. (N. S.) 534.

ADJOINING

See Basement Adjoining the Corner; Ground Outside of or Adjoining.
Additions adjoining and communicating, see Addition.

As adjacent

A statute allowed the commissioners of a land office to grant to "adjacent" owners land under the water surrounding Staten Island, which grant was not to extend more than 500 feet from low-water mark. A riparian landowner applied for a grant of land opposite to and "adjoining" his, and extending to a point 500 feet from low-water mark, and an affidavit appended to his application described his land as being bound by the low-water mark. The Attorney General recommended that applicant be granted the land "opposite to" that now held by him, and the commissioners passed a resolution that letters patent be issued to him for the land under water applied for. A patent was issued, describing the land granted as beginning at low-water mark and extending to a point 500 feet out. Held, that the words "adjoining" and "opposite to" must be understood to be equivalent to "adjacent" as used in the statute, and the application must be taken to apply to land immediately contiguous to that of the applicant, and as declaring that he owned the land to low-water mark, and hence was broad enough to include any land lying between his actual boundary and low-water mark, so that the patent must be construed as granting to applicant all the land lying between his land and a line 500 feet out from low-water mark, as any other construction would not be in accord with the commissioners' resolution, and would render the patent void under the statute. Bardes v. Herman, 129 N. Y. Supp. 723, 726, 144 App. Div. 772; Warth v. Same, 129 N. Y. Supp. 730, 144 App. Div. 943.

Adjacent and contiguous distinguished

That which is "adjacent" may be separated by some intervening object; that which is "adjoining" must touch in some part, while that which is "contiguous" must touch entirely on one side. Baxter v. York Realty Co., 112 N. Y. Supp. 455, 456, 128 App. Div. 79 (quoting and adopting the definition in Crabb's English Synonyms).

Sp. Laws 1907, p. 564, § 7, authorizing the acquisition by purchase or condemnation proceedings of such additional lands as may be deemed necessary, "adjoining or adjacent" to the capitol building site, located between designated streets, contemplates that it may be necessary to require various parcels of land within the boundaries, and the purchase or taking of one parcel within the boundaries does not exhaust the power, but other parcels may be acquired, though the word "adjoining," in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent, and though the word "adjacent" means lying near, neighboring. State v. Angus, 75 Atl. 623, 624, 83 Conn. 137.

As contiguous or touching

What is "adjoining" must touch in some part. Baxter v. York Realty Co., 112 N. Y. Supp. 455, 456, 128 App. Div. 79 (quoting and adopting the definition in Crabb's English Synonyms).

The word "adjoining" is a proper term to signify in contact with, though it, as well as the words "adjacent" and "abutting," are occasionally used in a different way. Northern Pac. Ry. Co. v. Douglas County, 130 N. W. 246–248, 145 Wis. 288.

The word "adjoining" with reference to municipal corporations indicates contiguity of territory. Rehill v. Borough of East Newark, 63 Atl. 81, 83, 73 N. J. Law, 220.

ADJOINING MUNICIPALITY

The phrases "any adjoining municipal corporation," and "any adjoining municipality," as used in P. L. 1897, p. 232, and in P. L. 1897, p. 323, § 76, as amended, P. L. 1899, p. 159, authorizing contracts for water supply between adjoining municipal corporations, refers only to municipalities whose corporate territory are contiguous. Rehill v. Borough of East Newark, 63 Atl. 81, 83, 73 N. J. Law, 220.

Borough Act, § 76, as amended by P. L. 1899, p. 159, authorizes a borough to contract with the governing body of "any adjoining municipality," or with any water company in the state, etc. P. L. 1897, p. 232, authorizes the governing body of a municipal corporation owning or controlling waterworks to contract with "any adjoining municipal corporation," or with any private corporation therein, to furnish a supply of water. Held, that the phrases "any adjoining municipality" and "any adjoining municipal corporation" refer only to municipalities whose corporate territories are contiguous, and a city and borough situated about five miles apart and touching each other at no point cannot contract thereunder. Bay-

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liss v. Borough of North Arlington, 76 Atl. 1024, 80 N. J. Law, 124.

ADJOINING PROPERTY OWNERS

The Baltimore City Charter provides that the board of estimates may grant minor privileges, such as the erection on alleys of bay windows, steps, etc., on the service of a copy of the application therefor on the "adjoining property owners" before filing the application with the board. Held, that service need not be made on an owner of property on the opposite side of the alley, since the quoted words referred to property owners on the same side of the alley, whether the fee be in the city or in the property owners. Fralinger v. Cooke, 71 Atl. 529, 530, 108 Md. 682.

ADJOURN—ADJOURNMENT

Adjournment from day to day, see From Day to Day.

Entries made from day to day by the county auditor in the minutes of the county board of supervisors, sitting in drainage proceedings, "Board adjourned," may be reasonably construed to mean an adjournment or recess for the day, and not an adjournment sine die; to "adjourn" being to close or suspend for the day; to suspend, take a recess; to suspend business from one day to another, or for a long period, or indefinitely. Hoyt v. Brown, 133 N. W. 905, 908, 153 Iowa, 324.

An "adjournment" may mean merely a temporary suspension of business, or the postponement thereof until some future day. Where the record of the board of supervisors showed that the board adjourned to a specified time, an amendment of the record showing that it took a recess until that time was unimportant; the words "recess" and "adjourn" both meaning that the meeting was postponed until the time specified. Beatie v. Roberts (Iowa) 137 N. W. 1006, 1008.

Convention

Under Primary Election Law, § 10, requiring that within 48 hours after the adjournment of a convention its permanent officers shall certify and file the record of the convention in the office of the custodian of primary records, "adjournment" means the final adjournment, because the act contemplated by the statute could only be performed after the convention has completed its work. In re Greene, 106 N. Y. Supp. 425, 427, 121 App. Div. 693.

Of court

Blackstone states that an "adjournment" is "no more than a continuation of the session from one day to another as the word itself signifies." Held, that a statement by a county judge in regard to a certain matter, as to which he had been enjoined from further proceeding, that he "held it open," was not an "adjournment," within Code Civ. Proc. § 2471a, authorizing the judge to proceed at the time to which the matter had been adjourned, and that he had lost jurisdiction. People ex rel. Stryker v. Van Bergen, 81 N. Y. Supp. 274, 276, 40 Misc. Rep. 139.

A "court" is defined as "the persons officially assembled under authority of law at the appropriate time and place for the administration of justice," while the word "term," when used with reference to a court, signifies the space of time during which the court holds a session. A "session" signifies the time during the term when the court sits for the transaction of business. Therefore there is a clear distinction between the "adjournment of court" and the "adjournment of the term." Parrott v. Wolcott, 106 N. W. 607, 608, 75 Neb. 530 (citing Webster's Dict.; Black's Law Dict.).

Under Code Civ. Proc. §§ 2959, 2960, prescribing when "adjournments" may be granted by a justice, where a case was adjourned by consent of the parties and a proper adjournment granted at defendant's request and both parties appeared on the adjourned day, the justice cannot, over the objection of defendant, hold the case open for six hours to enable plaintiff's attorney to appear, since such action constitutes a definite adjournment, and is cause for reversal of a judgment against defendant who did not appear at the adjourned hour. Blowers v. Malone, 135 N. Y. Supp. 535, 537, 75 Misc. Rep. 396.

Of legislature

The constitutional provision that, if any bill shall not be returned by the Governor within six days after it shall be presented to him, it shall become a law as if he had signed it, unless the Legislature by its adjournment prevents its return, contemplates a final "adjournment," and not a mere recess. State v. Joseph (Ala.) 57 South. 942, 944.

ADJOURNED MEETING

An "adjourned meeting" is not a new meeting, but a mere continuance of an original meeting. Green v. Town of Irvington, 73 Atl. 602, 81 N. J. Law, 723.

"The only difference between adjourned and special meetings [of a board of county commissioners] is: An 'adjourned meeting' is a meeting to be provided for while the board is in session, by a proper order, said meeting to be held after the close of the regular session. A 'special meeting' is a meeting called upon order of a majority of the board after the close of the regular session to be held at such time as the order may fix." Gilbert v. Canyon County, 94 Pac. 1027, 1031, 14 Idaho, 429.

ADJOURNED TERM

The "adjourned term" mentioned in Rev. St. 1899, § 1605, which provides that special

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or adjourned sessions of any court may be held in pursuance of the proclamation of the sheriff, or in continuation of the regular term, when so ordered by the court in term time, the order being entered on its record, although it is a continuation of a regular term, is not the uninterrupted or unbroken session held in pursuance of an adjournment from day to day, but is a session held after lapse of a longer period, and is commonly called an "adjourned term." Rev. St. 1899, § 7033, providing that an election contest shall be determined at the first term of the circuit court held 15 days after the official counting of the votes and service of the notice of contest, unless the same should be continued by consent or good cause shown, is not limited to the next regular term of court, but authorized the service of notice of contest to be held at an adjourned term. Montgomery v. Dormer, 79 S. W. 913, 915, 181 Mo. 5.

Under an order of a county court at a regular term adjourning the court to chambers, the "adjourned term" is in full force until the actual convening of the next term of court. In re Wood, 95 N. Y. Supp. 260, 261, 107 App. Div. 514.

There can be no "adjourned term" of a regular term of the same court, and the expression should be an "adjourned session" of the term. The courts, however, are not always governed by such niceties of language, and when they use the words "adjourned term" they mean an "adjourned session" of the same term. Though an "adjourned special term" may be said to be a continuance of the regular term because its object is to complete the business of the regular term, it is a distinct and separate term, and so it is the practice to note it in the record kept by the clerk. Continuance to an adjourned term of a regular term is within Rev. St. 1899, § 2599, providing for continuance of a criminal case at the cost of the moving party. State v. Butler, 95 S. W. 310, 118 Mo. App. 587 (citing State v. Harris, 59 Mo. 550; Dulle v. Deimler, 28 Mo. 583).

ADJUDGE

See Duly Adjudged.

ADJUDICATE—ADJUDICATION

See Former Adjudication.

Final adjudication, see Final Decree or Judgment.

ADJUDICATION OF BANKRUPTCY

"Adjudication of bankruptcy" is not the equivalent of a discharge in bankruptcy. The dismissal of an action as to a joint maker of a note in a suit, on a suggestion of his "adjudication of bankruptcy," did not render him competent to testify, as the adjudication did not remove his disqualifying interest. Anthony v. Sturdivant, 50 South. 1028, 163 Ala. 530.

ADJUNCTS

Act May 29, 1889, § 7, provides that the trustees of a sanitary district shall have power to lay out one or more main channels for carrying off the drainage, together with such adjuncts and additions thereto as may be proper. Act May 14, 1903, enlarging the boundaries of the sanitary district of Chicago, gave the trustees power to provide for the additional territory by constructing one or more channels together with such adjuncts and additions thereto as may be necessary, and shall maintain the same proportion of dilution of sewage through such auxiliary channels. Held, that the words "adjuncts" and "additions" were used as synonymous with "auxiliary channel," and did not mean city sewers connecting with the sanitary district outlet so as to authorize the district authorities to take charge of the building of sewers of municipalities within the district. City of Chicago v. Green, 87 N. E. 417, 422, 238 Ill. 258.

ADJUST

See Power to Audit, Adjust and Settle.

"To 'adjust' is to 'place in order.'" Anderson v. Seropian, 81 Pac. 521, 527, 147 Cal. 201.

To "adjust" an unliquidated claim is to determine what is due; to settle; to ascertain; or, according to Webster, "to settle or bring to a satisfactory state, so that parties are agreed in the result." Staats v. Pioneer Ins. Ass'n, 104 Pac. 185, 187, 55 Wash. 51; City of Longview v. Capps (Tex.) 123 S. W. 160, 162.

The word "adjust" means fitted or made accurate, and that is its meaning in Comp. Laws 1909, § 7620, making it the duty of the state board of equalization to equalize, correct, and adjust assessments. In re McNeal's Appeal, 128 Pac. 285, 289, 35 Okl. 17.

A constitutional provision requiring the state board of equalization to "adjust" and "equalize" the valuation of property among the counties creates a board which must exercise its judgment so that a suit against its members is a suit against the state. United States v. Hadley, 171 Fed. 118, 121.

The medical representative of a foreign company who comes into the state clothed with full authority to adjust a claim is one who "adjusts" or settles a loss within Rev. St. Mo. 1899, § 7992 (Ann. St. 1906, p. 3801), providing for service of process on local agents, although in fact such loss is not actually settled. Commercial Mut. Acc. Co. v. Davis, 29 Sup. Ct. 445, 447, 213 U. S. 245, 53 L. Ed. 782.

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ADJUSTABLE SCREENS

Signs 8 by 12 inches in size, having painted thereon the words "White" and "Colored," respectively, and supported on the backs of seats in street cars, are not "adjustable screens" within the meaning of Laws 1904, p. 140, c. 99, requiring the separation of the white and colored races on street cars, but permitting the use for that purpose of adjustable screens, to be moved about as the needs of the traffic may require. Southern Light & Traction Co. v. Compton, 38 South. 629, 86 Miss. 269.

ADJUSTED VALUATION

See Last Adjusted Valuation.

ADJUSTER

As the business of an insurance "adjuster" is to ascertain the amount of loss and agree with the assured on a settlement between him and insurer, it is reasonable to hold that he has authority to waive all matters of form or detail connected with the business. St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., 99 Pac. 647, 649, 23 Okl. 79.

ADJUSTMENT

See Audit.

ADJUSTMENT OF DISPUTE

A judicial decree, requiring a trustee to make good an impairment of the trust estate notwithstanding the assent of a beneficiary to such impairment, is not an "adjustment of a dispute" between the trustee and beneficiary, within the meaning of Rev. Laws, c. 150, § 17, providing that, on the settlement of an account of a trustee, a matter in dispute which has been previously heard and determined shall not be again questioned, without leave of court, by any party to the dispute. Bennett v. Pierce, 74 N. E. 360, 361, 188 Mass. 186.

ADMINISTER

See Fully Administered; To Be Administered.

To "administer is to control or regulate in behalf of others." (Quoting and adopting definition Cent. Dict.) The word is appropriately applied to a receiver in bankruptcy's control over property of the estate. In re Fleischer, 151 Fed. 81.

Drug, liquor or poison

The primary definition of "administer" is to give; the word is not a word having a strict legal or technical import. It is a word in general use, with a common and accepted meaning; and, where a person is charged with administering medicine, it is the same as charging him with giving medicine. Chandler v. State, 105 Pac. 375, 378, 3 Okl. Cr. 254 (citing 1 Words and Phrases, p. 195).

That one procured and delivered to a woman any drug or substance to procure an abortion was sufficient proof that he "administered" it. State v. Stafford, 123 N. W. 107, 145 Iowa, 285.

Where, in a prosecution for "administering" or prescribing medicine to a pregnant woman to produce an abortion, it was proved that defendant furnished medicine to her, and gave her directions with reference to taking it, he was properly convicted of "administering or prescribing" medicine or drugs to prosecutrix, etc., prohibited by Sand. & H. Dig. § 1459, though he was not present when the medicine was delivered to prosecutrix or taken. "The word 'administer,' in said section, does not signify merely the manual administering of the drug, medicine, or substance, but it has a much wider meaning. Among the definitions of said word are the following: To 'furnish,' to 'give,' to 'administer' medicine; to 'direct' and cause it to be taken. Webst. Dict. To 'supply,' 'furnish,' or 'provide with.' Stand. Dict. As used in said section, the word 'administer' was clearly intended to cover the whole ground named, making it an offense to give, furnish, supply, provide with, or cause to be given, furnished, supplied, or provided with, or taken, any such drug, medicine, or substance, with the intent named in said section. And said word embraced and was intended to embrace every mode of giving, furnishing, supplying, providing with, or causing to be taken any such drug, medicine, or substance. This is both the letter and spirit of the section." Burris v. State, 84 S. W. 723, 724, 73 Ark. 453 (quoting and adopting McCaughey v. State, 156 Ind. 41, 59 N. E. 169).

In defining the word "administer" as used in the statute permitting physicians to "administer" intoxicating liquors to patients, it is not necessary for the court to use all the synonyms of the word. An instruction that the legal definition of the word "administer" is to give, supply, dispense, is sufficient without adding the word "furnish." State v. Wilson, 80 Pac. 565, 71 Kan. 263.

Evidence that accused delivered pills to a pregnant woman with instructions to take them the following day, without any evidence that she ever swallowed any of them, was insufficient to support a conviction for administering a drug with intent to produce an abortion, since to "administer" a poison or other thing is to cause it to be taken by compelling a person by violence to swallow it, or by delivering it to one receiving it voluntarily into her system. State v. Stapp, 151 S. W. 971, 973, 246 Mo. 338.

ADMINISTERED ASSETS

An administrator de bonis non takes the unadministered assets only, and those which do not remain in specie but which have been

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changed in form, mixed with those of the former executor, are "administered assets." Michigan Trust Co. v. Ferry, 175 Fed. 667, 675, 99 C. C. A. 221; Id., 175 Fed. 681, 99 C. C. A. 235.

ADMINISTRATION

See Costs of Administration; Due Administration of Justice; Maladministration; Matter of Administration; Without Administration.

Ancillary letters of administration, see Ancillary Letters.

Expenses of administration, see Expenses.

The word "administration" as applied to decedents' estates comprehends an executorship. Kansas City Southern Ry. Co. v. Henrie, 112 S. W. 967, 968, 87 Ark. 443.

"Administration" of estates implies such a complete disposition of them as not only to collect assets from the debtors, but to place them in the hands of the creditor, legatee, or distributee to whom, after undergoing the process of administration, they finally belong. Mefford v. Lamkin, 77 N. E. 960, 38 Ind. App. 33 (citing Bouv. Dict., title "Administrator"; Walton v. Walton [N. Y.] 4 Abb. Dec. 512, 518; Martin v. Ellerbe's Adm'r, 70 Ala. 338).

"The term 'administration,' involving the general administration of an estate, is of comprehensive meaning. It includes more than the mere collection of the assets, the payment of debts and legacies, and distribution to the next of kin. It involves all which may be done rightfully in the preservation of estates, and all which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights; and it includes all which may be rightfully done in relation to adverse claims to assets which have come to the possession of the administrator, as the property of the testator or intestate." The United States Circuit Court, sitting in equity in a suit where it has jurisdiction of the parties, has power in the general "administration" of an estate to appoint a receiver of the estate pending the probate of a will, in the absence of the appointment of a custodian by the probate court, although proceedings for probate and the appointment of a manager are pending in such court which have been delayed by litigation between parties in interest. Underground Electric Rys. Co. of London v. Owsley, 176 Fed. 26, 30, 99 C. C. A. 500 (quoting and adopting Martin v. Ellerbe's Adm'r, 70 Ala. 339); Rucker v. Tennessee Coal, Iron & R. Co. (Ala.) 58 South. 465, 468; In re Acken's Estate, 123 N. W. 187, 191, 192, 144 Iowa, 519, Ann. Cas. 1912A, 1166.

"Administration" of an estate is a term applied to denote the management of an estate by a person appointed by authority of law to take charge thereof in place of the legal owner. In a bankruptcy court the legal owner of the estate is the bankrupt, who is required to turn over his entire estate to some one to be designated by the creditors and approved by the court, for the purpose of administering the same for the benefit of all the bankrupt's creditors. All acts necessary to be done to accomplish the purpose of converting the assets of the estate and distributing the same to and amongst the creditors legally entitled thereto, as well as any act tending to increase the value of the estate, or in some material manner benefit the estate of the bankrupt, whereby the general interests of all the creditors may be advanced, constitute "administration" of the estate. In re Kyte, 189 Fed. 531, 532.

As probate

See Probate.

ADMINISTRATION OF THE LAW

Under Acts 27th Leg. c. 26, § 3, providing that the publication by a newspaper of a fair account of judicial proceedings, unless prohibited by the court, etc., or of any other official proceedings authorized by law in the administration of the law, shall be deemed privileged, and not libelous, unless actual malice is proved, the phrase "in the administration of the law" is general, and includes the performance of acts or duties required by the law of officers in discharging their duty, and all the steps taken and things done, wherein legal procedure is required or authorized by law. A. H. Belo & Co. v. Lacy (Tex.) 111 S. W. 215, 217.

ADMINISTRATIVE DUTIES

Executive and "administrative" duties are such as concern the execution of existing laws. Brazell v. Zeigler, 110 Pac. 1052, 1055, 26 Okl. 826.

Laws 1907, p. 374, c. 232, requiring a district court judge to act as jury commissioner, and authorizing him to appoint a jury clerk to assist, does not prescribe duties "administrative" in character, but such as fall within the scope of the office of district court judge, and such duties do not appertain to another office within Const. art. 3, § 13, forbidding a district court judge to hold any other office. Moore v. Nation, 103 Pac. 107, 109, 110, 80 Kan. 672, 23 L. R. A. (N. S.) 1115, 18 Ann. Cas. 397.

The fixing of water rates by a city, when not a matter of contract, is an "administrative" function rather than a judicial function. City of Pocatello v. Murray, 173 Fed. 382, 385 (citing Reagan v. Farmers' Loan & Trust Co., 14 Sup. Ct. 1062, 154 U. S. 420, 38 L. Ed. 1031; Southern Pac. Co. v. Colorado Fuel & Iron Co., 101 Fed. 779, 42 C. C. A. 12).

ADMINISTRATIVE EXPENSES

As debt, see Debt.

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ADMINISTRATIVE OFFICE

See Principal Administrative Office.

ADMINISTRATOR

See Special Administrator; Substituted Administrator.

Removal of administrator as special proceeding, see Special Proceeding.

An "administrator" is a person appointed to manage and distribute the estate of an intestate or of a decedent who has no executor. Mefford v. Lamkin, 77 N. E. 960, 38 Ind. App. 33 (citing Bouv. Dict.).

An "administrator," under the law of Missouri, "is a statutory trustee to the end that the property of the estate may be collected, preserved, and disposed of according to law." Matson & May v. Pearson, 97 S. W. 983, 986, 121 Mo. App. 120 (quoting Smarr v. McMaster, 35 Mo. 349; Nichols v. Reyburn, 55 Mo. App. 1–7).

An administrator appointed by a state court is an officer of that court. His possession of the decedent's property is the possession of the court, and such possession cannot be disturbed by any court. Blythe Co. v. Bankers' Investment Co., 81 Pac. 281, 283, 147 Cal. 82; Byers v. McAuley, 13 Sup. Ct. 906, 149 U. S. 608, 37 L. Ed. 867.

"Administrators" are creatures of the statutes, and have no powers except those conferred therein. The only direct and specific power conferred on the administrator in connection with the repairs and improvements of an estate is that he is authorized to keep the buildings in tenantable repair, extraordinary casualties excepted, unless not directed to do so by an order of the court. Rice v. Conwill, 80 S. W. 393, 394, 35 Tex. Civ. App. 341.

The word "administrator," in a deed conveying lands to an administrator and describing him as such, is simply descriptive, and of no greater significance. Love v. Love, 83 Pac. 201, 202, 72 Kan. 658.

Where the defeated party to a judgment was a party thereto in his representative capacity as "administrator," and the assignment of errors on his appeal described him by name followed by the word "administrator," the appeal must be dismissed for failure to describe him in his representative capacity. Bender v. State, 95 N. E. 305, 176 Ind. 70.

As assign

See Assigns.

As attorney

See Attorney.

Executor distinguished

See Executor.

As legal representative

See Legal Representative.

As officer

See Officer.

As owner

See Owner.

As personal representative

See Personal Representative.

As privy

See Privity—Privy.

As representative

See Representative.

As state officer

See State Officer.

As trustee

See Trustee.

ADMINISTRATOR AD COLLIGENDUM

An "administrator ad colligendum" is the mere agent or officer of the court to collect and preserve the goods of the deceased until some one is clothed with authority to administer them, and cannot complain that another is appointed administrator in chief. Flora v. Mennice, 12 Ala. 836, 837.

"An administrator ad colligendum" is not such a representative of the estate as to require claims to be presented to him in order to avoid the statute of nonclaim. Erwin v. Branch Bank at Mobile, 14 Ala. 307, 314.

ADMINISTRATOR DE BONIS NON

"The term 'administrator de bonis non' is frequently used by the courts and by attorneys with reference to an administrator appointed in place of a former administrator or executor. Such an appointee receives his authority from the statutes and looks to the same to ascertain his duties. His power is greater than that implied by the term 'administrator de bonis non' at common law. The petition herein refers to the subsequently appointed administrator as an administrator de bonis non. We must construe this to mean the appointment of an administrator having all the powers and duties which our statutes vest in an administrator appointed to succeed the executrix, and such includes the power and duty to take up the administration and settlement of the estate and prosecute the same to the same extent as the executrix would in law have been required to do had she lived and continued in office." Prusa v. Everett, 113 N. W. 571, 572, 78 Neb. 251.

ADMINISTRATOR'S SALE

As judicial sale, see Judicial Sale.

The sale of land by an administrator, though irregularly appointed, under the license of the probate court, was an administrator's sale and governed by Rev. Laws 1905, § 3776, barring an action for the recovery of real estate sold by an administrator, unless brought within five years of the sale.

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Hanson v. Nygaard, 117 N. W. 235, 238, 105 Minn. 30, 127 Am. St. Rep. 523.

ADMISSIBILITY

The word "admissibility," in an instruction to the effect that the court would leave the admissibility of the testimony to the consideration of the jury under the following instructions, etc., was held to be used in the sense of leaving it to their consideration and to be considered by them under the following rules, etc., and did not leave the question of the legal admissibility of the evidence to the jury. Carbough v. State, 93 S. W. 738, 49 Tex. Cr. R. 452.

ADMISSION

ADMISSION (In Evidence)

See Implied Admission; Judicial Admission; Solemn Admission.

Admission for purposes of suit, see Purposes of Suit.

"An 'admission' is defined as 'a statement, oral or written, suggesting any inference as to any fact in issue, or relevant fact unfavorable to the conclusion contended for by the person by whom or on whose behalf the statement is made.'" Ogden v. Sovereign Camp, Woodmen of the World, 113 N. W. 524, 525, 78 Neb. 806 (quoting and adopting definition in Stephen's Digest, Evidence, art. 15, c. 4, pt. 1).

"An 'admission' * * * is nothing but a piece of evidence discrediting the party's present claim, and tending to prove the fact of its incorrectness. It is therefore to be distinguished from those statements of the party which become in themselves the foundation of independent rights for other persons by virtue of some doctrine of substantive law; in other words, from binding estoppels, warranties, and representations." Binewicz v. Haglin, 115 N. W. 271, 273, 103 Minn. 297, 15 L. R. A. (N. S.) 1096, 14 Ann. Cas. 225 (quoting and adopting definition in 2 Wigmore, Evidence, pp. 1222, 1224, §§ 1053, 1056). "Anything said by the party may be used as against him as an 'admission' provided it exhibits the quality of inconsistency with the facts now asserted by him in the pleadings or in testimony." Castner v. Chicago, B. & Q. R. Co., 102 N. W. 499, 501, 126 Iowa, 581 (quoting and adopting definition in 2 Wigmore, Evidence, §§ 1048, 1050).

An "admission" is an acknowledgment of the existence of a fact, of which it is evidence only in the sense that it dispenses with the proof of it. To be binding, it must necessarily be made by the party himself against whom it is introduced, or by some one having authority at the time, to speak for him in the premises. The admissions of an agent, therefore, to bind his principal, must be made in the course of his agency, and be concerned with the furtherance of it; and a statement by an agent with respect to a completed transaction, as to which his agency has ceased, however close in point of time, is a mere declaration or narration, which is not competent evidence to affect his principal. Goehrig v. Stryker, 174 Fed. 897, 899.

An "admission," as applied to a criminal case, is the statement by defendant of a fact or facts pertinent to the issues and tending, in connection with proof of other facts or circumstances, to prove the guilt of accused, but which is, of itself, insufficient to authorize conviction. It is a circumstance which requires the aid of further testimony to generate a reasonable conclusion of guilt. Ransom v. State, 59 S. E. 101, 102, 2 Ga. App. 826.

Admissions in writing

A self-charging "admission" does not lose all of its evidential force because it is not transmitted or delivered to another. On the trial of an indictment for conspiracy, letters shown to be in the handwriting of defendant addressed to an alleged co-conspirator and containing self-charging admissions, are admissible in evidence, though it is not proved that they were transmitted to the alleged co-conspirator. Chadwick v. United States, 141 Fed. 225, 238, 72 C. C. A. 343.

Where, in an action for injuries to an employé, H. testified for defendant that he was an independent contractor, and that the employé was in his service and not defendant's, a letter written by defendant's attorneys to the clerk of the court, directing the subpœna of certain witnesses, and stating that the witnesses whose addresses were not given worked for defendant at the plant where the accident occurred, and containing H.'s name, but not giving his address, was not admissible as an "admission" on defendant's part that H. was an employé of defendant at the time of the accident. Virginia-Carolina Chemical Co. v. Knight, 56 S. E. 725, 727, 106 Va. 674.

Confession distinguished

A "confession" is a voluntary admission of guilt, and an "admission," as applied to criminal cases, is an avowal of a fact or circumstance only tending to prove the offense charged, and not amounting to a confession. Riley v. State, 57 S. E. 1031, 1032, 1 Ga. App. 651.

A "confession" is one species of admission, namely, an admission consisting of a direct assertion by the accused of the main fact charged against him. "Admissions" are statements, assertions in words, and conduct cannot of itself be treated as an admission. Admissions are acts, and not assertions, and their use in evidence is a circumstantial one by way of inference from the conduct to the mental state beneath it, and from that to some ulterior fact. Burnett v. State, 124 N. W. 927, 928, 86 Neb. 11.

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What are called "confessions" in civil actions in criminal law are called "admissions." The terms are synonymous under the rule of evidence that silence, when accused is under no restraint and at full liberty to speak, may sometimes be regarded as a tacit "admission." Merriweather v. Commonwealth, 82 S. W. 592, 596, 118 Ky. 870, 4 Ann. Cas. 1039.

A "confession" is a voluntary admission of guilt, as distinguished from an "admission," which as applied to criminal cases is the statement by a defendant of a fact pertinent to the issues and tending in connection with proof of other facts to prove the guilt of accused, but which is of itself insufficient to authorize conviction. The nearer an admission approaches the completeness of a plenary confession of guilt without attaining thereto, the more likely is any reference in the charge to the subject of confession to confuse the jury and harm the defendant. Ransom v. State, 59 S. E. 101, 102, 2 Ga. App. 826.

A "confession" is a voluntary acknowledgment of a person charged with a commission of crime that he is guilty of the offense. It is a voluntary declaration by a person charged with a crime of his agency or participation in the crime. It is not equivalent to statements, declarations, or admissions of facts criminating in their nature or tending to prove guilt. It is limited in its meaning to the criminal act, and is an acknowledgment or "admission" of participation in it. Offers by a person arrested for forging a check to settle the matter by paying the amount of the check, or a greater sum, were not confessions, so as to authorize an instruction on the subject of confessions, in a prosecution for the crime. Michaels v. People, 70 N. E. 747, 748, 208 Ill. 603 (citing 8 Cyc. p. 562; 1 Greenl. Ev. § 170; Johnson v. People, 64 N. E. 286, 197 Ill. 48).

"A 'confession' is a voluntary 'admission' or declaration by a person of his agency or participation in a crime." When a person only admits certain facts from which the jury may or may not infer guilt, there is no confession, and where in a prosecution for murder there was evidence that defendant, when informed that he had been arrested, stated that if deceased had treated his informant as he had treated defendant informant would have wanted to kill him, it was prejudicial error to instruct that confessions are satisfactory and effectual proofs of guilt, as the evidence did not show a confession, but merely an inculpatory statement. Shelton v. State, 42 South. 30, 32, 144 Ala. 106 (citing People v. Parton, 49 Cal. 638).

"A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt can be inferred. Statements and declarations by a defendant in a criminal action, in denial of guilt, while a witness before a grand jury, are not confessions within the rule requiring them first to be shown to have been made voluntarily before they are competent evidence against him. State v. Campbell, 85 Pac. 784, 788, 73 Kan. 688, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203 (quoting and adopting definition in State v. Reinhart, 38 Pac. 822, 26 Or. 466).

A "confession" is a voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it. In a prosecution for burglary, statements made by defendant to police officers with reference to his possession of certain of the stolen property before he had been charged with any offense, and without any threats or inducements on the part of the officers, were admissible as "admissions." State v. Royce, 80 Pac. 268, 270, 38 Wash. 111, 3 Ann. Cas. 351 (quoting and adopting 8 Cyc. p. 562).

Where accused after his arrest was questioned in the presence of the sheriff and constable and others, and admitted his implication in an affray in which he shot and wounded complainant, but claimed that he acted only in self-defense and used his revolver as a club only, the discharge being accidental, and that after complainant had knocked him off a chair into a bedroom complainant's wife joined in the assault, it was error for the court to refer to such "admissions" as a confession of guilt. People v. Cismadija, 132 N. W. 489, 491, 167 Mich. 210.

Pen. Code, § 647, subd. 4, provides that every person known to be a confidence operator, either by his own confession, or having been convicted of such offense, and having no visible means of support when found loitering around certain public places, shall be deemed a vagrant. Held, that the word "confession" as so used had reference to an "admission" or declaration as to the party's status, as distinguished from his confession of guilt of a particular crime, and was not the equivalent of a "statement" or "declaration," and hence the section does not justify a conviction, or declare the offense established by the confession of the party, but only provides that his admission of the truth of one of the elements of the offense, to wit, his calling, is sufficient to establish such element. Ex parte Hayden, 106 Pac. 893, 894, 12 Cal. App. 145.

Offer of compromise or settlement distinguished

The "admissions" which are to be rejected because "made with a view to compromise" within Civ. Code 1895, § 5194, are those made as a concession to bring about a

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compromise or settlement, but independent statements of facts by a party, though made while they are trying to settle, are not necessarily inadmissible. Austin v. Long, 63 S. E. 640, 641, 5 Ga. App. 551.

In an action for injuries to a servant, it was proper to exclude a portion of a letter written by plaintiff to defendant's claim agent, to the effect that plaintiff assessed his damages at $500; the letter being one in which plaintiff stated that, expecting the presence of the claim agent, he had delayed making claim, etc., and hoped that defendant would call upon him and save the trouble of litigation, as the import of the letter was an "offer of settlement." St. Louis Southwestern Ry. Co. of Texas v. Kern (Tex.) 100 S. W. 971, 972.

ADMISSION (In Pleading)

Admissions in pleading or otherwise, see Otherwise.

Where a trustee was garnished by creditors of the beneficiary, and answered that the income which it had collected had been assigned to a creditor other than the attachment creditor and before the service of the attachment by an instrument in writing, but that the beneficiary had revoked the assignment, there was no "admission" of assets in the trustee's hands liable to attachment. Egbert v. De Solms, 67 Atl. 212, 213, 218 Pa. 207.

ADMISSION OR REJECTION OF TESTIMONY

The criminal procedure act provides that, if it appear from the record that plaintiff in error on the trial below suffered manifest wrong or injury either in the admission or rejection of testimony, whether objection was made thereto or not, the appellate court shall order a new trial. Held, that the phrase "admission or rejection of testimony" imports judicial action, and a judgment will not be reversed for refusal of the trial court to strike out testimony elicited by a question to which no objection was made. State v. Hummer, 67 Atl. 294, 81 N. J. Law, 430.

ADMISSION TO BAIL

A discharge on a prisoner's own recognizance is nothing more than "admission to bail without surety." Where the record on appeal showed that when defendant was arraigned before the court of Special Sessions he was discharged on his own recognizance, and that thereafter the order was revoked, and trial and conviction had, and it did not appear that before trial there was any investigation of the charge, no irregularity appeared, since, even if there was no authority to discharge, the order had not the effect of an acquittal, and, if the revocation of the order was unauthorized, nevertheless, defendant being before the court, it had jurisdiction. People v. Harber, 91 N. Y. Supp. 571, 572, 100 App. Div. 317.

The words "not admitted to bail," as used in Rev. Codes 1899, § 8679, relating to release on habeas corpus, mean that the accused has not been discharged on bail, but is in custody under commitment because unable or unwilling to furnish the bail required. State ex rel. Adams v. Larson, 97 N. W. 537, 538, 12 N. D. 474.

ADMITTED

See Regularly Admit to Practice.

In a rule of court, declaring that a rehearing shall not be "granted" after the lapse of the term at which the final decree is entered, and providing that in nonappealable cases a petition for a rehearing may be "admitted" before the end of the next term after final decree, the word "admitted" is synonymous with the word "granted," and the effect of the rule is to deprive the court of the power to grant a rehearing in any case after the lapse of the term next succeeding entry of the final decree. Glenn v. Dimmock, 43 Fed. 550, 551.

Though petitioner passed the legal examination for admission to the bar, and was permitted to take an attorney's oath and to sign the roll of attorneys, his certificate of admission being withheld until proof of his general educational qualifications, he was not "admitted," and his name is properly stricken from the roll, on failure to make such proof. In re Alexander, 133 N. W. 491, 492, 167 Mich. 495.

ADMITTED TO RECORD

See Duly Admitted to Record.

ADOPT—ADOPTION

Unanimously adopted, see Unanimous—Unanimously.

One may approve and at the same time fail to adopt a thing, and therefore an indictment, alleging that the local option law had been legally "approved," did not allege that it had been legally "adopted." State v. Campbell, 119 S. W. 494, 495, 137 Mo. App. 105.

An order of a county court "approving" the report of viewers appointed on proceedings for the establishment of a county road was a compliance with Laws 1903, p. 262, § 11, requiring the report to be "adopted." Miller v. Union County, 86 Pac. 3, 48 Or. 266; Pierce v. Same, 86 Pac. 5, 48 Or. 622.

The word "adopted," in a stipulation to the effect that the report of a referee shall be accepted and adopted, has the same meaning as "accepted," and the effect of the stipulation is merely to waive the right to question the authenticity of the report on the settlement of the bill of exceptions. Babcock v. Ormsby, 100 N. W. 759, 18 S. D. 358.

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Of child

See Roman Adoption.

"Adoption," properly considered, refers to the taking of minor children by persons who are strangers in blood, in contradistinction to "legitimation," where the blood relationship must exist. Allison v. Bryan, 97 Pac. 282, 283, 21 Okl. 557, 18 L. R. A. (N. S.) 931, 17 Ann. Cas. 468 (citing Bouvier, Black, Anderson, and Rapalje).

"Adoption" is the taking of a stranger in the blood as one's own child. The proceeding of adoption and the relation established is personal to the foster parent and child, and though the statute gives to them all of the rights to be derived from the legal relation of parent and child, including the "right of inheritance through each other," an adopted child may not inherit through the foster parents from his collateral kin. Kettle v. Baxter, 100 N. Y. Supp. 529–531, 50 Misc. Rep. 428. Adoption was unknown to the common law. Long v. Dufur, 113 P. 59, 62, 58 Or. 162. But it was an incident of the civil law, and incorporated in the Code Napoleon. Hockaday v. Lynn, 98 S. W. 585, 200 Mo. 456, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775.

The word "adoption," as used in Civ. Code 1895, §§ 2372–2387, regulating benevolent institutions and relating to the placing of children at service, is to be construed in the sense in which it is used in those provisions of the law where one person adopts the child of another. In the case of a legal adoption there is a complete surrender for all time of the parental control to the adoptive parents. The word "adoption" in this act is to be construed so as to confer upon the person receiving the child no greater power over the child than the benevolent institution itself had in the first instance, and that is, to retain the custody of the child until the time arrives when it shall be returned to its parents or to the court from which it was received. Kennedy v. Meara, 56 S. E. 243, 248, 127 Ga. 68, 9 Ann. Cas. 396.

Rev. Laws 1880, §§ 2536–2541, provide that, on an "adoption," the same rights, duties, and obligations and the same rights of inheritance shall exist "between the parties" as though the person adopted had been the legitimate child of the adoptive parent, except that the person so adopted shall not be capable of taking property expressly limited to the heirs of the body of the adoptive parent. The word "adoption" by common acceptation establishes the relationship of parent and child with all the consequences of that relationship, including the right of inheritance from the adoptive parents, and such right extends to the issue of the adopted child, and where intestate, who died without issue of his body, before marriage adopted complainant's mother as his daughter, and she died leaving complainant surviving her, complainant was entitled to share in intestate's estate by representation to the same extent as if he had been the son of intestate's natural daughter. Batchelder v. Walworth, 82 Atl. 7, 9, 85 Vt. 322, 37 L. R. A. (N. S.) 849.

The Domestic Relations Law defines "adoption" as the legal act whereby any adult takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent. A "voluntary adoption" is declared to be any other than that of an indigent child or one who is a public charge from an asylum or from a charitable institution, and, after providing the proceedings for voluntary adoption, declares that "thereafter" the parents of the minor are relieved from all parental duties, responsibilities for, and rights over such child, or his property by descent or succession, but the foster parent and the minor sustain the legal relation of parent and child with all the rights and duties of that relation, including the right of inheritance, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if the minor were the legitimate child of the adopting person, but as respects the passing and limitation over of real and personal property, dependent, by the provisions of any instrument, on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen. The statute then proceeds to provide a procedure for the adoption of children from charitable institutions without containing any further provision as to the rights of children so adopted. Held, that a child previously adopted from a charitable institution, who under the saving clause in the Domestic Relations Law was entitled to all the rights of children similarly adopted thereunder, her adopted parents having no other children, was the sole next of kin of her foster father under the statute of distributions, and therefore was entitled to take under a deed of trust for the benefit of her foster father, remainder on his death to his children. United States Trust Co. of New York v. Hoyt, 135 N. Y. Supp. 849, 852, 150 App. Div. 621.

An indenture of apprenticeship, providing that it was the intent of the party of the first part to place, and of the second part to receive, the apprentice as an adopted child of the party of the second part, to be maintained and treated with like care as if he were the child of such party, did not constitute the child an "adopted" son of the master. In re Wallace's Estate, 66 Atl. 1098, 1099, 218 Pa. 39.

Same—As legitimation

Under Civ. Code, arts. 200, 214, authorizing a natural father to legitimate his children by an act passed before a notary and witnesses, and declaring that any person may

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adopt another as his child, except those illegitimate children whom the law prohibits him from acknowledging, a man may "adopt" children with a colored woman, where at the time of the birth of the children he and the colored woman could have contracted marriage, though subsequently marriage between them was prohibited and the adoption occurred after such prohibition. Hodges' Heirs v. Kell, 51 South. 77, 81, 125 La. 87.

ADOPTED CHILD

See Adopt—Adoption.

As child

See Child—Children.

As heir

See Heir.

As heirs of the body

See Heirs of the Body.

As issue

See Issue (Descendants).

As lawful child

See Lawful Child.

As lawful issue

See Lawful Issue.

As lineal descendant

See Lineal Descendants.

As lineal issue

See Lineal Issue.

As next of kin

See Next of Kin.

ADOPTIVE MOTHER

As mother, see Mother.

ADOPTIVE PARENT

As parent, see Parent.

ADULT

As children, see Child—Children (In Statutes).

"Full age in male or female is 21 years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law." Under the express provisions of Code, § 3188, a male person remains a minor until the age of 21 years, but the common law is modified by the statute to the extent of declaring a female an "adult" at 18 years of age, and all persons such upon marriage. Banco De Sonora v. Bankers' Mut. Casualty Co., 100 N. W. 532, 535, 124 Iowa, 576, 104 Am. St. Rep. 367 (quoting Blackstone).

ADULT OWNER

A corporation owning lands within a proposed drainage district is an "adult owner," within drainage district statute (St. 1898, § 1379–11 et seq.), which authorizes a proceeding to organize a drainage district on petition of a majority of the adult owners of lands within the district, etc., though the word "adult," or an equivalent phrase, referring to one who has "arrived at lawful age," is commonly used to designate only persons who have arrived at full age, or the years of manhood. Jordan Land Co. v. Freeborn, 135 N. W. 751, 752, 149 Wis. 159.

ADULTERATE—ADULTERATION

The word "adulteration," means to corrupt, debase, or make impure by an admixture of a foreign or a baser substance. United States v. St. Louis Coffee & Spice Mills, 189 Fed. 191, 193. Articles are deemed to be adulterated when foreign matter is added to improve or change their appearance or flavor, in imitation of an article of higher grade or different kind. Adulteration is a treatment to simulate a better article; an artificial concealment of defects. City of St. Louis v. Jud, 139 S. W. 441, 442, 236 Mo. 1.

Illuminating oil colored red is not an adulteration as a matter of law within Laws 1909, p. 630, c. 502, prohibiting sale of adulterated oils. Bartles Oil Co. v. Lynch (Minn.) 124 N. W. 1, 25 L. R. A. (N. S.) 1234.

The manufacture of buchu gin by pouring pure gin on a bed or mat of buchu leaves and allowing it to percolate through; then adding distilled water and syrup, the gin comprising some 50 per cent. or more of the compound which is 46 per cent. alcohol and designed for use as a beverage, constitutes a "compounding" or "adulterating," within Ky. St., imposing a license tax of 1¼ cents a wine gallon on the business of compounding, rectifying, "adulterating," or blending distilled spirits. Bouvier Specialty Co. v. James, 118 S. W. 381, 133 Ky. 580.

Butter or oleomargarine

Proof of the presence of an abnormal quantity of moisture in butter and of a removal of the butter without a compliance with federal regulations concerning the taxing and branding of "adulterated butter" is insufficient to bring such butter within the class of adulterated butter or to sustain its forfeiture as such. United States v. 11,150 Pounds of Butter, 195 Fed. 657, 660, 115 C. C. A. 463.

Oleomargarine Act May 9, 1902, c. 784, § 4, 32 Stat. 194, imposes an internal revenue tax of 10 cents per pound on adulterated butter, and provides that "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream" shall be deemed "adulterated butter," and authorizes the Commissioner of Internal Revenue to decide what substances are taxable thereunder, and, with the approval of the Secretary of the Treasury, to make all needful regulations for carrying the act into effect. Held, that a regulation that butter containing 16 per cent. or more of water, milk, or cream should be classified as "adulterated butter" was val-

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id, not being an exercise of judicial power, but merely a determination as a question of fact of what constitutes an "abnormal" quantity of water, etc. Coopersville Co-operative Creamery Co. v. Lemon, 163 Fed. 145, 146, 89 C. C. A. 595; United States v. 11,150 Pounds of Butter, 195 Fed. 657, 660, 115 C. C. A. 463.

Drug

Pure Food and Drug Act, § 7, provides that drugs shall be deemed "adulterated" when they differ from the standard of strength, quality, or purity as determined by the test prescribed in the United States Pharmacopœia or National Formulary official at the time of investigation, and that no drug shall be deemed adulterated if the standard of strength, quality, or purity be plainly stated on the container, although the standard may differ from the test. Section 10 declares that any drug that is adulterated or misbranded and is being transported from one state to another for sale, or having been transported remains unsold, or in the original or unbroken packages, shall be liable to condemnation in any District Court of the United States and condemned. Held, that a drug is not "adulterated" so as to be subject to condemnation unless adulterated at the time of seizure. United States v. Five Boxes of Asafœtida, 181 Fed. 561, 562; Same v. Nine Boxes of Asafœtida, 181 Fed. 568.

Food

The word "adulteration," in Comp. Laws, § 5007, declaring it unlawful to manufacture and sell maple syrup that is in any wise adulterated with common sugar or any other foreign substance, without labeling it in a certain way, means the mixture of any foreign substance, wholesome or unwholesome, with maple syrup. Pierre Viaus Maple Co. v. Dairy & Food Com'r, 117 N. W. 553, 554, 154 Mich. 73.

Sess. Laws 1903, p. 103, c. 82, § 6, prohibits the sale of adulterated food, and provides that food shall be deemed "adulterated" (4) if any substance has been mixed with it so as to lower or depreciate its quality or purity, or (5) if any inferior substance is wholly or partly substituted, or (7) if it is an imitation; but that an article shall not be deemed adulterated if it is a mixture of recognized food products and not an imitation, provided each package sold as a mixture is labeled with the name and percentages of the components. Article 1, § 13, provides that maple syrup shall be the unadulterated product of the pure sap from the maple tree, and the mixing of other substances with maple syrup or their substitution therefor shall be deemed adulteration. An information alleged that accused offered for sale a can of recognized food products, to wit, maple syrup and cane sugar mixed in certain proportions, the can being labeled "W. syrup, a blend of pure maple and rock candy syrup," but was not labeled a as mixture with the name and percentage of each ingredient. Held, that the information did not charge an "adulteration" within section 13, or within section 6, and since the sale of unlabeled mixtures was not made unlawful by any statute unless they were adulterations, forbidden by section 6, which did not include unlabeled mixtures, the information did not allege an offense under the proviso of section 6. State v. Weeden, 100 Pac. 114, 115, 17 Wyo. 418.

Rev. Laws, c. 75, § 16, provides that no person shall sell any article of food which is "adulterated." Section 17 defines the term "food" to include all articles, simple, mixed, or compound, used in food or drink by man, and section 18 declares that food shall be deemed adulterated if any substance has been mixed with it, so as to reduce, depreciate, or injuriously affect its quality, strength, or purity, or if an inferior or cheaper substance has been substituted for it wholly or in part, or if it is an imitation of or sold under the name of another article, but that such provisions shall not apply to mixtures or compounds not injurious to health and which are recognized as ordinary articles or ingredients of articles of food, if every package sold or offered for sale is distinctly labeled as a mixture or compound with the distinct name of each ingredient therein. Held, that blended maple sugar "part maple and part granulated," itself a well-known article in the trade as a commercial unit of food bought and sold as such, was neither an "adulterated food" nor an "imitation" within the statute. Adams v. New England Maple Syrup Co., 97 N. E. 85, 87, 210 Mass. 475.

Sausage meat made from the meat of hams and select young pork prepared with spices and 2 to 10 per cent. cereals, to which water had been added, is not an adulterated food within Comp. Laws, § 5012, declaring that an article shall be deemed adulterated if it is an (subdivision 4) imitation of, or is sold under the name of, another article, or (subdivision 7) if it contains any added substance or ingredient which is poisonous or injurious to health. Armour & Co. v. State Dairy and Food Com'r, 123 N. W. 580, 581, 159 Mich. 1.

Under Federal Food and Drugs Act, § 7, an article of food is "adulterated": First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second. If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, that when in

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the preparation of food products for shipment, they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of such preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption. Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter." Savage v. Jones, 32 Sup. Ct. 715, 724, 225 U. S. 501, 56 L. Ed. 1182. Section 8 contains a proviso that food which does not contain any added or deleterious ingredients shall not be deemed "adulterated," and if in the case of mixtures or compounds, known as articles of food by their own distinctive name, such name shall be accompanied on the same label or brand with a statement of the place where the article has been manufactured or produced, and in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale. Held, that where a substance sold under the name "Corno Horse and Mule Feed" was contained in a package branded: "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois"—followed by a guaranteed analysis, such substance, being a compound and so described on the package, was not adulterated, because it contained a quantity of oat hulls mixed and packed therewith in excess of the amount normally present in oat feed consisting of whole ground oats. United States v. One Car Load of Corno Horse and Mule Feed, 188 Fed. 453, 455.

Milk

One charged with selling "adulterated milk," defined by the Agricultural Law, cannot defend by showing that he sold the milk as given by cows. People v. Bosch, 114 N. Y. Supp. 65, 66, 129 App. Div. 660.

A dealer, who sold milk in cans after having taken from them about two quarts of cream and then filling the same with milk from other cans from which the same quantity of cream had been taken, sold "adulterated milk," within Agricultural Law (Laws 1893, c. 338) §§ 20, 22, defining "adulterated milk" as milk from which any part of the cream has been removed; and where he sold it as milk from which the cream had not been taken he was liable to the penalty imposed, though the milk in other respects complied with the requirements of the law and was in fact wholesome. People v. Koster, 106 N. Y. Supp. 793, 794, 121 App. Div. 852; People v. Abramson, 122 N. Y. Supp. 115, 117, 137 App. Div. 549.

Under Consol. Laws, c. 1, § 32, making it unlawful to sell or offer for sale "adulterated milk," which is defined by section 30 as "milk containing more than 88 per cent. of water or fluids, and containing less than 12 per cent. of milk solids," the state, in an action for the penalties for a sale of adulterated milk, makes out a prima facie case by the uncontradicted testimony of two of its agents that defendant delivered at a lunchroom milk containing 88.63 per cent. water and 11.37 per cent. solids. People v. McDermott Dairy Co., 122 N. Y. Supp. 294, 295.

Rev. St. 1909, § 640, provides that whoever shall sell or offer for sale any milk containing any foreign substance or preservative injurious to health, or shall sell or offer for sale any unclean, adulterated, or unwholesome milk, shall be guilty of a misdemeanor. Held, that the word "adulterated" was used in the sense ordinarily given by lexicographers, to wit, the addition of foreign matter to change or improve the appearance or flavor of an article; and hence St. Louis City Ordinance No. 24,297, prohibiting the having in possession adulterated milk, with intent to sell, and providing that it shall be deemed adulterated if any substance is mixed with it, so as to lower or depreciate or injuriously affect its strength, quality, or purity, or if it is mixed or colored, so that inferiority is concealed, or if it is made to appear better than it really is, was not in conflict with section 640, on the theory that such section permitted the addition of coloring matter which was not harmful; and hence a conviction could properly be sustained under the ordinance for having in possession skim milk to which annatto had been added to make it appear richer in fat than it really was. City of St. Louis v. Jud, 139 S. W. 441, 442, 236 Mo. 1.

Rev. St. 1909, § 6595, provides that milk shall be deemed adulterated if it does not conform to the standard of strength, quality, and purity now or hereafter to be established by the United States Department of Agriculture. Held, that such section could not be construed to authorize the lowering of the quality of skimmed milk by the addition of water, provided that the proper per cent. of milk solids remained, so as to comply with the percentage required by the regulations of the federal agricultural department. St. Louis City Ordinance No. 24,297, providing that no person shall have in possession, with intent to sell, any adulterated milk, and that milk shall be deemed adulterated if any substance has been added to lower or depreciate or injuriously affect its strength, quality, and purity, or if it has been mixed or colored in any manner to conceal damage or inferiority, etc., was not void for uncer-

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tainty, in that it failed to fix any standard or measure of strength, quality, or purity. City of St. Louis v. Kruempeler, 139 S. W. 446, 448, 235 Mo. 710.

Wheat

The H. Company, at Kansas City, Mo., on April 3, 1909, contracted to sell to the W. Company at Ft. Worth, Tex., 5,000 bushels of No. 2 red wheat, according to the Missouri official state grades. On April 29, 1909, the H. Company ordered the operator of a public elevator where it stored its grain to ship to the W. Company in fulfillment of this contract No. 2 red wheat. The operator loaded and sent to the W. Company a car of wheat. After this wheat was loaded, the official inspector of the state of Missouri at Kansas City inspected, adjudged, and certified this wheat to be No. 2 red wheat. An invoice of it was forwarded to the W. Company dated May 3, 1909, showing that it was shipped under the contract of April 3, 1909, and subject to Kansas City weights and grades. The wheat arrived in Texas without change. The Texas inspector, the federal inspector, and other witnesses there found it to be, and it was, wheat of another and less valuable grade. None of the officers or employés of the H. Company had any knowledge of this fact, or anything to do with the grading or shipping, except to order the operator of the public elevator to ship No. 2 red wheat. Held, the H. Company was not guilty of misbranding or of "adulterating" within the meaning of Pure Food Act, §§ 7, 8 (Act June 30, 1906, c. 3915, 34 Stat. 768, 769. Hall-Baker Grain Co. v. United States, 198 Fed. 614, 615, 117 C. C. A. 318.

ADULTERY

See Guilty of Adultery; Incestuous Adultery; Live in Adultery; Living in State of Cohabitation and Adultery; Open and Notorious Adultery.

"'Adultery' is sexual intercourse of one spouse with any other than the other spouse." People v. Salmon, 83 Pac. 42, 43, 148 Cal. 303, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268.

"Adultery" is voluntary sexual intercourse by a married person with a person other than the offender's husband or wife. Cartier v. United States, 148 Fed. 804, 807, 78 C. C. A. 494; People v. Silva, 97 Pac. 202, 203, 8 Cal. App. 349; Ex parte Cooper, 121 Pac. 318, 319, 162 Cal. 81; Ex parte Sullivan, 119 Pac. 526, 17 Cal. App. 278.

Sexual intercourse by a married man with a woman other than his wife is "adultery" within the meaning of the statute making it a misdemeanor. Bashford v. Wells, 96 Pac. 663, 664, 78 Kan. 295, 18 L. R. A. (N. S.) 580, 16 Ann. Cas. 310.

As felony

See Felony.

Marriage of one party sufficient

"Adultery," as defined by the common law at the time of the colonization of the United States, is sexual connection between a man and a woman, one of whom is lawfully married to a third person; and the offense is the same whether the married person in the adulterous connection is a man or a woman. State v. Holland, 145 S. W. 522, 523, 162 Mo. App. 678.

The term "adultery" as used in the statutes means illicit intercourse between two persons of different sex, one of whom is married to another person. Rich v. State, 55 South. 1022, 1023, 1 Ala. App. 243. Sexual intercourse between two persons not husband and wife, either or both of whom are married, constitutes statutory "adultery." State v. Anderson, 118 N. W. 772, 774, 140 Iowa, 445. But under a statute defining "adultery" as the voluntary intercourse of a married person with a person other than accused's husband or wife, an unmarried man is incapable of committing the offense of living in a state of cohabitation and adultery. Ex parte Sullivan, 119 Pac. 526, 17 Cal. App. 278.

To constitute "adultery" under Act March 3, 1887, c. 397, § 31, 24 Stat. 635 (U. S. Comp. St. 1901, p. 3636), by a married man, it is immaterial whether the woman was married or not. United States v. Meyers, 99 Pac. 336, 337, 14 N. M. 522.

Ballinger's Ann. Codes & St. § 7230, defines "adultery" as "the sexual intercourse between a married person and one who is not such married person's husband or wife." Section 7231 provides that every person convicted of adultery shall be imprisoned not exceeding five years. Section 7238 provides that every man or woman, not being married to each other, lewdly and viciously associating and cohabiting together, shall be imprisoned in the county jail not exceeding six months. Defendant, an unmarried man, was living with the wife of another. Held, that defendant, though unmarried, was guilty of "adultery," and not only of the misdemeanor under section 7238, since it is clear from section 7230 that the Legislature intended to hold each of the offending parties under section 7231 equally guilty. State v. Keith, 92 Pac. 893, 894, 48 Wash. 77.

Other sexual offenses distinguished

In the absence of statute sexual intercourse on the part of an unmarried woman does not constitute "adultery" on her part, but amounts simply to fornication; and hence an unmarried woman cannot be guilty of an offense under a statute providing that every person who lives in adultery is guilty of a misdemeanor; Civ. Code, § 93, defining "adultery" as the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Ex parte Cooper, 121 Pac. 318, 319, 162 Cal. 81.

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In the law of divorce "adultery" is the voluntary sexual intercourse of a married person with one not the husband or wife of that person; therefore, if a rape be committed by a husband, his wife may have a divorce from him on the ground of adultery. Johnson v. Johnson, 80 Atl. 119, 120, 78 N. J. Eq. 507.

Under Pen. Code, § 338, defining "adultery" as the voluntary sexual intercourse by a married person with one other than his or her spouse, and Pen. Code, § 325, as amended by Gen. Laws 1907, c. 11, § 1, defining "rape" as sexual intercourse with a female, not the wife of the ravisher, under the age of 18 years, a complaint which charged that the defendant, a male over 14 years, feloniously assaulted and ravished a female, not his wife, who was under the age of 18 years, did not charge adultery, but only rape; the intercourse charged being with a female incapable of consent. State v. Rash, 130 N. W. 91, 93, 27 S. D. 185.

"Rape" is an act of sexual intercourse accomplished forcibly, and without the consent of the female. If it be with her consent, though some coercion is used to procure consent, and the intercourse is illegal, the crime is "adultery" or "fornication," as the case may be. The law recognizes no intermediate degree of force in the accomplishment of an illegal act of sexual intercourse which is sufficient to accomplish the act contrary to the consent of the female, and yet not constitute the crime of rape. Whidby v. State, 49 S. E. 811, 121 Ga. 588 (citing Mathews v. State, 29 S. E. 424, 101 Ga. 547; Taylor v. State, 35 S. E. 161, 110 Ga. 151 [6]).

ADULTERY BY LIVING TOGETHER

To constitute the crime of "adultery by living together," it is not necessary that the parties live together as man and wife, but only that they live together and have intercourse. Shaw v. State, 91 S. W. 1087, 49 Tex. Cr. R. 379.

While under Ky. St. to entitle a wife to divorce for the husband's adulterous conduct there must be more than a single act to constitute living together in "adultery," there need not be a living together continuously or for a given time, nor is it necessary for the man to abide in the same house with the woman; but, if he at stated periods or frequently spend the day or night with the woman, having carnal knowledge of her at will, it constitutes adultery. Baker v. Baker, 124 S. W. 866, 867, 136 Ky. 617.

A married man who visits and remains with his paramour one night in every week for seven months at her residence, a half mile from his own house, is guilty of the offense of living in "adultery," within Pen. Code, c. 6, § 3, declaring it a misdemeanor for any man and woman to live together in adultery or fornication. Collins v. State, 14 Ala. 608, 609.

ADVANCE—ADVANCES

The word "advance" or "advances" does not necessarily imply a promise to pay. Assets Realization Co. v. Howard, 127 N. Y. Supp. 798, 821, 70 Misc. Rep. 651.

The word "advance" is defined by Webster as a "furnishing of something before an equivalent is received, or on loan. In case of an 'advance' as distinguished from an 'advancement' there arises the relation of debtor and creditor, or else the advance is in the nature of an absolute gift." Paine v. Copper Belle Mining Co. of Arizona, 114 Pac. 964, 966, 13 Ariz. 406.

The various expressions "pay," or "furnish," or "advance," used interchangeably in defining a resulting trust, all imply that the payor does something and that he has the intention, in so doing, to acquire at least an equitable interest in the land. Merrill v. Hussey, 64 Atl. 819, 821, 101 Me. 439.

The phrase in a memorandum of sale of beans, "he to have advance for two weeks," cannot, without extrinsic testimony, be construed to refer to the market price at the end of two weeks, but it either refers to the highest price during the two weeks, or requires extrinsic evidence to explain it, in which event its construction on conflicting testimony was properly submitted to the jury. Chase v. Ainsworth, 97 N. W. 404, 135 Mich. 119.

To make a payment by a mortgagee on the mortgagor's account an "advancement" within a clause of the mortgage securing "further advances" by the mortgagee, such payment must involve a contract relation, express or implied, and a payment made without the knowledge of the mortgagor cannot constitute such an advancement. Provident Mut. Bldg. & Loan Ass'n v. Shaffer, 83 Pac. 274, 275, 2 Cal. App. 216.

Advancement distinguished

A husband purchasing real estate and causing the conveyance to be made to his wife presumptively makes a gift to her, and not an "advancement," which is a transfer of property from one standing in loco parentis toward another, and which applies only in cases of intestacy; and hence the court, in distributing the estate of a testator, must award to his wife, electing to take under the statute, dower without reference to real estate so conveyed to her, in the absence of any evidence creating a resulting trust in favor of the husband. In re Kennedy's Estate, 135 N. W. 53, 56, 154 Iowa, 460.

Loan equivalent

One of the meanings of "advance" is a loan; the word, when used in that sense, naturally importing a reimbursement, so as to

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imply the relation of debtor and creditor. Grone v. Economic Life Ins. Co. (Del.) 80 Atl. 809, 816. But it is said by another court that an "advance" of money does imply a loan. Schlesinger v. Burland, 85 N. Y. Supp. 350, 351, 42 Misc. Rep. 206.

The word "advance" could not be construed as meaning "loan" under the following state of facts: Stockholders of a mining corporation, which, though supposed to own valuable properties, was in financial trouble and had been declared bankrupt, entered into an agreement with one M., another stockholder, whereby M. was to provide sufficient money to discharge all corporate debts and to enable the company to operate its mines, as soon as the corporation should ratify the agreement, which further provided that the corporation should issue to M. treasury shares equal to 50 per cent. of the authorized capital stock in consideration of the "advance" by him of the money specified, etc. Thereafter the corporation was succeeded in interest by another company. The agreement is to be regarded as one for the purchase of the stock by M. in consideration of the advance, in the expectation that the stock of all concerned would thereby be made valuable. Paine v. Copper Belle Mining Co. of Arizona, 114 Pac. 964, 966, 13 Ariz. 406.

A complaint in an action for an accounting, which alleged the purchase of lands for the complainant's benefit and the taking of title thereto by the defendant under an agreement that he should "advance" sums necessary to purchase, sufficiently charged, as against a general demurrer, that there was a consideration moving from the plaintiff to the defendant which would support the action, as the word "advance" implies the return of money furnished for a specific purpose. Semi-Tropic Spiritualists' Ass'n v. Johnson, 126 Pac. 488, 489, 163 Cal. 639.

As pecuniary advances

"Advance" is equivalent to "pay." Central Trust Co. of New York v. Egleston, 98 N. Y. Supp. 1055, 1057, 47 Misc. Rep. 693.

The word "advance," as used in a contract, ordinarily means money furnished with an expectation that it shall be returned, though it may not necessarily have that meaning; Abbott's Law Dictionary defining it as "To furnish value before it becomes due or in aid of an enterprise from which a return is expected." Linderman v. Carmin, 127 S. W. 124, 128, 142 Mo. App. 519.

An undertaking in writing, whereby one binds himself, as surety, to repay an "advance" to be made to his principal, cannot be regarded as authorizing the latter, and the party invited to make the advance, to enter into an arrangement whereby such party releases his lien on property belonging to the other, thus enabling him to sell it for a sum in excess of the amount of a pre-existing debt he owes to the lienor, to discharge a portion of that debt, and to retain part of the proceeds of the sale in lieu of the advance which the surety authorized to be made. C. S. Hirsch & Co. v. Meldrim, 52 S. E. 813, 815, 124 Ga. 717.

To "advance" is "to supply beforehand"; "to pay before the equivalent is received"; "to pay before the proper time." Plaintiff employed defendant as an insurance solicitor, agreeing to pay a specified commission for his services. The contract also provided that plaintiff might offset against any claim under the contract any and all debts or liabilities of defendant to plaintiff. A supplemental contract provided for advances by plaintiff to defendant of $15 a week, which advances were to be a first lien on all commissions or renewals then due or that might thereafter become due; and plaintiff was authorized to deduct any advances made from any money received on premiums, which, under the primary contract, should be due to defendant. Held, that such advances did not create a debt on the part of defendant, and on failure of the venture to prove successful plaintiff could not recover the same of defendant. Arbaugh v. Shockney, 72 N. E. 668, 669, 34 Ind. App. 268.

A contract of employment as a salesman at a certain commission, the employer to "advance" the salesman a certain sum monthly, "said advances to be charged and deducted from the commission computed at the end of the period of employment," does not create a personal liability on the part of the salesman to repay advances in excess of commissions earned. Schlesinger v. Burland, 85 N. Y. Supp. 350, 351, 42 Misc. Rep. 206.

Giving a note to pay the debt of another to a third person is not an "advance" of its amount, as a note is not payment till it is paid, unless an express agreement to receive it as such is shown. Coleman v. State, 65 S. E. 46–48, 6 Ga. App. 398.

The word "advance," within the meaning of Laws 1903, p. 90, defining the offense of cheating and swindling, means a payment of money which has not been earned. Testimony on the part of a witness that a certain payment was an advance is not competent evidence of that fact; it being the province of the jury to determine from the facts in connection with the payment the state of the employé's account with his employer, and whether the payment made was an advance or part payment of an indebtedness for labor due by the employer to the servant. Fuller v. State, 59 S. E. 1, 2, 2 Ga. App. 696.

A will directed payment of $500 to plaintiff, his son, on the death of testator's wife; any "advances" to the son during the lifetime of the testator to be deducted from the $500. After payment of a legacy, the residue of the estate was given to another son. When the will was made, testator was an indorser on

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a note for $500, given by a firm of which plaintiff was once a member. The money for which the note was given had been obtained by plaintiff and put into the firm business; but the firm had been dissolved, and nothing had been paid on the note. Held, that the payment by testator of the note, which he kept among his papers, was an "advance," within such clause of the will. Ebeling v. Ebeling, 115 N. Y. Supp. 894, 896, 61 Misc. Rep. 537.

Laws 1902, c. 608, § 2, declares that a warehouseman shall have a lien on goods stored with him for his charges for "advances" thereon, including weighing and cooperage in relation to the goods or other goods belonging to the same owner, and that he may detain the goods until the lien is paid. Held, that the term "advances," as so used, does not include loans made on security of the goods, but is limited to expenditures in handling and protecting the goods. Schwab v. Oatman, 106 N. Y. Supp. 741, 746, 56 Misc. Rep. 393.

By factors

"Advances" by a factor consist of payments by him to his principal on the credit of the goods consigned and in anticipation of the debt which will become due on a sale of the goods. "The ordinary use of the term indicates moneys paid before or in advance of the proper time of payment. 'To advance' is to supply beforehand, to loan before the work is done or the goods are made." In re Murphy Co.'s Estate, 63 Atl. 745, 747, 214 Pa. 258, 5 L. R. A. (N. S.) 1147, 6 Ann. Cas. 308 (quoting Balderston v. National Rubber Co., 27 Atl. 507, 18 R. I. 338, 49 Am. St. Rep. 772).

ADVANCED IN MANUFACTURE

Where raw silk has been re-reeled from skeins upon cops or tubes thus permitting the operation of doubling or twisting to be omitted in the process of finishing the silk, and thus bringing the article one step nearer the condition of finished silk, held, that this removes the article from the provision in paragraph 660, Tariff Act July 24, 1897, § 2, Free List, for raw silk not "advanced in manufacture in any way," and brings it within the provision in paragraph 384, of said act, section 1, Schedule L, for "silk partially manufactured from cocoons, * * * and not further advanced or manufactured than carded or combed silk." United States v. Klotz, 133 Fed. 808, 809.

ADVANCED IN VALUE OR CONDITION

Talc sawed into cubes for use in making gas burners and insulators, the sawing being not merely to remove foreign matter and to put the material in shape for transportation, but to give it certain desired dimensions, has been "advanced in value or condition" within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 614, 30 Stat. 198. Kraemer & Foster v. United States, 180 Fed. 638, 639.

ADVANCED ROYALTY

The term "advanced royalty," as used in a mining lease fixing a royalty for coal mined, providing that operations should be commenced within one year, and that if they should not be so commenced certain amounts should be paid as "advanced royalty" for the first and second years, and providing that after the second year the royalties should amount to as much as a sum specified during the contract or until all mineable coal was removed, refers to a failure to take out coal in the years mentioned, and is intended as payment in advance for coal subsequently to be mined, and the parties manifestly intended that the lessee should begin mining the first year, but, in the event this might not be done, the lessors were not to be delayed in receipt of the income contemplated. Kissick v. Bolton, 112 N. W. 95, 96, 134 Iowa, 650.

ADVANCEMENT

Advancement or otherwise, see Otherwise.

The "advancements" for which a lien is created in favor of a landlord, by Code, § 1754, providing that crops raised on leased lands shall be vested in possession of the lessor until the rent is paid and the lessor reimbursed for advancements in making the crops, embraces anything of value supplied by the landlord to the tenant in good faith, for the purpose of making and saving the crop; and, when the advancements are appropriate and necessary to the cultivation of the crop, they will be presumed to create the lien, but where not in themselves so appropriate and necessary, it must appear that they were made in aid of the crop. Windsor Bargain House v. Watson, 62 S. E. 305, 306, 148 N. C. 295.

ADVANCEMENT (To Child)

An "advancement" is an irrevocable gift by a parent to a child of the whole or part of what it is supposed the child will be entitled to upon the death of the parent, who afterwards dies intestate. In re Allen's Estate, 56 Atl. 928, 929, 207 Pa. 325 (citing Appeal of Eshleman, 74 Pa. [24 P. F. Smith] 42); Tart v. Tart, 70 S. E. 929, 930, 154 N. C. 502, Ann. Cas. 1912A, 952; Schweitzer v. Schweitzer (Ky.) 82 S. W. 625; Bowran v. Kent, 100 N. Y. Supp. 768, 769, 51 Misc. Rep. 136; Lindsley v. McIver, 48 South. 628, 629, 57 Fla. 466; Cotton v. Citizens' Bank, 135 S. W. 340, 343, 97 Ark. 568.

An "advancement" is an irrevocable gift in præsenti of money or other property real or personal to a child by a parent to enable the child to anticipate by so much his inheritance or succession. Thompson v. Smith, 75 S. E. 1010, 160 N. C. 256.

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"An 'advancement' is that bestowment of property by one standing in loco parentis to another, in anticipation of the latter's share in the donor's estate. It may in one sense be a gift; but its treatment in law as an advancement depends on two facts: one, that the donor shall die intestate, totally or partially; the other, that the gift shall have been in fact with a view to a portion or settlement in life upon the donee." Owsley v. Owsley (Ky.) 77 S. W. 394, 396; Bowron v. Kent, 83 N. E. 472, 475, 190 N. Y. 422.

An "advancement" is a completed gift by the ancestor to be accounted by the recipient as his share or part of his share in the distribution of the estate of the ancestor, and is no part of the ancestor's estate at his death, and the advancement is deducted from the recipient's share, and, if the advancement exceeds what his share otherwise would have been, he accounts for it as the whole of his share; but he is not called on to contribute to make the other shares equal to the remainder of his advancement, and an advancement is not a loan to be repaid to the ancestor or his representative after death, nor is it a legacy paid in advance. Wentworth v. Wentworth, 78 Atl. 646, 648, 75 N. H. 547.

The word "advancement," in its limited statutory meaning, is applicable only to cases of intestacy, and to moneys advanced by a parent to a child in anticipation of such child's future share of the parent's estate. It is employed by courts of equity in a wider sense to denote money or property advanced as a satisfaction pro tanto—a general legacy given by a parent or other person standing in loco parentis to a child or grandchild. In re Cramer, 89 N. Y. Supp. 469, 470, 43 Misc. Rep. 494.

While the term "advancements" is generally used in case of intestacy, it is also applicable to wills; and, where testator's intention is clear that sums advanced should be deducted from bequests made, his intention must control. In re Bresler's Estate, 119 N. W. 1104, 1107, 155 Mich. 567.

According to Bouv. Dict., an "advancement" is "that which is given by a father to his child, or presumptive heir, by anticipation of what he might inherit." The ancestor must in his lifetime divest himself of all interest in the property set apart to the heir. It is unlike an ademption, since it concerns intestate estates only. An instrument recited that the undersigned acknowledged that their father had advanced to them specified sums, "the same to be taken out of" their respective shares at the final settlement of his estate, and bound the children to pay interest per annum during his lifetime, and that if they should fail to pay interest they should give a note for the same, and at the final settlement the money advanced with accrued interest and notes given for unpaid interest should be taken out of their respective shares, and provided that each child reserved the right to pay the sum advanced or any part thereof to the father before his death. Held, that the instrument showed an advancement by the father to his children and not a loan to them, so that the father was not liable for taxation on the sum advanced. Duckett v. Gerig, 79 N. E. 94, 95, 223 Ill. 284.

Where testator devised certain real estate to his son, charged with advancements made to him, the testator did not intend to restrict the meaning of the term "advancement" to its technical, but intended to employ it in its popular, sense. In the case of wills, when "advancements" are spoken of, the term is not taken in its technical sense. Montgomery's Trustee v. Brown, 121 S. W. 472, 475, 134 Ky. 592 (citing Barker v. Comins, 110 Mass. 477; Eisner v. Koehler [N. Y.] 1 Dem. Sur. 277; Hammett v. Hammett, 16 S. E. 293, 839, 38 S. C. 50).

A will divided the residue of the estate into shares, and gave to each of testator's children a share, directing, as to one son, that one half the share should be given to him absolutely and the other half held by the executors for him during his life, with remainder to his surviving children. The will also recited that testator had theretofore given to several of his children sums of money, and that he would probably give further sums to them, and directed that all such sums, as noted in his books, should be charged so as to make an equal division of the estate as respects the advancements. Testator's books showed certain advances of money to the son, part of whose share was held in trust, and notes of the son indorsed by testator and paid appeared among testator's records on a card system. Held that the notes shown by the card system were "advancements," within the meaning of the will, and that all the advancements to the son should be deducted from his whole share, and not from the half share given to him absolutely. In re Vilsack's Estate, 75 Atl. 604, 605, 226 Pa. 379.

Where an agreement provided that a certain trust fund should be treated as "an advancement on account of any share" testatrix's niece should acquire from testatrix's estate, such provision should be construed to refer to testatrix's death intestate, so that, she having made a will disposing of her entire estate without making any reference to such advancements, they were not chargeable against the bequest to the niece, under the rule that, if the donor disposes of his whole estate by will, the doctrine of advancements has no application, unless the will specifically refers thereto, and defines what previous gifts shall be considered as "advancements." Bowron v. Kent, 83 N. E. 472, 475, 190 N. Y. 422.

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Advance distinguished

See Advance—Advances.

Debt distinguished

Though an "advancement" is not a "debt" in any sense, testator may nevertheless impose such conditions on his devise to the beneficiary advanced as he sees proper and as are not unlawful. Montgomery's Trustee v. Brown, 121 S. W. 472, 475, 134 Ky. 592.

An "advancement" differs from a debt in that there is no enforceable liability on the part of the child to repay during the lifetime of the donor or after his death, except in the way of suffering a deduction from his distributive share. Duckett v. Gerig, 79 N. E. 94, 95, 223 Ill. 284.

Gift distinguished

An "advancement" differs from a gift in that it is charged against the child. Duckett v. Gerig, 79 N. E. 94, 95, 223 Ill. 284.

The intention which will characterize a gift as an "advancement" is the intention of the donor at the time of making the gift, expressed in the manner required by the statute, and a donor cannot change an executed gift to an advancement without the donee's consent. Bolin v. Bolin, 92 N. E. 530, 532, 245 Ill. 613.

Intent essential

To constitute an "advancement" it is necessary that the ancestor express in the gift or grant his intention that it be an advancement, or that he charge it in writing as an advancement, or that the child or descendant acknowledge in writing the gift or grant as an advancement. Lodge v. Fitch, 101 N. W. 338, 339, 72 Neb. 652; Boden v. Mier, 98 N. W. 701, 704, 71 Neb. 191 (citing Pomeroy v. Pomeroy, 67 N. W. 430, 93 Wis. 262; Bulkeley v. Noble, 19 Mass. [2 Pick.] 337; Bullard v. Bullard, 22 Mass. [5 Pick.] 527; Barton v. Rice, 39 Mass. [22 Pick.] 508).

Where decedent's son had obtained money from his father for which he gave interest-bearing notes, and paid interest from time to time for several years until the notes were surrendered to him by his father, the transaction was a loan, and, nothing showing the intent to convert the loan into an "advancement," the amount cannot be set off against his share of the estate. Even if the original loan to a son was intended to be an advancement, his father's subsequent conduct in returning to the son the notes he had taken, and declarations consistent with an intent to treat the notes as no longer a part of the estate, would prevent their being treated as an advancement. In re Bennington, 124 N. Y. Supp. 829, 830, 67 Misc. Rep. 363.

Transfer of real estate

A voluntary conveyance of property by a parent to a child, expressed in the deed as made in consideration of love and affection, is presumed to be an "advancement." Seed v. Jennings, 83 Pac. 872, 873, 47 Or. 464.

Where a deed is taken in the name of one whom the person paying the purchase money is under a legal or moral obligation to provide for, as a wife or child, the presumption is that the purchase was intended as an "advancement" or "settlement" and not in trust for the person furnishing the money, and evidence to overcome this presumption must be of the most satisfactory kind. De Roboam v. Schmidtlin, 92 Pac. 1082, 1083, 50 Or. 388.

Under Rev. St. 1899, §§ 2913, 2914, providing that when any of the children of an intestate shall have received in his lifetime any property by way of advancement shall choose to come into partition, such advancement shall be brought into hotchpot, etc., the doctrine of bringing "advancements," which are money or property, given to a child by the father, or any one in loco parentis, in anticipation of inheritance, into hotchpot, applies only in cases of intestacy. In re Lear's Estate, 124 S. W. 592, 594, 146 Mo. App. 642.

ADVANTAGE

See Prospective Advantage.

ADVANTAGEOUS

A contract which provides that a sale of real estate shall be made when "advantageous" does not necessarily mean that a sale should only be made when profitable as a sale might be advantageous, as is held in this case, when it will prevent the entailment of further losses to the parties. Mariner v. Ingraham, 127 Ill. App. 542, 547.

ADVENTURE

See Joint Adventure.

ADVERSE

The word "adverse" is defined as "opposite," "hurtful," "unfavorable"; and as synonyms of "prejudicial" are given "hurtful," "injurious," "disadvantageous." Prunty v. Consolidated Fuel & Light Co., 108 Pac. 802, 803, 82 Kan. 541.

ADVERSE CLAIM

A claim, by one who acquired possession of property of a bankrupt before the filing of the petition in bankruptcy, that such property was delivered to him in part payment of a debt, and that he had no reasonable cause to believe that a preference was thereby intended, is clearly an "adverse claim," which a referee has no jurisdiction to summarily determine on its merits, except by the claimant's consent. In re Adams, 130 Fed. 788, 789 (citing In re Hartman, 121 Fed. 940, 10 Am. Bankr. Rep. 387).

An "adverse claim" to an interest in real property, within B. & C. Comp. § 516, providing that any person claiming such an interest in land not in the actual possession of an-

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other may sue in equity another who claims an interest therein adverse to him, is the expressed assertion of a right by a claimant of suitable age and sufficient intelligence; and infants who have attained the age of 15 years may be proceeded against under such section for the purpose of determining such adverse claim. Harding v. Harding, 80 Pac. 97, 98, 46 Or. 178.

Where a grantor in a deed containing a condition subsequent re-enters for the grantee's breach of the condition, and is in possession at the time of an action by him to cancel the conveyance for the violation of the condition, the action is brought for the purpose of incidentally compelling the determination of a hostile claim within Code Civ. Proc. §§ 1638–1650, authorizing actions to compel the determination of claims to real estate, and defendant may not complain on the ground that the remedy of the grantor is by ejectment. Norton v. Valentine, 135 N. Y. Supp. 1084, 1085, 151 App. Div. 392.

A claim may be "adverse" within the meaning of Pub. Acts 1893, c. 66 (Gen. St. 1902, § 4053), authorizing any person claiming an interest in real estate to bring a suit against any person or persons claiming an adverse interest, although no attempt has been made to enforce the claim. To set it up is sufficient. Dawson v. Town of Orange, 61 Atl. 101, 102, 78 Conn. 96.

ADVERSE CLAIMANT

A surety on a bail bond of a bankrupt with whom the bankrupt, before the commencement of the bankruptcy proceedings, deposited money to indemnify him against liability, is an "adverse claimant" of such money, within the meaning of Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552, and the court of bankruptcy is without jurisdiction to proceed against him summarily therefor without his consent. In re Horgan, 158 Fed. 774, 776, 86 C. C. A. 130.

Where a petition was filed by the trustee of a bankrupt corporation against two of its officers in their official capacity to compel them to pay over money alleged to belong to the corporation, and received by them as the proceeds of a sale of certain of the corporation's stock, and also for an amount assessed against them for unpaid stock, and it appeared that they had controlled the corporation absolutely from its inception, and that the other incorporators and first board of directors were but their dummies, they could not be regarded as "adverse claimants" in determining the jurisdiction of the bankruptcy court. In re Kornit Mfg. Co., 192 F. 392, 396.

ADVERSE PARTY

The "adverse party" on whom a notice of appeal must be served is the party who appears by the record of the proceedings in which the appeal is taken to be adverse. McKenzie v. Hill, 98 Pac. 55, 56, 9 Cal. App. 78.

An "adverse party" is a natural or an artificial person by or against whom an action or suit is brought, and whose interest in relation to the judgment or decree rendered therein is in conflict with a modification or reversal thereof by an appeal therefrom. Kramer v. Marsh, 90 Pac. 583, 49 Or. 417.

The term "adverse party," as used in a statute providing that the service of notice of appeal must be made on the adverse party or his attorney, means every party whose interest in the subject-matter would be affected by a modification or reversal of the judgment or order appealed from, irrespective of whether he is a plaintiff, defendant, or intervener. Titiman v. Alamance Min. Co., 74 Pac. 529, 9 Idaho, 240; Bell v. San Francisco Sav. Union, 94 Pac. 225, 228, 153 Cal. 64 (quoting and adopting the definition in Senter v. De Bernal, 38 Cal. 637); Diamond Bank v. Van Meter, 108 Pac. 1042, 18 Idaho, 243, Ann. Cas. 1912A, 1; Crouch v. Dakota, W. & M. R. R. Co., 117 N. W. 145, 146, 22 S. D. 263; Griffin v. Southern Pac. Co., 87 Pac. 1091, 1092, 31 Utah, 296 (citing Commercial Nat. Bank of Ogden v. United States Savings, Loan & Building Co., 44 Pac. 1043, 13 Utah, 189; Rache v. Stanley, 49 Pac. 648, 15 Utah, 314; Stephens v. Stevens, 75 Pac. 619, 27 Utah, 261; Nelden-Judson Drug Co. v. Commercial Nat. Bank of Ogden, 86 Pac. 498, 31 Utah, 42).

"Adverse parties," within Laws 1899, p. 83, c. 62, providing for the service of notice of appeal on adverse parties, are all parties whose interests require that the order, judgment, or decree appealed from be sustained. It is immaterial whether such party appeared as one of the original parties to the action, or was brought in by order of the court. Stephens v. Stevens, 75 Pac. 619, 620, 27 Utah, 261.

The term "adverse party," as used in Rev. St. 1898, § 3049, relating to the service of notice of appeal to the Supreme Court, does not mean merely the opposite party on the record. A person may be an appellant or an adverse party, within the meaning of the statute, and his name not appear in the litigation resulting in the decision. If he has a substantial interest adverse to the decision, that is all that is required for an appellant, whether it be direct, or by privity created between himself and the person against whom the decision was rendered, by reason of succeeding to his rights after the decision or subsequent to the commencement of the action. Harrigan v. Gilchrist, 99 N. W. 909, 926, 121 Wis. 127 (citing Rogers v. Shove, 73 N. W. 989, 98 Wis. 271; Crowns v. Forest Land Co., 74 N. W. 546, 99 Wis. 103; Hiscock v. Phelps [N. Y.] 2 Lans. 106; Cotes v. Carroll [N. Y.] 28 How. Prac. 436; Barnes v. Stoughton [N. Y.] 6 Hun, 254;

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Pickersgill v. Read [N. Y.] 7 Hun, 636; Baylies, New Trials & Appeals [2d Ed.] 145).

The plaintiff serving an amended complaint after answer must be deemed an "adverse party," within Code Civ. Proc. § 798, providing that, if service on an adverse party is made through the post office, the time within which such adverse party is required to do an act is double the time specified. Bucklin v. Buffalo, A. & A. R. Co., 85 N. Y. Supp. 114, 115, 41 Misc. Rep. 557. "The defendant who serves his answer thereby affords occasion to the plaintiff to take such action thereupon as he may be advised, to reply, etc. At this stage the plaintiff is the 'adverse party' who has afforded to him double the time prescribed by the Code or the rules of practice in case the service had been personal. Certainly the defendant, perforce of his original answer, is not an 'adverse party' when he serves an amended answer. He may become an 'adverse party,' but only when, in sequence to some action of the plaintiff, he takes counter action. The term 'adverse' is relative to the action of the other party." Schlesinger v. Borough Bank of Brooklyn, 98 N. Y. Supp., 136, 141, 112 App. Div. 121.

Code Civ. Proc. § 783, makes the provisions of the Code relative to appeals applicable to certiorari proceedings except so far as inconsistent. By sections 460 and 462 a final order, affecting a substantial right, made in a special proceeding, may be reviewed. Section 752 declares that the party prosecuting a special proceeding may be named as the plaintiff and the adverse party the defendant. Held, that the "adverse party" in a special proceeding embraces any person whose personal or property rights may be adversely affected by the judgment or final relief sought in a certiorari proceeding, as well as the court, tribunal, or officer whose official acts are challenged, so that, where such a proceeding to review the validity of a liquor election sought as a part of the relief prayed the cancellation of licenses issued to third persons, they were "adverse parties," though not originally named as defendants in the application for the writ, or the writ itself, and, their licenses having been canceled by the court, they were "parties aggrieved" and entitled to appeal. State ex rel. Cook v. Board of Com'rs of Tripp County, 137 N. W. 354, 358, 29 S. D. 358.

An "adverse party," within Rem. & Bal. Code, § 1721, requiring the giving of a bond on appeal to the adverse party, is one whose interests will be affected by a reversal or modification of the judgment appealed from; and where the court, in a suit by individuals and a corporation to quiet title, quieted title in the corporation against defendant, without determining that the individuals had any rights in the land, a bond on defendant's appeal, making the individuals obligees, is so defective as to amount to no bond. Bruhn v. Steffins, 119 Pac. 29, 66 Wash. 144.

Where R. & C. were made defendants in an action to recover for labor and to foreclose a lien, and facts are not alleged showing an indebtedness due said R. & C., or that they claimed or were entitled to a lien, and they filed no pleading in said cause or set forth their lien in any manner, and the court made no finding in their favor, or against them, and the judgment in no way granted them any right or gave them anything or denied them any claim or right, and it affirmatively appears from the record that such parties would not be prejudicially affected by a reversal of the judgment, held that, even though they appeared by general appearance only in said action, they were not entitled to any notice of an appeal from the judgment. Nelson Bennett Co. v. Twin Falls Land & Water Co., 92 Pac. 980, 981, 13 Idaho, 767, 13 Ann. Cas. 172 (citing 1 Words and Phrases, p. 224).

Under General Corporation Law (Laws 1892, c. 687) § 27, giving the Supreme Court jurisdiction to review elections of any corporation on notice being given to the "adverse party or to those to be affected thereby," where a suit is brought to review an election of directors of a mutual insurance organization having over 9,000 policy holders, a notice to the corporation itself and to the members of the board of directors, the legality of whose election is challenged, is sufficient without notice to the policy holders. In re Empire State Supreme Lodge of D. of H., 103 N. Y. Supp. 465, 469, 53 Misc. Rep. 344.

A codefendant was an "adverse party" who should have been served with notice of appeal from a judgment for plaintiff in an action to specifically enforce a contract to sell land, where the court found that a defendant purchased from the codefendant who had agreed to convey the land to plaintiff and decreed the codefendant to be the owner and holder of a note and mortgage given by defendants to the codefendant for part of price of the purchase, and that plaintiff pay a certain sum to codefendant, as a condition for the specific performance and satisfaction of the mortgage. Niles v. Gonzalez, 92 Pac. 74, 75, 152 Cal. 90.

Codefendants

The expression "adverse party" is held to include all parties who have an interest in opposing the object sought to be accomplished by an appeal. Under Rev. Codes, § 7100, requiring the service of notice of appeal on the adverse party or his attorney, two defendants represented by the same counsel who appeal on the same grounds from a judgment against them, and from an order refusing to set aside verdicts against each, need not serve the notice of appeal on each other. Cummings v. Reins Copper Co., 107 Pac. 905, 907, 40 Mont. 599.

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Plaintiff, suing F., D., and C. on the theory that F. and D. held money in trust for themselves and for plaintiff and C., procured, on his application in which C. joined, the appointment of a receiver of the fund. F. and D. appealed from the order. Held that C., being interested in the fund, was an "adverse party" within Code Civ. Proc. § 940, providing that notice of appeal must be served on the "adverse party." Ford v. Cannon, 89 Pac. 1071, 1072, 5 Cal. App. 185.

Where judgment was rendered against several defendants, one of whom contended that its codefendants alone were liable, which contention, if sustained, would relieve it of all liability, and cast the burden of the judgment wholly on such codefendants without right of contribution, the latter were "adverse parties" within the meaning of Code Civ. Proc. § 659, requiring notice of motion for new trial to be served on the adverse party. Ford & Sanborn Co. v. Braslan Seed Growers' Co., 103 Pac. 946, 947, 10 Cal. App. 762.

Where a joint judgment is rendered against two or more parties and an appeal is taken by one of them, all other parties against whom such judgment was rendered are "adverse parties" within Rev. Codes, § 4808, providing that an appeal is taken by certain acts, including the service of notice of appeal on the adverse party, or his attorney, and notice of appeal must be served upon each to give the Supreme Court jurisdiction. Diamond Bank v. Van Meter, 108 Pac. 1042, 1044, 18 Idaho, 243, 21 Ann. Cas. 1273.

Code, § 3133, declares that a supersedeas may be issued on an application in forma pauperis only when authorized by an order made by the judge on notice to the "adverse party" of such application. Held, that the "adverse party," as there used, meant a party adverse to the plaintiff or parties on opposite sides in the suit, and hence, where several defendants were sued, one of them was not entitled to a supersedeas on notice to the other as "the adverse party," though the latter's interest was adverse as between himself and the other defendant. Campbell v. Boulton, 62 Tenn. 354, 356.

Executor

In an action by an executor against W. to collect money, notice of motion for new trial or of appeal need not be served on another executor made a defendant merely because he would not join as plaintiff, and who was not mentioned in the judgment, which was exclusively in favor of plaintiff and against W.; he not being an "adverse party," and it not being possible for him to be adversely affected by a new trial or a reversal. Sprague v. Walton, 78 Pac. 645, 646, 145 Cal. 228.

Heir or devisee

In a hearing on claims in probate court, an heir is not an "adverse party," in the practice sense; the personal representative is such party as to the claimant. In re Koch's Estate, 134 N. W. 663, 672, 148 Wis. 548.

On application for partial distribution of the estate of a decedent, persons claiming as devisees under the will left by decedent and appearing in that capacity to contest the petition for partial distribution were "adverse parties," within a statute declaring that a draft of the bill of exceptions or a copy thereof must, within 10 days after notice of entry of judgment, be served upon the "adverse party." In re Young's Estate, 85 Pac. 145, 149 Cal. 173.

Intervener

The term "adverse party," within Rev. St. 1887, § 4229, authorizing the court, after notice to the adverse party, to relieve a party from a judgment, etc., taken against him through mistake, etc., means a party to the original action or proceeding, or one who has been brought into the case by order of the court, or who has been allowed by order of the court to intervene or become a party plaintiff or defendant in the action as originally instituted. Kerns v. Morgan, 83 Pac. 954, 957, 11 Idaho, 572.

Where, in an action for the possession of personal property, an intervener intervenes and denies the complaint, and alleges that intervener was the original purchaser of the property from plaintiff under a conditional sale, and that there has been no violation of the terms of the contract, and seeks damages, and after the evidence is in the court sustains a motion to nonsuit the intervener and then sustains a motion made by the defendant and intervener for a nonsuit against the plaintiff, held, that the intervener is an "adverse party" within the purview and meaning of section 4808, Rev. Codes, and that notice of appeal should have been served on the intervener, and that for a failure to do so the appeal must be dismissed. Berlin Mach. Works v. Bradford-Kennedy Co., 123 Pac. 637, 638, 21 Idaho, 669.

Mortgage foreclosure

Where, in an action by an assignee to foreclose mortgages, in which the mortgagor, mortgagees, and transferee of the real estate were parties defendant, the judgment against the mortgagor and mortgagees was for only such deficiency as existed after applying the proceeds of the sale of the realty, the mortgagor and mortgagees were "adverse parties" to the transferee, within Code Civ. Proc. § 659, so as to require such transferee to serve his notice of intention to move for a new trial upon them, since the result of sustaining his contention that the land should not be subject to sale, after payment of a judgment against his codefendants, would increase the deficiency judgment against them. National Bank of California at Los An-

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geles v. Mulford, 120 Pac. 446, 448, 17 Cal. App. 551.

After a judgment against D. and property sold on execution, D. and her husband mortgaged the property to plaintiff, who brought suit to foreclose the mortgage and have equitable relief in aid thereof, making the persons claiming under the execution sale parties. D. defaulted in the action and judgment was taken against her, and subsequently judgment was rendered for plaintiff on the merits against the other defendants. After the commencement of the action, a defendant claiming under the execution sale conveyed the property to F., who was not made a party defendant to the action. Held, that there was a complete severance of the action as between D. and such defendant, and on appeal by defendant, F. and D. were not adverse parties, within the meaning of Rev. Codes, § 7100, which requires that a notice of appeal shall be served on the adverse party, as an "adverse party," within the meaning of that statute, is one who has an interest in opposing the object sought to be accomplished by the appeal. Jenkins v. Carroll, 112 Pac. 1064, 1067, 42 Mont. 302.

Mortgagee

A mortgagee who is made a defendant to an action on a policy of fire insurance is an "adverse party" to an appeal by the insurance company, within the statute requiring notice of appeal from a judgment to be served on the "adverse party," though such mortgagee never answered or appeared in the action. Johnson v. Phenix Ins. Co., 80 Pac. 719, 721, 146 Cal. 571.

As witnesses

The word "adverse," as used in Ballinger's Ann. Codes & St. § 5991, providing that in an action where the "adverse" party sues or defends as executor, administrator, or legal representative of any deceased person, etc., the party in interest shall not be admitted to testify in his own behalf as to transactions made with decedents, etc., does not refer to parties to the action in the sense of either party or both parties. "Adverse," as here used, refers more particularly to the one party or the opposing party who may sue or defend in a representative capacity, and the use of the word "adverse" is made plain when the language is transposed, as: A party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction with a deceased person, where the "adverse" party sues or defends as executor; and the statute does not disqualify an interested witness on the part of the estate; hence, in an action against a widow as administrator of her deceased husband on a note indorsed by him, the widow is competent to testify as to what took place between her husband and plaintiff in her presence at the time the indorsement was made. O'Connor v. Slatter, 89 Pac. 885, 886, 46 Wash. 308.

Where plaintiff's assignor of a contract for the sale of land sued on was made a defendant with the purchaser, and admitted the facts alleged in the complaint, he was an "adverse party" as to the purchaser, and was therefore subject to cross-examination as such, under St. 1898, § 4068, by the purchaser. O'Day v. Meyers, 133 N. W. 605, 608, 147 Wis. 549.

An actuary of a defendant bank, though an officer therein, is not an "adverse party" to plaintiff, within Rev. Laws, c. 175, § 22, conferring upon either party to a suit the right to call and cross-examine his adversary. Reed v. Mattapan Deposit & Trust Co., 84 N. E. 469, 470, 198 Mass. 306.

ADVERSE POSSESSION

See Peaceable and Adverse Possession; Title by Adverse Possession.

See, also, Actual Possession; Color of Title; Fitful Acts of Ownership; Hostile Possession; Peaceable Possession; Possession; Prescription; Substantial Inclosure.

"Adverse possession" is defined to be an actual and visible appropriation of land commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another. Montoya v. Unknown Heirs of Vigil, 120 Pac. 676, 690, 16 N. M. 349 (quoting and applying Comp. Laws 1897, § 2938); White v. Pingenot, 90 S. W. 672, 674, 49 Tex. Civ. App. 641; Holland v. Ferris (Tex.) 107 S. W. 102, 104; Costello v. Muheim, 84 Pac. 906, 907, 9 Ariz. 422 (quoting Rev. St. 1901, § 2944); Jenkins v. Maxwell Land Grant Co., 107 Pac. 739, 741, 15 N. M. 281. Every possession is adverse which is not in subservience to the title of another, either by a direct acknowledgment or an open or tacit disavowal of right on the part of the occupant, and it is in the latter case only that the law adjudges the possession of one to the benefit of another. Davis v. Waggoner, 83 N. E. 381, 383, 84 N. E. 1105, 42 Ind. App. 115 (citing Rennert v. Shirk, 72 N. E. 546, 163 Ind. 542; Pittsburgh, C., C. & St. L. R. Co. v. Stickley, 58 N. E. 192, 155 Ind. 312; Webb v. Rhodes, 61 N. E. 735, 28 Ind. App. 393; Burr v. Smith, 53 N. E. 469, 152 Ind. 469).

"Adverse possession" is the occupancy of real estate by a person holding it in opposition to the rights of all others, and, to so constitute a valid adverse possession, the possession must be hostile to the rights of all others and under claim of right in its very inception, and must be continuous. Willette v. Gifford, 92 N. E. 186, 187, 46 Ind. App. 185.

Acts of ownership exercised for a sufficient length of time to create a presumption of a valid grant constitute a technical "adverse possession." Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich, 116 N. Y. Supp. 532, 537, 132 App. Div. 118.

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"Adverse possession" is the open and hostile possession of land under a claim of title to the exclusion of the true owner, which if continued for the statutory period ripens into an actual title. Scallon v. Manhattan Ry. Co., 78 N. E. 284, 285, 185 N. Y. 359, 7 Ann. Cas. 168.

To constitute "adverse possession," there must be an open, notorious, exclusive, and continuous possession, hostile and under claim of title. Chastang v. Chastang, 37 South. 799, 801, 802, 141 Ala. 451, 109 Am. St. Rep. 45; Hunter v. Malone, 108 S. W. 709, 713, 49 Tex. Civ. App. 116.

"The 'adverse possession' which is required to constitute a bar to the assertion of a legal title by the owner of it must include these five elements: It must be (1) hostile or adverse; (2) actual; (3) visible, notorious and exclusive; (4) continuous; and (5) under a claim or color of title." Page v. Bellamy, 78 N. E. 938, 939, 222 Ill. 556 (quoting and adopting definition in Zirngibl v. Calumet & C. Canal & Dock Co., 42 N. E. 431, 157 Ill. 430); McCaslin v. State, 75 N. E. 844, 845, 38 Ind. App. 184 (quoting and adopting definition in Worthley v. Burbanks, 45 N. E. 779, 146 Ind. 534).

In order to establish a title to land by "adverse possession," it must be shown that for a period of 10 years the claimant and those under whom he claims held a hostile possession under claim of right that was actual, exclusive, open, notorious, and continuous. McCreary v. Jackson Lumber Co., 41 South. 822, 823, 148 Ala. 247 (citing Chastang v. Chastang, 37 South. 799, 141 Ala. 451, 109 Am. St. Rep. 45; Lawrence v. Alabama State Land Co., 41 South. 612, 144 Ala. 524).

"Adverse possession," in its legal sense, arises where one has not for 20 years surrendered control of the premises. Willin v. Roe (Del.) 78 Atl. 773, 775.

To render possession "adverse," it must not only be actual, but open, continuous, notorious, and hostile, and unmistakably indicate assertion of ownership. Enderlin Inv. Co. v. Nordhagen, 123 N. W. 390, 392, 18 N. D. 517.

"Adverse possession" of land is the actual, visible, and exclusive appropriation of the land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of his rights as to give him a cause of action, and the possession must be hostile, actual, open, notorious, exclusive, continuous, and under a claim of right. Bryant v. Cadle, 104 Pac. 23, 27, 18 Wyo. 64.

To constitute "adverse possession" the possession must be by actual occupation open and notorious, not clandestine; it must be hostile to the plaintiff's title; it must be held under a claim of right exclusive of any other right as one's own; it must be continuous and uninterrupted for a period of five years prior to the commencement of the action; and since the passage of Code Civ. Proc. 1878, proviso to section 325, there must be payment of taxes. Bashore v. Mooney, 87 Pac. 553, 555, 4 Cal. App. 276 (citing Unger v. Mooney, 63 Cal. 595, 49 Am. Rep. 100, distinguishing Churchill v. Louie, 67 Pac. 1052, 135 Cal. 608).

"Adverse possession" sufficient to vest title must consist of actual, open, and notorious occupation, hostile to plaintiff's title, held under a claim of title exclusive of any other right as the holder's own property, continuous and uninterrupted for five years prior to the commencement of the action, and payment of taxes. Steckter v. Ewing, 93 Pac. 286, 288, 6 Cal. App. 761.

Possession to be of any value to vest a right, or bar a remedy, must be actual, continued, visible, notorious, hostile, and open. One having and holding land under the belief that it is vacant and public land with the intention of acquiring title from the state is not holding adversely to the true owner, and such possession will not ripen into title by "adverse possession." Jones v. Weaver (Tex.) 122 S. W. 619, 621 (quoting and adopting definition in Bracken v. Jones, 63 Tex. 184.)

To constitute "adverse possession" there must be a claim of title and continuous, open, and notorious possession for the period prescribed by law. Frick v. Harper, 46 South. 453, 155 Ala. 231.

To support a title by "adverse holding," the possession must have been continuous, actual, open, and peaceable for at least 15 years. Young v. Pace, 140 S. W. 555, 145 Ky. 405.

Possession, to be "adverse," must be visible, open, exclusive, hostile in its inception, and so continue for 20 years. Horn v. Metzger, 84 N. E. 893, 895, 234 Ill. 240.

In order to constitute "adverse possession" there must be actual, visible, notorious, distinct, and hostile possession of the premises, cultivating, using, or enjoying the same for the statutory period. Hess v. Webb, 113 S. W. 618, 623. The possession must be such as will operate as unequivocal notice to the true owner that some one is in possession of his land in hostility to his title. Young v. Grieb, 104 N. W. 131, 95 Minn. 396.

"Adverse possession" consists not only in the claimant holding possession of a boundary of land for 15 years, but requires that such possession be adverse, open, and continuous to a well-defined marked boundary. Hughes v. Owens (Ky.) 92 S. W. 595, 596.

"Adversary possession" must be actual, exclusive, open, and notorious and continued for the statutory period, accompanied by bona fide claim of title against all others, and mere naked possession without claim of

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right, however long continued, cannot ripen into a good title, but is regarded as for the benefit of the true owner. Yellow Poplar Lumber Co. v. Thompson's Heirs, 62 S. E. 358, 362, 108 Va. 612.

"An 'adverse possession' ought to be such as to challenge the right of all the world; but when an occupant evacuates the place, and suffers it to go to wreck, he hauls down his colors, and the challenge is withdrawn." Adverse possession "is to be made out by acts which are open, visible, notorious, and continuous, and does not depend upon the secret purpose and intention of the intruder that he will return at his convenience, sooner or later, and reoccupy the land." Continuous possession for five years, and after an abandonment for several years a possession for six months, followed by occupancy of a storehouse for several years, but less than seven, did not make out that continuous "adverse possession" sufficient to create title by prescription under color. Clark v. White, 48 S. E. 357, 358, 120 Ga. 957 (quoting and adopting definitions in Stephens v. Leach, 19 Pa. 262; Denham v. Holeman, 26 Ga. 183, 71 Am. Dec. 198).

"Adverse possession" rests upon the presumed acquiescence of the party against whom it is held, and such acquiescence presumes knowledge. All that the law requires is that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and adverse claim of title. Lawrence v. Alabama State Land Co., 41 South. 612, 614, 144 Ala. 524 (citing Foulke v. Bond, 41 N. J. Law, 547; Farley v. Smith, 39 Ala. 44; May v. Chapman, 16 Mees. & W. 355; Wells v. Sheerer, 78 Ala. 142; Woods v. Montevallo Coal & Transp. Co., 3 South. 475, 84 Ala. 560, 5 Am. St. Rep. 393).

Exercising dominion over the thing used, taking that use and profit it is capable of yielding in its present condition, such acts being so repeated as to show that they are done in the character of owner, and not of an occasional trespasser, constitute "adverse possession." Every possession, then, is "adverse" which is not subservient to the title of another either by direct acknowledgment of some kind or an open or tacit disavowal or right on the part of the occupant, and it is in the latter case only that the law adjudges the possession of one to the benefit of another. The adverse intention of the tenant, in the absence of proof of his admissions to the contrary or other proof of his possession, was only permissive, or in fact without hostile intent, may be generally evidenced by the character of his possession and acts of ownership. If these are sufficiently definite, open, and exclusive, it will be presumed that they are done with the intent to appropriate the land. By such acts it is said the party proclaims to the public that he asserts an exclusive ownership over the land. Rennert v. Shirk, 72 N. E. 546, 548, 163 Ind. 542 (quoting and adopting definition in Dyer v. Eldridge, 36 N. E. 522, 136 Ind. 654).

"Adverse possession" is predicable only of the title to land or other thing in controversy. It is the possession and enjoyment of real property or any estate lying in grant continued for a length of time and held adversely and in denial and opposition to the title of another claimant. It is held in opposition instead of in subordination to the true title, and an actual, visible, and exclusive appropriation of land commenced and continued under a claim of right with the intent to assert such claim against the true owner and accompanied by such an invasion of the rights of the opposite party as to give him a right of action. The term relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. Berry v. W. M. Ritter Lumber Co., 54 S. E. 278, 282, 141 N. C. 386 (citing Black's Dict.; Alexander v. Polk, 39 Miss. 755; Revisal 1905, § 386).

Code Civ. Proc. § 551, provides that where there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but none founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held "adversely." Van Horn v. Stuyvesant, 100 N. Y. Supp. 547, 551, 50 Misc. Rep. 432.

Rev. St. 1895, art. 3343, limits the bringing of actions for the recovery of land held by another under "peaceable and adverse possession" to 10 years. Article 4348 defines "peaceable possession" as "continuous and not interrupted by adverse suit." Article 3349 defines "adverse possession" as the visible appropriation of land held under a claim inconsistent and hostile to another's claim. Held, that where defendant claimed land by the limitation of the statute, it was error prejudicial to him to instruct the jury that to recover his possession must have been "peaceable, distinct, notorious, continued, and hostile" and that his appropriation must have been "actual, open, and peaceable under a claim inconsistent with the rights of the true owner, and must disseise the owner." Logan v. Meads, 98 S. W. 210, 212, 43 Tex. Civ. App. 477.

Where one entered into possession of land not knowing where the boundaries were, or who, if any one, owned it, never had it listed on the assessment books or paid any taxes, but simply claimed that he had more right to it than anybody else, his possession was not under a claim adverse to the true owner so as to give title by "adverse possession."

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Heckescher v. Cooper, 101 S. W. 658, 662, 203 Mo. 278.

Defendants in error, being in actual possession of part of the tract by their tenant living in a house built upon the tract holding under color of title and claiming the land as their own at the time the timber was felled and the logs taken away, their possession extended to the limits or boundaries contained in their title papers which covered the space where the trees grew. This possession was an "effective possession" or "virtual possession" and was an "adverse possession" in the sense in which that term is used in the law. Lieberman, Loveman & O'Brien v. Clark, 85 S. W. 258, 264, 114 Tenn. 117, 69 L. R. A. 732.

A mortgage foreclosure action was prosecuted to judgment of foreclosure and sale, but no sale was had. Subsequently the mortgagee entered into possession of the premises, and held the same for over 25 years, continuously cultivating and improving the same as owners usually do, with the knowledge and acquiescence of the mortgagor, who made no claim adversely to such occupancy, and who did not pay any taxes during such period. Held that, under Code Civ. Proc. § 379, providing that an action to redeem from a mortgage may be maintained by the mortgagor against the mortgagee in possession unless he has maintained an "adverse" possession for 20 years, the mortgagor might sue to redeem; the word "adverse," in view of the judicial decisions rendered prior to the adoption of the section, being used in its ordinary meaning. Becker v. McCrea, 86 N. E. 463, 465, 193 N. Y. 423, 23 L. R. A. (N. S.) 754.

Actual occupation

"Adverse possession" consists in actual possession with intent to hold to the exclusion of others and is denoted by making the ordinary use of which the property is susceptible and taking the usual profits. Locklear v. Savage, 74 S. E. 347, 348, 159 N. C. 236.

One who purchases land adjoining his farm and clears, fences, and attaches, the greater portion of the same to his home place, and claims to have a definite and well-marked boundary, remaining in actual and adverse possession of the tract for more than 15 years, acquires "title by adverse possession." King v. See (Ky.) 87 S. W. 758. But the possession may be had through a tenant. Willin v. Roe (Del.) 78 Atl. 773, 775.

One holding open "adverse possession" of land without color of title, but by actual possession within an inclosure, for more than 30 years, is entitled to a decree quieting the title as against one claiming under an agreement whereby another agreed to enter under the laws of the United States the land for a homestead for his benefit. Hardy v. Samuels, 122 S. W. 654, 655, 92 Ark. 289.

Possession, to be "adverse" within Rev. St. 1895, art. 3349, defining it as the actual and visible appropriation of land, commenced and continued under a claim of right, inconsistent with, and hostile to, the claim of another, must be actual, continued, visible, notorious, distinct, and hostile, and mere occasional grazing is not sufficient, but continued cultivation is sufficient, as well as any visible and notorious acts evidencing an intention to claim ownership and possession, and an inclosure is only an act indicative of possession and claim of ownership. Stevens v. Pedregon, 140 S. W. 236, 239.

No particular acts are necessary in order that "adverse possession" may be actual; any visible or notorious acts clearly showing an intention to claim by adverse possession being sufficient. McComb v. Saxe, 122 S. W. 987, 92 Ark. 321.

Under the rule that "adverse possession" to ripen into title must be open, continuous, notorious, and to a well-defined boundary, the occupation of land by tenants for a few years who worked on adjoining land, the occasional cutting of small timber for mine props, and the taking of tan bark therefrom, together with the payment of the taxes, was insufficient to establish title by "adverse possession." Mahoning Coal Co. v. Dowling (Ky.) 124 S. W. 370, 372.

Under Rev. St. 1895, art. 3349, defining "adverse possession" as an actual and visible appropriation of the land commenced and continued under a claim of right, one claiming adverse possession under a junior title overlapping an older survey must show an actual and visible appropriation of at least some part of the junior survey. Lake v. Earnest, 116 S. W. 865, 868, 53 Tex. Civ. App. 555.

Where defendant and his grantor occupied up to a division fence, and improved the ground to such line exclusively for 40 years, such occupancy constituted "adverse possession" sufficient to vest title up to the fence. Bayhouse v. Urquides, 105 Pac. 1066, 1068, 17 Idaho, 286.

In 1872 a grantee in a warranty deed of 400 acres in one tract entered into possession and cleared a part and claimed the whole. In 1879 he conveyed the entire tract to his son, who for more than 10 years actually claimed title to the whole and lived thereon and cultivated a part thereof. He obtained from another part his rails for his entire farm, and he also cut and sawed timber therefrom, and he paid taxes on the whole tract. His successors in title paid taxes. Held to establish title by "adverse possession." Nall v. Conover, 122 S. W. 1039, 1043, 223 Mo. 477.

Color of title

"Adverse possession," to be effective, must not only be hostile to the title of the

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true owner, but must be either under a claim of right or under some color of title. Mere naked possession or occupancy, no matter how long, without a claim of right or color of title, cannot ripen into a good title, but must be regarded as being an occupancy for the use and benefit of the true owner. To constitute the basis of adverse possession the entry must be accompanied by a claim of right. Wade v. Crouch, 78 Pac. 91, 92, 14 Okl. 593.

Color of title is not necessary to give title by "adverse possession," but it is necessary to extend the title acquired beyond the limits of the actual possession. Actual possession of part of a tract, with color of title for the whole tract, carries the possession to the limits of the land described in the deed giving color. Bradbury v. Dumond, 96 S. W. 390, 391, 80 Ark. 82, 11 L. R. A. (N. S.) 772.

To constitute an "adverse possession," there must be a holding under claim of title and with an unconditional intent to hold the land against all the world. Stout v. Michelbook, 114 Pac. 929, 930, 58 Or. 372.

To constitute the "adverse possession" described in Code Civ. Proc. § 47, providing that when it shall appear that an occupant entered into possession under claim of title, founding such claim on a written instrument as being a conveyance, and there has been a continuous occupation, the premises shall be deemed to have been held adversely, the essential requirement seems to be that the party shall enter under a claim of title exclusive of any other right, founding such claim upon a written instrument. A tax deed under which possession is taken is sufficient color of title, though invalid. Murphy v. Dafoe, 99 N. W. 86, 88, 18 S. D. 42.

Code Civ. Proc. §§ 369, 370, provide that possession shall be deemed "adverse" where one claiming title, exclusive of any other right, founded on a written instrument or a judgment, enters possession of land, protects it with a substantial inclosure, and occupies it continuously for 20 years under the same claim. Held, that where inclosed land was deeded to one in 1866, the conveyance being duly recorded, and the grantee entered into possession under an exclusive claim of title founded on such deed, and improved the premises and held possession until 1888, when he died intestate, the land descending to his only son and heir at law, who went into possession under such conveyance, and no claim of ownership had been made adversely since 1866, there was "adverse possession" within the meaning of the Code. Freedman v. Oppenheim, 79 N. E. 841, 843, 187 N. Y. 101, 116 Am. St. Rep. 595.

Where a remainderman in expectancy took a deed in January, 1902, from the life tenant and at a time when it could not be known or foreseen whether the life estate would mature into a fee-simple title or the remaindermen would ever acquire any title or interest in the estate, and the deed thus executed purported to convey an absolute and fee-simple title to the estate, and the purchaser took such conveyance, believing she was acquiring an absolute estate, and entered into the possession of the property thereunder and continued in the open, exclusive, and notorious possession thereof, occupying and cultivating the same continuously until the commencement of an action by the other remaindermen in expectancy in November, 1908, paying all taxes and assessments thereon, and making improvements, held, that such facts constitute color of title and "adverse possession" within the meaning of sections 4038, 4039, and 4040, Rev. Codes, and bar any right of recovery on the part of the other remaindermen in expectancy. Wilson v. Linder, 123 Pac. 487, 490, 491, 21 Idaho, 576, 42 L. R. A. (N. S.) 242.

Continuousness

Whether continuity of possession of land has been broken by an interval of time between the going out and the coming in of tenants depends largely upon the location of the land and the particular surrounding circumstances. "The law has not attempted to define what breaks in possession will constitute breaks in the continuity of possession so as to defeat title by limitation. It has held, however, that an interval of one month in the possession would not be a break." Dunn v. Taylor (Tex.) 107 S. W. 952, 956.

It is an indispensable element of "adverse possession" that it must be continuous, and evidence that a decedent at one time was in possession of land and claimed it is not sufficient to give title as against the owner of the legal title, where it is not shown that deceased exercised any act of ownership over the land for a number of years before his death. Henry v. Brown, 39 South. 325, 326, 143 Ala. 446; Farley v. Smith, 39 Ala. 38.

To give a party the ownership of land by reason of his "adverse possession," the possession must have been not only adverse and actual, but must have been continuous, open, and notorious. A title asserted by virtue of "adverse possession" cannot be maintained unless there has been a continuity of possession. There is not such continuity as will give title by adverse possession where persons live on and cultivate, and at different times and for short periods only, small portions of the land. Overton v. Overton, 96 S. W. 469, 474, 123 Ky. 311.

The "adverse possession" under color of title, necessary to confer title under Gen. St. 1906, § 1721, must be actual, continuous, and adverse for the full statutory period and be established by clear and positive proof. Dallam v. Sanchez, 47 South. 871, 874, 56 Fla. 779. Claimant must maintain continuous domain over the land according to the pur-

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pose for which it is being used, and according to the custom of the country. Dunn v. Taylor (Tex.) 107 S. W. 952, 955 (citing Thompson v. Burhans, 79 N. Y. 93).

In order to acquire title as against an elder grant, the "adverse possession" must not only be actual, but so continued for the statutory period as to furnish a cause of action every day during that period. Courtney v. Ashcraft (Ky.) 105 S. W. 106, 107.

A lime kiln was erected on land and used for the burning of lime for some years. About the same time that the kiln was constructed, houses were built for the lime burners. The houses were destroyed by fire four or five years later and were not rebuilt. The lime kiln remained in good condition, but it had not been used continuously for seven years. Held not to show "adverse possession" for seven years, within Shannon's Code, § 4456, vesting title in one who has had seven years' adverse possession, holding under an assurance of title. Southern Iron & Coal Co. v. Schwoon, 135 S. W. 785, 794, 795, 124 Tenn. 176.

An instruction on "adverse possession," requiring plaintiff's possession and his claim of ownership to have been "open, notorious, visible, adverse, and under claim of right" for 20 years, was not erroneous for failure to require the possession to have been continuous, since the phrase quoted excluded the idea of an interrupted or intermittent possession. Fatic v. Myer, 72 N. E. 142, 143, 163 Ind. 401.

Disseisin

The defense that a person's title to land has been lost by "adverse possession" is established by proof that he has been disseised and continuously kept out of possession for the legal term, by another, occupying the land continuously, openly, and adversely, under a claim of title. Murphy v. Commonwealth, 73 N. E. 524, 530, 187 Mass. 361.

A possession to be "adverse" must operate to disseise or oust some other person of his possession or right of possession. Lecroix v. Malone, 47 South. 725, 728, 157 Ala. 434.

To hold land "adversely," there must be a disseisin of the owner at some particular time, and the possession must be open and notorious under color of title or claim of right. Johnson v. Ingram, 115 Pac. 1073, 1074, 63 Wash. 554.

Exclusiveness

To make possession "adverse," it must be such as to unmistakably indicate an assertion of claim of exclusive ownership in the occupant. Bender v. Brooks, 127 S. W. 168, 170, 103 Tex. 329, Ann. Cas. 1913A, 559; Scallon v. Manhattan R. Co., 78 N. E. 284, 285, 185 N. Y. 359, 7 Ann. Cas. 168; Chastang v. Chastang, 37 South. 799, 801–803, 141 Ala. 451, 109 Am. St. Rep. 45; Page v. Bellamy, 78 N. E. 938, 939, 222 Ill. 556; Horn v. Metzger, 84 N. E. 893, 895, 234 Ill. 240; Bryant v. Cadle, 104 Pac. 23, 27, 18 Wyo. 64.

Good faith

Good faith is no element of "adverse possession." Dawson v. Falls City Boat Club, 99 N. W. 17, 18, 136 Mich. 259, 112 Am. St. Rep. 363.

Hostile character

The elements of title by limitation are uninterrupted possession, actual, visible, notorious, adverse, and hostile under color and claim of right for the statutory period; the words "adverse" and "hostile" meaning practically the same thing. Long v. Lackawanna Coal & Iron Co., 136 S. W. 673, 680, 233 Mo. 713.

"'Adverse possession' is a possession held by one not the owner adversely to the actual owner." Ramos Lumber & Mfg. Co. v. Labarre, 40 South. 898, 903, 116 La. 559.

"Claim of ownership, openly asserted as hostile to the true owner, is an indispensable ingredient of 'adverse possession.'" Henry v. Brown, 39 South. 325, 329, 143 Ala. 446 (citing 1 Brick. Dig. p. 49; Potts v. Coleman, 67 Ala. 221).

Possession to be "adverse" must not only be under claim of right but hostile to and inconsistent with the possession or right of possession of the true owner. Possession under a tax sale certificate is, during the period of redemption, an admission that the possession is subject to the owner's right of redemption, and is not adverse to the true owner. Salt Lake Investment Co. v. Fox, 90 Pac. 564, 32 Utah, 301, 13 L. R. A. (N. S.) 627, 125 Am. St. Rep. 865. Possession by a widow of land as her homestead during her life is not hostile to that of the heir. Watson v. Hardin, 132 S. W. 1002, 1003, 97 Ark. 33.

"Adverse possession" must be hostile and under a claim of right. An adverse and hostile possession is one held for the possessor, as distinguished from one held in subordination to the rights of another, and is a possession inconsistent with the possession or right of possession of another. As applied to real estate, it is an actual, visible, and exclusive appropriation commenced and continued under a claim of right with the intent to assert such claim against the true owner and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. "Adverse user" means such a use of property as the owner would make, asking permission of no one, and disregarding all other claims to it so far as they conflict with the use. There must be an ouster of the real owner, followed by an actual, notorious, and continuous possession by the adverse claimant with an intention on his part to claim in hostility

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to the title of the real owner. There must be an intention to claim title as owner and in defiance of the rights of the true owner. The term "adverse possession" implies that it commenced in wrong by ouster or disseisin, and is maintained against right, since the law presumes that every possession is rightful and consistent with the title and ownership of the land. A party who relies on "adverse possession" must prove his possession to be adverse, and that its character was known to the true owner, or was of such a nature as to charge the owner with knowledge of its true character. (See Hunnewell v. Burchett, 54 S. W. 487, 152 Mo. loc. cit. 613.) Swope v. Ward, 84 S. W. 895, 896, 897, 185 Mo. 316; Lewis v. Pope, 68 S. E. 680, 682, 86 S. C. 285.

Every possession is "adverse" which is not in subservience to the title of another, either by a direct acknowledgment or an open or tacit disavowal of right on the part of the occupant, and it is in the latter case only that the law adjudges the possession of one to the benefit of another. Davis v. Waggoner, 83 N. E. 381, 383, 42 Ind. App. 115 (citing Rennert v. Shirk, 72 N. E. 546, 163 Ind. 542; Pittsburgh, C., C. & St. L. Ry. Co. v. Stickley, 58 N. E. 192, 155 Ind. 312; Webb v. Rhodes, 61 N. E. 735, 28 Ind. App. 393; Burr v. Smith, 53 N. E. 469, 152 Ind. 469).

To constitute "adverse possession" by a tenant in common, "acts of an unequivocal character and of such inherent nature as to impart information and give notice to his cotenants of actual disseisin are required. * * * A possession which was in its inception friendly, as under a lease, or for some definite term, or subordinate to the true title, or originating in a fiduciary relation, may not be turned into an 'adverse possession' by a mere change in mental attitude or caprice." Coberly v. Coberly, 87 S. W. 957, 961, 189 Mo. 1.

"Adverse possession" is an aggressive act, and the stamp of its character must always be preserved by acts on the premises. The character of the possession is not determined by what the occupant intends, but what he shows by his acts. As is sometimes stated, he must "keep his flag flying and present a hostile front to adverse pretensions." When the adverse occupant leaves the premises personally, he must leave it under circumstances indicating that he has not left the possession. There must be something in the condition and appearance of the premises themselves showing to the world that there is still a person in possession. Hoyle v. Mann, 41 South. 835, 837, 144 Ala. 516 (citing Susqehanna & W. Val. R. & Coal Co. v. Quick, 68 Pa. 189, 199; Louisville & N. R. Co. v. Philyaw, 6 South. 837, 88 Ala. 264, 268; Perry v. Lawson, 20 South. 611, 112 Ala. 480, 484).

While a tenant in common may hold adversely against his cotenant, to make his possession "adverse possession," it must be open, notorious, and hostile to cotenant, and known by him to be so. Kidd v. Bell (Ky.) 122 S. W. 232, 235.

"The possession of one cotenant is not adverse to other cotenants, unless the possessor gives notice to the other cotenants of his adverse claim, or does some act which clearly indicates his adverse claim of which the others have notice, or of which they should take notice." Keith v. Keith, 87 S. W. 384, 385, 39 Tex. Civ. App. 363.

"The claim of title of a tenant in common in possession which is necessary to put in operation the statute of limitations against cotenants out of possession must be actual, exclusive, and wholly within the claimant's own right. The possession must also be exclusive and adverse to all tenants in common, and in this state this condition must continue for a period of 15 years before the statute of limitations becomes a bar to an action of ejectment by a cotenant out of possession." Schoonover v. Tyner, 84 Pac. 124, 125, 72 Kan. 475. There must be an actual ouster, and notice or knowledge of the hostile intention in pursuance of which the exclusive possession has been held. Beers v. Sharpe, 75 Pac. 717, 719, 44 Or. 386.

Where, in an action for a division of land, plaintiff claimed a half interest, but his share had been sold by his agent 35 years before to the owner of the remaining interest, who with his grantees have been in actual continuous possession ever since, and within four years after the sale plaintiff, when asked to clear the title, said he had received his pay and had no interest in the land, the possession was afterward openly and notoriously "adverse" as to him, even as an alleged joint tenant. Godsey v. Standifer (Ky.) 101 S. W. 921, 923.

The possession of the vendee under an executory contract for the purchase of land is not "adverse" to the vendor so long as the purchase money is not paid, or at least not before the vendee is entitled to demand a deed. Johnson v. Peterson, 97 N. W. 384, 385, 90 Minn. 503 (citing Hannibal & St. J. R. Co. v. Miller, 21 S. W. 915, 115 Mo. 158).

In ejectment, a charge to find for plaintiff unless defendant had been in "uninterrupted, continuous, adverse, and hostile possession," etc., was not erroneous in using the word "hostile" in addition to "adverse," as the two words mean the same in law. Weller v. Wagner, 79 S. W. 941, 943, 181 Mo. 151.

The use of the word "adverse," in an instruction that plaintiff or his vendors must have held land in controversy in actual adverse possession, to a well-defined boundary line, continuously, for 15 years prior to an

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alleged trespass, requires a finding that the land was held in hostile opposition by plaintiffs to the claim of defendants and all others. Vincent v. Willis (Ky.) 82 S. W. 583, 584.

In the absence of an express grant of a right of way, it is necessary for claimants of a right of way to prove an adverse, exclusive, and uninterrupted enjoyment for twenty years. By "adverse" in this connection is meant a user without license or permission, for an adverse right of an easement cannot grow out of a mere permissive enjoyment; the real point of distinction being between a permissive or tolerated use, and one which is claimed as matter of right. Dummer v. United States Gypsum Co., 117 N. W. 317, 323, 153 Mich. 622.

Hostile possession synonymous

See Hostile Possession.

Intent

Intention to claim title is an essential element of "adverse possession." Bryant v. Cadle, 104 Pac. 23, 27, 18 Wyo. 64.

Occupancy of land necessary to constitute title by "adverse possession" must be so open and exclusive as to leave no inquiry as to occupant's intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse, and so continuous as to have furnished a cause of action every day during the required period. McNear v. Guistin, 92 Pac. 1075, 1076, 50 Or. 377 (citing 1 Cyc. p. 984).

To establish "adverse possession" as against the holder of the legal title there must be actual occupancy, clear, definite, positive, and notorious. It must be continued, adverse, and exclusive during the whole statutory period, and with an intention to claim title to the land occupied. One may claim land adversely, though he knows his title to be defective; but his possession must be under claim of right or title. Complainant did not hold land adversely to the true owner where he knew, when he entered it, that he did not have any title, and believed it belonged to the United States, though he cut timber at various places and times on the land, and though there is evidence that he cultivated a field; the description and length of occupancy thereof being indefinite. McDaniel v. Sloss Iron & Steel Co., 44 South. 705, 152 Ala. 414, 126 Am. St. Rep. 48.

Possession, to be "adverse," must be held under claim of right, and there can be no adverse possession without an intention to claim title; and one occupying land up to a certain fence because he believes that to be the line of his land, but without intention to claim up to it if it should be beyond the line, has no intention to claim title coincident with his possession, and the possession to the fence is therefore not adverse; but where coterminous owners agree upon a line as the dividing line and occupy up to it, or where one of them builds a fence as the dividing line and occupies and claims to it with knowledge of such claim by the other, the claim is hostile and the possession adverse. McLester Bldg. Co. v. Upchurch (Ala.) 60 South. 173, 174.

Openness and notoriety

Open and notorious possession is an essential element of adverse possession. Scallon v. Manhattan R. Co., 78 N. E. 284, 285, 185 N. Y. 359, 7 Ann. Cas. 168; Chastang v. Chastang, 37 South. 799, 801–803, 141 Ala. 451, 109 Am. St. Rep. 45; Hunter v. Malone, 108 S. W. 709, 713, 49 Tex. Civ. App. 116; Page v. Bellamy, 78 N. E. 938, 939, 222 Ill. 556; McCaslin v. State, 75 N. E. 844, 845, 38 Ind. App. 184; McCreary v. Jackson Lumber Co., 41 South. 822, 823, 148 Ala. 247; Bryant v. Cadle, 104 Pac. 23, 27, 18 Wyo. 64; Bashore v. Mooney, 87 Pac. 553, 4 Cal. App. 276; Steckter v. Ewing, 93 Pac. 286, 288, 6 Cal. App. 761; Frick v. Harper, 46 South. 453, 155 Ala. 231; Young v. Pace, 140 S. W. 555, 145 Ky. 405; Stevens v. Pedregon (Tex.) 140 S. W. 236, 239; Horn v. Metzger, 84 N. E. 893, 895, 234 Ill. 240; Yellow Poplar Lumber Co. v. Thompson's Heirs, 62 S. E. 358, 362, 108 Va. 612; Clark v. White, 48 S. E. 357, 358, 120 Ga. 957; Enderlin Inv. Co. v. Nordhagen, 123 N. W. 390, 392, 18 N. D. 517.

The term "adverse user," or "adverse possession," implies a user or possession that is not only under a claim of right, but that is open and of such character that the true owner may have notice of the claim. Snowden v. Bell, 75 S. E. 721, 722, 159 N. C. 497.

To constitute "adverse possession," such open and notorious acts of physical possession, continued for 15 years, as would put the real owner, upon notice of a hostile claim to his land to a defined boundary, must be shown. Whitley County Land Co. v. Powers' Heirs, 144 S. W. 2, 7, 146 Ky. 801.

No particular act or series of acts is necessary that possession may be notorious, but any visible act clearly demonstrating an intention to claim ownership and possession is sufficient to establish claim of "adverse possession," and such claim may be made out by visible acts, without any assertions by word of mouth. Gurnsey v. Antelope Creek & Red Bluff Water Co., 92 Pac. 326, 328, 6 Cal. App. 387.

To constitute an effective "adverse possession" there must be a hostile, actual, open and notorious, exclusive and continuous occupancy for the statutory period. Notoriety is important only where the adverse character of the possession is to be brought home to the owner by a presumption, and possession which is actually known to the true owner is equivalent to a possession which is open and notorious and adverse. One who

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after receiving a deed to wild lands, not susceptible of occupancy, improvement, or cultivation, paid the taxes for a long term of years, during which the former owner neither paid taxes nor asserted any claim to the land, and used the timber from the land in the same way and to the same extent that he used timber from other lands belonging to him with the knowledge of the former owner, and placed mortgages of record on the land, and offered the same for sale to the public, possessed the land "adversely," to the former owner. McCaughn v. Young, 37 South. 839, 842, 85 Miss. 277 (citing 1 Cyc. p. 999, par. C).

To constitute an "adverse possession," there need not be a fence, building, or other improvement made; it sufficing, for this purpose, that visible and notorious acts of ownership be exercised for the statutory period, after an entry under claim and color of title. Baker v. De Armijo (N. M.) 128 Pac. 73, 75.

The word "possession," in Ky. St. 1903, c. 210, declaring that conveyances of lands of which any other person has adverse possession shall be void, means an adverse actual possession, so open and notorious as to give notice to the ousted claimant that another is occupying the premises and such possession as, if maintained long enough, will, under the limitation statute, confer title on the possessor. Interstate Inv. Co. v. Bailey (Ky.) 93 S. W. 578.

Prescription distinguished

"Prescription" is the term usually applied to incorporeal hereditaments; "adverse possession" to lands. Hindley v. Metropolitan Elevated R. Co., 85 N. Y. Supp. 561, 564, 42 Misc. Rep. 56.

"Adverse possession" and "prescription" are closely related. The one is regulated by statute and the other by common law, which has adopted 20 years as the prescriptive period from analogy to the statute of limitations. "Adverse possession" is the open and hostile possession of land under claim of title to the exclusion of the true owner which if continued for 20 years ripens into an actual title. "Prescription" rests upon the presumption of a grant of incorporeal rights that has become lost and after the lapse of 20 years the presumption ripens into a title also. It is measured by user, and the adverse use must commence the same way, continue for the same period, and be of the same character as the adverse possession required to give title to the real estate. The close connection between the two methods of acquiring property makes it reasonable and natural to extend the analogy to the subject of disability. Muller v. Manhattan Ry. Co., 102 N. Y. Supp. 454, 456, 53 Misc. Rep. 133 (quoting Scallon v. Manhattan R. Co., 78 N. E. 284, 285, 185 N. Y. 359, 7 Ann. Cas. 168).

Trespass

A possession, to be "adverse," must be denoted by the exercise of acts of dominion over the premises in making the ordinary use and in taking the ordinary profits of which the land is susceptible, and such acts must be so repeated as to show that they are done in the character of owner, and not merely of an occasional trespasser. Currie v. Gilchrist, 61 S. E. 581, 583, 147 N. C. 648.

ADVERSE PROCESS

See Sale by Adverse Process.

ADVERSE TITLE

The grantor in a deed of trust to secure a debt thereafter sold the property to a purchaser, who assumed the debt. The purchaser subsequently gave another deed of trust to another party to secure another loan. Held, that on foreclosure of the junior lien, the purchaser on forclosure of the senior lien having been made a defendant, his rights were a proper matter for adjudication; his title not being an "adverse title" within the rule precluding litigation of adverse claims of title in foreclosure. Hampshire v. Greeves (Tex.) 130 S. W. 665, 667.

ADVERSE USE OR USER

See Continuous Adverse Use.

"Adverse use" is a use under a claim of right known to the owner of a servient tenement to be availed of whenever desired without permission asked or objection made; a use such as the owner of an easement would make of it without permission, and disregarding the claims of the owner of the land; a use under a claim of right inconsistent with or contrary to the interest of the servient owner, and such as to be difficult to account for except on the presumption of a grant. Crosier v. Brown, 66 S. E. 326, 328, 66 W. Va. 273, 25 L. R. A. (N. S.) 174.

"To constitute 'adverse user,' the acts relied upon in maintenance of a prescriptive right must have been an invasion of the rights of the party against whom it is set up, and of such character as to afford him grounds of action."—Hume v. Rogue River Packing Co., 92 Pac. 1065, 1071, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

"Adverse use" is inconsistent with a license or permissive use. Occupation, in order to constitute an adverse user, must be based upon a claim of right. This claim may be made by acts alone quite as effectively as by the use of words either oral or written. Knight v. Cohen, 93 Pac. 396, 398, 7 Cal. App. 43 (citing Barnes v. Light, 22 N. E. 441, 116 N. Y. 34).

Continued user for more than 20 years, under claim of right, by plaintiff and his predecessors in title of lands up to boundary fences, whether or not the fences were on the true boundary line, constitutes "adverse

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user" within St. 1898, § 4214, defining adverse possession. Progress Blue Ribbon Farms v. Harter, 132 N. W. 895, 897, 147 Wis. 133.

The term "adverse user," or "adverse possession," implies a user or possession that is not only under a claim of right, but that is open and of such character that the true owner may have notice of the claim. Snowden v. Bell, 75 S. E. 721, 722, 159 N. C. 497.

The use of water by a subsequent appropriator does not begin to be "adverse," as against a prior appropriator, unless it results in a deprivation to such appropriator, or amounts to such an invasion of his rights as will enable him at any time during the statutory period to maintain an action against the subsequent appropriator. Featherman v. Hennessy, 113 Pac. 751, 754, 42 Mont. 535.

To constitute an "adverse user" of water of a stream it is not sufficient merely to show that one used water from the stream, but it must be shown that the water which by priority belonged to another appropriator was taken and used under claim of right or title, and that the taker or user was in the peaceable, open, continuous, and uninterrupted possession thereof under such claim for a period of seven years. When there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running. Each is entitled to the use of the water, and it is only when the water becomes so scarce that all the parties cannot be supplied, and that one appropriator takes water which by priority belongs to another appropriator, that there is an adverse use. The statute commences to run from the time when such adverse use is made of the water, the adverse use being only of that water which the prior party is entitled to. When there is a sufficiency of water in the river, the prior appropriator is not entitled to the water used by the subsequent appropriator, and the subsequent appropriator can use under his appropriation without being an adverse user. Minnie Maud Reservoir & Irrigation Co. v. Grames, 81 Pac. 893, 895, 896, 29 Utah, 225 (quoting and adopting definition in Egan v. Estrada, 56 Pac. 721, 6 Ariz. 248; citing Anahein Water Co. v. Semi-Tropic Water Co., 30 Pac. 623, 64 Cal. 185; American Co. v. Bradford, 27 Cal. 361; Alta Land & Water Co. v. Hancock, 24 Pac. 645, 85 Cal. 219, 20 Am. St. Rep. 217; Faulkner v. Rondoni, 37 Pac. 883, 104 Cal. 140; Church v. Stillwell, 54 Pac. 395, 12 Colo. App. 43; 3 Farnham, Water & Water Rights, p. 2106).

Plaintiff used a passway belonging to defendant more or less regularly for 15 years, when a gate leading to the way was not locked. Plaintiff on two occasions attempted unsuccessfully to make arrangements with defendant's directors to have the uninterrupted use of the passway, and during the periods when the gate was locked plaintiff made no attempt to open the same or use the way. Held, that plaintiff's use was not an "adverse use," but was permissive only. Prewitt v. Hustonville Cemetery Co. (Ky.) 101 S. W. 892, 893.

ADVERTISE

The word "advertise" is defined in the Century Dictionary as "the act or practice of bringing anything, as one's wants or one's business, into public notice, as by paid announcement in periodicals, or by hand bills, placards, etc., as to secure customers by advertising." The word "solicit" in Kirby's Dig. § 5133, making it unlawful for any one engaged in the sale of liquor where the same may be lawful to solicit orders by agent or otherwise for sale of intoxicating liquors in any place in the state where the same is prohibited by law, does not include advertising, although advertising is a method, in a broad sense, of soliciting the public to purchase the wares advertised, and an advertisement of liquors in a newspaper is not within the statute. Carter v. State, 98 S. W. 704, 81 Ark. 37.

ADVERTISEMENT FOR BIDS

As contract, see Contract.

ADVERTISING COMPANY

As trading corporation, see Trading Corporation.

ADVERTISING MATTER

Letter heads and bill heads are not "advertising matter," within a statute requiring every corporation to have printed the word "incorporated" on advertising matter. Commonwealth v. National Biscuit Co. (Ky.) 106 S. W. 799, 800.

ADVERTISING PURPOSES

A person's picture is not used for "advertising purposes" or for "purposes of trade," within Civil Rights Law (Consol. Laws, c. 6) § 51, prohibiting the use of any person's picture or portrait without his written consent for advertising purposes, or for purposes of trade, so as to warrant an injunction against such use, unless it is used as part of an advertisement, nor is it used for the purposes of trade within the section when merely used for the dissemination of information, and not for commerce or traffic. Jeffries v. New York Evening Journal Pub. Co., 124 N. Y. Supp. 780, 781, 67 Misc. Rep. 570.

ADVICE

See By and with Advice; Independent Advice; Legal Advice and Services; Proper Independent Advice.

"Where the Constitution declares that the power to act is in the Governor or that

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the act may be done by the Governor 'by and with the advice of council' or 'by and with the advice and consent of the council,' we are of opinion that the responsibility rests primarily upon the Governor to determine, as the supreme executive magistrate, whether any action is called for and what act, if any, is desirable, and that the provision for advice of council is a requirement that their approval and concurrence shall accompany the affirmative act and enter into it before it becomes complete and effective. We do not think that these different phrases, used in different parts of the Constitution, namely, 'by and with the advice of council,' 'by and with the advice and consent of the council,' 'with the advice and consent of the council,' 'with advice of council,' and 'with advice of the council,' differ at all in legal effect. They all recognize the fact that the act first of all, and afterwards for all time, is to be the act of the Governor. The only connection that the council can have with it is advisory. Whether the Governor takes advice or not, his conclusion must rest finally upon his own judgment. Inasmuch as the responsibility for his determination, with or without advice, must rest upon him, both in the beginning and forever after, the natural course of proceeding would seem to be that he would seek such aid as he might desire from any proper source and not be obliged to ask advice, in the first instance, from an official body whose opinion could never relieve him from the duty of deciding." In re Opinion of the Justices, 78 N. E. 311, 312, 190 Mass. 616.

Threat distinguished

See Threat.

ADVISE

Ky. St. § 3509, provides that a city council, prior to the election of a city attorney, shall fix his compensation, and that it shall be his duty to attend the meetings of the council, advise it in all matters of litigation or legal proceedings, and perform other duties required. Prior to plaintiff's election as city attorney, an ordinance was passed fixing salary, and defining his duties, which required him to give legal advice to the mayor and other officers, and boards of the city and also the board of education, and to "advise" the various boards, etc. Thereafter the council adopted a further ordinance providing that the services of the attorney should include all legal and other business of the city within his jurisdiction. Held, that the word "advise" was used in its broad sense, meaning that he should be the legal adviser of the various boards of the city in litigation and legal proceedings, and that he was not therefore entitled to extra compensation for caring for litigation between the board of education and a schoolhouse contractor arising out of the latter's failure to perform his contract. Board of Education of City of Ludlow v. Ritchie, 149 S. W. 985, 986, 149 Ky. 674.

The word "advise," as used in a statute authorizing city councils of certain cities to appoint a city attorney whose duty it shall be to advise the board as to all legal matters, etc., means that such city attorney shall be the legal adviser of the council in all matters of litigation and legal proceedings; and in defining the duties which are required of him in his department the council may properly include attention to litigation as to which it is his duty to advise it. City of Ludlow v. Richie (Ky.) 78 S. W. 199, 200.

In an instruction that all persons concerned in the commission of a crime, whether they directly committed the act constituting the offense, or aided or abetted in its commission, or even if not present at its commission, have advised or encouraged its commission, are principals in the crime so committed, the word "advise" means "to give counsel; to offer an opinion to as worthy or expedient to be followed; to recommend as wise and prudent; or to suggest as the proper course of action." And the term "encourage" means "to give courage to; to excite to action or perserverance." While the terms are not synonymous in a technical sense, they are in popular usage, and one who suggests to another that the commission of a crime is wise or that it is a proper course of action, and the advice so given is followed, may be said in a popular sense to have encouraged the commission of the offense. To incite one to action involves the idea of giving advice to the same end. By avoiding a strictly technical construction and giving the terms employed a more liberal and popular meaning, which is the correct canon of construction to be applied in such cases, there is no difference in principle between giving advice and giving encouragement, and criminal responsibility should be regarded as attaching to the giver in each case. State v. Allen, 87 Pac. 177, 182, 34 Mont. 403.

ADVISORY

See Only Advisory.

ADVOCATE IN THE CAUSE

In a criminal case, the presiding judge has been consulted as an "advocate in the cause," in the sense of Act No. 40 of 1880, relative to the recusation of district judges when he has been previously employed on the same matter in civil proceedings. State v. Perkins, 50 South. 805, 806, 124 La. 947.

AËROLITE

As property, see Real Property.

ÆSTHETIC

In an action for obstructing access to a street from plaintiff's property, an instruction

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that no æsthetic or unreasonable desire of plaintiff for convenience of way should be permitted to give him a right of access beyond that essential to a fairly convenient way, was defective and inappropriate for using the word "æsthetic," which relates to the beautiful as a means of producing pleasure, and not to matters of utility, which was the only question involved. Meighan v. Birmingham Terminal Co., 51 South. 775, 778, 165 Ala. 591.

AFFAIRS

See County Affairs; Fiscal Affairs; Internal Affairs; Municipal Affair; Prudential Affairs; Township Affairs.

AFFECT

See Injuriously Affected; Would Affect.

Code Civ. Proc. § 1249, prior to the amendment of April 10, 1911, provided that in condemnation proceedings the right to damages should be deemed to have accrued at the date of the summons, and the actual value at that date should be the measure of compensation. By St. 1911, p. 842, the section was amended by adding a proviso that if the issue is not tried within one year after the commencement of the action, unless the delay is caused by defendant, the compensation and damages shall be deemed to have accrued at the date of the trial, but that nothing in the section contained should be construed to affect pending litigation. Held, that the word "affect" was used in the proviso in its ordinary significance as meaning "to influence," "to produce an effect upon," "to act upon," and hence the amendment did not repeal the section as it previously existed with reference to pending litigation, so that in such a proceeding in which the trial was had within a year from the time of the filing of the complaint the damages were properly assessed as of the date of the summons. Sacramento Terminal Co. v. McDougall, 126 Pac. 503, 504, 19 Cal. App. 562.

Section 15 of the act of July 1, 1902, providing that lands allotted to members and freedmen of the Choctaw and Chickasaw Nations shall not be "affected" or "incumbered" by any deed, debt, or obligation, of any character, contracted prior to the time at which said land may be alienated, means that there shall be no burden on the title or charge against such allotment, and that the same shall in no event become liable for any debt or obligation contracted prior to the removal of restrictions. In re Davis' Estate, 122 Pac. 547, 551, 32 Okl. 209.

Laws 1895, c. 1006, § 2, authorized local authorities to lay out streets, avenues, and roads in a city and file a map or plan, and provided that on and after the filing of a map, the streets, avenues, and roads shown thereon shall be the only lawful streets, avenues, and roads in that section of the city, and the thoroughfares theretofore laid out dedicated or established not shown thereon, and not then actually open and in use, shall not after the filing of such map or plan cease to be or remain for any purpose a street, avenue, highway, or thoroughfare. Section 5 provided for the filing of claims because of damages by discontinuing streets within six years after the filing of the map showing such discontinuance by any "owner affected," or that such claim should be barred. Held that, as to streets and highways not actually used at the time of the filing of the map as provided and which are to be closed, an owner of adjoining land does not become an "owner affected" by the closing of the street until the closing actually takes place, and hence limitations as to his right to claim damages for the subsequent closing of the street run from the date of closing, and not from the filing of the map. In re Walton Ave. in City of New York, 130 N. Y. Supp. 378, 381, 382, 145 App. Div. 855.

As act on injuriously

The word "affect," as applied to such parties as a reversal of a judgment would affect, mean adversely affect. Nelson Bennett Co. v. Twin Falls Land & Water Co., 92 Pac. 980, 13 Idaho, 767, 13 Ann. Cas. 172 (citing 1 Words and Phrases, p. 224).

As change

The word "affected," as used in a finding that a grantor was affected by undue influence, signified acted upon, moved, or changed. Lyons v. Elston, 98 N. E. 93, 94, 211 Mass. 478.

AFFECTED BY THE IMPROVEMENT

Laws 1891, c. 124, § 126, provides that the appeal to the circuit court by the owner of land affected by street improvements, given by the preceding section from the report of the board of public works confirmed by the common council, shall be the only remedy of the owner or any person interested therein, affected by the improvements for the redress of any grievance he may have by reason of the making of such improvement. Held, that the words "affected by the improvement" limit the remedy to such parcels of realty as the administrative board dealing with the matter would have jurisdiction under any circumstances to affect thereby. Northern Pac. R. Co. v. Douglas County, 130 N. W. 246, 248, 145 Wis. 288.

AFFECTING TITLE

An executory contract for a sale of real estate is, when duly executed and acknowledged, entitled to record as a writing "affecting the title to real estate." McBee v. O'Connell, 120 Pac. 734, 735, 16 N. M. 469.

A suit to rescind an executed contract for the sale of land and to recover the consideration paid therefor is a suit to affect

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title by the cancellation of the contract and conveyance within Code Civ. Proc. § 982, providing that an action "affecting title" in real property must be tried in the county in which the subject of the action is situated, though a cancellation of the deed is not demanded, since there can be no recovery without a cancellation and a reconveyance. Birmingham v. Squires, 123 N. Y. Supp. 906, 908, 139 App. Div. 129.

A proceeding to enjoin the removal of a wing of a courthouse to another part of the courthouse grounds must be brought in the county where the courthouse is located, under Hurd's Rev. Stat. 1903, c. 22, § 3, providing that suits which may affect real estate must be brought in the county where the same, or some part thereof is situated, as such a proceeding will "affect" real estate. Real estate is affected if the court, to grant the relief sought, must deal directly with the real estate. Munger v. Crowe, 76 N. E. 50, 51, 219 Ill. 12 (citing Johnson v. Gibson, 6 N. E. 205, 116 Ill. 294; Hayes v. O'Brien, 37 N. E. 73, 149 Ill. 403, 23 L. R. A. 555; Craft v. Indiana, D. & W. Ry. Co., 46 N. E. 1132, 166 Ill. 580).

AFFECTION

See Natural Affection.

"'Affection' may be expressed by acts or words. When expressed by words, the force of the expression may depend less upon the words used than upon the connection in which they were used or the manner in which they were uttered. If, for instance, the remark made by a testator as to his brother were, 'He is a brother,' it might have indicated one thing, had emphasis, apparently coming from deep feeling, been laid in pronunciation upon 'is' and quite another had it been scornfully thrown upon 'brother.'" Appeal of Spencer, 60 Atl. 289, 291, 77 Conn. 638.

AFFECTION (Disease)

See Local Affection.

AFFIANT

Where a claim against an administrator is verified by the affidavit of the claimant, the use of the words "to the knowledge of said claimant," instead of "to the knowledge of said affiant," the words used in the statute (Code Civ. Proc. § 2604), does not render the affidavit insufficient. Dorais v. Doll, 83 Pac. 884, 885.

As "affiant" is one who has made an affidavit, a return showing that an information had been made, upon the information and belief of the "affiant," would indicate that the information had been sworn to. People ex rel. Livingston v. Wyatt, 79 N. E. 330, 332, 186 N. Y. 383, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972.

AFFIDAVIT

See Appeal by Affidavit; False Affidavit; Fraudulent Affidavit; Verified by Affidavit.

An "affidavit" is a statement in writing declared to be true by the party making it and certified to have been sworn to before him by the officer who takes it. Partridge v. Mechanics' Nat. Bank of Burlington, 77 Atl. 410, 411, 77 N. J. Eq. 208; Holman v. State, 39 South. 646, 144 Ala. 95.

An "affidavit" is a statement or declaration, reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath. Miller v. Caraker, 71 S. E. 9, 9 Ga. App. 255 (citing 1 Words and Phrases, p. 240); People for use of Esper v. Burns, 125 N. W. 740, 742, 161 Mich. 169, 137 Am. St. Rep. 466; People ex rel. Livingston v. Wyatt, 79 N. E. 330, 332, 186 N. Y. 383, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972. A statement sworn to before a person who gives his official title as "U. S. Comm.," he having no authority to administer oaths, is not an "affidavit" within the meaning of Code Civ. Proc. § 367, defining an "affidavit" as a written declaration under oath, made without notice to the adverse party, and a tax deed issued thereon is void. Lanning v. Haases, 130 N. W. 1008, 89 Neb. 19.

An "affidavit for a lien" under the Mechanics' Lien Law is not a process, a pleading, a judgment, nor a conveyance, but merely a notice of a claim of a mechanic or materialman. Doyle v. Wagner, 111 N. W. 275, 276, 100 Minn. 380.

Under Code, § 4673, providing that an "affidavit" is a written declaration under oath without notice to the adverse party before any person authorized to administer oaths within or without the state, a mere jurat annexed to a justice's certificate to claims for costs in criminal cases did not constitute an affidavit of facts required to be attached to such claims by sections 4598, 4599, relating to the audit and payment from the county treasury of constable's fees in criminal cases. McGuire v. Iowa County, 111 N. W. 34, 36, 133 Iowa, 636.

Deposition distinguished

A verified deposition is an "affidavit." Chubbuck v. Beaty, 104 Pac. 558, 559, 80 Kan. 789.

The reduction of plaintiff's testimony to writing after his oral examination before the chancellor on a motion to dissolve an injunction was not an "affidavit" within Code 1907, § 4535, providing that affidavits may be submitted by the parties, as an oral examination should not be substituted for the affidavits required, unless they are waived by the opposing party. Nelson v. Hammonds, 55 South. 301, 302, 173 Ala. 14.

Under the act of 1901 (P. L. p. 372), authorizing proceedings supplemental to execu-

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tion, and directing that the discovery shall be before a judge or a Supreme Court commissioner, and Practice Act (P. L. 1903, p. 596) § 228, authorizing a Supreme Court examiner to take any "affidavit" that may be taken before a Supreme Court commissioner, a Supreme Court examiner may take the deposition of a judgment defendant under an order directing him to make discovery in proceedings supplemental to execution, though technically an "affidavit" is taken ex parte, and though a "deposition" is technically taken on notice, so that the testimony taken under an order for discovery is technically a "deposition," but the words "deposition" and "affidavit" may be synonymous. Herschenstein v. Hahn, 71 Atl. 105, 106, 77 N. J. Law, 39.

As evidence or testimony

It was an offer of evidence where an importer appeared before the Board of General Appraisers and submitted an "affidavit" made by a person in a foreign country. H. Mendelson & Co. v. United States, 154 Fed. 33, 34, 83 C. C. A. 145.

An "affidavit" of a claimant, accompanying a claim for compensation for Indian depredations, filed in the Interior Department before the passage of the Indian depredation act of March 3, 1891, is not evidence within the meaning of section 2 of that act, preserving as pending cases those in which evidence had been presented, since the word "evidence" must be considered as referring to the prior act of 1872, and the regulations authorized thereby, which required claims for such depredations to be accompanied by the depositions of two or more persons having personal cognizance of the facts. Nesbitt v. United States, 22 Sup. Ct. 805, 806, 186 U. S. 153, 46 L. Ed. 1100.

As indictment

See Indictment.

As an oath

A written signed statement of facts, purporting to be the statement of the signer, followed by the certificate of an officer authorized to administer oaths that it was sworn to and subscribed before him, is a lawful "affidavit"; and it is not necessary that it should be stated in the instrument, prior to the signature of affiant, that the declaration was made under oath, if in fact the oath was administered. Miller v. Caraker, 71 S. E. 9, 10, 9 Ga. App. 255.

As pleading

See Pleading.

As proceeding

See Proceeding.

Signature, necessity of

An "affidavit" is defined by Bouvier as a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath. The signature of the affiant is not necessary, in the absence of a rule of court or statute requiring it. In re Shannahan-Wrightson Hardware Co. (Del.) 58 Atl. 1023, 5 Pennewill, 138.

An "affidavit" attached to a chattel mortgage which is sworn to, but not signed, by affiant, is valid, within Pub. Acts 1907, No. 332, providing that a mortgage is not receivable for filing without an annexed affidavit. Rameau v. Valley, 134 N. W. 987, 988, 168 Mich. 569.

Where the court charged that the affidavit on which the warrant was issued must be signed, the word "affidavit" meant a written statement sworn to, and an objection that the signing of an affidavit was not a swearing to it cannot be sustained. State v. Williams, 56 S. E. 783, 784, 76 S. C. 135.

AFFIDAVIT OF DEFENSE

An "affidavit of defense" peculiar to the practice in Pennsylvania is not a pleading, nor is it equivalent to an answer under the Code practice, or to a plea under the practice at common law; its sole function being to prevent a summary judgment. United States v. Schofield Co., 182 Fed. 240, 244.

AFFIDAVIT OF ILLEGALITY

The proper office of an "affidavit of illegality" to an execution is not to attack the validity of the judgment, where the defendant has had his day in court, but to resist the execution on account of some injustice in the party who seeks to enforce it. Monroe v. Security Mutual Life Ins. Co., 56 S. E. 764, 127 Ga. 549.

AFFIDAVIT OF MERITS

Rem. & Bal. Code, § 208, providing that an action begun in the wrong county may be tried therein unless defendant when he answers files an affidavit of merits and demands a change of venue, must be construed with reference to sections 207 and 209, authorizing the court to change the venue on it appearing by affidavit that the county designated in the complaint is not the proper county, etc., and a change of venue must be made when any of the conditions are shown without a showing of a defense to the action; the phrase "affidavit of merits" referring to a showing of any of such conditions. State ex rel. Stewart & Holmes Drug Co. v. Superior Court for King County, 121 Pac. 460, 461, 67 Wash. 321.

AFFINITY

"An affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related by 'affinity' to all the blood relatives of his wife, and the wife is related by 'affinity' to

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all blood relatives of the husband." Bliss v. Livingston Probate Judge, 113 N. W. 317, 319, 149 Mich. 601 (citing 1 Bouv. Law Dict. 112; 2 Cyc. p. 38; 23 Cyc. p. 583; 24 Cyc. p. 274; 1 Words and Phrases, p. 245). But one spouse is not related to the affinities of the other; and hence a juror, related by affinity to plaintiff's wife, is not related to plaintiff. Louisville & N. R. Co. v. Holland, 55 South. 1001, 1007, 173 Ala. 675.

Rev. St. 1899, § 3785, forbidding the impaneling of a juror of kin to either party within the fourth degree of consanguinity or affinity, disqualifies a juror who is a second cousin of the wife of one of the parties, because he is within the fourth degree of "affinity," which is the relationship by marriage between a husband and his wife's blood relations or between a wife and her husband's blood relations. Pemiscot Land & Cooperage Co. v. Davis, 126 S. W. 218, 220, 147 Mo. App. 194.

An award made by an arbitrator whose nephew married a sister of one of the principals is not invalid either under the common law or the statute, because of the relationship, for Rev. St. 1895, art. 48, providing that an arbitrator shall not be related to either party by consanguinity or affinity, means relationship by "affinity" in the third degree. Bell v. Campbell (Tex.) 143 S. W. 953, 956, 957.

AFFIRM

Where a Circuit Court of Appeals affirms a decision "on the opinion below," it approves the reasoning, adopts the findings, and concurs in the conclusions of the court below; but, where the decision below is merely "affirmed," such approval and concurrence are not to be inferred, but, on the contrary, it is to be understood that for some reason the appellate court prefers not to adopt the opinion below. Victor Talking Mach. Co. v. Hoschke, 188 Fed. 326, 328, 110 C. C. A. 304; Same v. Sonora Phonograph Co., 188 Fed. 330.

As confirm

Bankr. Act July 1, 1898, provides that claims shall not be proved subsequent to one year after the adjudication. "Adjudication" is defined by section 1, subsec. 2, as the date of entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when it is finally confirmed. Held, that the word "confirmed" is not synonymous with "affirmed," but includes termination of an appeal from an adjudication by dismissal, so that where an adjudication was appealed from, and the appeal dismissed, creditors were entitled to prove their claims within a year from date of such dismissal. In re Lee, 171 Fed. 266, 269.

AFFIRM WHOLLY OR PARTLY

See Reverse or Affirm Wholly or Partly.

AFFIRMANCE

If an appellee recover judgment in the Supreme Court, although for a less sum than he recovered in the county court, it is an "affirmance" of the judgment of the county court, within the meaning of the condition of the recognizance for the prosecution of such appeal. Page v. Johnson (Vt.) 1 D. Chip. 338, 339.

Where a judgment for plaintiff was affirmed by the Supreme Court on the condition that he remit a certain item of damage, to show which evidence was admitted when the pleadings did not authorize its recovery, the judgment otherwise being reversed for new trial, the Supreme Court's judgment was an "affirmance in part and a reversal in part," within Comp. St. 1910, § 5126, authorizing an apportionment of the costs in such case between the parties in such manner as the court deems equitable. Henderson v. Coleman, 115 Pac. 439, 455, 19 Wyo. 183.

To "ratify" a fraudulent contract means something more than merely standing on the contract, or affirming it; meaning an "affirmance" of the contract after full knowledge of the fraud, intention to abide by the contract notwithstanding, and a waiver of all claim for damages. Potts v. Lambie, 121 N. Y. Supp. 384, 385, 65 Misc. Rep. 334.

AFFIRMATIVE DEFENSE

An "affirmative defense" is a plea interposed as a basis for proving some new fact. F. V. Smith Contracting Co. v. City of New York, 128 N. Y. Supp. 351, 353, 70 Misc. Rep. 132.

AFFIRMATIVE EASEMENT

An "affirmative easement" is one which entitles the owner of the dominant estate to make active use of a servient tenement, or to do some act which in the absence of the easement would be a nuisance or a trespass, such as rights of way, etc. Bernero v. McFarland Real Estate Co., 114 S. W. 531, 534, 134 Mo. App. 290.

AFFIRMATIVE EVIDENCE

Where the testimony of a witness, who had opportunity to know of an occurrence, testified by another witness to have occurred, takes the form of recollection, and a positive denial based thereon, the testimony is "affirmative evidence." So testimony that the bell in an elevator did not ring at a particular time, contrary to the evidence that it did ring, while negative in form, is an affirmation of a fact that the bell did not ring. Anderson v. Horlick's Malted Milk Co., 119 N. W. 342, 344, 137 Wis. 569.

AFFIRMATIVE PROOF

The provisions of a benefit certificate, requiring "affirmative proof" of death as the proximate result of external, violent, and accidental means, meant such evidence of the truth of the matters asserted as tended to

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establish them, regardless of its character, so as to show prima facie that death occurred, and that it resulted from the cause stated. Jenkins v. Hawkeye Commercial Men's Ass'n, 124 N. W. 199, 201, 147 Iowa, 113, 30 L. R. A. (N. S.) 1181.

AFFIRMATIVE WARRANTY

"Warranties in insurance law are of two kinds—affirmative and promissory. 'Affirmative warranties' consist of a representation in the policy of a fact. 'Promissory warranties' are those that require that something shall be done or not done after the policy takes effect." Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co., 46 S. E. 1021, 55 W. Va. 238.

AFFIRMATIVELY AUTHORIZED

Act Cong. March 3, 1899, c. 425, § 10, 30 Stat. 1151, regulating the obstruction of navigable waters, provides that the creation of any obstruction not "affirmatively authorized by Congress" to the navigable capacity of any waters in respect of which the United States has jurisdiction is prohibited, and then declares that the building of certain structures and the performing of certain work with reference to navigable waters are forbidden without authority of the Secretary of War. Held, that the word "affirmatively" was used to distinguish the two kinds of authority referred to, and that the section should be construed to require that the initial authorization to create an obstruction must rest on affirmative congressional authority, and not on a mere permit of the Secretary of War. Hubbard v. Fort, 188 Fed. 987, 996.

AFFIX

See Fixtures.

As expressly defined by statute, a thing is deemed to be "affixed" to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. Western Nat. Bank v. Gerson, 117 Pac. 205, 206, 27 Okl. 280. Under a similar statute, it was held that where mining machinery, consisting of electric motors, etc., was bolted to a concrete foundation placed in the earth or to a wood foundation, and the lighting transformer was on a pole which was fixed in the ground, and an electric pump was bolted down in the mine, and all were used in working and developing the mine, such machinery and appliances, though placed on the premises by an assignee of the vendee of the mine, were fixtures as between creditors of such assignee and the vendor, holding title to the mine as security for unpaid purchase money; the contract of sale containing no provisions for removal. Conde v. Sweeney, 116 Pac. 319, 320, 16 Cal. App. 157.

AFFRAY

See Sudden Affray.

An instruction that an "affray is a mutual combat voluntarily engaged in by two or more persons in a public place, while technically accurate, might be construed as one in which both willingly took part, and was therefore misleading. Reynolds v. Commonwealth (Ky.) 82 S. W. 978, 979. See, also, Reynolds v. Commonwealth (Ky.) 82 S. W. 233.

AFORESAID

See As Aforesaid; Day Aforesaid.

The words "aforesaid neat cattle," used as description of property in a count of an information charging the receiving of stolen goods, are insufficient for that purpose, and they are also insufficient to incorporate into that count allegations of the number, sex, age, color, and brands characterizing cattle fully described in the preceding count. State v. Fields, 78 Pac. 833, 70 Kan. 391.

In replevin for wool, which defendant had purchased for plaintiff on commission, defendant claimed a lien for commissions and advances. The jury, in answer, to an interrogatory, expressly denied that the contract was that defendant should purchase at specified prices and store, weigh, and deliver the wool to plaintiff on cars for shipment, and for his services for purchasing, storing, and delivering the same on board the cars as aforesaid should receive one cent a pound. In answer to the succeeding interrogatory, requesting the jury to state the contract of employment, it stated that defendant agreed to purchase wool during the season with plaintiff's money without reference to price, that plaintiff should furnish sacks, and for defendant's services for purchasing, storing, sacking, and delivering the wool on board the cars as aforesaid he should receive one cent a pound. Held, that the word "aforesaid" in the latter answer should not be construed necessarily as referring to the manner of delivery, or to the purchasing, sacking, or storing as described in the prior answer, and that, since no inferences could be drawn in aid of answers to interrogatories, the language of the latter answer did not constitute a finding that it was defendant's duty to deliver the wool to plaintiff on board cars for shipment before his commissions were earned. Welker v. Appleman, 90 N. E. 35, 38, 44 Ind. App. 699.

AFORETHOUGHT

See Malice Aforethought; With Malice Aforethought.

"The term 'aforethought' indicates simply what is thought of beforehand, or pre-

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meditated." Commonwealth v. Tucker, 76 N. E. 127, 140, 189 Mass. 457, 7 L. R. A. (N. S.) 1056; State v. Forsha, 88 S. W. 746, 751, 190 Mo. 296, 4 L. R. A. (N. S.) 576; State v. Bond, 90 S. W. 830, 831, 191 Mo. 555; State v. Hottman, 94 S. W. 237, 239, 196 Mo. 110.

"Aforethought," as used to define murder, means a predetermination to kill, however recently formed in the mind before the killing. Freeman v. Commonwealth (Ky.) 118 S. W. 917. But Bishop says the word, so used has been taken to mean almost if not quite nothing. There is no particular time in which it is necessary that the malice should have existed. 2 New Cr. Law, § 677. State v. Heidelberg, 45 South. 256, 258, 120 La. 300.

"Aforethought" means a predetermination to do the act, however sudden or recently formed in the mind the resolution to do it has been made. Hathaway v. Commonwealth (Ky.) 82 S. W. 400, 402; Gambrell v. Commonwealth, 113 S. W. 476, 480, 130 Ky. 513.

"Aforethought," as used in the term "malice aforethought" distinguishing the higher from the lower grades of assault with intent to kill, means thought of beforehand for any length of time, however short. State v. Tetrick, 97 S. W. 564, 199 Mo. 100.

AFRICAN DESCENT

The words person of "African descent," in by-laws of a cemetery company, providing that "no person of African descent" shall be eligible to become a lot holder or member, necessarily includes the South African Boers, more remotely of Dutch descent, and many Algerians, more remotely of French descent, and such descent must in any case be proved, and cannot be presumed. Corin v. Glenwood Cemetery (N. J.) 69 Atl. 1083, 1084.

AFTER

See At or After; Before or After; From and After; On and After; Thereafter. Immediately after, see Immediately.

Charge or condition imposed

The words "after," or "subject to," when used in a will devising the residue "after," or "subject to," the payment of certain precedent legacies, imply an intention that the legacies are to be charged on the land. Moerlein v. Heyer, 97 S. W. 1040, 1042, 100 Tex. 245.

A clause "after all my lawful debts are paid and discharged," constituting part of a printed form used by a testator does not amount to an expression or declaration that the executor may withhold all payments of the legacy referred to until he has liquidated the last debt against the testator. Conklin v. Clark, 96 N. Y. Supp. 914, 915, 48 Misc. Rep. 432.

Where testator bequeathed a general legacy to a home for destitute children, and then provided that after the payment of such legacy the executor and trustee should pay to the widow a general legacy of $50,000, and invest the further sum of $32,000 and pay to her the income therefrom for her life, the words "after the payment" should be construed as referring to the order of marshaling the assets of the estate, and not to the point of time when the rights of the widow accrued, and the legacy to the widow vested in her at testator's death. In re Kings County Trust Co., 125 N. Y. Supp. 713, 715, 141 App. Div. 43.

Day excluded

The day of demand being excluded, 12 full days must pass before the time "after 12 days" can begin to run. Fenlason v. Shedd, 84 Atl. 409, 410, 109 Me. 326.

Where a time is to be computed "after" a certain date, such date, must be excluded; and where defendant in a dispossessory warrant issued under Civ. Code 1895, § 4821, is given notice on Thursday, November 7th, that after three days, not counting Sunday or holidays, the officer will evict him unless he files the statutory counteraffidavit, defendant has the 8th, 9th, and 11th of November within which to file his defense, and the officer cannot legally evict him before November 12th. Holt v. Richardson, 67 S. E. 798, 134 Ga. 287.

Interest "after date" ordinarily means interest from the date of the instrument. W. H. Howard Piano Co. v. Glover, 67 S. E. 277, 278, 7 Ga. App. 548.

Day included

Under a statute providing for the collection of delinquent taxes and directing that "the advertisement shall also recite that the back tax attorney will 'after thirty days' from date [giving date, time, terms, and place of sale] sell such property at public outcry at the courthouse door for cash to the highest and best bidder," a sale which was advertised on the 12th day of April and took place on the 12th day of May, is advertised for a sufficient length of time. Levy v. Acklen, 2 Tenn. Ch. App. 201, 219.

Enjoyment of estate devised referred to

"There is a long line of uniform authorities that the words 'on,' 'when,' 'after,' 'from and after,' and like expressions, used in a devise of a remainder following a life estate, do not afford sufficient ground in themselves for adjudging that a remainder is contingent, and not vested, and that such words, unless their meaning is enlarged by the context, are to be construed as relating merely to the time of the enjoyment of the estate, and not to the time of its vesting an interest. Where nothing appears in the context of the will which enlarges these words, they do not of themselves effect a

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postponement of the vesting of the remainder until the death of the life tenant." Davidson v. Jones, 98 N. Y. Supp. 265, 266, 112 App. Div. 254 (citing Connelly v. O'Brien, 60 N. E. 20, 166 N. Y. 406; Hersee v. Simpson, 48 N. E. 890, 154 N. Y. 496; Nelson v. Russell, 31 N. E. 1008, 135 N. Y. 137; Moore v. Lyons [N. Y.] 25 Wend. 119); Clark v. Peters, 124 N. Y. Supp. 961, 68 Misc. Rep. 252.

The word "after" does not always or necessarily refer to time, but to order in point of right or enjoyment; and where testator gave his entire estate to trustees, and provided that on the death of his wife and daughter, and "after" the payment of all his debts, his remaining estate, except a specified bequest, should be distributed, his intention was to dispose of all his property, and the will should not be so construed as to unduly suspend the power of alienation and create a void trust, so as to leave him intestate with respect to certain real estate. McGraw v. McGraw, 176 Fed. 312, 322, 99 C. C. A. 650 (quoting and adopting Haug v. Schumacher, 60 N. E. 245, 166 N. Y. 506, and Lamb v. Lamb, 11 Pick. [28 Mass.] 378).

A will gave all moneys "derived from my father's estate as my share of the same, after my decease," to be equally divided between my sons. Held, that the words "after my decease" did not apply merely to the time of the enjoyment of the fund, and the legatees were not entitled to moneys received by testator in his lifetime as his share of his father's estate. Demarest v. Demarest, 61 Atl. 569, 66 N. J. Eq. 433.

A will created a trust, and provided that on the death of the beneficiary the fund should pass to testator's sister and two brothers, and should be equally divided between them, and that "after" the fund for the trust was set aside the residue should go in trust for the benefit of his father and mother for life, and thereafter to his sister and brothers. It was contended that the creation of the residuary trust "after" the prior created trust indicated an intention to exclude from the residuary trust all of that which was included in the former trust, and the words "after" and "then" were relied on as indicating such intention. It was held, however, that these words were to be considered words of description rather than of exclusion and limitation, and the provision of his will creating a residuary estate was deemed to speak as of the date of his death, so that it would include all property that had been devised or bequeathed to others, including a legacy which had lapsed. Langley v. Westchester Trust Co., 73 N. E. 44, 46, 180 N. Y. 326.

The residuary clause of a will recited that all the rest and residue of the estate, "after providing for the devises, bequests and legacies" mentioned, and after so much thereof as may be necessary to defray the expense of taxes on his homestead and keeping the same in repair for the benefit of testator's wife, was devised and bequeathed to the then living children of his brothers and sisters. Held that, in view of the testator's solicitude for his wife, and the fact that part of the fund of which she was given a life income was directed to be disposed of as part of the residuum, and in view of the use of the word "after," which ordinarily denotes subordination as to time, the will created only one residuum, which was not to be distributed until after the death of the testator's wife. In re Stark's Will, 134 N. W. 389, 397, 149 Wis. 631.

As immediately after or upon

In an action by a judgment creditor to set aside the debtor's transfers of property as fraudulent, an allegation in the complaint that, "after the time" of the transfer, the judgment defendant did not have sufficient property to pay his debts, instead of "at the time" of the transfer, was sufficient, as the words "after the time" had relation to and commenced the moment the transfer was made, and in that connection meant "from the time" of the transfer. Kelley v. Bell, 172 Ind. 590, 88 N. E. 58, 60.

AFTER-ACQUIRED PROPERTY

A water company owning a plant and a franchise for supplying water to the inhabitants of a city executed a mortgage to secure an issue of bonds largely in excess of its then indebtedness, a part of which were to be retained by the trustee, and issued only when required for the extension of the plant. The mortgage covered the company's property and franchises, and all extensions and additions thereto, and all after-acquired property. The reserved bonds were issued on the sworn certificate of the officers that extensions were to be made, and a new pumping station, necessary to obtain a supply of pure water and to fulfill the company's contract obligations to the city, was built, and mains extended therefrom and connected with those of the company. Such station and mains were nominally constructed and owned by a second company controlled by the same stockholders, but the station was equipped with the engine from the old station, and they had no purpose or function except to supply water to the pipes of the original company. Held, that they constituted the extensions and additions contemplated and provided for by the mortgage, and came within its lien, as "after-acquired property," without regard to whether or not they were actually built with the proceeds of the bonds sold for the purpose. New England Waterworks Co. v. Farmers' Loan & Trust Co., 136 Fed. 521, 526, 69 C. C. A. 297 (citing Wade v. Chicago, S. & St. L. R. Co., 13 Sup. Ct. 892, 149 U. S. 327, 37 L. Ed. 755).

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AFTER APPROPRIATION EXHAUSTED

See Debt Incurred After Appropriation Exhausted.

AFTER-BORN CHILD

As child, see Child—Children.
As issue, see Issue (Descendants).
Mention of, see Mention.

AFTER DATE

See After; On Demand After Date.

AFTER THE FIRE

There is no difference between insurance policies prescribing a time limit for the commencement of suit "after loss" and those fixing it "after the fire." Hogl v. Aachen & Munich Ins. Co., 64 S. E. 441, 65 W. Va. 437, 131 Am. St. Rep. 972.

AFTER HIM

Where testator gave to his son and his heirs "after him" all his real estate, the words "after him" will be construed to mean the same as if the provision of the will read "after his death." Nesbit v. Skelding, 62 Atl. 1062, 213 Pa. 487.

AFTER LOSS

See After the Fire.

AFTER SIX MONTHS

See Sale After Six Months.

AFTERNOON

See P. M.

AGAIN

See Marrying Again.

AGAINST

The word "against," in a contract with a salesman whereby for his services he was to receive $125 per month and certain commissions on his sales, and "against" such amount $50 was to be paid each week, meant "towards," and the $50 was for paying the salary and commissions already earned, and without any intention that any part of it should be paid back. Lobsitz v. Leffler, Thiele & Co., 124 N. Y. Supp. 533, 534, 140 App. Div. 14.

Competency of witness

A prosecution of a husband for personal violence committed against his wife is a prosecution for a crime "against" her, within Code, § 4606, providing that neither the husband nor wife shall be a witness against the other, except in criminal prosecutions for a "crime committed one against the other." Molyneux v. Willcockson (Iowa) 137 N. W. 1016, 1017, 41 L. R. A. (N. S.) 1213.

AGAINST HER WILL

As used in a statute defining rape to be the carnal knowledge of a female forcibly and against her will, the words "against her will" are synonymous with the words "without her consent." Gore v. State, 46 S. E. 671, 672, 119 Ga. 418, 10 Am. St. Rep. 182; State v. Peyton, 125 S. W. 416, 417, 93 Ark. 406, 137 Am. St. Rep. 93. The phrase, as an element of rape, is not necessarily synonymous with "without her consent"; the words "against her will" being used to describe the condition of mind of the female. Beard v. State, 97 S. W. 667, 669, 79 Ark. 293, 9 Ann. Cas. 409.

Upon the trial of one under indictment for rape, the court did not err (the evidence authorizing it) in instructing the jury: "If you believe and find from the evidence submitted in this case that the defendant now on trial had knowledge of Penny Jones [the prosecutrix, and the wife of another], and that at the time she was asleep and not consenting, or having given the defendant any reason to believe she consented, and the sexual connection was against her will, the jury would be authorized to find that the act was one of rape. Carnal knowledge of a woman while she is asleep and unconscious of the act, and her body being penetrated before she awakes, would be against her will and without her consent, and would constitute the offense of rape, unless she had given the party charged with the rape some reason to believe that she consented to the act." In Gore v. State, 46 S. E. 671, 119 Ga. 418, 100 Am. St. Rep. 182, it was held that the words "against her will," in the definition of rape, are synonymous with "without her consent," and that therefore "a man who has sexual intercourse with an imbecile female, who is mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, though no more force be used than is necessary to accomplish the carnal act, and though the woman offer no resistance." This ruling in effect authorized the instruction complained of. Brown v. State, 76 S. E. 379, 138 Ga. 814 (citing Harvey v. State, 14 S. W. 645, 53 Ark. 425, 22 Am. St. Rep. 229; Maupin v. State [Ark.] 14 S. W. 924; Malone v. Commonwealth, 15 S. W. 856, 91 Ky. 307; Payne v. State, 49 S. W. 604, 40 Tex. Cr. R. 202, 76 Am. St. Rep. 712; State v. Shroyer, 16 S. W. 286, 104 Mo. 441, 24 Am. St. Rep. 344; State v. Welch, 89 S. W. 945, 191 Mo. 179, 4 Ann. Cas. 681; see also Carter v. State, 35 Ga. 263; Commonwealth v. Burke, 105 Mass. 376, 7 Am. Rep. 531).

AGAINST LAW

The words "against law," as used in Code Civ. Proc. § 657, subd. 6, specifying a verdict or decision against law as a ground for a new trial, includes no cause falling within any other subdivision of that section. People v. Amer, 90 Pac. 698, 700, 151 Cal. 303 (citing Brumagim v. Bradshaw, 39 Cal. 35).

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The statutory ground for new trial, that the decision is "against law" refers to a situation furnishing a reason for re-examining an issue of fact. A decision is not "against law," when the only fault in the findings is that they do not support the legal conclusions drawn from them and the judgment based thereon. In re Keating's Estate, 122 Pac. 1079, 1081, 162 Cal. 406.

A verdict which the law does not authorize the jury to render on the evidence, because the conclusion drawn is not justified by the evidence, is a "verdict contrary to law." Tucker v. O'Brien, 117 N. Y. Supp. 1010, 1013.

A verdict is "contrary to law" within Civ. Code Prac. § 340, subsec. 6, authorizing a new trial, where the verdict is contrary to law, when it is contrary to the instructions whether they are right or wrong. Lynch v. Snead Architectural Iron Works, 116 S. W. 693, 695, 132 Ky. 241, 21 L. R. A. (N. S.) 852.

A failure to find on all the material issues is a "decision against law," for which a new trial may be had. "Whatever else may be meant by the expression 'decision against law,' we think there is no doubt that it includes a case where the decision is based upon findings which do not determine all of the material issues of fact raised by the pleadings." Where a judgment is entered upon findings which do not determine all the material issues raised by the pleadings with respect to which evidence was introduced, the decision is against law. Brown v. Macey, 90 Pac. 339, 340, 13 Idaho, 451 (quoting and adopting definition in Knight v. Roche, 56 Cal. 15).

A judgment based upon findings not determining all the material issues is a "decision against the law," for which a new trial may be had. Cargnani v. Cargnani, 116 Pac. 306, 307, 16 Cal. App. 96.

When upon the trial of a case the court renders its decision without making findings upon all the material issues presented by the pleadings, it is held that such decision can be reviewed upon a motion for a new trial. In such a case there has been a mistrial, and the decision having been fully tried is considered to have been a "decision against law." Dillon Implement Co. v. Cleaveland, 88 Pac. 670, 671, 32 Utah, 1 (quoting and adopting definition in Brison v. Brison, 27 Pac. 186, 90 Cal. 323).

The expression "decision against law," in Code Civ. Proc. § 657, providing that a new trial may be granted on certain grounds, among others, that the verdict is against the law, includes a case where the decision is based on findings which do not determine all the material issues of fact raised by the pleading. Hamilton v. Murray, 74 Pac. 75, 76, 29 Mont. 80 (citing Knight v. Roche, 56 Cal. 15).

Under Code Cr. Proc. 1895, art. 817, declaring that new trials in felonies shall be awarded where the verdict is "contrary to law and evidence," where accused is found guilty of an offense of inferior grade, but of the same nature to that proved, a conviction of manslaughter, while the evidence shows guilt of a higher grade of homicide, is not prejudicial to accused. High v. State, 112 S. W. 939, 940, 54 Tex. Cr. R. 333.

AGAINST PAPERS

See Sight Draft Against Papers.

AGAINST THE STATE

See Suit Against the State.

AGAINST THE STATUTE

See Statute.

AGATE

Manufactures of, see Manufactures—Manufactured Articles.

AGE

16 years of age or under, see Years of Age.

AGENCY

See Actual Agency; Commercial Agency; Conserve the Best Interests of the Agency; Dangerous Agency; Exclusive Agency; General Agency or Agent; Ostensible Agency; Public Agency; Scope of Agency; Special Agency or Agent.

Agency of partner, see Partnership.

Office as a public agency, see Office.

"Agency" is the legal relation founded upon the express or implied contract of the parties, or created by law by virtue of which one party, the agent, is employed and authorized to act for the other, the principal. Harkins v. Murphy & Bolanz, 112 S. W. 136, 137, 51 Tex. Civ. App. 568; Steele v. Lawyer, 91 Pac. 958, 961, 47 Wash. 266. It is a representative relation, and in its broadest sense includes every relation in which one person acts or represents another by his authority. International Harvester Co. v. Commonwealth, 145 S. W. 393, 397, 147 Ky. 655. The relation arises when one is authorized to represent another in bringing or to aid in bringing the latter in contractual relation with a third party, however such authority may be conferred. Keyser v. Hinkle, 106 S. W. 98, 100, 127 Mo. App. 62.

"Agency" is a contract, and, like other contracts, it is essential that the minds of the parties should meet in making it. In re Cullinan, 99 N. Y. Supp. 1119, 1121, 114 App. Div. 509.

Within the purview of the embezzlement statutes, an "agency" may be created without compensation. State v. Fraley (W. Va.) 76 S. E. 134, 136, 42 L. R. A. (N. S.) 498.

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"'Agency' properly relates to transactions of business with third persons, and implies more or less of discretion in the agent as to the time and manner of his performance. 'Service,' on the other hand, has reference to actions upon or about things. It deals chiefly with matters of mere manual or mechanical execution, in which the servant acts under the direction and control of the master." Munn v. Wellsburg Banking & Trust Co., 66 S. E. 230, 231, 66 W. Va. 204, 135 Am. St. Rep. 1024 (quoting definition in Mechem, Agency).

Cotenants are not partners, neither does the relation of "principal and agent" exist between them, except upon an express agreement or one necessarily implied. Wright v. Kaynor, 113 N. W. 779, 782, 150 Mich. 7.

An "agency" was not established by a contract whereby a street railroad company leased to another company its railway, divesting itself of the use of the property for a term of 40 years, in consideration of a specific rent to be paid by the latter company and the performance of other duties in the nature of rent, and providing for the restoration of the property of the former at the end of the term, and for re-entry if the latter defaulted in the performance of its contract during the term; no provision being made that the latter should conduct the business in the name of or for the benefit of the former, except as in so far as the former was benefited by the consideration to be paid to the latter. Moorshead v. United Rys. Co. of St. Louis, 100 S. W. 611, 612, 203 Mo. 121.

The relation of principal and agent not existing between an insane person and his guardian, where such person is sought to be held, upon a default of the guardian's promise or undertaking, an insane person was not liable to her tenant for injuries resulting from her guardian's breach of a covenant to cover a cellarway. The court said: "There cannot be an 'agent' unless there is a 'principal.' In order to create the relation, there must exist a person who is competent to select and appoint an agent to act for the principal. An agent can and does exercise delegated powers only, and an incompetent person cannot delegate powers arising, either directly or by implication of law. The doctrine of principal and agent, therefore, cannot apply between an insane person and his guardian, at least not where the insane person is sought to be held upon a default of the supposed agent's personal promise or undertaking." Reams v. Taylor, 87 Pac. 1089, 1090, 31 Utah, 288, 120 Am. St. Rep. 930, 11 Ann. Cas. 930 (citing Andrus v. Blazzard, 63 Pac. 888, 23 Utah, 233, 248, 249, 54 L. R. A. 354, distinguishing Mechem, Agency, § 48; In re Strasburger, 30 N. E. 379, 132 N. Y. 128; Stillwell v. Louisville Land Co. [Ky.] 58 S. W. 696, 50 L. R. A. 825).

"Agency" and "place of business," as used in Civ. Code 1895, § 1900, which provides that a writ may be served on a corporation by leaving a copy with the agent of the defendant, or, if there be no agent in the county, then at the "agency" or "place of business," are synonymous, and hence refer to the same place. Tuggle v. Enterprise Lumber Co., 51 S. E. 433, 434, 123 Ga. 480.

The agreement of defendants, manufacturers of boxes and box materials, in terms creating an "agency," placed in charge of a board of principals, on which each party had a single representative, giving such board authority to appoint a general agent with authority, subject to the supervision of the board, to act as the agent of each of the principals, "severally and respectively," for the sale of all manufactured products "covered by the agreement" and to collect "all proceeds of sales" passing through the agency, he to have only such powers as were "expressly conferred on him" by the agreement, or "may be conferred on him by resolution of the board, passed at a regular meeting and entered on its minutes, declaring the purpose of the agency to limit the production and fix the prices of the output of the mills of the parties," expressly providing that the board was the agent of each of the principals "severally," and that it should not have power to "represent or act for the principals jointly or any number of them jointly," or to bind any principal "jointly with any other principal" or other than separately and severally, and that it should not "create any joint obligation as to the said principals or any number of them," does not create a partnership, but only an "agency." National Lumber & Box Co. v. Grays Harbor Commercial Co., 127 Pac. 577, 579, 71 Wash. 31.

Option distinguished

A writing in express terms empowering and authorizing real estate brokers to sell land for $1,000, or as much less as the owner might take, binding the brokers to accept as remuneration any sum they might obtain in excess of the sum stipulated that the owner should receive is a contract of "agency," and not an option to the brokers to purchase the land. Tate v. Aitken, 90 Pac. 836, 839, 5 Cal. App. 505.

An option is a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future, and a contract between owners of land who agree to plat the same, and a person who agrees to attempt its sale, paying a certain sum for each acre sold, is not one conferring an option but creates an "agency" to sell. Raddle v. Lindemann, 151 Ill. App. 441, 444.

As place of business

That a traveling soliciting agent of a corporation remained in a county for a week

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or two at a time during the rice purchasing season for the purpose of buying rice did not establish that the corporation had an "agency" in that county, authorizing the maintenance of a suit for breach of a rice contract therein, under Rev. St. 1895, art. 1194, § 23, declaring that an action against a corporation may be brought in any county where it maintains an agency. Mangum v. Lane City Rice Milling Co. (Tex.) 95 S. W. 605, 606. The statute contemplates service on a person employed in forwarding the particular business for which the corporation was organized, and service on an attorney representing the defendant, and who was in the county at the time of service merely for the purpose of settling certain claims between the parties to the action, is insufficient. Bay City Iron Works v. Reeves & Co., 95 S. W. 739, 740, 43 Tex. Civ. App. 254.

Where a carrier contracts generally to carry goods, but provides that, if it has not an "agency" at the point of destination, it shall carry to its nearest agency, and there notify the consignee, or deliver the property to some other carrier, it is not sufficient to bring the case within the contract to prove that it had no office at the point of destination. Saunders v. Adams Express Co., 74 Atl. 670, 671, 78 N. J. Law, 441.

Within the purview of Civ. Code 1910, § 2259, authorizing actions against corporations to be begun in the county where the action arose, service to be effected by leaving a copy of the writ with the "agent" of the defendant, or if there be none in the county then at the agency or place of business, the expression "agency" is synonymous with "place of business," and means the place wherein the corporation's business is transacted. Central Georgia Power Co. v. Parnell, 76 S. E. 157, 158, 11 Ga. App. 779.

In treatment of disease

"Agency," as used in a statute forbidding the prescribing of any drug or medicine or other "agency" for the treatment of disease by an unlicensed person, means treatment by a method similar to drug and medicine, not including osteopathy, or chiropractics. State v. Liffring, 55 N. E. 168, 169, 61 Ohio St. 39, 50, 46 L. R. A. 334, 76 Am. St. Rep. 358; State v. Gallagher, 143 S. W. 98, 99, 101 Ark. 593, 38 L. R. A. (N. S.) 328.

Means synonymous

See Means.

As trust

See Trust.

AGENCY BY ESTOPPEL

"Agency" or authority "by estoppel" arises where the principal by his negligence permits his agent to exercise powers not granted to him, though the principal have no notice of the conduct of the agent. Dispatch Printing Co. v. National Bank of Commerce, 124 N. W. 236, 240, 109 Minn. 440.

AGENCY OF STATE

Municipal corporation as, see Municipal Corporation.

AGENT

See Authorized Agent; Business Agent; Duly Authorized Agent; Emigration Agent; General Agency or Agent; Highway Agent; Immigrant Agent; Innocent Agent; Insurance Agent; Joint Agent; Known Agent; Labor Agent; Local Agent; Managing Agent; Passenger or Freight Agent; Selling Agent; Soliciting Agent; Special Agency or Agent; Ticket Agent.

Any agent, see Any.

Other agent, see Other.

An "agent" is one who acts for another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter. The term applies to any one who, by authority, performs an act for another. Peters v. St. Louis & S. F. R. Co., 131 S. W. 917, 922, 150 Mo. App. 721 (citing 1 Words and Phrases, p. 352); Pouppirt v. Greenwood, 110 Pac. 195, 196, 48 Colo. 405. To create the relation there must be a contract of employment, express or implied. Uniontown Grocery Co. v. Dawson, 69 S. E. 845, 846, 847, 68 W. Va. 332, Ann. Cas. 1912B, 148.

An "agent" is generally defined as a person who acts on behalf of another person who is his principal. In practical affairs the relation assumes so many phases that it is often difficult to apply the definition, but it is certainly necessary to constitute agency that there be some kind of representation of the principal by virtue of authority conferred by him. Authority to contract is sufficient to constitute agency, but it is said that the claim of agency based on any other authority short of power to contract has rarely been maintained, and certainly should be allowed with great caution. A timekeeper of a foreign corporation is held by divided court to be an agent of the corporation. Jenkins v. Penn Bridge Co., 53 S. E. 991, 992, 73 S. C. 526.

An "agent" is one employed and authorized to represent and act for another, and the distinguishing features of the agent are his representative character and his derivative authority. Taylor v. Sutherlin-Meade Tobacco Co., 60 S. E. 132, 133, 107 Va. 787 (quoting and adopting the definition in Mechem, Agency, § 1).

"An agent is one who represents another, called the 'principal,' in dealing with third persons (Civ. Code, § 2295), and may be authorized to do any acts which his principal might do (Id. § 2304)." Nicholls v. Mapes, 82 Pac. 265, 267, 1 Cal. App. 349.

The term "agent," as used in Gen. St. 1906, § 3311, denouncing embezzlement, contem-

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plates one who has undertaken to transact some business or manage some affair for another, by the authority and on the account of the latter, and to render an account of it, or who is subject to the immediate direction and control of his master so that a boy employed by the agent of an express company, whose salary was paid by the agent, is not an "agent" of the company within the contemplation of the statute. Tipton v. State (Fla.) 43 South. 684, 686 (quoting and adopting the definitions in 2 Bishop, New Cr. Law, § 333; 1 Clark, Cr. Law, p. 274). The word as employed in a similar statute imports a principal and implies employment, service, delegated authority to do something in the name and stead of the principal. Echols v. State, 48 South. 347, 158 Ala. 48.

Under White's Ann. Pen. Code 1901, art. 10, providing that all words and phrases not having a technical meaning, or where not specifically defined, shall be taken in their ordinary signification, the word "agent," when used in a statute, must be construed to mean one in the employ of another for a specific purpose. Lamb v. State, 93 S. W. 734, 49 Tex. Cr. R. 442.

The word "agent," written after the name of the vendee in a written contract for the sale of real estate without further disclosure of the person for whom he was agent, would be rejected as surplusage or treated as descriptio personæ, and not a word of limitation. In re Miley, 187 Fed. 177, 179.

Stock certificates issued to "M., Agent," were presumedly held by him as agent for another; the word "agent" prima facie not being descriptio personæ. Tyson v. George's Creek Coal & Iron Co., 81 Atl. 41, 44, 115 Md. 564.

A contract made by defendant as "agent" without more specific designation, is, under the direct provisions of Civ. Code 1895, § 2998, the individual undertaking of the maker. Hearn v. Gower, 57 S. E. 916, 1 Ga. App. 265.

Attorney at law

The word "agent" in Code Pub. Gen. Laws 1904, art. 27, § 103, prohibiting embezzlement by an "agent," includes an attorney at law, "attorney," originally meaning "agent," or "attorney in fact," and in its restricted sense relating to the representation of others in legal actions or demands. Dick v. State, 68 Atl. 576, 107 Md. 11.

A return by the sheriff, that he delivered seisin and possession of land taken in execution to the agent, instead of the attorney, of the creditor, is sufficient. "The words 'agent' and 'attorney' are frequently used synonymously; and it ought not to be in the power of a sheriff, who uses one instead of the other, by ignorance or design, to defeat the creditor's title." Pratt v. Putnam, 13 Mass. 361, 363.

As used in Wag. St. c. 88, art. 3, § 19, requiring that notice of a claim for a mechanic's lien shall be given "to the owner, owners, or 'agents,' or either of them," should be construed to include one admitted to be "the attorney" of defendant "for the purpose of attending to the lien on the house." Agency in fact is expressed by the words of the admission and as the statute directs that the notice shall be served on the owner or agent, the matter of the agency was the matter involved, and the service of the notice of claim for a mechanic's lien on such attorney was sufficient. Schulenburg v. Werner, 6 Mo. App. 292, 293.

Bookkeeper

One employed by a corporation as bookkeeper for a definite period is not an "agent" of the corporation within Code 1906, c. 53, § 53, holding his place during the pleasure of the directors, and removable by them without cause without liability on the corporation for breach of the contract of employment. Munn v. Wellsburg Banking & Trust Co., 66 S. E. 230, 66 W. Va. 204, 135 Am. St. Rep. 1024.

While a bookkeeper may be, and often is, the "agent" of his employer, the word does not ex vi termini import that relation, and, in the absence of averment that it exists, the courts cannot by intendment enlarge the ordinary signification of the word so as to bring it within a class to which it may or may not belong. Code 1887, § 3286 (Code 1904, p. 1730), provides that when, in assumpsit, an affidavit is filed with a declaration that the amount claimed is justly due, a plea in bar shall not be received unless verified, in the absence of which judgment shall be for plaintiff. An affidavit by plaintiff's bookkeeper, filed with the declaration, is insufficient to authorize judgment in favor of plaintiff, though the statute permits the filing of the affidavit by plaintiff or his agent. Merriman Co. v. Thomas & Co., 48 S. E. 490, 492, 103 Va. 24.

Broker

An insurance broker who sends applications for insurance to a foreign company, delivers policies issued thereon and sent to him for delivery, collects and remits premiums, retaining a commission which is allowed, is an "agent," within Burns' Ann. St. 1908, § 4102, defining agency, so that process against the company may be served on him. McCord v. Illinois Nat. Fire Ins. Co. of Springfield, 94 N. E. 1053, 1054, 47 Ind. App. 602. But a person who brings a corporation and a county together in a single transaction resulting in a sale by the corporation to the county of road machinery, and who receives from the corporation pay therefor, is not an "agent" of the corporation within statutes authorizing service of process under an indictment on an agent of accused. Good Roads Machinery Co. v. Commonwealth, 143 S. W. 18, 19, 146 Ky. 690.

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One employed on a commission to sell the capital stock of a corporation and required to report all sales, forward to his principal all moneys received, less his commission, is an "agent" within Rev. Laws 1905, § 5078, defining larceny. State v. Phillips, 117 N. W. 508, 511, 105 Minn. 375.

Carrier

The word "agent," as used in a clause, in a contract for the shipment of live stock, by which the shipper agreed to release the carrier from liability for delay after delivery to its agent referred to the connecting line to which the initial carrier contracted to deliver the shipment. Texas & N. O. Ry. Co. v. Farrington, 88 S. W. 889, 891, 40 Tex. Civ. App. 205.

Clerk or collector

Gen. St. 1902, § 1413, by which "agents," etc., are made amenable for the misappropriation of money, goods, or choses in action which are in their care and custody in such capacity, and for money received by them for the sale of such goods or choses in action or collected by them in such capacity, includes a collection agent engaged in the general collection of accounts on commission. State v. Lanyon, 76 Atl. 1095, 1097, 83 Conn. 449.

The chief clerk in the office of a station agent, doing merely the routine work of the office, is not an "agent," within Civ. Code 1895, § 2243, requiring a 30 days' notice to build cattle guards to be served upon the agent of the railroad by the owner of the lands to be affected, and section 2244, imposing a penalty for failure to erect cattle guards within such time. Smith v. Southern Ry. Co., 63 S. E. 801, 804, 132 Ga. 57.

Comptroller of the currency

The Comptroller of the Currency is an "agent," within the provision of Rev. St. § 5209 that every officer of a national bank who makes any false entry in a report to any agent appointed to examine the affairs of such association shall be guilty of a misdemeanor, and it is immaterial that another statute confers power upon him to appoint suitable agents to examine the affairs of such banks. United States v. Corbett, 30 Sup. Ct. 81, 84, 85, 215 U. S. 233, 54 L. Ed. 173.

Contractor

A contractor transferring freight from one car which has become defective during transit to another car, to enable the carrier to carry the freight to its destination, is an "agent" of the carrier within Rev. St. 1909, § 5425, authorizing an action for the death of an employé caused by the negligence of any officer or agent while running or managing any car or train. Peters v. St. Louis & S. F. R. Co., 131 S. W. 917, 922, 150 Mo. App. 721.

A person getting out logs and piling under a contract with the owner is an "agent," within the meaning of the statute providing that every person performing labor upon or assisting in obtaining or securing logs, etc., shall have a lien upon the same for the work done in obtaining or securing them, whether it was done at the instance of the owner of the same or his agent; hence the lien of persons performing work for the contractor is good as against the owner of the logs. O'Brien v. Hopgood, 95 Pac. 489, 49 Wash. 395.

One in control or management of property

An "agent within the state," which receives and distributes goods forwarded by a foreign storage and transfer company, is such an agent as may be served with process, within a statute providing that a summons in a suit against a foreign corporation doing business in the state shall be served on an agent thereof. Lee v. Fidelity Storage & Transfer Co., 98 Pac. 658, 659, 51 Wash. 208.

Corporation

One who shipped goods to a corporation on its order containing the words "purchasing agent" after the corporate name, and billed and charged the same to said corporation, by which it was customarily paid, is not entitled to join in a petition in bankruptcy against another corporation merely because its stock was owned and its business controlled by the purchasing company, which fact did not make the latter an "agent," even though by its directions the goods were shipped to the subsidiary company. In re Hudson River Electric Power Co., 173 Fed. 934, 950.

As creditor

See Creditor.

Drayman

A drayman, authorized in writing by the defendant to receive and receipt for freight at a local railway station, is an "agent" of the defendant for such purposes. State v. Dahlquist, 115 N. W. 81, 83, 17 N. D. 40.

Engineers and other railway employés

Gen. St. Kan. 1901, § 5858, providing that railroad companies shall be liable for damages to any employé of said companies in consequence of any negligence of their agents or of any mismanagement of their engineers or other employés to any person sustaining such damage, does not make a distinction between "agents" on the one hand and engineers and other employés on the other, but by the act a company is made responsible for any mismanagement of its engineers or other employés to any person sustaining damage thereby. Missouri, K. & T. Ry. Co. of Texas v. Kellerman, 87 S. W. 401, 404, 39 Tex. Civ. App. 274. Under a similar statute it is held that the word "agent" was not used in a strict sense, but was intended to include employés within its

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meaning. Giving the word "agent" that meaning, it is clear that the act, if applied literally, is broad enough to impose on a railroad company liability for the negligence of a fellow servant. Beleal v. Northern Pac. Ry. Co., 108 N. W. 33, 34, 15 N. D. 318, 11 Ann. Cas. 921.

Guardian

A statute providing that no stay of a judgment against any agent for delinquency in his duties shall be allowed, does not apply to an action against a guardian; he not being an "agent" within the meaning of such statute. Parker v. Wilson, 137 S. W. 926, 99 Ark. 344, Ann. Cas. 1913B, 84.

As holder

See Holder.

As legal representative

See Legal Representative.

Machinist

The word "agent," as used in Acts Sp. Sess. 1907, No. 3, § 10, which after providing for the appointment of an agent within the state to accept service of process on a foreign corporation authorized to do business within the state and for service on the secretary of state, declares that service of process may also be made on any officer or agent of such corporation, is not confined to one having authority, discretion, or control over some part of the corporation's business, and where an expert machinist was employed by the corporation's designated agent within the state to go into another county on the company's business, service of process on him within that county constituted service on the corporation. Arnold v. Huber Mfg. Co., 131 N. W. 537, 166 Mich. 190.

Officer of corporation

One distinction between "officers" and "agents" of a corporation lies in the manner of their creation. An officer is created by the charter of the corporation, and the officer is elected by the directors or the stockholders. An agency is usually created by the officers, or one or more of them, and the agent is appointed by the same authority. It is clear that the two terms, "officers" and "agents," are by no means interchangeable. One, deriving its existence from the other, and being dependent upon that other for its continuation, is necessarily restricted in its powers and duties, and such powers and duties are not necessarily the same as those pertaining to the authority creating it. The officers, as such, are the corporation. An agent is an employé. Vardeman v. Penn. Mut. Life Ins. Co., 54 S. E. 66, 67, 125 Ga. 117, 5 Ann. Cas. 221.

The word "agent," in St. 1898, § 2637, subd. 13, which provides for service of process on a foreign corporation by service of summons and notice of object of action, by delivering copies thereof to any agent having charge of or conducting any business, is used in contradistinction to the words "chief officer," "vice president," "secretary," "treasurer," "director," or "managing agent." Minneapolis Threshing Mach. Co. v. Ashauer, 126 N. W. 113, 115, 142 Wis. 646.

The president of an insurance corporation is its "agent," within Civ. Code Prac. § 71, which provides that an action against such corporation, arising out of a transaction with an agent of the corporation, may be brought in the county where the transaction took place. Ward v. Citizens' Life Ins. Co., 114 S. W. 751, 131 Ky. 129.

A local council secretary of a beneficiary society incorporated in another state was an "agent" of the corporation, within the meaning of the statute relating to the service of process on corporations, where it was his duty to forward to the supreme council approved applications for membership, to receive and countersign benefit certificates issued thereon and deliver them to the members, to collect and forward assessments, to convey communications between the local and the supreme councils and their members and officers, to keep a list of local members, notify the supreme secretary of withdrawals, etc., to make out relief fund statements, etc. Riddle v. Order of Pendo, 89 Pac. 640, 641, 49 Or. 229.

Under Ky. St. § 631, which provides that, before any foreign insurance company may do business in the state, it must file with the Commissioner of Insurance its consent to service of process upon him, and that, if process is served upon the commissioner, he shall at once send it by mail addressed to the company at its principal office, the commissioner is not the company's "agent" in the usual and ordinary sense, and service of process is not completed by a mere delivery of a copy to the commissioner, but only when he has promptly forwarded the summons to the company. Chicago Life Ins. Co. v. Robertson, 143 S. W. 740, 742, 147 Ky. 61.

A summons against an individual, followed by the word "agent," is insufficient to give a corporation for whom the individual is an agent notice that the action is against it and not against the individual. Smith Premier Typewriter Co. v. Westcott, 75 Atl. 1052, 1053, 112 Ind. 146.

The word "agent," as used in a statute providing for service of process on telegraph and telephone companies, is not intended to be understood in any unusual, limited, or restricted sense, or otherwise than was justified in its ordinary signification. Southern Bell Telephone & Telegraph Co. v. Parker, 47 S. E. 194, 197, 119 Ga. 721.

The question whether one is an "agent" of a foreign corporation, on whom service of process may be made within Code Civ. Proc. 1902, § 155, does not depend on express authority conferred on him to represent the corporation, but such authority may be in-

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ferred from the facts and from the law whereby the corporation entering into the state to do business must be deemed to assent impliedly to the authority of its agent to receive service of process, and, where the character of the agency is such as to render it fair and just to imply an authority to receive service, the law will imply such authority, and service on such agent is sufficient. H. L. & L. F. McSwain v. Adams Grain & Provision Co., 76 S. E. 117, 119, 93 S. C. 103.

Officer of state or public corporation

An officer appointed or elected by a municipal corporation, in obedience to law, to perform a public service in which the corporation has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, is not regarded as an "agent" for whose negligence or want of skill in the performance of his duties a municipal corporation is held liable, although the service is one which the corporation is bound to see performed in pursuance of a duty imposed by law for the general welfare. Under a statute giving the highway agent of a town, under direction of the selectmen, charge of the construction and repair of highways within the town, and empowering him to employ men and teams, the highway agent and selectmen are public officers of the state, and not private agents of the town, so far as their duties in connection with the construction and repair of highways are concerned. O'Brien v. Town of Derry, 60 Atl. 843, 847, 73 N. H. 198 (quoting and adopting the definition in Wakefield v. Town of Newport, 62 N. H. 624, 625).

Under Rev. Laws, c. 42, § 27, providing that the school committee of a town "shall have the general charge and superintendence of all the public schools," the school committee act, not as "agents" of the town, but as "public officers," intrusted with powers and charged with duties concerning the maintenance of the schools. Morse v. Ashley, 79 N. E. 481, 482, 193 Mass. 294.

Municipal tree wardens, for whose appointment provision is made by statute, are public officers, and not "servants" or "agents," within another statute, which authorizes recovery for negligent death caused by a person or corporation or their "agents or servants." Donahue v. City of Newburyport, 98 N. E. 1081, 1082, 211 Mass. 561, Ann. Cas. 1913B, 742.

As owner

See Owner.

As person

See Person.

As plaintiff

See Plaintiff.

As real party in interest

See Real Party in Interest.

As representative

See Representative.

Selling agent or salesman

The word "agent" is frequently used to indicate that a merchant or dealer has the exclusive right to sell a specified article in certain territory. The dealer does not represent the manufacturer, but simply buys from him in the regular course of trade, and sells the specified article to the public. Poirier Mfg. Co. v. Kitts, 120 N. W. 558, 559, 18 N. D. 556.

Under a statute providing that, in an action against a foreign corporation doing business in the state, the summons may be served on any "agent" thereof, one appointed by a foreign corporation as agent for the sale of its machinery under an agreement to sell the machinery for the corporation at prices and terms fixed by it, and account for the proceeds, was an "agent" on whom service might be made. Womach v. J. I. Case Threshing Mach. Co., 114 Pac. 509, 511, 512, 62 Wash. 661.

Under Stock Corporation Law, § 29, requiring foreign corporations to keep a book showing the names of its stockholders for inspection by stockholders, and prescribing a penalty against the corporation and its agent for refusing an inspection, a mere selling agent of the corporation with no authority to keep such book is not liable to the penalty; "agent" in the statute applying to a transfer agent by whom the book could be kept. Hovey v. Elswald, 124 N. Y. Supp. 130, 131, 139 App. Div. 433.

One employed by a refining company to sell and distribute oil to customers, being paid by a commission on the amount of sales, is an "agent" or servant of the company, which is liable for acts of negligence in the conduct of the business on the part of the agent or others employed by him. Riggs v. Standard Oil Co., 130 Fed. 199, 201.

A mere traveling salesman for a corporation, sent into another state on a special matter with specific instructions, but having general authority to solicit orders for goods, to be submitted to the company for approval, is not an "agent" of the foreign corporation on whom service of process against it may be made. William Grace Co. v. Henry Martin Brick Mach. Mfg. Co., 174 Fed. 131, 132, 98 C. C. A. 167; W. T. Adams Mach. Co. v. Castleberry, 106 S. W. 940, 84 Ark. 573.

The word "agent," as used in the statute of Missouri providing that foreign corporations doing business in the state shall file their articles of incorporation, establish an office or agency, and subject themselves in prescribed respects to the laws of the state, but exempting corporations entirely nonresident, soliciting business through drummers or traveling salesmen, and further providing that service shall be authorized to be made,

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in an action against a corporation having no office or agency, by serving an agent of the company, wherever found, does not include one merely soliciting orders for goods which are sent to the nonresident principal, a corporation, to be filled, the solicitor receiving a commission on such orders, and having no other relation to the corporation, and having no relation to the matter out of which an action against the corporation arose. Strain v. Chicago Portrait Co., 126 Fed. 831, 832.

Servant distinguished

Civ. Code, § 2295, defines an "agent" as one who represents another in dealings with third persons. Section 2009 defines a servant as one employed to render personal services to his employer and who remains entirely under the control and direction of the latter. Held that, where defendant agreed to devote his entire time and attention to the interests and business of plaintiff, a real estate broker, defendant's compensation to be a specified percentage of commissions, the relation between the parties was that of master and servant and not that of principal and agent. Sumner v. Nevin, 87 Pac. 1105, 4 Cal. App. 347.

Rev. St. 1899, § 2586, provides that eight hours shall constitute a day's labor for all "coal miners and laborers," etc. Section 2587 declares that the word "day" in all contracts between any owner, lessee, or operator of any mine with any such miner or laborer, shall mean eight hours, and section 2589 declares that any owner, lessee, or operator, his or its agent, employés, or servants, violating any of the provisions of the chapter, shall be fined, etc. Held, that the words "employés" or "servants," used in section 2589, should be construed to mean employés or servants of the mine owner occupying positions of "agents," and not to include miners and laborers, so that a miner was not subject to punishment under the penal provision for working more than eight hours a day.—State v. Thompson, 87 Pac. 433, 434, 15 Wyo. 136 (citing Lewis' Sutherland, Stat. Con. [2d Ed.] § 521).

One employed by a refining company to sell and distribute oil to customers, being paid by a commission on the amount of sales, is an "agent" or servant of the company, which is liable for acts of negligence in the conduct of the business on the part of the agent or others employed by him. Riggs v. Standard Oil Co., 130 Fed. 199, 201.

Solicitor

A mere soliciting agent, employed by a foreign corporation which is not "doing business" in the state, is not an "agent" of the corporation, within Laws 1894, c. 61, relating to service of process on agents; the term "agent" meaning only an agent vested with some general authority and discretion. Saxony Mills v. Wagner & Co., 47 South. 899, 901, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199. But a resident who makes contracts for the transportation of freight over the lines of a foreign corporation doing business in the state is an "agent" of the corporation, within Acts 29th Leg. c. 25, authorizing service of process on any agent contracting for the transportation of freight over the line of any foreign railroad corporation doing business in the state. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Tex.) 145 S. W. 623, 626.

A person who transmits the application of another for insurance to an insurance company and sends insured the company's acceptance is the latter's "agent," under the express provisions of St. 1898, § 1977. Costello v. Grant County Mut. Fire & Lightning Ins. Co., 113 N. W. 639, 640, 133 Wis. 361. Code Iowa, § 1750, provides that the term "agent," as applied to insurance, shall include any person who shall, directly or indirectly, transact any insurance business for an insurance company, and that any agent representing such company who may solicit insurance or transact the business generally of such company shall be held to be the agent of the company with authority to transact all business within the scope of his employment. Scrivner v. Anchor Fire Ins. Co., 122 N. W. 942, 943, 144 Iowa, 328.

Where a bartender of a licensed liquor dealer while absent from his place of business and within prohibition territory received an order for whisky, which he in person delivered to defendant at the saloon, and defendant accepted it and received the money and shipped the whisky, he was guilty of violating Acts 1907, p. 327, § 2, forbidding the soliciting of orders within prohibition territory by agent or otherwise, and defining "agent" as any person who receives an order and transmits it to some dealer who accepts and fills it. Van Valkinburgh v. State (Ark.) 142 S. W. 843, 844. But where a person solicits orders for whisky in prohibition territory, and buys the whisky from a distiller and delivers it to his purchasers, the distiller knowing no one in the transaction but such person, the latter cannot be convicted of soliciting orders as an "agent" in prohibited territory. State v. Earles, 106 S. W. 941, 84 Ark. 479.

Tenant

A tenant is not by virtue of his relation as such, the landlord's "agent" so as to subject the latter's property to a materialman's lien under Rev. St. 1909, § 8212, giving a lien for material furnished under a contract with the owner or his agent; nor is he the landlord's agent within the statute for making repairs by reason of a general covenant by the tenant to keep the premises in repair; but he is the latter's agent within the statute if the landlord binds the tenant for a compensation to make substantial improvements upon the property, so as to entitle

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one furnishing material for the improvements under contract with the tenant to a lien. McGuinn v. Federated Mines & Milling Co., 141 S. W. 467, 468, 160 Mo. App. 28.

State institution

The school for feeble-minded, supported by the state, is an "officer or agent" within the statute providing that officers or agents who contract for the commonwealth for the construction of public buildings shall obtain security for payment by the contractor for labor and materials. Burr v. Massachusetts School for Feeble-Minded, 83 N. E. 883, 884, 197 Mass. 357.

Trustee

See Trustee.

As trustee of express trust, see Trustee of Express Trust.

AGGRAVATE—AGGRAVATION

The term "increase" is the synonym of "aggravate." Mathew v. Wabash R. Co., 78 S. W. 271, 272, 115 Mo. App. 468.

The unlawful breaking of a house, scattering of household goods, and the leaving of the doors unlocked constitutes such a tort as carries "aggravation in the act," authorizing the assessment of damages additional to the actual property loss, irrespective of the intent with which the tort was committed, under Civ. Code 1895, § 3906, allowing additional damages for a tort where there are aggravating circumstances in the act or intent. Holman v. Brown, 69 S. E. 1084, 8 Ga. App. 551.

AGGRAVATED ASSAULT

An assault committed with premeditated design, but without the specific intent to kill, and by the use of means calculated to inflict great bodily injury, is an "aggravated assault." Armstrong v. State, 131 S. W. 1074, 60 Tex. Cr. R. 316. An intent to injure is not a necessary element. Cromwell v. State, 131 S. W. 595, 60 Tex. Cr. R. 183. An unlawful assault with a deadly weapon, not in self-defense, is "aggravated assault." Hamilton v. State, 131 S. W. 1127, 60 Tex. Cr. R. 258. The gist of the offense which is defined by Gen. St. 1906, § 3228, as an assault with a deadly weapon without a premeditated design to effect the death of the person assaulted, consists in the character of the weapon with which the assault is made. Lindsey v. State, 43 South. 87, 89, 53 Fla. 56.

Under Pen. Code 1895, art. 610, declaring that an assault is aggravated when committed with a deadly weapon under circumstances not amounting to an intent to murder or maim, an issue of "aggravated assault" was raised on the following facts: Defendant, an adult male, was charged with assaulting a boy 13 years of age and stabbing him with a sword for running between the line of a Knights of Pythias funeral procession. An examination of the boy disclosed a small punctured wound one-fourth to half an inch deep on his thigh and about half an inch long, which seemed to have been caused by a sharp pointed instrument. Defendant denied that he struck the boy, and disclaimed any purpose or intent to do so, nor was there any motive or evidence of any intention on the defendant's part to kill the boy. Malone v. State, 132 S. W. 769, 60 Tex. Cr. R. 509. Accused was guilty of "aggravated assault," if of anything, if he cut prosecutor's throat, and made a gash five inches long around his neck, and one three inches long across his cheek, and cut his coat and vest, without reference to whether he acted in the heat of passion. Wimberley v. State, 130 S. W. 1002, 60 Tex. Cr. R. 65.

For an assault upon a person who is an officer to be "aggravated assault," within Pen. Code 1895, art. 601, which provides that when an assault is committed upon an officer in the lawful discharge of his duties, etc., it must appear that the person assaulted was an officer in the actual discharge of his duties, and that such assault was made as an interruption of his duty. Jeanes v. State, 132 S. W. 352, 353, 60 Tex. Cr. R. 440.

Where one, at the immediate close of religious services, calls the minister just outside the place of worship and assaults him in immediate proximity to the congregation, it is an "aggravated assault"; it not being necessary that the assault be committed within the very walls of the building. Pollock v. State, 131 S. W. 1094, 1095, 60 Tex. Cr. R. 265.

Under a statute providing that an "aggravated assault" must be perpetrated with intent to commit a felony, an information charging that accused feloniously assaulted a married woman with intent to have unlawful voluntary sexual intercourse with her, does not charge an assault with intent to commit a felony, since, if the unlawful act had been committed, both parties would have been guilty of adultery, under section 338, which requires the concurrence of consenting parties. State v. Archer, 115 N. W. 1075, 1076, 22 S. D. 137.

Where there is no intent to kill, but simply a shooting to frighten or even to inflict injury without killing, the offense is "aggravated assault." Young v. State (Tex.) 151 S. W. 1046, 1047; Ward v. Same (Tex.) 151 S. W. 1073, 1076.

Pen. Code 1911, arts. 1008, 1009, 1011, 1022, define an "assault and battery" and declare that, when an injury is caused by violence to the person, the intent to injure is presumed; that an assault and battery may be committed by the use of anything capable of inflicting the slightest injury; and that an assault becomes aggravated when committed in the house of a private family. Accused, while a guest at the home of prosecu-

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trix, went into her bed at night and was discovered by her brother. He claimed that he had received her permission to come to her bed, and that he roused her during the night by touching her with a stick, and that she then awoke and opened the door for him. She denied that she had given her consent. Held, that he was properly found guilty of aggravated assault. Ward v. State (Tex.) 151 S. W. 1073, 1076.

AGGREGATE

Const. art. 9, § 8, providing that "county authorities shall never assess taxes, the aggregate of which shall exceed 75 cents per $100 valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county," does not show an intent, by the use of the word "aggregate," that the county authorities shall specify the particular purposes to which the money, when collected, shall be appropriated, and that the "aggregate" shall not exceed the rate specified; but the provision was intended merely as a limitation upon the power of county authorities to levy taxes. People v. Wisconsin Cent. R. Co., 76 N. E. 80, 81, 219 Ill. 94.

AGGRESSOR

As used in the law of self-defense, "aggressor" means one who brings on a conflict or affray by some overt act or demonstration calculated to precipitate the difficulty or conflict. State v. Gray, 79 Pac. 53, 54, 46 Or. 24; State v. Ryan, 108 Pac. 1009, 1014, 56 Or. 524.

AGGRIEVED

As determining right to appeal, see Aggrieved Party.

In a legal sense a person is "aggrieved" by an act when a legal right is thereby invaded. Choate v. Viha, 89 S. W. 1082, 1083, 40 Tex. Civ. App. 566 (quoting and adopting the definition in Peavy v. Goss, 37 S. W. 317, 90 Tex. 89). The word implies a substantial grievance, denial to a person of some right of property or of person, or imposition on him of some burden or obligation. In re Macky's Estate, 102 Pac. 1088, 1089, 46 Colo. 100; Wilson v. Board of Regents of University of Colorado, Id.; McKenna v. McKenna, 69 Atl. 844, 845, 29 R. I. 224.

Mills' Ann. St. § 210, provides as to officers or others having any person in custody that they shall admit an attorney whom such person may desire to see or consult, and that any officer violating such provision shall forfeit and pay a certain sum to the "person aggrieved" to be recovered by action. Held to give a right of action only to the person in custody, and not to the attorney as the "person aggrieved." McPhail v. Delaney, 110 Pac. 64, 65, 48 Colo. 411.

Under Ky. St. § 4803, providing "that it shall be unlawful for any warehouseman or commission merchant to directly or indirectly charge the seller or owner anything by way of commission or otherwise, for paying to him the money for which his tobacco is sold," and section 4807, providing that the proprietor of any warehouse who shall violate that section, shall be liable to the "party aggrieved thereby" in the sum of not less than $25 and not more than $100, the seller or owner is "aggrieved" by such unauthorized charge, and therefore entitled to the penalty, though there has been no settlement, and though he be still indebted to the warehouseman after the charge is stricken off. Farmers' Tobacco Warehouse Co. v. Minor, 53 S. W. 641, 642, 107 Ky. 287.

Under Kirby's Dig. § 6620, providing that any of the persons or corporations mentioned in previous sections who shall demand greater compensation than is allowed by the act shall forfeit certain amounts to be recovered in a suit at law by the party aggrieved, a passenger whose father purchased a ticket for her use, and who used it on defendant's passenger train, was a "party aggrieved" and entitled to maintain the action for the penalty. St. Louis, I. M. & S. Ry. Co. v. Freeman, 128 S. W. 1024, 95 Ark. 218.

Abatement of tax

Where it appears that a corporation has no personalty subject to taxes, it sufficiently appears that it is "aggrieved," so as to entitle it to a cancellation of a tax. People ex rel. Twenty-Third St. R. Co. v. Feitner, 87 N. Y. Supp. 304, 307, 92 App. Div. 518.

Under Rev. Laws, c. 12, § 73, providing that a person aggrieved by the taxes assessed upon him may apply for an abatement, etc., a "person aggrieved" means one whose pecuniary interests are or may be adversely affected. Under Rev. Laws, c. 12, § 73, providing that a "person aggrieved" by the tax assessed upon him may apply for an abatement, etc., where the record discloses the illegality of a tax assessed against property belonging to one petitioning for abatement, making it apparent that no proceeding in rem under the assumed tax could affect the title thereto, because it was assessed to one who was neither the record owner nor in occupation on May 1st, the petitioner is not a "person aggrieved," within the contemplation of the statute, and cannot maintain his petition. Hough v. City of North Adams, 82 N. E. 46, 47, 48, 196 Mass. 290.

Application for certiorari

A rival public service corporation is interested in the securities which the Public Service Commission may authorize a competing company to issue, and therefore with reference to that question may be a "party

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aggrieved" by the commission's order, so as to entitle it to a review thereof on certiorari. People ex rel. New York Edison Co. v. Willcox, 100 N. E. 705, 207 N. Y. 86.

A city charter provided that the council should designate as the official newspapers two papers representing the two principal political parties. The publishers of a newspaper not designated, claiming to represent one of the parties, brought certiorari to review the action of the council. Held, in the absence of a showing that there were no other newspapers published in the city, representing the principles of that party, the publisher was not a "party aggrieved," within Code Civ. Proc. § 2127, providing that the application for writ of certiorari must be made by the party aggrieved. People ex rel. Sweet v. Raymond, 115 N. Y. Supp. 275, 277, 131 App. Div. 160.

Election contest

A person who intends to run as an independent candidate for delegate to a state convention may, under Election Law (Laws 1911, c. 891) § 56, as a "person aggrieved" thereby, maintain a proceeding to review the improper certification of the names of others as designated by a county committee as regular candidates to be placed on the official ballot; he being at a disadvantage if their names are printed thereon as are those of regularly designated candidates, while his, under the primary law, will have to be written thereon. In re Clark, 137 N. Y. Supp. 218, 220.

Where, on the hearing of a protest against a primary election, the parish committee canvassing the returns sustained the protest and ordered a new election, whereupon plaintiff, claiming to have been nominated, instituted proceedings against defendant to contest such ruling, in which defendant appeared and resisted plaintiff's claims, defendant could not object that plaintiff was not entitled to institute the proceeding, because he was not a "party aggrieved," within Acts 1906, p. 66, No. 49, authorizing the party aggrieved by the result declared by a parish committee to prosecute such proceeding, for the reason that defendant had not been declared the nominee, and therefore should not have been sued. Triche v. Labiche, 46 South. 130. 132, 121 La. 138; Vial v. Elfer, 46 South. 134, 121 La. 148.

Failure to receive or delay in delivering freight

The "party aggrieved," within Revisal 1905, § 2631, authorizing recovery by him of a penalty for refusing to receive freight, is one injured by the refusal, and an attorney for persons who attached goods in suits against the real owner could not sue for a penalty for refusal to receive the goods. McRackan v. Atlantic Coast Line R. Co., 63 S. E. 1042, 1043, 150 N. C. 331.

Revisal 1905, § 2632, declares that it shall be unlawful for any railroad company to neglect to transport freight within a reasonable time to or from any place in the state, and for a violation of the duty imposed a penalty is given "to the party aggrieved." In an action to recover the penalty by the consignors of a shipment of hay, one of the plaintiffs testified that the consignees were anxious for the hay, and that they paid in full for it after delivery. Held, that the consignees, and not the consignors, were the "parties aggrieved," within the statute, and that the consignors were without right to sue for the delay. Stone & Co. v. Atlantic Coast Line R. Co., 56 S. E. 932, 936, 144 N. C. 220 (citing Summers v. Southern R. Co., 50 S. E. 714, 715, 138 N. C. 295; Lexington Grocery Co. v. Southern R. Co., 48 S. E. 801, 136 N. C. 396).

Where goods are delivered to a carrier for transportation and a bill of lading issued, the title, in the absence of any direction, or agreement to the contrary, vests in the consignee, who alone is the "party aggrieved" within Revisal 1905, § 2632, imposing a penalty for delay in transporting freight. Elliott v. Southern Ry. Co., 71 S. E. 339, 340, 155 N. C. 235.

Where goods are shipped under an open bill of lading, and the contract between the shipper and the consignee provides that the goods are not to be paid for until received, inspected, and weighed at the point of destination, and the stipulation is inserted to ascertain the quantity of the goods and the price therefor, the title remains in the shipper, who is the "party aggrieved" by the carrier's delay in transportation, and he alone may sue for the penalty imposed by Revisal 1905, § 2632, though the carrier is ignorant of the contract. Id.

A plaintiff, who loaded and received the bill of lading for a car load of wood shipped to a consignee to be sold by him for plaintiff's benefit, and not the consignee, was the "party aggrieved" by an unreasonable delay in the transportation thereof, within the meaning of Revisal 1905, § 2632, giving the "party aggrieved" the right to recover a penalty for such delay. Rollins v. Seaboard Air Line Ry., 59 S. E. 671, 672, 146 N. C. 154.

A plaintiff, who sold goods to one at a distant point and delivered them to a carrier, receiving a bill of lading therefor, delivery at the buyer's home being a part of the contract of sale, and not the consignee, was the "party aggrieved" by an unreasonable delay in transporting the goods, within the meaning of Revisal 1905, § 2632, giving such party the right to recover a penalty against the carrier. Cardwell v. North Carolina R. Co., 59 S. E. 673, 146 N. C. 218.

The seller of goods consigned them to his own order at the town in which plaintiff did

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business, upon a bill of lading reading "order notify" plaintiff, and plaintiff paid for the goods, obtained the bill of lading, and presented it to the railroad company's agent and demanded the goods, which were not delivered to him. Held, that plaintiff was the "consignee aggrieved," within a statute giving such party a right to recover a penalty for failure to adjust, within the statutory period, a claim for nondelivery of goods. Brown v. Atlantic Coast Line R. Co., 74 S. E. 754, 755, 91 S. C. 377.

Failure to receive or transmit telegram

Under Acts 1885, p. 151, c. 48, imposing on telegraph companies the duty to transmit telegrams with impartiality and in the order of time they are received, section 3 of which provides that a party violating the provisions of the act shall be liable to any "party aggrieved" in a certain penalty, the party aggrieved is the real party in interest, with whom the contract was entered into, and for whose benefit the service was to be rendered, and not merely the one whose name is signed to the message, and the fact that a sender of a telegram signs it with the name of another will not prevent any recovery by him. Western Union Telegraph Co. v. Troth, 84 N. E. 727, 729, 43 Ind. App. 7.

Injunction

Copyright Act March 4, 1909, c. 320, § 1e, 35 Stat. 1075 (U. S. Comp. St. Supp. 1911, p. 1472), gives the owner of a copyright for a musical composition the exclusive right to make or license another to make perforated music rolls or records for mechanically producing such composition, subject to the condition that, if he shall make or authorize the making of such records, any other person may make similar use of the work on payment of a fixed royalty. The right so given to a subsequent maker, however, does not authorize him to copy the record of the first maker, but his work must be done from the original composition, and under section 36 of the act, which authorizes a suit in equity by "any person aggrieved" to enjoin the violation of any right secured thereby, the original maker, whether the proprietor of the copyright or his licensee, is entitled to an injunction to restrain such copying or reproduction of his records. Æolian Co. v. Royal Music Roll Co., 196 Fed. 926, 928.

Irrelevant pleading

The necessity of answering irrelevant and redundant matter makes a defendant, when moving to strike out the same, a "person aggrieved thereby," within Code Civ. Proc. § 545, providing that such matter may be stricken out on motion of a person aggrieved thereby. Kolb v. Mortimer, 120 N. Y. Supp. 543, 544, 135 App. Div. 542.

A defendant is a "person aggrieved" by the answer of a codefendant, which seeks to inject irrelevant matters into the action, within Code Civ. Proc. § 545, providing that irrelevant matter contained in a pleading may be stricken upon motion of a person aggrieved thereby. North River Savings Bank v. Buckley, 130 N. Y. Supp. 787, 788.

A party is "aggrieved," within Code Civ. Proc. § 545, authorizing the striking out of irrelevant and redundant matter contained in a pleading on motion of a person aggrieved, where such matter appears in a pleading which requires an answer or reply. Cleminshaw v. Coon, 120 N. Y. Supp. 181, 183, 136 App. Div. 160.

Recovery of excessive fees

A "party aggrieved," within Code Civ. Proc. §§ 3281, 3282, declaring an officer demanding fees greater than that allowed by law to be liable to an action in behalf of the person aggrieved, is the one whose money is withheld, who is thus directly injured by the excess taken, and may be the attorney himself, instead of his principal. Hale v. McDermott, 137 N. Y. Supp. 975, 976, 78 Misc. Rep. 52.

Recovery of overcharge

One suffering a loss of 50 cents per ton on coal purchased by it by reason of the fact that a carrier transporting the coal charged him 50 cents per ton more than he charged another shipper is a "party aggrieved" within V. S. 3904, making a carrier liable to the party aggrieved for overcharges, in violation of section 3902. State v. Central Vermont R. Co., 71 A. 194, 197, 81 Vt. 463, 130 Am. St. Rep. 1065.

V. S. 3901 (P. S. 4485), authorizing the party aggrieved to recover from a carrier an overcharge for freight, does not permit a buyer to sue a carrier for an overcharge collected from the seller for transporting the goods and included by the seller in the price and paid to him by the buyer; the words "party aggrieved" in their natural sense being the one from whom the overcharge is collected. State v. Central Vermont R. Co., 71 Atl. 193, 81 Vt. 459, 21 L. R. A. (N. S.) 949.

Reformation of instrument

One who has succeeded to the rights of the grantee in a deed, which, because of a mutual mistake, does not correctly describe the land, is a "party aggrieved," within Civ. Code, § 3399, authorizing reformation on application of the party aggrieved. Hart v. Walton, 99 Pac. 719, 721, 9 Cal. App. 502.

Refusal to give street car transfer

A passenger to whom a transfer is denied is "aggrieved," within Railroad Law, § 104, providing that, for every refusal to comply with the act, the corporation so refusing shall forfeit $50 to the aggrieved party. Fox v. Interurban St. R. Co., 86 N. Y. Supp. 64, 65, 42 Misc. Rep. 538. But the penalty cannot be recovered by one who demanded a transfer with the sole object of recovering

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for refusal, he not being "aggrieved." Nicholson v. New York City Ry. Co., 103 N. Y. Supp. 695, 697, 118 App. Div. 858; Bull v. New York City Ry. Co., 85 N. E. 385, 387, 192 N. Y. 361, 19 L. R. A. (N. S.) 778. A passenger for whom a transfer is rightfully demanded and wrongfully refused is "aggrieved," though his fare was paid by another. McLaughlin v. New York City Ry. Co,. 94 N. Y. Supp. 653, 659, 106 App. Div. 1. Where plaintiff's husband paid the fares of both plaintiff and himself on defendant's street car, plaintiff was entitled to a transfer as a "passenger paying one single fare," and on refusal of such transfer could, as the "aggrieved party," maintain an action under the statute. Carpenter v. New York City Ry. Co., 93 N. Y. Supp. 600–601.

Sale of liquor

The father of a minor son, to whom a retail liquor dealer sold liquor, and whom he permitted to remain in his place of business, in violation of law and the obligations of the liquor dealer's bond, is an "aggrieved" person, and authorized by the statute to sue on the bond for the penalty thereof. White v. Manning, 102 S. W. 1160, 1161, 46 Tex. Civ. App. 298.

A widowed mother injured by the sale of liquors to her adult son, an habitual drunkard, is "aggrieved" within Rev. St. 1895, art. 5060g, providing for a liquor dealer's bond conditioned not to sell intoxicating liquors to any habitual drunkard after notice in writing, which bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, though the mother has given no notice not to sell to her son. Coughtry v. Haupt, 105 S. W. 516, 517, 47 Tex. Civ. App. 452.

Under Sayles' Ann. Civ. St. 1897, art. 3380, authorizing suit on a liquor dealer's bond by the person aggrieved by its breach, an action for the unlawful sale of liquor to a minor may be brought by the sister of the minor where the mother of such minor died when he was very young, and the minor was left by the mother with the request to the sister that she take care of and raise him, and gave the possession and custody of the minor to the sister, the father being a drunkard and without a home, and disqualified to care for and raise the minor, and the sister assumed the care and support of the minor and in all respects cared for him as his mother; she being a person "aggrieved" within the meaning of the statute. Saunders v. Alvido & Laserre, 113 S. W. 992, 994, 52 Tex. Civ. App. 356.

Vacation of grant

Revisal 1905, § 1748, providing that, when any person claiming title to lands under a grant shall consider himself "aggrieved" by any grant issued to any other person, etc., he may sue to have the same vacated, is limited to one claiming title to the land covered by a grant to himself, and does not authorize an action by a private individual in the name of the state to vacate a grant to an oyster bed in which he has no interest other than as a citizen. Jones v. Riggs, 70 S. E. 465, 154 N. C. 281.

AGGRIEVED PARTY

As determining rights other than that of appeal, see Aggrieved.

The "person aggrieved," as used in the statute providing that such persons may appeal, means the "person interested." Woodward v. Spear, 10 Vt. 420, 422.

The rule generally adopted that a party is "aggrieved" by a judgment or decree when it operates on his rights of property or bears directly upon his interest. The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation. McKenna v. McKenna, 69 Atl. 844, 845, 29 R. I. 224.

The phrase "aggrieved party" is not a technical one, and the words must be given their natural meaning, and, when used with reference to legal remedies, the words mean one who is injured in a legal sense, and a person aggrieved is one whose pecuniary interest is directly affected by an adjudication. State v. Central Vermont R. Co., 71 Atl. 193, 81 Vt. 459, 21 L. R. A. (N. S.) 949. In legal acceptation a party is "aggrieved" by a judgment or decree when it operates on his rights of property, or bears directly upon his interest. Ruff v. Montgomery, 36 South. 67, 68, 83 Miss. 185 (citing 2 Cyc. p. 633); Smith v. Whaley, 61 Atl. 173, 174, 27 R. I. 185.

Upon principle, as to any judgment or order of a court adverse to one in a suit or proceeding, who is the proper representative therein, of the interests of others prejudiced by the result, that one is a "party aggrieved," within the meaning of such term as used in appeal statutes. McKenney v. Minahan, 97 N. W. 489, 490, 119 Wis. 651; In re Creighton's Estate, 129 N. W. 181, 183, 88 Neb. 107.

A defendant is truly "aggrieved" only when by appropriate pleadings, or pleadings and proofs, he has become an active party to an issue or a controversy which is adjudged against him. New Jersey Building, Loan & Investment Co. v. Lord, 58 Atl. 185, 187, 66 N. J. Eq. 344.

"Every person aggrieved," within the meaning of Mo. Rev. St. 1879, § 3710, giving the right of appeal to every person "aggrieved" by any final judgment or decision of any circuit court in any civil cause, includes every person whose rights are in any respect concluded by the judgment. Switzer v. Switzer, 98 S. W. 461, 463, 201 Mo. 66, 119 Am. St. Rep. 731 (citing Nolan v. Johns, 18 S. W. 1107, 108 Mo. 431).

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If the court entered a judgment which deprived complainant of any of its property rights, then it must be a "party aggrieved," within Rev. St. 1887, § 4802, providing that any party aggrieved may appeal. It is not necessary for a person or corporation to be named as plaintiff or defendant or intervener in the title to an action, or in the title to a judgment entered therein, in order to become a party to the action. Washington County Abstract Co. v. Stewart, 74 Pac. 955, 956, 957, 9 Idaho, 376.

Plaintiffs in an action to quiet title, having admitted that they could not show title to particular tracts, are not "aggrieved parties" so far as the judgment relates to such tracts. Flannigan v. Towle, 96 Pac. 507, 8 Cal. App. 229.

In proceedings under St. 1898, § 4096, for the examination of adverse witnesses before trial, an individual defendant seeking an appeal from an order denying his petition for the suppression and denial of his examination and dismissing the action as to him, is not an "aggrieved party," within the meaning of section 3048, which gives an appeal to such parties only. American Food Products Co. v. Winter, 133 N. W. 595, 596, 147 Wis. 464.

Under Ballinger's Ann. Codes & St. § 185, providing that any party "aggrieved" by the taxation of costs by the clerk may have the same retaxed, and section 4749, providing that the party commencing the action shall be known as the "plaintiff" and the opposite party as the "defendant," the witnesses in a criminal case have no right to appeal from an order disallowing their fees for attendance and mileage as certified by the clerk, they not being parties to the proceeding. State v. Fair, 76 Pac. 731, 734, 35 Wash. 127, 102 Am. St. Rep. 897.

Gen. St. 1902, § 3834, gives the right of appeal from an order of railroad commissioners, approving a street railroad location, to any "party aggrieved" by the decision or order of the commissioners. Section 3843 gives the right of appeal from the location by the local authorities to any owner of land fronting on a highway aggrieved by the location of tracks thereon. Held, that one is "aggrieved" within such sections by a judgment or order, when his rights of property are injuriously affected thereby, and if he claims such injury through the illegal action of the railroad commissioners, and it appears on the face of the proceedings that this may be so, he is entitled to appeal. Appeal of Norton, 78 Atl. 587, 588, 591, 84 Conn. 40.

From an order restraining the common council of a city from proceeding with an election to fill a vacancy caused by resignation of an alderman on the ground that the offices of the aldermen elected at the time he was elected had ceased to exist, such aldermen may appeal as "aggrieved parties," within Code Civ. Proc. § 1294. Koster v. Coyne, 97 N. Y. Supp. 433, 436, 110 App. Div. 742.

Under Rev. Laws, c. 173, § 110, providing that an excepting party, who is aggrieved by the disallowance of a bill of exceptions, may petition the full court to establish the truth of the exceptions, a party is "aggrieved" only when the action of the judge in disallowing the bill is erroneous. In re Meehan, 94 N. E. 393, 395, 208 Mass. 60.

Under Code Va. 1904, § 3454, authorizing a person thinking himself "aggrieved" by a decree to appeal therefrom, etc., a commissioner, appointed in a decree directing a resale of land in a suit to subject the assets of the deceased owner to the payment of debts, cannot in his official capacity alone appeal from a decree setting aside the decree for a resale, rendered on a petition against him alone. Brown v. Howard & Whitehead, 55 S. E. 682, 683, 106 Va. 262.

In a suit against an executor and infant devisees to enforce a contract whereby the executor contracted to convey the lands devised, the infants, on the guardian ad litem failing to appeal from a judgment of specific performance, may do so by some one as their next friend; they being "aggrieved" by the decree. Givens v. Clem, 59 S. E. 413, 414, 107 Va. 435.

The liability imposed by St. 1898, § 1502, declaring that the children of a parent unable to maintain himself shall maintain such parent, gives a child such a substantial interest in a proceeding to appoint a guardian of the person and estate of his father, on the ground that he is incompetent to manage his property and is wasting his estate, as to constitute him a "person aggrieved" by a refusal to make the appointment, within section 4031, allowing an appeal to the circuit court from the county court by any person aggrieved. Merrill v. Merrill, 114 N. W. 784, 785, 134 Wis. 395.

A judgment debtor's personal right being invaded by an order to compel a safety deposit company to permit the judgment debtor's receiver to open a box in the vaults of the company standing in the joint names of the judgment debtor and another and to examine the contents, he was a "person aggrieved" within Code Civ. Proc. § 1294, though title to the contents of the box may have passed to his receiver. Ehrich v. Root, 119 N. Y. Supp. 395, 400, 134 App. Div. 432.

Where directors of a mutual insurance organization were illegally elected, the policy holders were "persons aggrieved" within General Corporation Law (Laws 1892, c. 687) § 27, conferring jurisdiction on the Supreme Court to review elections of any corporation, and such policy holders were entitled to sue to have such election reviewed, and were not limited to an application

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to the Attorney General to proceed on behalf of the state, as authorized by Code Civ. Proc. § 1948. In re Empire State Supreme Lodge, 103 N. Y. Supp. 465, 469, 53 Misc. Rep. 344.

An appeal by a city from an order of a city court judge, discharging a person convicted for violating an ordinance, lies under Code 1907, § 6245, providing that any "party aggrieved" by the judgment may appeal. City of Bessemer v. Eidge, 50 South. 270, 271, 162 Ala. 201.

Const. art. 7, § 33, provides that appeals from all judgments of county courts may be taken to the circuit court under such restrictions and regulations as may be prescribed by law, and Kirby's Dig. § 1487, authorizes appeals as a matter of right from the county to the circuit court by "the aggrieved party filing an affidavit," etc. Held that, where a county court had jurisdiction to grant a competing ferry license, the operator of another ferry, who had obtained a previous license, but who had not made himself a party to the proceedings for the granting of the license complained of before judgment, was not a "party aggrieved," and was therefore not entitled to appeal therefrom. Turner v. Williamson, 92 S. W. 867, 868, 77 Ark. 586.

A judgment debtor sold real property, and under agreement with the purchaser part of the purchase money was deposited with trustees to hold for 90 days as security for the payment by the vendor of liens on the premises sold. In proceedings supplementary to execution, before the expiration of the 90 days, in which one of the trustees was examined under third party orders, the trustees were ordered to satisfy judgments out of the trust fund. Held, that the trustee examined was entitled to appeal under Code Civ. Proc. § 1294, providing that a "party aggrieved" may appeal, etc., except where the order of which he complains was made upon his default, since an unauthorized or illegal disbursement would render him liable to the purchaser. Ghersin v. Thuor, 107 N. Y. Supp. 195, 196, 56 Misc. Rep. 465.

One is aggrieved, within Gen. St. 1902, § 3834, authorizing a "party aggrieved" by the order of the railroad commissioners to appeal to the superior court, when his rights are injuriously affected by the unauthorized or irregular acts of the commissioners; but by an appeal the superior court is not empowered to try de novo the questions properly submitted to the commissioners as an administrative tribunal. Stevens v. Connecticut Co., 84 Atl. 361, 363, 86 Conn. 36, Ann. Cas. 1913D, 597.

Code Civ. Proc. § 783, makes the provisions of the Code relative to appeals applicable to certiorari proceedings except so far as inconsistent. By sections 460 and 462 a final order, affecting a substantial right, made in a special proceeding, may be reviewed. Section 752 declares that the party prosecuting a special proceeding may be named as the plaintiff and the adverse party the defendant. Held, that the "adverse party" in a special proceeding embraces any person whose personal or property rights may be adversely affected by the judgment or final relief sought in a certiorari proceeding, as well as the court, tribunal, or officer whose official acts are challenged, so that, where such a proceeding to review the validity of a liquor election sought as a part of the relief prayed the cancellation of licenses issued to third persons, they were "adverse parties," though not originally named as defendants in the application for the writ, or the writ itself, and, their licenses having been canceled by the court, they were "parties aggrieved" and entitled to appeal. State ex rel. Cook v. Board of Com'rs of Tripp County, 137 N. W. 354, 358, 29 S. D. 358.

Action of beneficial association

A by-law of a beneficial association, which stipulates that any "person aggrieved" at the action of a council for failing to pay benefits, may appeal, whereon the council shall appoint a commissioner to take testimony and report, and that the aggrieved party may appeal to the board of appeals from the action of the council refusing to pay benefits, or the action of the council shall be final, includes members and beneficiaries, and is a part of the contract between the association and a member, and a beneficiary must comply therewith before resorting to the courts for relief. King v. Wynema Council, No. 10, etc. (Del.) 78 Atl. 845, 848.

Administrator or executor

Where the probate of a will is denied, the executor therein named is a "party aggrieved," and consequently possesses sufficient interest to enable him to appeal under Code Civ. Proc. §§ 1294, 2568, authorizing appeals by any person aggrieved by the order appealed from. In re Rayner's Will, 87 N. Y. Supp. 23, 93 App. Div. 114.

Where the Supreme Court adjudges a probate invalid, and the surrogate revokes letters testamentary before an appeal is taken from the judgment of the Supreme Court, such revocation does not affect adversely the right of the executor to appeal, since, as executor named in the will, he is a "party aggrieved" when probate of the will is denied, and is entitled to appeal. In re Cavanaugh's Will, 131 N. Y. Supp. 982, 985, 72 Misc. Rep. 584.

Appointment of receiver

In an action for the dissolution of a partnership, and for a receiver, where the complaint alleged that all defendants were members of the partnership, and asked relief

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against them all, even if the articles of partnership were not signed by one of the defendants, he was a "party aggrieved," within Burns' Ann. St. 1908, § 1289, allowing an appeal by a "party aggrieved" in a proceeding wherein a receiver is appointed or refused. Marshall v. Matson, 86 N. E. 339, 341, 342, 171 Ind. 238.

Creditor

A creditor of an insolvent estate is a "party aggrieved" by an erroneous order making a family allowance to the widow, and may therefore appeal, under Code Civ. Proc. § 963, subd. 3, and section 938, providing that an appeal may be taken from such order by a party aggrieved. In re Fretwell's Estate, 93 Pac. 283, 284, 152 Cal. 573.

Decree or order in probate

To entitle a widow to appeal from a decree probating a will as a "person aggrieved," it must be established with a reasonable degree of certainty that there was a valid marriage subsisting between her and testator at his death. Pattee v. Stetson, 48 N. E. 1022, 170 Mass. 93.

One who contests a will on the grounds of undue influence and testamentary incapacity, and who obtains a judgment on the issue of undue influence, is not "aggrieved" by the judgment, and cannot appeal, though the trial court refused to submit to the jury the issue of testamentary incapacity. Turner v. Anderson, 139 S. W. 180, 185, 236 Mo. 523.

Under Rev. Laws 1905, §§ 3872, 3873, providing that an appeal may be taken from an order of the probate court admitting a will to probate, or denying the same, by any "party aggrieved," an executor, propounding a will by which he is nominated, may appeal from an order denying probate thereof. In re Bretzman's Will, 135 N. W. 980, 981, 117 Minn. 247.

P. L. 1898, p. 793, § 204, gives the right of appeal from any decree of the orphans' court to any "person aggrieved" thereby. Held, that an heir at law and next of kin, who was not cited on the filing of the caveat to the probate of a will, is a "person aggrieved" by a decree admitting the will to probate. One is aggrieved by a decree whose pecuniary interest is directly affected thereby, or whose right of property may thereby be established or divested. In re Young's Will, 59 Atl. 154, 155, 67 N. J. Eq. 553 (citing Swackhamer v. Kline's Adm'r, 25 N. J. Eq. 503; Andress v. Andress, 22 Atl. 124, 46 N. J. Eq. 528).

One not an heir, but merely a legatee under an alleged will of decedent antedating another alleged will of decedent, which was admitted to probate in the county court without first having procured the allowance of the will under which he claims in the county court, which has sole jurisdiction of the probate of wills, is a "party aggrieved," within St. 1898, § 3788, authorizing appeals from the county court on the probate of wills only by persons aggrieved. In re Hunt's Will, 100 N. W. 874, 875, 122 Wis. 460.

A creditor of an estate of decedent was not "aggrieved" by an order of the probate court whereby its records were amended by inserting a provision that the executors give notice of their appointment by certain advertisements. Smith v. Whaley, 61 Atl. 173, 174, 27 R. I. 185.

A petitioner for the appointment of a guardian of the person and estate of a spendthrift is not "aggrieved" by the dismissal of the petition by the probate court, though he has an annuity charged in part on the real estate of the alleged spendthrift. McKenna v. McKenna, 69 Atl. 844, 845, 29 R. I. 224.

Where a surrogate allowed grossly extravagant compensation to special guardians of certain minors for conducting and prosecuting an appeal to the Appellate Division from the surrogate's order settling the accounts of certain trustees, and directing that such compensation be paid out of the minors' shares of the fund to be distributed, the trustees were "aggrieved." In re Stevens, 99 N. Y. Supp. 1070, 1074, 114 App. Div. 607.

Prior to an amendment to Kirby's Dig. § 1348, by Act May 31, 1909 (Laws 1909, p. 956), heirs or legatees could not, without having filed exceptions to an account current of an executor or administrator, appeal from a judgment of the probate court confirming it, for the reason that they were not privy to the record and were not the "party aggrieved," within the meaning of the statute regulating appeals from probate courts. Stricklin v. Galloway, 137 S. W. 804, 805, 97 Ark. 56.

Where, in proceedings for a final accounting by an administratrix, the only issue was whether the alleged donee of all of intestate's property or the next of kin were entitled thereto, and the decree directed payment of the property to the next of kin, the administratrix was not a "party aggrieved" within Code Civ. Proc. § 2568, giving a party aggrieved the right to appeal from a surrogate's decree, and the administratrix would not be entitled to appeal even if a valid gift by way of trust had been established under which the administratrix was trustee for the donee; the purpose of the trust having been accomplished. In re Heldmann's Estate, 135 N. Y. Supp. 143, 144, 151 App. Div. 234.

Where an order is made setting aside a homestead for the use of the widow pending administration, the executors are "parties aggrieved," within the meaning of the law relative to the right of appeal. In re Levy's Estate, 75 Pac. 301, 141 Cal. 646, 99 Am. St.

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Rep. 92 (citing In re Heydenfeldt's Estate, 49 Pac. 713, 117 Cal. 551).

Where the wife of a minor under guardianship had obtained a divorce, with a decree for alimony, prior to the settlement of the guardian's account on the husband's becoming of age, but she had neither brought suit against the guardian, attached the ward's estate, nor levied an execution, she was not a "party aggrieved," so as to be entitled to appeal from a probate decree settling the guardian's accounts, though she be regarded as a creditor of the ward. Leyland v. Leyland, 71 N. E. 794, 795, 186 Mass. 420.

St. 1898, § 4031, as amended by Laws 1907, c. 593, provides that any executor or "person aggrieved" by the action of the county court may appeal to the circuit court. On petition for the probate of a lost will, the petitioner alleged that she had been named as executrix in such will, and that her children had been made residuary legatees. On a hearing by the county court, probate was refused, and there was a finding that it could not be determined that any one was named as executrix therein. Held, that the petitioner had no appealable interest, since she had not been judicially declared an executrix of the will, and since she was not a "person aggrieved" within the terms of the statute; the mere fact that petitioner may have a strong natural desire to reverse the judgment, or that its rendition affronted or injured her feelings, not being an appreciable grievance. In re Powers' Will, 130 N. W. 888, 889, 145 Wis. 671.

St. 1898, § 4031, limits the right to appeal from an order denying the application for appointment of a guardian for an insane person to certain specified officers and to "any person aggrieved." Held, that mere affront to desire or sentimental interest, not amounting to a determination adversely affecting the legal rights of a petitioner, was insufficient to make her a "person aggrieved," so that an adult nonresident sister of an alleged incompetent, having no legal right to control the incompetent's custody or conduct, nor any right to support from or legal duty to care for or support the incompetent, nor any rights with reference to her property while the incompetent was living, had no capacity to appeal from a decree dismissing her petition for appointment of a guardian. In re Carpenter, 123 N. W. 144, 140 Wis. 572, 25 L. R. A. (N. S.) 155; Id., 123 N. W. 145, 140 Wis. 577.

Trustee in bankruptcy

A "party aggrieved," within Kirby's Dig. § 4665, authorizing any person aggrieved by a judgment of a justice to appeal, is one whose pecuniary interest is affected by the judgment or whose right of property may be established or devested thereby, and a trustee in bankruptcy of a defendant in replevin may appeal from an adverse judgment. Brown v. Frenken, 112 S. W. 207, 87 Ark. 160.

AGIST

AGISTMENT

An "agistment," under Rev. St. 1899, § 4228, giving a lien for keeping animals, is a species of bailment, and cannot exist without the possession of the animals being left with the bailee. Cotton v. Arnold, 95 S. W. 280, 281, 118 Mo. App. 596 (citing Everett v. Barse Live Stock Commission Co., 88 S. W. 165, 115 Mo. App. 482; State, to Use of Vette, v. Shevlin, 23 Mo. App. 598).

AGITATOR

See Labor Agitator.

AGREE

Contract synonymous

The word "agreed" being defined as "brought into harmony, united in opinion, settled by consent," and as being synonymous with "contracted," a complaint, alleging that defendant, a common carrier, "agreed" with plaintiff for a reward to receive and transport freight that plaintiff was notified by defendant to have the shipment prepared for loading, and that defendant wrongfully refused to accept and transport the freight when tendered, to plaintiff's damage, was not demurrable for failing to allege that plaintiff agreed to ship the staves and pay the freight thereon. Mott v. Jackson, 55 South. 528, 530, 172 Ala. 448 (citing 1 Words and Phrases, p. 279).

Grant synonymous

"It is settled that the word 'agree,' may be read 'grant.' Bailey v. Agawam Nat. Bank, 76 N. E. 449, 451, 190 Mass. 20, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep. 296 (citing Hogan v. Barry, 10 N. E. 253, 143 Mass. 538; Ladd v. City of Boston, 24 N. E. 858, 151 Mass. 585, 21 Am. St. Rep. 481).

Understood synonymous

See Understood.

AGREE TO CANCEL

The phrase "agrees to cancel," as used in a lease providing that in a certain contingency the lessee agrees to cancel the lease, is equivalent to saying that the lessee agrees that the lease shall be canceled, and does not contemplate any act by the lessee himself to complete the cancellation. Bruder v. Geisler, 94 N. Y. Supp. 2, 3, 47 Misc. Rep. 370.

AGREE TO LET

The words "agree to let" and similar phrases have been held to confer a leasehold, though a further writing or memorandum was called for in the document wherein

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those words were used. Ver Steeg v. Becker-Moore Paint Co., 80 S. W. 346, 351, 106 Mo. App. 257.

AGREED

See Dismissal Agreed.

AGREED CASE

An "agreed case" stands for a petition, answer, all the evidence, and a verdict returned to the court. Peake v. Webb, 112 S. W. 13, 14, 132 Mo. App. 601.

AGREED STATEMENT OF FACTS

See Statement of Fact.

AGREED TO

An important vital element in the adoption of a valid amendment to the Constitution is that it shall be "agreed to by three-fifths of all the members elected to each House" of the Legislature. If a proposed amendment is passed by the requisite vote in the Senate, it is done subject to the right of the Senate under the rules to reconsider such passage, and if such passage is duly reconsidered, and the proposed amendment is not afterwards duly "agreed to," its publication and submission to the electors is not authorized by the Constitution and may be enjoined in appropriate proceedings where no other adequate remedy is afforded by law. Crawford v. Gilchrist, 59 South. 963, 966, 968, 64 Fla. 41.

AGREED UPON

The phrase "which will be agreed upon" in the charge of the court that, if plaintiff is entitled to recover on his theory, he is entitled to a specified sum, with interest, "which will be agreed upon," does not mean that the parties will agree that interest must follow the verdict, but only that the amount of the interest will be agreed upon, that there will be no dispute over the computation. McAfee v. Dix, 91 N. Y. Supp. 464, 469, 101 App. Div. 69.

AGREEMENT

See During Life of Agreement; Express Agreement; Future Agreement; Independent Agreement; Mutual Agreement; On Any Understanding or Agreement; Sale by Agreement; This Agreement; Written Contract or Agreement.

Executory Agreement, see Executory Contract.

To constitute an "agreement," there must be a proposal by one party and an acceptance by another, which must be manifested by some appropriate act. White v. Allen Kingston Motor Car Co., 126 N. Y. Supp. 150, 152, 69 Misc. Rep. 627.

The statute in relation to homestead entries in forbidding an applicant to make any "agreement" by which the title he may acquire from the government shall inure in whole or in part to the benefit of another, means that there must be a meeting of minds expressed in some tangible way. One party may have intended to sell, the other party may have intended to buy, yet this would not be sufficient, unless the intention of each was in some way communicated from one to the other, and was understood and agreed to by both. United States v. Richards, 149 Fed. 443, 451.

Personal Property Law N. Y. § 42, requires lenders of money on salaries on an assignment or note to file a copy of the "agreement" with the employers. An employé gave a power of attorney to execute a note in his name for a loan and to assign a part of his salary. The attorney executed a note in the name of the employé and delivered it to the lender. The making of the note and the advance of the money were simultaneous acts. Held, that the note and the power of attorney were, when construed together, an "agreement" within the statute. Thompson v. Gimbel Bros., 128 N. Y. Supp. 210, 212, 71 Misc. Rep. 126.

An account annexed to the declaration in an action on an account, which recited that defendant was indebted to plaintiffs for a specified sum, with interest, on account of defendant's share of the amount paid by plaintiffs on a bond given by them to a third person at the request of and for defendant, and on defendant's "agreement" to be responsible for her share, shows a cause of action on an express agreement by defendant to be responsible for her share of the money paid by plaintiffs on the bond. Cunniff v. McDonnell, 81 N. E. 879, 196 Mass. 7.

Decedent executed a demand note to defendant, agreeing that the proceeds of certain policies of life insurance, which he had deposited with defendant as collateral to secure the note, should be applied to the payment thereof, and that, if he should come under any other liability or enter into any other agreement with defendant while it was the holder of such obligation, then any excess of collaterals should be applied to such other note or claim, and, in case of any exchange of the collaterals, the provisions of the note should extend to the new collaterals. Decedent thereafter executed a new note to defendant's cashier for a debt owing to defendant, which note was, in fact, for defendant's benefit. When decedent died, he was also a member of a firm which was indebted to defendant for insurance premiums collected and unpaid. At this time all but $181.50 of the original debt had been paid, for which amount a renewal note had been given which was due and unpaid. Held, that the words "liability," "agreement" and "claim," used in the collateral agreement, were sufficient to cover every conceivable obligation, and that the surplus due on the policies was therefore liable, not only for the balance of the original debt, but also for the note made payable to defendant's cashier,

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and for the firm's liability for the unpaid premiums. Norfleet v. Pamlico Ins. & Banking Co., 75 S. E. 937, 939, 160 N. C. 327.

Contract synonymous

There is no difference between a "contract" and an "agreement." Michael v. Kennedy, 148 S. W. 983, 984, 166 Mo. App. 462.

Deed

A quitclaim deed cannot be regarded as an "agreement in writing," satisfying the statute of frauds, for the conveyance of an after-acquired title. Chamberlain v. Abrams, 79 Pac. 204, 205, 206, 36 Wash. 587.

Receipt

A receipt or memorandum in the following language: "Lowe, Idaho, Nov. 17, 1902. Received from S. C. K. one hundred and ninety dollars on land Sec. 25, Tp. 32, R. 2 E., 160 acres"—signed by the parties, is not such "agreement in writing" as is required by Rev. St. 1887, § 6009, to justify specific performance. Kurdy v. Rogers, 79 Pac. 195, 196, 10 Idaho, 416.

An instrument acknowledging receipt of a sum of money, and stating that the party receiving it deducted the same from the purchase price of described land as commission for the sale, as the commission belonged to a third person and by agreement was to be deducted from the price is not an "agreement in writing" upon which an action may be brought within five years, but is a mere receipt for the money. Lewis v. Norris, 103 Pac. 134, 135, 80 Kan. 620.

Stipulation synonymous

The word "agreements" being synonymous with the word "stipulations," as used in a building contract, providing that the owner on a certificate by the architect of the contractor's failure to perform any of the "agreements" may on notice terminate the contract and complete the work, and that the expense incurred by the owner shall be certified by the architect, whose certificate shall be conclusive, the contract does not provide against abandonment of the work by the contractor, and where the contractor abandons the work the owner may complete it without obtaining the architect's certificate. Heidbrink v. Schaffner, 127 S. W. 418, 420, 147 Mo. App. 632.

AGREEMENT FOR SALE OF REAL ESTATE

Real property defined, see Real Property.

A parol agreement, creating a partnership and giving the partners an interest in real estate owned by a partner at the time of the formation of the firm, is an "agreement for the sale of real estate," within the statute of frauds, and is void. Burgwyn v. Jones, 75 S. E. 188–191, 113 Va. 511, 41 L. R. A. (N. S.) 120.

AGREEMENT LIMITING LIABILITY

A condition contained in a railroad ticket that the carrier assumed no liability for baggage, except for wearing apparel, and then only for $100 in value, unless a contract for a greater value was made in writing, and a rule or regulation to the same effect filed with the Interstate Commerce Commission, did not constitute an "agreement limiting the carrier's liability for its own negligence" resulting in loss of baggage. Homer v. Oregon Short Line R. Co. (Utah) 128 Pac. 522, 527, 528.

AGREEMENT TO ANSWER FOR DEBT OF ANOTHER

Where plaintiffs, attorneys, in a suit brought by their clients to recover land in which defendant was interested, in consideration of $200, agreed that defendant might settle the suit directly with their clients, and such a settlement was made and the suit dismissed, defendant's agreement to pay plaintiffs the $200 was not an "agreement to answer for another's debt," within the statute of frauds, on the theory that it was an agreement to pay the fee which plaintiffs' clients would have owed to them; defendant having agreed to pay the sum for his own benefit to procure plaintiffs' consent to a settlement with their clients. Van Winkle v. King, 141 S. W. 46, 47, 145 Ky. 691.

AGREEMENT TO BE PERFORMED WITHIN A YEAR

See Perform.

AGREEMENT TO MARRY

"The 'agreement to marry' partakes of the nature of a civil contract, as upon its violation the injured party may recover damages; but the contract or agreement to marry and the marriage relation itself are by no means one and the same. When the agreement to marry has been executed in a legal marriage, the relation thus formed becomes much more than a mere civil contract. The rights and duties incident to this relation are from a source much higher than a contract of which the parties are capable, and can never be restricted nor enlarged nor in any way controlled by any contract which the parties can make." Elkenbury v. Burns, 70 N. E. 837, 838, 33 Ind. App. 69.

AGREEMENT TO SELL AND BUY

"An 'agreement to sell and buy' is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor" (quoting Civ. Code, § 1729). Consequently, a contract by which one agrees to sell to another a half interest in his business in consideration of a specified amount of cash, such other agreeing to devote his entire time and skill to the business is a completed "agreement to sell and buy," though only a small portion of the cash was

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paid at the time of making the contract, and the cash to be paid is but a fraction of the real value of the interest in the business purchased. Stum v. Hadrich, 94 Pac. 82, 83, 7 Cal. App. 241.

AGREEMENT TO SELL OR CONVEY

Sale distinguished, see Sale.
See, also, Sold.

An "agreement to sell land" is an agreement to sell a title to the land, and, in the absence of a stipulation to the contrary, the law implies an undertaking by the vendor to make a good title, and the form of the conveyance is immaterial so long as the form executed conveys the title contracted to be conveyed. Davis v. Lee, 100 Pac. 752, 755, 52 Wash. 330, 132 Am. St. Rep. 973.

Civ. Code, § 1727, defines an "agreement to sell," generally termed a "conditional sale," as a contract by which one engages, for a price, to transfer to another the title to a certain thing. Ward Land & Stock Co. v. Mapes, 82 Pac. 426, 427, 147 Cal. 747 (citing Van Allen v. Francis, 56 Pac. 339, 123 Cal. 474).

A contract is taxable as an "agreement to sell stock," where it provides for payment in weekly installments, for the transfer to the buyer of a part of the stock when the payments aggregate a specified sum, and for the transfer of the remainder on the payment of the full price and which declares that during the continuance of the agreement, and, until there shall be a default for five days, the stock shall be indorsed in blank and placed in escrow to be held in accordance with the agreement, and that during the continuance thereof the buyer shall have no power to exercise any of the rights of a stockholder. Phillips v. Grossman, 135 N. Y. Supp. 567, 568, 76 Misc. Rep. 497.

AGREEMENT UNDER SEAL

An "agreement under seal" may be construed to be a "grant." Bailey v. Agawam Nat. Bank, 76 N. E. 449, 451, 190 Mass. 20, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep. 296 (citing Hogan v. Barry, 10 N. E. 253, 143 Mass. 538; Ladd v. Boston, 24 N. E. 858, 151 Mass. 585, 21 Am. St. Rep. 481).

AGRICULTURE

See Farming.

AGRICULTURAL LABORER

See Farm Laborer.

AGRICULTURAL LANDS

Land as including, see Land.

Within Rev. Codes, § 4465, providing that no lease of agricultural lands for a longer period than 10 years shall be valid the term "agricultural lands," is descriptive of the nature of the land itself, and does not necessarily mean acre property. Lerch v. Missoula Brick & Tile Co., 123 Pac. 25, 28, 45 Mont. 314.

AGRICULTURAL PURPOSE

Irrigation purposes synonymous, see Irrigation Purposes.

A close was used for "agricultural purposes" where it was used in connection with a pasture for a cow lot, and the business of the occupant of the premises was farming. McNeely v. State, 96 S. W. 1083, 50 Tex. Cr. R. 279 (citing Webster's Dict.).

AGRICULTURAL PURSUITS

See Farmer; Farming.

AGRICULTURAL SOCIETY

As public corporation, see Public Corporation.

AHEAD

See Run Ahead.

AID

See Contract In Aid of Monopoly; Pecuniary Aid; State Aid.
Any other aid, see Any Other.

Aid offender

Rev. St. U. S. § 5444, relating to "aid in the illegal admission of imports," includes aid given both before and after the fact; and where a customs officer aids one who has made wrongful entry, by concealing the falsity of the entry, or by supporting it by false official returns, he is within the prohibition of the section. United States v. Mescall, 164 Fed. 584, 586.

Aiding prisoner to escape

Under White's Ann. Pen. Code, 1901, art. 229, providing that, if any person shall willfully aid a prisoner to escape from the custody of an officer by whom he is legally detained on an accusation for a misdemeanor, he shall be punished by fine, etc., a person who has been convicted of a misdemeanor, and is serving a sentence as a county convict, is not in custody on an accusation, within the statute, and hence assisting such a person to escape is not a violation of the statute. Brannan v. State, 72 S. W. 184, 185, 44 Tex. Cr. R. 399.

AID AND ABET

The word "aid" does not imply guilty knowledge or felonious intent, whereas "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. People v. Lewis, 98 Pac. 1078, 1079, 9 Cal. App. 279; State v. Allen, 87 Pac. 177, 182, 34 Mont. 403; People v. Bond, 109 Pac. 150, 155, 13 Cal. App. 175.

The words "aid and abet" comprehend all assistance rendered by acts, or words of encouragement, or support, or presence, actu-

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al or constructive to render assistance should it become necessary. No particular acts are essential. If encouragement be given to commit the felony, then aiding or abetting is made out. Jones v. State, 57 South. 31, 32, 174 Ala. 53; Loeb v. State, 64 S. E. 338, 341, 6 Ga. App. 23.

The definition in Raiford v. State, 59 Ala. 106, given in substantially the above language is criticised in State ex rel. Attorney General v. Tally, 15 South. 722, 102 Ala. 66, in which the court says: "The definition was sufficient for the case then in hand, and it is in the form not infrequently found in the books. But it is incomplete. Mere presence for the purpose of rendering aid obviously is not aid in the substantive sense of assistance by an act supplementary to the act of the principal. Nor is it aid in the original sense of abetting, nor abetting in any sense, unless presence with the purpose of giving aid, if necessary, was preconcerted or in accordance with the general plan conceived by the principal and the person charged as an aider or abettor, or, at the very least, unless the principal knew of the presence, with intent to aid, of such person. * * * And in the nature of things the fact of presence and purpose to aid could not incite or encourage or embolden the principal unless he knew of the existence of that fact. * * * The definition we have quoted is, as an abstract proposition, clearly at fault. As applied in the concrete to cases of confederacy as it is, we undertake to say, whenever it is stated in this form, it is free from objection. But in the absence of confederacy, or at least of knowledge on the part of the actual perpetrator of a crime, one cannot be a principal in the second degree who is present intending to aid and does not aid by word or deed. The definition must go further. It should appear by it that, to be an aider or abettor when no assistance is given or word uttered, the person so charged must have been present by preconcert, special or general, or at least to the knowledge of the principal, with the intent to aid him." Morris v. State, 41 South. 274, 283, 146 Ala. 66 (citing Woolweaver v. State, 34 N. E. 352, 50 Ohio St. 277, 40 Am. St. Rep. 667; Goins v. State, 21 N. E. 476, 46 Ohio St. 457; Tanner v. State, 9 South. 613, 92 Ala. 1; Jordan v. State, 79 Ala. 9).

One "aids and abets" in the commission of an offense where he has such a connection with it as at common law would make him guilty as principal in the second degree, which consists of being present and doing some act to aid the actual perpetrator though without taking a direct part in its commission. State v. Davenport, 72 S. E. 7, 15, 156 N. C. 596.

As stated in Bouvier's Law Dictionary, "aiding and abetting" is "the offense committed by those persons who, though not the direct perpetrators of a crime, are yet present at its commission, and do some act to render aid to the actual perpetrator thereof. A 'principal in the second degree' is he who is present 'aiding and abetting' the fact to be done. Actual presence is not necessary. It is sufficient to be so situated as to come readily to the assistance of his fellows." To render one guilty as an "accessory before the fact," it is not necessary that he should have shared the criminal or mischievous design of the principal felony, and that that design should have been substantially effected through his incitement thereto. The essential element in "aiding and abetting" in the commission of a crime is the taking of an active part with a criminal intent to commit the crime. From this it follows that the act of officers or employés of a corporation in obeying the order of the president in preparing and delivering a check by which the funds of the corporation are misappropriated is not "aiding and abetting" the commission of a crime. People ex rel. Perkins v. Moss, 99 N. Y. Supp. 138, 144, 113 App. Div. 329 (citing People v. Peckens, 47 N. E. 883, 153 N. Y. 585).

"Aiding and abetting" must either precede or accompany the commission of the crime. Where one is indicted and placed on trial, and the evidence fails to show that he committed the offense charged, but tends to prove that after said offense had been committed by another the accused performed acts in the interests of the other for the purpose of covering up the crime and of preventing detection and punishment, such subsequent acts do not constitute "aiding and abetting" of the crime within the meaning of the Ohio statute. State v. Lingafelter, 83 N. E. 897, 898, 77 Ohio St. 523.

A finding that a person "aided and abetted" the promoters of a corporation in a fraudulent scheme implies an intentional participation with knowledge of the object to be attained. Lomita Land & Water Co. v. Robinson, 97 Pac. 10, 15, 154 Cal. 36, 18 L. R. A. (N. S.) 1106.

The words "aids or abets," as used in U. S. Rev. St. § 5209, providing that every person who with intent to deprive a national banking association of its funds aids or abets any clerk or agent in any violation of such section shall be guilty of a misdemeanor, are to be construed according to their natural import, and are satisfied by proof that accused actually participated in such misappropriation, and of concurring acts performed by him to that end. Keliher v. United States, 193 Fed. 8, 13, 114 C. C. A. 128.

The furnishing by the defendant of a machine that happened afterwards, without his privity, to be used for gambling, does not constitute either the "aiding, abetting, or assisting" in the keeping of a gambling re-

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sort. State v. Flynn, 72 Atl. 296, 297, 76 N. J. Law, 473.

AIDER AND ABETTOR

See, also, Particeps Criminis.

"An 'aider and abettor' is one who advises, counsels, procures, or encourages another to commit a crime, whether personally present at the time and place of the commission of the offense or not." Flickinger v. United States, 150 Fed. 1, 9, 79 C. C. A. 515. An aider or abettor may be one who so far participates in the commission of a crime as to be present for the purpose of assisting therein if necessary. In such a case he will also be liable as principal. Brinegar v. State, 118 N. W. 475, 476, 82 Neb. 558.

"To constitute one an 'aider and abettor' in the commission of a crime, he must be present when it is committed, aiding, advising, or assisting therein. Upon the other hand, though he be not present when the crime is committed, if its commission nevertheless results from his advice or assistance or by his procurement, he is equally guilty with the perpetrator of the crime, but as an 'accessory before the fact.'" Wheeler v. Commonwealth, 87 S. W. 1106, 1109, 120 Ky. 697; Vogel v. State, 119 N. W. 190, 197, 138 Wis. 315. To make one an "aider and abettor," he must participate in the crime, sharing the criminal intent of the principal. Landrum v. Commonwealth, 96 S. W. 587, 589, 123 Ky. 472.

An aider generally is one who gives aid and comfort, or commands, advises, or encourages another to commit a crime, and persons who were in the employ of accused's employer, and with accused as leader went armed upon land in another's possession, and by force compelled the possessors to vacate and destroyed property thereon, were "aiders and abettors" in the offense of forcible trespass. State v. Davenport, 72 S. E. 7, 15, 156 N. C. 596.

One present at the commission of a trespass, encouraging or exciting it by words, gestures, looks, or signs, or who by any means countenances and approves the trespass, is in law deemed to be an "aider and abettor," and liable as principal. Hunt v. Di Bacco, 71 S. E. 584, 587, 69 W. Va. 449.

AIDFUL

Proper synonymous, see Proper.

AILMENT

See Personal Ailment.
Other serious ailment, see Other.

A person does not consult a physician and is not treated for an "ailment" within the meaning of a question in an insurance application, by merely stating to a physician that he has a headache and receiving medicine therefor, without asking or receiving any professional advice. Modern Woodmen of America v. Miles (Ind.) 97 N. E. 1009. Nor is pregnancy or confinement an ailment. Rasicot v. Royal Neighbors of America, 108 Pac. 1048, 1053, 18 Idaho, 85, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

AIM

The words "aim and point," as used in a statute which makes it an offense to "point or aim" a gun, etc., are synonymous. Coleman v. State, 48 South. 181, 182, 94 Miss. 860.

To "aim" a weapon at another is to point it intentionally. There is a distinction between the words "aim," "point," and "level." "Aim" expresses more than the other two words, inasmuch as it denotes a direction towards some minute point in an object, and the others imply direction towards the whole objects themselves. We "aim" at a bird; we "point" a cannon against a wall; we "level" a cannon at a wall. "Pointing" is, of course, used with most propriety with reference to instruments that have points. It is likewise a less decisive action than either aiming or leveling. A stick or finger may be pointed at a person merely out of derision; but a blow is leveled or aimed with an expressed intent of committing an act of violence. Livingston v. State, 65 S. E. 812, 6 Ga. App. 805 (quoting Crabbe's English Synonyms).

The word "aim," as used in Burns' Ann. St. 1901, § 2073, which provides that it shall be unlawful for any person over the age of 10 years, with or without malice, purposely to point or aim any pistol or other firearm, either empty or loaded, towards any other person, is used in the disjunctive, and under such circumstances the statute may be violated by doing either or both of the forbidden acts. The accused may be charged (1) with having purposely pointed the pistol at and towards another; (2) with having purposely aimed the weapon at and towards another; and (3) with having purposely pointed and aimed the weapon at and towards another. Eaton v. State, 70 N. E. 814, 162 Ind. 554.

AIR

AIR PUMP

As appliance, see Appliance.

AISLE

Greater New York Charter makes the manager of a theater subject to penalty for causing or permitting any person to stand or sit in the "aisles and passageways" during performances, or for neglecting or refusing to cause such persons to forthwith vacate such aisles on being notified of their occupancy thereof. Held that, where the only

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entrance to the main floor of a theater is through a center door, and persons entering such door are compelled to pass behind the rows of seats to gain the aisle on either side of such floor, the space in the rear of the seats between the said aisles is embraced within the term "aisles and passageways" of the charter. Waldo v. Seelig, 126 N. Y. Supp. 798, 800, 70 Misc. Rep. 254.

AL

See Et Al.

ALBUM

As scrapbook, see Scrapbooks.

ALCOHOL

See Methyl Alcohol; Pure Alcohol.

"Alcohol" is a product of fermentation. It is separated, not produced, by distillation, and the liquor thus separated, containing a percentage of alcohol, is spirituous liquor. Pennell v. State, 123 N. W. 115, 116, 141 Wis. 35.

As intoxicating liquor

See Intoxicating Liquor.

As a spirituous liquor

See Spirituous Liquor.

ALCOHOLIC COMPOUND

The provision in Tariff Act July 24, 1897, for "alcoholic compounds," does not include herbs immersed in alcohol. United States v. Stone & Downer Co., 171 Fed. 293. Fresh leaves of aconite and belladonna, and fresh roots of bryonia, immersed in their natural condition in alcohol for preservation, are not "alcoholic compounds," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151. Boericke & Runyon Co. v. United States, 126 Fed. 1018, 1019. But the term does include a mixture of fine-cut herbs and alcohol, in which the alcohol mainly serves as a preservative in the importation of the leaves, but continues in use after importation, for the purpose of producing a tincture, although there might be no justification for holding that the purpose of using the alcohol as a mere preservative determines classification under this provision. United States v. Stone & Downer Co., 175 Fed. 33, 34, 99 C. C. A. 49.

ALCOHOLIC LIQUORS

The phrase "alcoholic or spirituous liquors" necessarily means intoxicating liquors. Marks v. State, 48 South. 864, 159 Ala. 71, 133 Am. St. Rep. 20.

"Alcoholic" means containing or pertaining to alcohol, which is a volatile organic body, a limpid colorless liquid, hot and pungent to the taste, having a slight, but not offensive, scent. It has but one source, fermentation, and is extracted from its by-products by distillation; its purity and strength depending on the degree of perfection of distillation. While it is the intoxicating principle of all intoxicating drinks, within the meaning of ordinary prohibition statutes, it is rarely in its pure state used as a beverage. Marks v. State, 48 South. 864, 866, 159 Ala. 71, 133 Am. St. Rep. 20.

The general words "alcoholic, spirituous, malt, or intoxicating liquors," as used in the prohibition statute of 1907 (Acts 1907, p. 81), import only liquors that will produce intoxication when drunk to excess, and, under an indictment using such words as descriptive of the offense, it is only necessary, to make out a prima facie case, for the state to show that the particular liquor sold was within one of the classes, and the burden is then upon defendant to prove that the liquor was not intoxicating when drunk to excess, or was not a beverage or reasonably capable of being used as such. Stoner v. State, 63 S. E. 602, 603, 5 Ga. App. 716.

The term "alcoholic liquors" does not embrace medicinal, toilet, and culinary preparations recognized as such by standard authority (such as the United States Dispensatory) not intended to be used as intoxicating beverages, and not reasonably capable of being so used, such as paregoric, essence of lemon, essence of ginger, bay rum, cologne, wood alcohol, and the like, although such articles are liquid, contain alcohol, and may produce intoxication. Roberts v. State, 60 S. E. 1082, 1086, 4 Ga. App. 207.

ALCOHOLIC PRINCIPLE

The words "alcoholic principle," as used in Laws N. D. 1909, c. 187, defining intoxicating liquor as a beverage retaining the alcoholic principle as a destructive force, have no reference whatever to quantity, but only to some characteristic or quality. The Legislature evidently meant to connect, without reference to quantity, two qualities, viz., the intoxicating quality present in alcohol with that found in other poisonous drugs, possibly those, or some of those, mentioned in the latter part of the act. State v. Fargo Bottling Works, 124 N. W. 387, 391, 19 N. D. 396, 26 L. R. A. (N. S.) 872.

ALCOVE

An "alcove" is not a room, but merely part of the room. People ex rel. Cornman v. Butler, 105 N. Y. Supp. 117, 118, 120 App. Div. 590.

ALCOVE ROOM

An "alcove room," as used in a statute requiring that every room in a tenement house shall have at least one window, is a room with an alcove, and the words did not refer to the alcove itself, which is only a recess or part of such room. People ex rel. Cornman v. Butler, 105 N. Y. Supp. 117, 118, 120 App. Div. 590.

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ALDERMAN

See Board of Aldermen.
As civil officer, see Civil Officer.

ALE

See Bok Ale.

Cider is not "ale," or any mixture thereof. Donithan v. Commonwealth, 64 S. E. 1050, 109 Va. 845.

As intoxicating liquor

See Intoxicating Liquor.

ALIAS

Or construed as alias, see Or.

Sometimes a man is known by several different names, and it was formerly the custom, in drawing indictments, to charge him under all the names by which he was known; connecting them with the words "alias dictus," or with simply "alias." These words mean "otherwise called" or "otherwise." State v. Howard, 77 Pac. 50, 51, 30 Mont. 518.

ALIAS WRIT

An "alias writ" is a second writ issued when the first has failed its purpose. Municipal Court Act, § 26, provides that an action must be commenced by the service of summons. Section 30 provides that, if defendant cannot be found, the clerk, at the request of plaintiff, shall issue another summons, to be known and stamped "alias." Held, that service of an "alias" summons is not fatally defective, although the original summons is not also served therewith. Lawrence v. Bernstein, 92 N. Y. Supp. 817, 818, 46 Misc. Rep. 608 (quoting and adopting definition in Cent. Dict.).

An "alias summons" is issued when the original has not produced its effect because defective in form or manner of service, and, when issued and served, it supersedes the first writ. Mansur v. Pacific Mut. Life Ins. Co. of California, 118 S. W. 1193, 1194, 136 Mo. App. 726.

ALIBI

See Complete Alibi.

The defense of an "alibi" is that accused was not present at the place where the crime was committed. State v. Massey (Del.) 82 Atl. 243, 244; State v. Bond, 90 S. W. 830, 832, 191 Mo. 555 (quoting and adopting definition in 1 Bishop's New Cr. Proc. § 1061); State v. Roberts (Del.) 78 Atl. 305, 309; O'Hara v. State, 124 S. W. 95, 97, 57 Tex. Cr. R. 577; Burns v. State, 79 N. E. 929, 75 Ohio St. 407 (citing Walters v. State, 39 Ohio St. 215; Lytle v. Boyer, 33 Ohio St. 506); Tinsley v. State, 106 S. W. 347, 351, 52 Tex. Cr. R. 91.

"Alibi" as a defense to a criminal charge means accused's absence from the scene of the alleged crime at the time of its commission thus making it impossible for him to have perpetrated it. Williams v. State, 51 S. E. 322, 324, 123 Ga. 138; People ex rel. Genna v. McLaughlin, 130 N. Y. Supp. 458, 461, 145 App. Div. 513.

The defense does not deny that the crime was committed, but is designed to prove that the defendant during the whole time was so far from the place where the crime was committed that he could not have participated in it, and such defense is not made out by mere proof that accused was not present at the commission of the crime. People v. Conners, 92 N. E. 567, 570, 246 Ill. 9; People v. Lukoszus, 89 N. E. 749, 751, 242 Ill. 101.

The proof must cover the whole of the time of the commission of the crime, so as to render it impossible, or highly improbable, that the defendant could have committed the act. Briggs v. People, 76 N. E. 499, 503, 219 Ill. 330.

An "alibi" is a defense that if an offense was committed at the time and place alleged, defendant was at that time at another and different place from that at which the offense was committed, and therefore was not and could not have been the person who committed it. Crowell v. State, 120 S. W. 897, 903, 56 Tex. Cr. R. 480.

ALIEN—ALIENAGE

See Nonresident Alien.
Any alien, see Any.
Entry of alien, see Enter-Entry (Under Immigration Laws).
Proceeding to expel or exclude alien as crime, see Crime; criminal proceeding, see Criminal Proceeding.

The term "aliens," as used in Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, applies only to alien immigrants, and not to alien residents. United States v. Tsuji Suekichi, 199 Fed. 750, 751, 118 C. C. A. 188.

Act Cong. March 3, 1903 does not apply to alien residents returning to the United States after a temporary absence. United States v. Nakashima, 160 Fed. 842, 845, 87 C. C. A. 646.

The provision of the naturalization act of June 29, 1906, c. 3592, § 4, cl. 6, 34 Stat. 596 that "when any 'alien who has declared his intention' to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention," must be construed to include persons who made their declarations under the old statute, and subsequently died, whose minor children may be naturalized under the new act with-

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out making any declaration of intention. In re Shearer, 158 Fed. 839, 841.

Persons born out of the limits and jurisdiction of the United States, the father at the time of their respective births not being a citizen of the United States, are born "aliens." The status, as aliens, of children born in a foreign country of alien parents, is not changed by the naturalization of their father as a citizen of the United States by taking out his second papers while the children are detained in custody as immigrants at Ellis Island, and they remain subject to exclusion under the immigration laws for a dangerous contagious disease contracted before their embarkation; such children not being affected by Rev. St. § 2172, which provides that the minor children of persons duly naturalized, if dwelling in the United States, shall be considered as citizens thereof. United States v. Williams, 132 Fed. 894, 895.

A foreign-born Chinese woman, though married to a Chinaman of American birth, is an "alien," within the meaning of the provisions of the act of Congress for the deportation of any alien found as an inmate of a house of prostitution within three years subsequent to her entry into the United States. Low Wah Suey v. Backus, 32 S. Ct. 734, 737, 225 U. S. 460, 56 L. Ed. 1165.

Under the express terms of Act Cong. March 2, 1907, c. 2534, § 3, 34 Stat. 1228, c. 2534, respecting the expatriation of citizens, an American woman became an "alien" by marrying an alien, though she continued to reside in the United States, and hence was incompetent to act as a witness in support of his petition for naturalization. In re Martorana, 159 Fed. 1010, 1011.

The word "alien," within Act Cong. Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 which provides that any "alien" who shall enter the United States in violation of the law, and such as become public charges from causes existing prior to landing, shall be deported at any time within three years after the date of entry, is not synonymous with "immigrant," but is intended as a broader term, and includes a Russian unmarried woman, who entered the United States in 1897 or 1898, and remained therein continuously until March, 1908, when she returned to Russia, after having engaged in prostitution for a considerable time, and who attempted to re-enter the United States in June, 1908, she being within three years thereafter an alien of the excluded classes and subject to deportation. Ex parte Hoffman, 179 Fed. 839, 841, 103 C. C. A. 327.

The word "alien" as used in Immigration Act March 3, 1903, § 18, which requires officers of vessels to take due precaution to prevent aliens from landing therefrom, except at the time and place designated by the immigration officers, having replaced the term "alien immigrants" in a previous statute, is used in its broad and full meaning, and hence is not restricted to alien immigrants, but includes as well aliens who are members of the ship's crew. Taylor v. United States, 152 Fed. 1, 4, 81 C. C. A. 197.

As citizen

See Citizen.

Foreign corporation

A foreign corporation is within Code Civ. Proc. § 2612, prohibiting the granting of letters testamentary to an "alien" not an inhabitant of the state. In re Avery's Estate, 92 N. Y. Supp. 974, 979, 45 Misc. Rep. 529.

As heir

See Heirs.

As next of kin

See Next of Kin.

As white person

See White Person.

As widow

See Widow.

ALIEN IMMIGRANT

The term "alien immigrant" is a less comprehensive term than "alien." Taylor v. United States, 152 Fed. 1, 4, 81 C. C. A. 197.

"In the statutes regulating immigration, an 'alien immigrant' is one who offers to take up his residence here, but has not yet carried out this desire." An alien, who in good faith has acquired and maintains his residence in the United States, on his return from a temporary absence in a foreign country, is not an "alien immigrant" within the meaning of the immigration statutes, but has the right to leave and re-enter the United States, with the same freedom as a resident who is also a citizen. In re Buchsbaum, 141 Fed. 221, 223 (quoting and adopting definition in In re Panzara, 51 Fed. 275).

Whether an alien who has once been admitted into the United States, but who, without being naturalized, afterward returned to the country of his original domicile, upon again coming to this country, is an "alien immigrant," within the meaning of the immigration act depends upon the circumstances of the particular case. If, on his first entry, he left a family in his native country, to which he returned, without any definite intention of again coming to the United States, and leaving neither business nor property here, he cannot be considered to have acquired a domicile here, which takes him out of the operation of the statute when he again applies for admission without his family. United States v. Rodgers, 191 Fed. 970, 978, 112 C. C. A. 382.

A native of Porto Rico, who was an inhabitant of that island at the time of its cession to the United States by a treaty of April 11, 1899, 30 Stat. 1754, with Spain, is not, upon her arrival at the port of New York, an "alien immigrant," within the meaning of

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Act Cong. March 3, 1891, c. 551, 26 Stat. 1084, providing for the detention and deportation of alien immigrants likely to become public charges. Gonzales v. Williams, 24 Sup. Ct. 177, 192 U. S. 1, 48 L. Ed. 317.

When defendant's ship was anchored off shore at a Mexican port, a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore, he found that the vessel had started, and proceeded some distance. Defendant refused his request that he be taken back, and landed, but promised to stop and leave him on the return trip, and thereupon put him at work, but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. Held, that such facts were not sufficient to warrant defendant's conviction for neglecting to detain an alien not entitled to land, as such Mexican was not an "alien immigrant" who left a foreign shore to come to the United States for the purpose of becoming a permanent resident here; all the acts and agreements affirmatively appearing to have been made in the utmost good faith, and not for the purpose of evading any law. Moffitt v. United States, 128 Fed. 375, 379, 63 C. C. A. 117.

ALIEN—ALIENATE—ALIENATION

See Inalienable; Involuntary Alienation; Power of Alienation; Suspension of Power of Alienation; Voluntary Alienation.

"Alienate" means to make over to another title or right and is given as a synonym of "surrender." Kessler v. Clayes, 125 S. W. 799, 801, 147 Mo. App. 88 (citing Stand. Dict.). But, "any transfer of real estate short of a conveyance of title is technically not an 'alienation' of the estate." Hubbell v. Hubbell, 113 N. W. 512, 515, 135 Iowa, 637, 13 L. R. A. (N. S.) 496.

"To 'alienate' real estate is a voluntary parting of the ownership of it, either by bargain and sale, or by some conveyance, or by gift or will." In re Lands of Five Civilized Tribes, 199 Fed. 811, 829 (quoting from Burbank v. Rockingham Mut. Fire Ins. Co., 24 N. H. 550, 57 Am. Dec. 300).

"The word 'alienation' usually means the act by which the title to real property is voluntarily transferred by one person to and accepted by another, and such act is generally accomplished by the execution of a deed or of a will." Kalyton v. Kalyton, 78 Pac. 332, 45 Or. 116 (quoting Burbank v. Rockingham Mut. Fire Ins. Co., 24 N. H. 550, 57 Am. Dec. 300).

"Alienation" is the voluntary and complete transfer from one person to another, and if it be concerning the transfer of property it involves the complete and absolute exclusion, out of him who alienates, of any remaining interest, or particle of interest, in the thing transmitted. It involves the complete transfer of the property and possession of lands, tenements, or other things to another. Orrell v. Bay Mfg. Co., 36 South. 561, 563, 83 Miss. 800, 70 L. R. A. 881 (citing Stark v. Duvall, 7 Okl. 217, 54 Pac. 454).

The word "alienation" means the transfer of the property and possession of land, tenements, or other things from one person to another, and is particularly applied to absolute conveyances of real property. Where a testator directs that his trustees have and exercise all requisite power, including that of alienation, necessary or convenient for the management of the estate and the division and distribution thereof, the use of the word "alienation" clearly imports an intention on the part of the testator to confer on the trustees the power to alienate or transfer the real estate if it should be necessary for the proper management of the estate or for the division and distribution thereof in the manner contemplated by the will. Dickson v. New York Biscuit Co., 71 N. E. 1058, 1063, 211 Ill. 468.

The words "alienable" and "alienating" are used in Const. art. 10, relating to conveyance of homesteads, in the sense of conveying or transferring the legal title of any beneficial interest in the exempt homestead during the life of the owner, and, the method by which the homestead may be alienated being expressly prescribed in the Constitution to be by joint consent and deed or mortgage duly executed by the husband and wife, all other methods of alienation are prohibited. Thomas v. Craft, 46 South. 594, 596, 55 Fla. 842, 15 Ann. Cas. 1118.

The word "alienation" was not used in its technical sense in Act Cong. March 3, 1885, c. 139 (23 Stat. 340), providing for the allotment of lands to the Indians residing on the Umatilla reservation, and declaring that the law of alienation and descent in force in the state of Oregon shall apply after patents have been executed. Kalyton v. Kalyton, 78 Pac. 332, 45 Or. 116.

The word "alienate" signifies a transfer of property and implies the right by title to do so; and hence a contract of conditional sale under which the buyer acquired no title or interest, and which entitled the seller to immediate possession of the property if it was taken on attachment, was not repugnant to the interest created or a restraint on alienation, within Civ. Code, § 711, declaring that conditions restraining alienation, when repugnant to the interest created, are void.

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Morris v. Allen, 121 Pac. 690, 693, 17 Cal. App. 684.

Contract to convey

A contract for the sale of insured property does not of itself constitute an "alienation," within the meaning of an insurance policy declaring that a change of insured's interest shall work a forfeiture. Finkbohner v. Glens Falls Ins. Co., 92 Pac. 318, 320, 6 Cal. App. 379.

Deed of trust or mortgage

A mortgage is not a "sale" or "alienation," within Ky. St. § 4021, providing that the lien on property for taxes shall not be defeated by sale or alienation, unless made more than five years before suit to enforce the lien. Rissberger v. City of Louisville (Ky.) 118 S. W. 319.

A mortgage in Kansas, being merely security for a debt, conveys no title, and is not an "alienation," within the meaning of the homestead act. A mortgage upon government land, made by a claimant holding under the homestead act, prior to final proof, for the purpose of procuring money to improve the land, or for any purpose, provided it is not intended thereby to transfer the title in evasion of the statute, is not void, nor in violation of the homestead laws. Stark v. Morgan, 85 Pac. 567, 568, 570, 571, 73 Kan. 453, 6 L. R. A. (N. S.) 934, 9 Ann. Cas. 930.

An act empowering a married woman to "alienate" her lands with the assent and concurrence of her husband, evidenced by his joining in the conveyance, of its own force authorized a married woman to execute a deed of trust on her land to secure her debts. Collier v. Alexander, 38 South. 244, 245, 142 Ala. 422.

A mortgage given to secure a loan by an intermarried citizen of one of the Five Civilized Tribes, not of Indian blood, on his surplus lands, is a conveyance amounting to an "alienation" within the meaning of Act Cong. April 21, 1904, c. 1402, § 1, 33 Stat. 204, removing all restrictions on alienation by such allottees except as to homesteads. Frame v. Bivens, 189 Fed. 785, 790.

Descent or devise

"The word 'alienate' means, among other things, the power of disposition by will." A deed by the United States to an Indian forbidding alienation deprives him of the power to dispose of the property by will. Jackson v. Thompson, 80 Pac. 454, 456, 38 Wash. 282.

The words "alienable" and "inalienable," used to restrict the disposition of lands in the supplemental agreement with the Chickasaws and Choctaws (Act July 1, 1902, c. 1362, 32 Stat. 642, 643, pars. 12, 15, 16), include disposition by will. Taylor v. Parker, 126 Pac. 573, 33 Okl. 199; Hayes v. Barringer, 168 Fed. 221, 223, 93 C. C. A. 507.

The word "alienable," in the New York Real Property Law, making an expectant estate "descendible, devisable and alienable in the same manner as an estate in possession," empowers the owner of an expectant estate to deal with it in all respects as he might were he actually in possession of the property. New York Life Ins. & Trust Co. v. Cary, 83 N. E. 598, 600, 191 N. Y. 33.

Lease

A lease of a homestead is an "alienation" thereof within the Constitution, and is void unless signed by the lessor's wife. Mailhot v. Turner, 121 N. W. 804, 805, 157 Mich. 167, 133 Am. St. Rep. 333.

A lease of an Indian allottee's lands constitutes an "alienation." Duff v. Keaton, 124 Pac. 291, 294, 33 Okl. 92, 42 L. R. A. (N. S.) 472; Eldred v. Okmulgee Loan & Trust Co., 98 Pac. 929, 930, 22 Okl. 742; Barnes v. Stonebraker, 113 Pac. 903, 905, 28 Okl. 75; Sharp v. Lancaster, 100 Pac. 578, 579, 23 Okl. 349.

As sale

See Sale.

ALIENATION OF AFFECTIONS

Malice in actions for alienation of affections, see Malice.

The gist of the action for "alienation of affections" is the loss of consortium, namely, conjugal fellowship, company, co-operation, and aid of the husband or wife; and alienation of affections is a matter of aggravation. Such an action is maintainable by the wife as well as the husband. Dodge v. Rush, 28 App. D. C. 149, 152, 8 Ann. Cas. 671.

"Alienation of a wife's affections" includes all wrongful interference by others, causing her to leave her husband or do things destructive of marital happiness. It does not necessarily imply that she has been debauched; but neither her voluntary bestowal of affections upon one who did nothing wrongful to gain it, nor her intercourse with one who did not seduce her, will support the action. De Ford v. Johnson, 133 S. W. 393, 395, 152 Mo. App. 209.

As personal injury

See Personal Injury.

ALIGHTING

Engaged in alighting, see Engaged.
In or about alighting, see In or About.

ALIGNMENT

The word "alignment," used with reference to a system of drainage, means the ground plan of the work. Board of Directors of Plum Bayou Levee Dist. v. Roach, 174 Fed. 949, 953, 99 C. C. A. 453.

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ALIKE

See Share and Share Alike.
As similar, see Similar.

ALIMONY

See Decree for Alimony; Order Granting or Refusing Alimony; Permanent Alimony.
Judgment for alimony as money judgment, see Money Judgment.

"Alimony" in its origin was the method whereby the spiritual courts of England enforced the duty of maintenance owed by husband to wife during their legal separation, and, in modern jurisprudence, is the allowance made to a woman on divorce for support out of her husband's estate. Anderson v. Norvell-Shapleigh Hardware Co., 113 S. W. 733, 734, 134 Mo. App. 188.

"The amount given to the wife in a decree of divorce in generally called 'alimony.' This term is derived from a Latin word which primarily meant to nourish; that is, to supply the necessities of life. It was introduced into divorce proceedings by the early ecclesiastical courts of England, and in the early practice of those courts it was defined to be 'that support which the husband, on separation, is bound to provide for the wife, and is measured by the wants of the wife and the circumstances and the ability of the husband to pay.'" Fall v. Fall, 113 N. W. 175, 181, 75 Neb. 104, 121 Am. St. Rep. 767 (citing Cole v. Cole, 31 N. E. 109, 142 Ill. 19, 19 L. R. A. 811, 34 Am. St. Rep. 56).

"Alimony" is that provision which the law makes for the support of the wife, on the dissolution of the marriage, out of the estate of the husband, after separation, in lieu of his common-law obligation to support her as wife, if they had continued living together. Muir v. Muir (Ky.) 92 S. W. 314, 316, 4 L. R. A. (N. S.) 909.

"Alimony" is an allowance to the wife on the termination of the marriage relation by divorce, the authority to grant which is purely statutory. Wallace v. Wallace, 72 Atl. 1033, 75 N. H. 217. The term as used in the Constitution and statutes of new Hampshire means that provision or allowance which is made to a wife upon a divorce from the bonds of matrimony. Wallace v. Wallace, 67 Atl. 580, 581, 74 N. H. 256, 13 Ann. Cas. 293 (citing Sheafe v. Sheafe, 24 N. H. 564, 567; Parsons v. Parsons, 9 N. H. 309, 318, 319, 32 Am. Dec. 362).

In general, "alimony" is not awarded as a penalty, but as a substitute for marital support; the right thereto being wholly statutory and subject to revision as provided by Rev. Laws 1905, §§ 3590, 3592. Haskell v. Haskell, 138 N. W. 787, 789, 119 Minn. 484; Lally v. Lally, 138 N. W. 651, 654, 152 Wis. 56.

The support and maintenance which may be secured in an equitable action is not "alimony," as the word is to be understood in the divorce statutes. Stephen v. Stephen, 113 N. W. 913, 102 Minn. 301.

"The word 'alimony' used in Rev. St. 1881, §§ 5134–5135, in relation to the judgment for support and maintenance, is used in its primary sense of nourishment, sustenance, and means of living." Smith v. Smith, 74 N. E. 1008, 1010, 35 Ind. App. 610 (quoting and approving Carr v. Carr, 33 N. E. 805, 6 Ind. App. 377).

The word "alimony" as used in Code Civ. Proc. § 111, providing that no person shall be imprisoned for a longer period than six months on a fine for contempt of court in the nonpayment of alimony in a divorce case, where the amount is $500 or more, includes both temporary and permanent alimony, whether granted by an interlocutory order or by final judgment, and hence, where a husband in a suit for separation had served a term for failure to comply with an order for temporary alimony, he was not subject to further imprisonment for failing to pay later installments thereafter maturing. People ex rel. Levine v. Shea, 94 N. E. 1060, 1063, 201 N. Y. 471.

Continuous or gross payments

Every provision for support in a judgment in divorce, whether it requires payment of money at intervals or in a gross sum is to be regarded as "alimony." Brenger v. Brenger, 125 N. W. 109, 112, 142 Wis. 26, 26 L. R. A. (N. S.) 387, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136.

"Originally 'alimony,' in its technical significance, meant an allowance of money payable in periodical installments, not in gross." "'Alimony' is not a sum of money, nor a specific proportion of the husband's estate, given absolutely to the wife; but it is a continuous allotment of sums payable at regular intervals for her support from year to year." Kusel v. Kusel, 81 Pac. 295, 296, 147 Cal. 57 (quoting 1 Bouv. Law Dict. 131, and citing the definition in 2 Bishop, Mar. & Div. §§ 834, 835).

"Alimony," in general terms, "is the allowance which a husband pays by order of court to his wife while living separate from him." Where a stipulation for the dismissal of a suit for divorce bound the husband to pay certain monthly installments to the wife for her separate maintenance, such installments were in the nature of alimony, to recover which a separate suit in equity was maintainable, as provided by Kirby's Dig. § 2675. Shirey v. Hill, 98 S. W. 731, 732, 81 Ark. 137.

As debt

See Debt.

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Dependent on means of parties

"Alimony," by whatever authority it is conferred, is an incident of marriage, and based on the principle that it is the duty of the husband to support his wife, and not necessarily to endow her. It signifies, primarily, not a certain portion of his estate, but an allowance or allotment adjudged against him for her subsistence, according to his means and their condition in life during their separation, whether it be for life or for years. Bialy v. Bialy, 133 N. W. 496, 499, 167 Mich. 559, Ann. Cas. 1913A, 800.

Division of property distinguished

"Alimony" is not to be granted on the theory of division of the husband's estate, as in the case of his death, nor on the theory of dissolution of a business partnership; but the controlling element must be contribution for the wife's support and maintenance under the obligations of the marriage contract, though in practical application an award of permanent alimony in gross may result in a division of the husband's estate. Bialy v. Bialy, 133 N. W. 496, 499, 167 Mich. 559, Ann. Cas. 1913A, 800.

"Alimony" has for its basis maintenance only, while a division of property has for its basis the giving to each party the portion of the property justly and equitably due, without regard to the necessities of the case. Bowers v. Bowers, 78 Pac. 430, 431, 70 Kan. 164.

As estate or property right

"Alimony" is "purely incidental to divorce proceedings, and is an allowance out of the divorced husband's estate, made to the divorced wife for her support and maintenance. In this state it has no existence as a separate and independent right. It must be adjudged, if at all, in the divorce proceedings, and cannot be the subject-matter of an independent suit." Rariden v. Rariden, 70 N. E. 398, 33 Ind. App. 284, 104 Am. St. Rep. 252.

Estate of husband distinguished

"'Alimony' is a technical word, theoretically restricted to personalty, and practically to money. It is payable out of the husband's estate, real as well as personal. But the word never covers the estate itself." This is the meaning of the word "alimony," as used in Comp. St. 1901, c. 25, § 22, providing that in case of a divorce the court may decree to the wife such part of the personal estate of the husband, and such alimony out of his estate, as it shall deem just and reasonable. Hence the district court, in a suit for divorce, has no jurisdiction to award real estate of the husband to the wife in fee as alimony. Cizek v. Cizek, 99 N. W. 28, 30, 69 Neb. 797, 5 Ann. Cas. 464.

Maintenance of children

The word "alimony," in Pub. Acts 1899, No. 330, allowing imprisonment for nonpayment of alimony, includes allowance for the support and education of children. Brown v. Brown, 97 N. W. 396, 397, 135 Mich. 141.

"'Alimony' is one thing, and an allowance for the maintenance of the minor children is another. 'Alimony' is for the maintenance and support of the divorced wife." Lukowski v. Lukowski, 83 S. W. 274, 275, 108 Mo. App. 204.

ALIMONY PENDENTE LITE

"Alimony pendente lite," strictly speaking, is that allowance which the husband may be compelled to pay his wife to prosecute the suit for divorce or separation, or to defend and answer where the proceedings are instituted by him; but an allowance as alimony pendente lite may also be made in an action for alimony without divorce, where the wife is without means and the husband is able to furnish them. Brady v. Brady, 39 South. 237, 239, 144 Ala. 414.

ALIZARIN ASSISTANT

Soluble grease, a preparation of tallow used in the process of dyeing cotton cloth for softening the fabric after the application of the dye, is not dutiable as an "alizarin assistant," but as an unenumerated manufactured article. Abram De Ronde & Co. v. United States, 140 Fed. 92, 93.

ALKALINE

See Intensely Alkaline Nature; Weak Alkaline Solution.

ALL

See Either, Any or All.

"All" means every one, or the whole number of particulars (quoting Words and Phrases, p. 312). Heitman v. Commercial Bank of Savannah, 65 S. E. 590, 597, 6 Ga. App. 584.

The word "all," as an adjective of number, means the whole number of; every one of. Encyclopædic Dictionary. In considering whether the statute of Merton, in which the words "omnes viduæ" were used, applied to each of the five kinds of dower, Lord Coke observed, "Qui omne dicit nihil excludit"—who says all does exclude nothing. 2 Inst. 81. We would not be understood, however, as asserting that the word, as used in legislation, is always to be understood as an all inclusive one. As so used, it is a general term, which is to be understood as comprehending whatever is within the outmost circle of the meaning of the word, unless, after subjecting the statute to interpretation and construction, there is sufficient reason for holding that the term was not used in so broad a sense. Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser, 71 N. E. 218, 222, 163 Ind. 247.

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Gen. Laws 26th Leg. p. 29, c. 11, set apart to the school fund all the unappropriated public domain of the state, and provided for its survey, classification, and sale. Gen. Laws 27th Leg. p. 253, c. 88, amending the act of the Twenty-Sixth Legislature, provided that tracts or parcels of unsurveyed school lands containing 640 acres or less, and which were detached from other public lands, might be sold without the condition of actual settlement. An act passed at the same session of the Legislature (Laws 27th Leg. p. 292, c. 125, §§ 7, 9), a few days after the passage of the above amendatory act, provided that "all" lands which are or may become detached shall be sold to actual settlers only and repealed all inconsistent acts. *Held*, that as the act of the Twenty-Sixth Legislature and its amendment dealt with unsurveyed lands, and the last-mentioned act dealt with lands which had been surveyed and sectionized as school lands, the provisions of the amendatory act permitting sale of detached lands of less than 640 acres without the conditions of actual settlement was not repealed by the last-mentioned act. Considering the acts as dealing with different classes of school lands, section 7 must be construed as applying to the surveyed school lands, and the word "all" must be understood as meaning "all" of that class. The generality of the word "all" is frequently to be restrained not only by the context of the statute, but by its general form and scheme as the intention of the Legislature may appear. McGrady v. Terrell, 84 S. W. 641, 642, 98 Tex. 427 (citing Bivins v. Vinzant's Lessee, 15 Ga. 521; State v. Townley, 18 N. J. Law, 314).

As any or each

Under a will providing that all the legatees shall accept such legacies in full satisfaction of all claims against testator or his estate, the words "all the legatees" mean "each" of them, and the legatees who were willing to accept under the will could do so, regardless of the acceptance of the others. Shaver's Adm'r v. Ewald's Ex'r, 134 S. W. 906, 907, 142 Ky. 472.

The word "all" is used in the sense of "any" in a mortgage stipulating that, on default of payment of "all taxes, interest on prior mortgage, charges, and assessments," the mortgagee may pay the same and enforce a lien on the premises, etc. Weinstein v. Sinel, 117 N. Y. Supp. 346, 348, 133 App. Div. 441.

A will provided that upon the decease or marriage of testator's widow the estate should go to testator's three unmarried daughters, so long as they should remain unmarried, and in case they "all" should marry it should be equally divided between testator's five children or the issue of deceased children. Held, that the daughters took the use of the fund during the time they remained unmarried, as joint tenants, with right of survivorship between them, and so long as any of the daughters remained alive and unmarried the trust continued for their benefit, although others had died unmarried, so as to make it impossible that "all" should ever marry. Trenton Trust & Safe Deposit Co. v. Armstrong, 62 Atl. 456, 457, 70 N. J. Eq. 572.

As every

Every as all, see Every.

The word "all" has a distributive as well as a collective meaning. One of the definitions given by the Standard Dictionary is "the entire number," each individual or member being taken separately; and under the word "distributive," the Standard Dictionary says, "all" and "every" are distributive words. Young v. Du Bois, 113 N. Y. Supp. 456, 457, 60 Misc. Rep. 381.

As the whole

"The word 'all' does not mean some, nor a part, but means the whole." Joslin v. Williams, 107 N. W. 837, 839, 76 Neb. 594 (quoting and adopting definition in Haverly v. Elliott, 57 N. W. 1010, 39 Neb. 201).

The word "all," as used in the law giving a farm laborer a preferred lien on all the crops produced, means the "entire quantity; the whole amount." Beckstead v. Griffith, 82 Pac. 764, 767, 11 Idaho, 738.

All actions or proceedings

The phrase "all actions or proceedings," in Rem. & Bal. Code, § 6226, which provides that any receiver or other fiduciary required by law to give bond as such may include as a part of his lawful expenses such reasonable sum paid to a corporation for such suretyship as the head of the department, court, judge, or officer or body by which he was appointed allows, and that in "all actions or proceedings" the party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing any such bond, as may be allowed by the court or judge before whom the action or proceeding is pending, is sufficiently broad to justify an allowance to an appellant as part of the costs on an appeal of the premium paid for the appeal bond; the section not being limited to fiduciary bonds the expense of which has been allowed by the court. Church v. Wilkeson-Tripp Co., 109 Pac. 113, 114, 58 Wash. 262, 137 Am. St. Rep. 1059.

The expression "all civil actions and proceedings at law and in equity" in Laws 1905, c. 295, which gives the superior court of a particular county jurisdiction concurrent with the circuit court of that county in "all civil actions and proceedings at law and in equity," with an immaterial exception, is extensive and general, rather than restrictive and particular, and confers on the superior court or the judge thereof the same power to appoint commissioners in condemnation pro-

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ceedings as is possessed by circuit courts or judges. Wisconsin River Imp. Co. v. Pier, 118 N. W. 857, 859, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

All bills payable

Guaranty of "the payment of all bills payable by this contract" includes a balance of the total amount remaining unpaid. Klosterman v. United Electric Light & Power Co., 60 Atl. 251, 252, 101 Md. 29.

All cases

The term "all cases," of which the Supreme Court has appellate jurisdiction under Const. of 1898, includes civil and criminal cases. State v. Judge of First District Court, 37 South. 546, 548, 113 La. 654.

While Levee Act, § 58, which provides that justices of the peace shall have jurisdiction of proceedings to extend drainage districts, does not authorize an appeal to the circuit court, an appeal is authorized under Hurd's Rev. St. 1911, c. 79, § 115, which allowed appeals from judgments of justices of the peace in all cases, except on judgments confessed; the expression in "all cases" including the particular statutory proceeding in question, as the Legislature did not except it from the general statute. Lower Salt Fork Drainage Dist. v. Smith, 100 N. E. 179, 180, 257 Ill. 52.

The provision of article 3, § 2, of the federal Constitution, that "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction" is not to be so construed as to annul the provisions of a treaty giving consular representatives of another nation jurisdiction over controversies between officers and seamen of vessels of such nation, the word "all" in such provision being used for the purpose of excluding jurisdiction of the states over admiralty and maritime causes. The Koenigin Luise, 184 Fed. 170, 173.

All charges

See Free of All Charges.

All contracts of insurance

The words "all contracts of insurance," as used in Act Pa. May 1, 1876, declaring that the agent of any insurance company of any other state or government which does not comply with the laws of Pennsylvania shall be personally liable on all contracts of insurance made by or through him, directly or indirectly, for or on behalf of the company applies only to contracts of insurance on property in Pennsylvania. Though the language is inclusive of all contracts, yet, as the liability it imposes is an extraordinary and penal one, it should not be held to embrace anything beyond what clearly appears to have been contemplated by the Legislature; and, for ascertainment of the legislative intent, attention is not to be confined to the words employed, but the familiar rule must be applied, "that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers." Rothschild v. Adler-Weinberger S. S. Co., 130 Fed. 866, 867, 65 C. C. A. 350.

All costs and damages

"All costs of suit" generally include all charges to which a successful party is entitled, including attorney's fees. Chalutz v. Wisconsin Cent. Ry. Co., 128 N. W. 425, 427, 143 Wis. 623.

An undertaking on appeal from a judgment of a justice to pay "all costs," covers costs on appeal. Johnson v. Glaspey, 113 N. W. 602, 603, 16 N. D. 335. In a suit in admiralty brought in forma pauperis, a decree was entered dismissing the libel, from which an appeal was taken, and a surety entered into a stipulation conditioned that appellant should "answer all damages and costs" if he failed to make his plea good. Held that on an affirmance of the decree by the appellate court, "with costs," the respondent is entitled to a decree against the libelant and the surety for his costs in both the appellate and district courts. The Joseph B. Thomas, 158 Fed. 559, 560.

An appeal bond, operating as a supersedeas, given on appeal from a decree in equity which directs the payment of money from the appellant to the appellee, conditioned as required by Rev. St. § 1000, and in accordance with rule 29 of the Supreme Court and rule 13 of the Circuit Court of Appeals, to "answer all damages and costs" if appellant fails to make its appeal good, covers the amount of the decree appealed from, as well as damages for delay and costs. American Surety Co. of New York v. North Packing & Provision Co., 178 Fed. 810, 811, 102 C. C. A. 258.

The phrase "all costs herein expended," as used in a judgment reciting, "It is therefore considered and adjudged by the court that this cause be dismissed, and that defendant recover from the plaintiff all costs herein expended," meant "only such costs as were authorized by law, and could be properly taxed in favor of the defendant below." Casto v. Eigeman, 70 N. E. 807, 162 Ind. 506 (citing Wilson v. Jenkins, 46 N. E. 889, 147 Ind. 533; Mott v. State, 44 N. E. 548, 145 Ind. 353).

The phrase "all damages," as used in a bond given to a sheriff to indemnify him against all damages sustained by a levy on personal property, is broad language, and must be construed to include every element of damages which may fairly be said to have been contemplated by the parties, and covers attorney's fees which the sheriff was compelled to pay in defending an action for conversion of the property levied on, after notice to the obligors to defend and their refusal to do so. Cousins v. Paxton & Gallagher Co., 98 N. W. 277, 278, 122 Iowa, 465.

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Civ. Code 1902, § 2434, making a landlord making excessive distress liable for "all damages" sustained by the tenant, authorizes the recovery of punitive and compensatory damages for an excessive distress. Jones v. McCreary Land & Investment Co., 64 S. E. 225, 226, 82 S. C. 456.

A railroad company incorporated under an act which provides that the state may, on expiration of a fixed period, repeal the act, provided the company shall be compensated for "all damages" by reason of the repeal, is, on the repeal of the act, entitled to compensation for the loss of its franchise. Michigan Cent. R. Co. v. State, 111 N. W. 735–738, 148 Mich. 151.

Wilson's Rev. & Ann. St. 1903, § 3068, provides that any railroad company operating a line within Oklahoma Territory shall be liable for all damages sustained by fire originating from operating the road. Held, that the term "all damages" as so used should be construed as limited to indemnity recoverable by a person who has sustained an injury either in his person, property, or relative rights through the act or default of another, not including such acts as are damnum absque injuria, and hence a complaint by a husband against a railroad company for alleged mental anguish, suffering, terror, and other states of mind of his wife, caused by fire alleged to have been negligently set out by defendant railroad approaching their dwelling disassociated from any acts of personal injury or violence, did not state a cause of action. Tiller v. St. Louis & S. F. R. Co., 189 Fed. 994, 1000.

All creditors

- Creditors as including, see Creditors.

All damages

A deed conveying all the coal underlying land together with the free and uninterrupted right of way into, upon, or under the land, so far as may be necessary in the mining and carrying away the coal, "hereby waiving all damages," includes within the waiver injuries resulting from mining and removing all the coal, and waives the grantor's right to surface support. Stilley v. Pittsburgh-Buffalo Co., 83 Atl. 478, 480, 234 Pa. 492, 41 L. R. A. (N. S.) 236.

All debts and liabilities

Where the only express provision in a trust deed requiring the trustees to pay the grantor's debts applied to debts contracted by the grantor prior to the execution of the deed, a subsequent clause directing the trustees to convert the remaining part of the grantor's estate into cash, and distribute it after having paid "all the debts and funeral expenses" of the grantor, does not broaden the express provision as to what debts of the grantor the trustees shall pay, so as to entitle a creditor of the grantor, whose debt was contracted subsequent to the execution of the deed, to enforce his claim against the trust estate; the trust deed having been duly recorded prior to contracting the debt. Smith v. Taylor, 72 N. E. 651, 652, 34 Ind. App. 194.

The term "all debts" in a guaranty by defendant of payment of all debts due plaintiff by a commission company included, not only debts which the company might contract directly, but also debts of other persons to plaintiff, which the company might thereafter become liable for, and therefore included the company's liability as indorser on a note. Union Nat. Bank of Mahoney City, Pa., v. Rockefeller, 111 S. W. 883, 884, 132 Mo. App. 252.

A partner agreeing on the dissolution of the firm to assume "all liabilities" of the firm assumes the liability of the firm in favor of an employé injured through its negligence, especially where there was evidence that the employé's suit was contemplated and discussed as a possible liability, though the copartner then insisted that there was no liability, but without falsely representing to the partner any of the facts. Binyon v. Smith, 112 S. W. 138, 140, 50 Tex. Civ. App. 398.

All delinquent taxes

The word "all" in Laws 1909, c. 57, which provides that all delinquent taxes for stated years shall be distributed to the general county fund and general school fund of the respective counties in which they are collected, should be construed as used in a restrictive sense, excluding from the operation of the act taxes levied for city purposes. Territory v. Pinney, 114 Pac. 367, 370, 15 N. M. 625.

All detail drawings

"All detail drawings," which were required by a contract for structural steel work to be furnished by the owner, was a plan showing the position of each column, beam, etc., and not "shop drawings and punching sheets." New York Architectural Terra Cotta Co. v. Williams, 92 N. Y. Supp. 808, 814, 102 App. Div. 1.

All elections

Const. Schedule, § 18, making the qualifications of electors in "all elections" those prescribed by article 2, meant all elections ordained by the Constitution or mentioned in the Schedule itself, not including local option elections. Willis v. Kalmbach, 64 S. E. 342, 346, 109 Va. 475, 132 Am. St. Rep. 908.

Const. art. 2, § 2, which provides that in "all elections," not otherwise provided for by the Constitution, every white male citizen 21 years of age, with certain residence qualifications, shall be entitled to vote, while intended to apply to the election of constitutional officers, contemplates only elections for officers by whose acts all the people within a district are to be affected, and does not extend to an irrigation district, in which only

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the landowners have any interest and in which a nonresident owner has the same interest as a resident owner; and hence L. O. L. § 6168, as amended by Laws 1911, pp. 378–404, providing that any person, male or female, of the age of 21 years, whether a resident or not, who is a bona fide holder of land situated in it, may vote at an election, is not in conflict with the Constitution, and an election thereunder was valid. Board of Directors of the Payette-Oregon Slope Irr. Dist. v. Peterson (Or.) 128 Pac. 837, 840.

All expenses

Any and all necessary expenses, see Any.

The term "all expenses," as used in an agreement by a real estate agent to take charge of certain property and pay all expenses, must be deemed to include the annual taxes, and such other expenses or payments as an agent in full charge of property of such a character for a term of years would reasonably be required to pay out of the income in the process of a good management. Seymour v. Warren, 71 N. E. 260, 261, 179 N. Y. 1.

The words "all expenses incurred," in Acts 1905, c. 167, § 75, authorizing the board of commissioners to issue bonds for the construction of a highway improvement to an amount not exceeding the contract price, and "all expenses incurred" and damages allowed prior to the letting of the contract, mean the expenses incurred in the performance of the work required by the act; and, though a petition must be filed to obtain an improvement, a petitioner employing an attorney to draw the petition cannot charge his fees to the construction fund. Overmeyer v. Board of Com'rs of Cass County, 43 Ind. App. 403, 86 N. E. 77, 78.

All hope of recovery

See Lost All Hope of Recovery.

All I may possess

Where a will, after containing certain legacies, devised to testator's wife the residue of all the real and personal property that he owned at the date of the will, and also the residue of "all I may possess at my death," it gave to the wife any property he might acquire between the date of the execution of the will and the date of his death. Mueller v. Buenger, 83 S. W. 458, 465, 184 Mo. 458, 67 L. R. A. 648, 105 Am. St. Rep. 541.

All improvements

The words "all improvements thereon," in an assignment of original letters patent for an improvement in pulp-beating engines and "all improvements thereon," include all improvements on the improvement in engines for which the original letters patent were granted. Marshall Engine Co. v. New Marshall Engine Co., 85 N. E. 741, 742, 199 Mass. 546.

All incumbrances

A conveyance by plaintiff's remote grantor, "subject to all incumbrances of record," applied only to valid incumbrances, and did not preclude plaintiff from attacking a void municipal assessment levied against the property. Carter v. Cemansky, 102 N. W. 438, 439, 126 Iowa, 506.

All inhabitants

In Const. 1776, art. 4, conferring the right to vote on "all inhabitants" having certain qualifications, the quoted phrase is limited to those having the right to vote before the adoption of the Constitution. Carpenter v. Cornish, 83 Atl. 31, 32, 83 N. J. Law, 254.

All inside and outside repairs

A covenant by a tenant in a lease to make "all inside and outside repairs" includes damages to the building rendering it unfit for occupancy by its collapse through the weight of snow on its roof, and therefor the tenant cannot refuse to pay rent for such reason. A general covenant is binding upon the tenant under all circumstances. If the injury proceeds from an act of a stranger, from storms, floods, lightning, accidental fire, or public enemies, he is as much bound to repair as if it came from his own voluntary act. Such has been the settled rule since the time of Henry III. If the tenant desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operation of his covenant. May v. Gillis, 66 N. Y. Supp. 4, 5, 53 App. Div. 393.

All interest

A direction to testamentary trustees to pay to a beneficiary "all the interest" arising out of the personal property, including the proceeds of the sale of real estate, entitles the beneficiary to the net income only after the payment of taxes and other necessary expenses incidental to the care and handling of the property. Goodwin v. McGaughy, 122 N. W. 6, 7, 108 Minn. 248.

All inventions of like nature

An inventor's agreement to assign "all inventions of like nature or similar thereto" is not limited to mere improvements on the inventions, though including them. Davis & Roesch Temperature Controlling Co. v. Tagliabue, 150 Fed. 372, 373.

All items

A clause on a postal card to a bank, acknowledging receipt of a draft drawn on the bank, that "all items sent to us are credited subject to payment," applies only to items drawn upon banks other than the one giving the notice. Walnut Hill Bank v. National Reserve Bank, 121 N. Y. Supp. 892, 893, 65 Misc. Rep. 315.

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All kinds

The term "licenses of all kinds," as used in a statute providing that the town council shall prescribe by ordinance the manner in which "licenses of all kinds" shall be applied for and granted, is broad enough to include state as well as municipal licenses, and therefore vests in the council sole power to grant or refuse state or municipal licenses for the sale of intoxicating liquors. State v. Harden, 58 S. E. 715, 728, 729, 62 W. Va. 313.

All levies

The words "all levies," as used in Bankr. Act July 1, 1898, making void "all levies or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him in case he is adjudged a bankrupt," are used in their most comprehensive sense, covering any and all seizures of property of the bankrupt within the four-months period, under legal process looking to the enforcement of claims against the bankrupt which would be released by his final discharge, and cover a seizure of property on a writ of replevin. In re Hymes Buggy & Implement Co., 130 Fed. 977, 980.

All likelihood

See In All Likelihood.

All merchantable timber or trees

Where defendant's grantor sold defendant "all the merchantable pine timber from 12 inches square at the stump and upwards" to be cut and removed within 15 years, the measurement referred to the date of the deed. Where defendant's grantor sold "all the merchantable pine timber 12 inches square" on certain land, defendant was only entitled to timber that would square 12 inches at the date of the deed, excluding the bark. Whitfield v. Rowland Lumber Co., 67 S. E. 512, 513, 152 N. C. 211.

In a contract for the sale of standing timber, a description of the timber sold as, "all merchantable yellow poplar, ash, and cucumber trees" owned by us on a certain tract of land, is sufficiently definite to pass title to the timber. Hays v. McLin, 72 S. W. 339, 340, 115 Ky. 39.

All money in any bank

Moneys deposited by the son of testatrix to his individual account are not included in a bequest of "'all moneys in any banks' deposited in my name for my benefit," though a part of the sum so deposited had been collected by the son as agent of testatrix; and where the son, as executor, accounts for the amount of certain checks drawn on the account to the order of testatrix, which checks she held without presentation for payment, the assets represented by the checks should be distributed as part of the residue of her estate not specifically bequeathed. In re Baker, 137 N. Y. Supp. 530, 533, 77 Misc. Rep. 90.

All my estate

A devise of "all my estate" by one who owns an undivided interest only in property does not show intent to devise more than his interest. Waggoner v. Waggoner, 68 S. E. 990, 992, 111 Va. 325, 30 L. R. A. (N. S.) 644. The phrase includes all the community estate of the testator and his wife and puts the wife to her election whether to take under the will or claim her statutory rights. Couts v. Holland, 107 S. W. 913, 915, 48 Tex. Civ. App. 476 (citing In re Stewart, 15 Pac. 445, 74 Cal. 98).

All my just debts

See Pay All My Just Debts.

All my lands

A devise of "all my lands" by one who owns an undivided interest only in property does not show intent to devise more than his interest. Waggoner v. Waggoner, 68 S. E. 990, 992, 111 Va. 325, 30 L. R. A. (N. S.) 644.

All my property

A devise of "all my property" is sufficient to include both real and personal property. Caffey v. Tindall, 56 South. 177, 99 Miss. 851.

There is no difference between the phrases "all my property" and "all the property I possess," as used in a will devising such property. Thomas v. Blair, 35 South. 811, 813, 814, 111 La. 678.

A devise of "all my property of every kind" is plain and free from ambiguity, and excludes the idea that the devise is subject to the curtesy of the husband of the testatrix in the real estate. Balster v. Cadick, 29 App. D. C. 405, 408.

All, and not merely one-half of community property of which testator became the absolute owner by the death of his wife after the making of his will, passed under it, it in terms purporting to cover all his property, "real, personal, and mixed, and wheresoever the same may be," notwithstanding a provision whereby he declared that "all of the estate" of which he was possessed was his separate estate, except a certain lot, and that, in his disposition of his estate by the will, he had undertaken to dispose of "all" his separate property and one-half of the community property. In re Lux's Estate, 85 Pac. 147, 149, 149 Cal. 200.

All of which one may die possessed

A gift of "all of which one may die possessed" carries only the net amount of the estate. Blakeslee v. Pardee, 56 Atl. 503, 505, 76 Conn. 268.

All personal property

As money, see Money.

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Bank stock being declared to be personal property by Code 1904, p. 608, § 1173a, subsec. 7, such stock was covered by a city ordinance imposing a tax on "all" personal property of every description, including capital stock of banks located within the city, though the latter clause should be construed as referring to the capital of the bank. West v. City of Newport News, 51 S. E. 206, 208, 104 Va. 21.

All persons

The term "all persons," in an act providing that a conveyance certified and recorded shall impart notice to all persons of the contents thereof, means all persons who acquired interests as subsequent purchasers or mortgagees, and it was not intended that the record should be notice to all the world, or even to purchasers or mortgagees, in relation to other matters. McCabe v. Grey, 20 Cal. 509, 516.

The words "all persons concerned," as used in the orphans' court act requiring a citation to "all persons concerned" when a caveat is put in against proving a will, mean the caveators and the proponents, and service of citation upon them gives the court jurisdiction over the question of probate. In re Myers' Estate, 64 Atl. 138, 139, 69 N. J. Eq. 793.

The phrase "all persons interested," as used in Civ. Code Prac. § 499, subsec. 1, providing that a person desiring a division of land held jointly with others may file a petition containing a statement of the names of "those having an interest" in the land, and thereon "the persons interested" in the property who have not united in the petition shall be summoned to answer, refer to persons owning an interest in the land under the same title, and do not include the holder of a lien on the undivided interest of one of the owners. Barry v. Baker (Ky.) 93 S. W. 1061, 1062.

Where, in a suit for 160 acres of land, defendant disclaims as to all but 49 acres thereof, to which it sets up title in virtue of alleged condemnation proceedings pursuant to act of Congress approved February 28, 1902 (Act. Feb. 28, 1902, c. 134, 32 Stat. 43), which requires notice by the referees "to all persons interested," and where the notice given is "to all persons having any claim or any interest in said described premises of whatsoever kind or nature," without naming the plaintiffs who were conceded to be the owners thereof, held, that said notice was void and conferred no jurisdiction on the court, and that, too, although the judgment approving the report of the referees recited that they "gave notice in the manner as provided by law." Bruner v. Ft. Smith & W. R. Co., 127 Pac. 700, 701, 33 Okl. 711.

Labor and materials used in the prosecution of a public work, whether furnished under the contract directly to the contractor or to a subcontractor, must be deemed within the obligation of a surety company under a bond executed pursuant to Act August 13, 1894, conditioned for the prompt payment of the contractor to "all persons supplying labor or materials in the prosecution of the work provided for in said contract," in view of the manifest purpose of that statute to protect those whose labor or materials has contributed to the prosecution of the work. United States v. American Surety Co. of New York, 26 Sup. Ct. 168, 170, 200 U. S. 197, 50 L. Ed. 437.

All pipes

The term "all pipes," as used in P. L. 1876, p. 316, § 21, regulating the laying of gas pipes in streets, and providing that "all pipes" shall be placed at the greatest practicable distance from the nearest part of any other gas pipe then laid, etc., refers to main or distributing pipes only, and not to service pipes. Atlantic City Gas & Water Co. v. Consumers' Gas & Fuel Co., 61 Atl. 750, 751, 70 N. J. Eq. 536.

All probate matters

While the word "probate" in a technical sense means the official proof of an instrument offered as a last will and testament, the term "probate matters," as used in Const. art. 6, § 20, providing that probate courts, when established, shall have original jurisdiction of "all probate matters," means the settlement of estates, including the granting of letters, testamentary or of administration, the collection of assets, allowance of claims, payment of debts, and the sale of real estate, if necessary for that purpose, and the distribution of the property to those, entitled thereto by the laws of descent or by the will, but does not include the administration of testamentary trusts. In re Mortenson's Estate, 94 N. E. 120, 121, 248 Ill. 520, 21 Ann. Cas. 251.

Const. art. 6, § 20, declares that the General Assembly may provide for the establishment of a probate court in each county having over 50,000 population, which courts, when established, shall have original jurisdiction of "all probate matters," the settlement of estates of deceased persons, the appointment of guardians and conservators, and in cases of sales of real estate of deceased persons for the payment of debts. Held, that "probate matters" as so used meant matters pertaining to the settlement of estates of deceased persons, and did not include the administration of testamentary trusts, and hence Act June 14, 1909 (Hurd's Rev. St. 1909, c. 37, §§ 239f–239k), attempting to extend the jurisdiction of probate and county courts to the administration of testamentary trusts, in so far as it related to probate courts being an attempt to vest such courts with an unconstitutional juris-

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diction, and this being one of the controlling purposes for the act, it was void in toto. Frackelton v. Masters, 94 N. E. 124, 127, 249 Ill. 30.

All property

Words of general description used in reference to taxation, such as "all property," include everything of that kind not expressly, or by necessary implication, excepted. Under the amended charter of St. Louis, providing that "all the property" fronting on or adjoining an improvement shall be subject to a special assessment therefor," property constituting part of a railroad's right of way located in a special assessment district is subject to assessment. Heman Constructing Co. v. Wabash R. Co., 104 S. W. 67, 70, 206 Mo. 172, 12 L. R. A. (N. S.) 112, 121 Am. St. Rep. 649, 12 Ann Cas. 630.

The phrase, "all property, both real and personal," as used in the statute designating the property that shall constitute a married woman's separate property, being used in a general sense, a married woman, joined by her husband, can make a valid conveyance of her expectancy in the community estate of her mother. Daggett v. Barre (Tex.) 135 S. W. 1099, 1101.

Act Feb. 14, 1855, amending the charter of Northwestern University and exempting from taxation "all property, of whatever kind and description, belonging to or owned by said corporation," applies to real estate acquired after the adoption of such amendment, though such corporation has acquired such a large amount of real estate within the village in which it is situated as to impair the revenues of such village. Northwestern University v. Hanberg, 86 N. E. 734, 735, 237 Ill. 185.

All purposes

See For All Purposes.

All qualifications

Under the statute providing that a special judge must possess "all the qualifications of a circuit judge," it is not necessary that a special judge shall be a resident of the district. Commonwealth v. Carnes, 98 S. W. 1045, 1046, 124 Ky. 340.

All regular policies of insurance

An insurance policy insuring a brig against "risks contained in all regular policies" of insurance, being an insurance against the "usual risks," was insurance against loss by capture, and parol evidence was inadmissible to prove that the parties understood it as covering sea risks only. Levy v. Merrill, 4 Me. (4 Greenl.) 156, 161.

All right, title and interest

A conveyance of all the "right, title, and interest" which the grantor has in and to the land described in his deed, conveys only the right, title, and interest which he actually has at the time of the conveyance. It assumes to convey no more. The grant, in the deed, is of all his right, title, and interest in the land, and not of the land itself, or any particular estate in the land. It passes no estate which is not then possessed by the party. Coe v. Persons Unknown, 43 Me. 432, 436.

A deed purporting to convey "all the right, title, and interest in real estate" is understood to convey nothing more than the interest or estate of which the grantor is seised or possessed at the time and does not operate to pass or bind an interest not then in existence. There is an equal distinction between a contract to convey land absolutely and a contract to convey an interest in land. Ward v. Foley, 141 Fed. 364, 366, 72 C. C. A. 140 (quoting and adopting definition in Van Rensselaer v. Kearney, 52 U. S. [11 How.] 297, 13 L. Ed. 703).

All road crossings

The words "all road crossings," as used in Cobbey's St. 1907, § 11,963, providing that telephone wires shall be placed at the height of not less than 20 feet above all road crossings, refers to private as well as public roads. Weaver v. Dawson County Mut. Telephone Co., 118 N. W. 650, 651, 82 Neb. 696, 22 L. R. A. (N. S.) 1189.

All sums

The expression "all sums due to employés" means sums due at the time of the decretal order appointing the receivers, and which accrued before it. Dickinson v. Saunders, 129 Fed. 16, 21, 63 C. C. A. 666.

The phrase "all sums of money," as used in Code Civ. Proc. § 2730, providing that commissions shall be paid to executors and administrators upon "all sums of money" received and paid out, does not include specific securities, or unsold real estate, bequeathed in trust, in advance of their conversion into money. In re Wanninger, 105 N. Y. Supp. 4, 5, 120 App. Div. 273.

Code Civ. Proc. § 3320, as amended in 1904, provided that a trustee shall receive commissions on "all sums of principal" received and paid out. "All sums of principal" would apply as well to securities in bulk as it would to money received. The principal of a trust consists of the securities in which the trust is vested, and, whether they are turned over to the trustee in specie or money, the trustee has received the principal of the estate. Robertson v. De Brulatour, 98 N. Y. Supp. 15, 27, 111 App. Div. 882.

All the evidence

The phrases "all the evidence in the case," and "all the other circumstances appearing in the trial," are not equivalents, and the use of the latter instead of the former, in an instruction in a criminal prosecution is erroneous. Ryan v. People, 122 Ill. App. 461, 464.

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All the lumber

A contract by which defendant appoints plaintiff its agent for the sale of "all the lumber" to be sawed on specified land, which refers to certain by-laws of defendant by which contracts are revocable at the pleasure of defendant's directors, may be revoked by defendant's directors at any time; the reference to "all the lumber" being descriptive of his agency while it existed. Bradlee v. Southern Coast Lumber Co., 79 N. E. 777, 778, 193 Mass. 378.

All the rest, residue, and remainder

The mere enumeration of certain articles in a bequest to the residuary legatee, followed by the words and "all the rest and residue of my estate," does not necessarily make the bequest specific as to the things enumerated. Le Rougetel v. Mann, 3 Atl. 746, 748, 63 N. H. 472.

Where a testator, after creating in his residuary estate a trust to raise and pay the widow a certain income for life in lieu of dower, and to raise a certain income for his son for life, directed the trustees to divide all the rest, residue, and remainder of his estate into two equal parts, the words "all the rest, residue, and remainder of my estate" were intended to cover the remainder of the property held in trust for the annuity of the widow. Thomas v. Thomas, 89 N. Y. Supp. 495, 497, 43 Misc. Rep. 541.

All valid liens

The phrase "all valid liens," in Ky. St. § 2316, providing that all valid liens on the personalty of a lessee created before the property was carried onto the premises shall prevail against a distress warrant for rent, means such liens as are valid under other provisions of the statutes. Wender Blue Gem Co. v. Louisville Property Co., 125 S. W. 732, 735, 137 Ky. 339.

All wills

The phrase "all wills," used in Code Civ. Proc. § 1322, declaring that all wills duly proved in any other state or country may be allowed and recorded in any county where testator shall have left any estate, should be construed to mean all foreign wills, and to include all wills, other than domestic wills, duly approved and allowed in any of the United States or in any foreign country or state. In re Clark's Estate, 82 Pac. 760, 761, 148 Cal. 108, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

All years to come

The Houston city charter of 1903, which provides that all delinquent taxes due the city for the year 1875 up to and including the year 1896, and for "all years to come," may be collected by suit, being a copy of the provisions of city charters granted in 1897 and 1899, authorizes the city to sue for all taxes due it for the year 1875, and up to and including the year 1896, and all years thereafter; for the words "and for all years to come" must mean the years after 1896. City of Houston v. Dooley, 89 S. W. 777, 40 Tex. Civ. App. 371.

ALL OTHER

All other alterations

A sign constructed on the roof of a building was not an alteration within a lease which required the lessee to make certain alterations, consisting of an addition to the building, the putting in of store fronts, and other changes necessary to convert the upper part into bachelor apartments, and that "all other alterations" should be made subject to the landlord's approval, as it did not change the nature or character of the building, but was merely a use to which the outside of it could be applied. Brown v. Broadway & Seventy-Second St. Realty Co., 116 N. Y. Supp. 306, 307, 131 App. Div. 780.

All other causes

See Independently of All Other Causes.

All other creditors

The term "all other creditors," in the Alabama Constitution, giving to holders of bank notes and depositors who have not stipulated for interest a preference of payment over "all other creditors" in case of the bank's insolvency, means and includes, among others, depositors who have stipulated for interest and also persons who have lent money to the bank on notes. A holder of a bank's certificate of deposit, payable on a fixed date with interest, is a creditor of the bank on a loan made to it for a fixed period on which interest is stipulated for, and is not a "depositor" within the meaning of the Constitution. Taylor v. Hutchinson, 40 South. 108, 109, 110, 145 Ala. 202.

All other debts

The words "all other debts," in the article of the Louisiana Code providing that whenever the widow and minor children of a deceased person shall be left in necessitous circumstances they shall be entitled to receive $1,000 to be paid in preference to "all other debts" except those for vendor's privileges and expenses incurred in selling the property, include all privileged debts with the exception of vendor's privileges and expenses of sale. The claim of the widow and minor children is superior to the "expenses of last illness" and all other general privileges set forth in the statute. Succession of Campbell, 40 South. 449, 450, 115 La. 1035.

All other grants, gifts and devises

The word "other," as used in Const. art. 8, § 4, providing that all other grants, gifts, and devises that have been or may hereafter be made to the state shall be applied to the support and maintenance of the com-

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mon schools, means other than the grants, gifts, and devises specified in sections 2 and 3 of the article. McMurtry v. Engelhardt, 98 N. W. 40, 42, 5 Neb. (Unof.) 271.

All other losses

A marine policy insuring against perils of the sea and "all other losses" extended to accidents occurring in the course of necessary repairs while the vessel was on a railway or in a dock or hove down upon a beach or by a wharf. Swift v. Union Mut. Marine Ins. Co., 122 Mass. 573, 575.

All other necessary charges

Rev. Laws, c. 25, § 15, empowering towns to appropriate money for specified purposes and for "all other necessary charges arising in such town," is an authorization to raise and appropriate money in respect to matters as to which it has a corporate duty, right, or interest to perform, defend, or protect. The question whether liquors shall be sold in a town being one for local determination, and no license having been voted therein, the municipality has such an interest in the enforcement of the law as to warrant it in appropriating money to indemnify a special police officer and a constable who had been subjected to expense by reason of an action brought against them in consequence of complaints made by them in good faith of violations of the liquor law. Leonard v. Inhabitants of Middleborough, 84 N. E. 323, 198 Mass. 221.

All other officers

The words "all other officers," within a statute making a county treasurer the custodian of public funds of the county, and requiring those into whose hands funds come to turn them over to the treasurer, and making it the duty of the country treasurer and "all other officers" of the county having county funds in their possession or under their control to deposit them in the depositories designated by the board of supervisors, include deputies of the treasurer and persons appointed to perform his duties, as authorized by law, but who are not designated as treasurer. Board of Sup'rs of Gratiot County v. Munson, 122 N. W. 117, 118, 157 Mich. 505.

Election Law, § 97, provides that circuit courts may hear contests of the election of judges of the county courts, mayors of cities, presidents of county boards, presidents of villages, in reference to the removal of county seats and in reference to any other subject which may be submitted to the vote of the people, and shall have concurrent jurisdiction with the county court in all cases mentioned in section 98, which declares that the county court shall hear and determine contests of election of all other county, township, and precinct officers and all other officers for the contesting of whose election no provision is made. Held, that such sections should be construed in pari materia, and that the phrase "all other officers," used in section 98, should be read "all other like officers," so that the county court of S. county had jurisdiction to try a contest for the offices of trustees of the Pleasure Driveway and Park District of a city located in such county, whether the park district be considered a municipal or quasi municipal corporation. Baker v. Shinkle, 94 N. E. 58, 59, 249 Ill. 154.

All other proceedings

The phrase "all other proceedings," in Pol. Code, § 3787, which makes a tax deed conclusive evidence of the regularity of all other proceedings than those enumerated in section 3786 as to which the deed is prima facie evidence only, does not include omission of a jurisdictional prerequisite to a valid sale. A tax deed is therefore not conclusive that the delinquent list and published notice stated the correct amount of taxes, penalties, and costs due. Warden v. Broome, 98 Pac. 252, 254, 9 Cal. App. 172.

All other property

A will commenced with the statement that testator wished to make a suitable disposition of all such personal property as he might leave, and then proceeded to dispose of such personal property, after which followed this clause: "It is my will and wish that 'all other property' of which I die possessed be applied to the payment of my debts and I hereby give and bequeath to my wife all the rest and remainder of my property, to have and to hold the same for her and her assigns forever." Held, that testator intended to devise real estate by such residuary clause. Mills v. Tompkins, 97 N. Y. Supp. 9, 10, 110 App. Div. 212.

All other purposes

Under Laws 1901, p. 318, c. 132, § 202, providing that personal property of corporations taxable under section 187a (page 316) shall be exempt from taxation for "all other purposes," and section 187a, requiring trust companies to pay a tax on their capital stock and profits, the personal property of such companies is exempt from local assessment and taxation. People ex rel. Poughkeepsie Trust Co. v. Lane, 83 N. Y. Supp. 606, 607, 41 Misc. Rep. 1.

All other school officers

The term "all other school officers," used in How. St. § 5132, as amended by the act of 1885, which requires a majority vote to elect the "trustees and all other school officers," means the moderator, director, and assessor, who comprise the board of the primary school district. Cleveland v. Amy, 50 N. W. 293, 294, 88 Mich. 279, 374.

All other taxes

As used in Gen. Laws 1907, p. 479, c. 18, levying gross earnings annual occupation tax on street railways and declaring in

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section 22 that the tax so levied shall be in addition to "all other taxes" with the exceptions defined by the act, the words "all other taxes" include all taxes except those specified in section 25, which prescribes the taxes from which corporations shall be exempt, including occupation taxes imposed by act 1905 (Laws 1905, p. 217, c. 111). Hence the act of 1907 did not impliedly repeal so much of article 5049, subd. 54, as imposed occupation taxes on street railway companies, but the taxes imposed by that act were in addition to the gross earnings tax imposed under act 1907. Dallas Consol. Electric St. Ry. Co. v. State, 120 S. W. 997, 998, 102 Tex. 570.

ALL POSSIBLE CARE

"All possible care" for the safety of passengers has a broader meaning than "utmost care." "Utmost care" means the greatest care and falls short of the expression "all possible care" in this, that "utmost care" is understood to apply to the surroundings as matters stood and could be foreseen. Gulf, C. & S. F. Ry. Co. v. Brown, 40 S. W. 608, 614, 16 Tex. Civ. App. 93.

ALL RIGHT

Where defendant requested plaintiff to furnish the lumber his son asked for, saying that it would be "all right," the words "all right" imply with punctual payment. Birdsall v. Heacock, 32 Ohio St. 177, 181, 30 Am. Rep. 572.

ALLEGATION

See Immaterial Allegation; Material Allegation.

The term "allegation" has a fixed technical meaning in law; it is a term in pleading, and not in evidence. An allegation is a formal averment of a party setting forth the issue and what he proposes to prove. The disclosures by a trustee to interrogatories are not allegations by way of pleading, but a discovery. Thompson v. Dyer, 62 Atl. 76, 78, 100 Me. 421.

ALLEGE—ALLEGED

See As Alleged.

The word "alleged" in a statute providing that all prosecutions before justices of the peace for misdemeanors shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed, does not refer to the allegations in the information, so that the naming of the township in the margin thereof will be sufficient to give the justice jurisdiction, no matter in what township the offense was really committed, but it was the intent that the prosecution should be commenced in the township in which the alleged offense was committed. State v. Sexton, 125 S. W. 519, 521, 141 Mo. App. 694.

Suppose synonymous

See Suppose.

ALLEY

See Bowling Alley; Private Alley; Public Alley.

Any street or public ground, see Any.

An "alley" is simply a narrow passageway. Oberheim v. Reeside, 81 Atl. 590, 592, 116 Md. 265 (citing 1 Words and Phrases, p. 342). A narrow street. Asbury v. Kansas City, 144 S. W. 127, 128, 161 Mo. App. 496. Webster defines it as a narrow passage, especially a walk or passage in a garden or park, bordered by rows of trees or bushes; a bordered way; a narrow passage or way in a city as distinct from a public street. Milliken v. Denny, 47 S. E. 132, 133, 135 N. C. 19.

An "alley" may be public or private. When used in a plat or statute concerning towns or cities, it will be taken to mean a public way, unless the word "private" is prefixed or the context requires a different meaning; but when used in a deed it may mean a private alley. Flaherty v. Fleming, 52 S. E. 857, 859, 58 W. Va. 669, 3 L. R. A. (N. S.) 461; the word "alley," when used without qualification and applied to subdivision of land into lots, ordinarily means a public alley. Shultz v. Redondo Improvement Co., 105 Pac. 118, 120, 156 Cal. 439; Talbert v. Mason, 113 N. W. 918, 921, 136 Iowa, 373, 14 L. R. A. (N. S.) 878, 125 Am. St. Rep. 259.

The words "streets" and "alleys" are constantly used in collocation and in legislation, there being no difference between them, except an indefinite difference in width. J. Burton Co. v. City of Chicago, 86 N. E. 93, 94, 236 Ill. 383, 15 Ann. Cas. 965.

The word "alleyway," as used in a deed granting "a free right of way for an alleyway 12 feet wide extending from" the lot conveyed across another lot owned by the grantor, is to be given the same meaning as the word "alley," which is a narrow passage or way in a city, as distinguished from a public street. Flaherty v. Fleming, 52 S. E. 857, 859, 58 W. Va. 669, 3 L. R. A. (N. S.) 461. But use of the term "alleyway," in a complaint for injuries, does not of itself imply that the strip has been dedicated to the public use; for one may use a part of his land as an alleyway for his business without subjecting it to a public use. Briscoe v. Henderson Lighting & Power Co., 62 S. E. 600, 603, 148 N. C. 396, 19 L. R. A. (N. S.) 1116.

As highway

See Highway.

As road

See Road.

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As street

See Street.

ALLOT

The word "allot," as used in a communication from the Commissioner of Indian Affairs to the Secretary of the Interior, reciting the terms of an agreement between the United States and a tribe of Indians in respect to the restoration to the public domain of lands in possession of the Indians, is to be given its technical meaning, which is that land held for allotment among the Indians is to be parceled out to them in severalty. United States v. Moore, 154 Fed. 712, 717.

The word "allot," as used in an act for the allotment of lands to Indians in severalty according to the size of the families, etc., is not a term of sale or grant, but of apportionment of that to which the parties are entitled as of right. Parr v. United States, 153 Fed. 462, 468.

The term "allotted," as used in Sess. Laws 1903, p. 246, § 33, making it the duty of the state engineer to make an examination of the streams, beginning with those streams the waters of which have not been allotted, means decreed by the proper court. Boise City Irrigation & Land Co. v. Stewart, 77 Pac. 25, 29, 10 Idaho, 38.

ALLOTTEE

The word "allottees," as used in Act April 21, 1904, c. 1402, 33 Stat. 204, refers to the parties to whom an allotment is made, and not to their heirs; and where the allottee under the said act would have been authorized to alienate his land, had he lived, the same, on his death, was alienable by his heirs, without reference to their blood. Parkinson v. Skelton, 128 Pac. 131, 132, 33 Okl. 813.

The term "allottee," as used in the Nez Perce treaty, providing that allottees, whether under the care of an Indian agent or not, should for 25 years be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians, was descriptive of the person, and not of the condition, and an Indian to whom lands had been allotted was not thereby removed from the class described in the treaty as "Nez Perce Indian allottees" by the issuance to him of a patent conveying the absolute title to his allotment prior to the expiration of the specified 25 years, so that it was no defense to a prosecution for furnishing liquor to such an Indian that he was an allottee to whom the United States had conveyed the absolute title to his allotment by patent. United States v. Zumwalt, 186 Fed. 596, 597.

ALLOTMENT

See Any Allotment.

The term "allotment," in the constitutional provision giving probate courts jurisdiction in all matters of the allotment of dower, applies to parties who claim in virtue of the title of the deceased, as the widow and heirs, and over whom the probate court may have jurisdiction. It signifies an apportionment of the interest of one or more parties entitled to a share of the estate. It does not affect strangers. Jiggitts v. Bennett, 31 Miss. 610, 613.

ALLOW

See Erroneously Allowed; Inspection Allowed.

"Allowed" and "caused" are synonymous as used in an averment that defendant negligently "caused or allowed" cotton to be damaged by fire. Louisville & N. R. Co. v. Smith, 50 South. 241, 244, 163 Ala. 141.

To "allow" grounds of a motion is not equivalent to approving them. Gay v. Peake, 63 S. E. 650, 5 Ga. App. 583. And an order, signed by the judge, "allowing" an amendment to the motion for a new trial, is not an equivalent of the approval and verification required by law as to statements of fact contained in the grounds of a motion for new trial, and the grounds of such amendment cannot be considered on writ of error. Thornton & Warren v. Cordell, 70 S. E. 17, 8 Ga. App. 588.

A certificate of a trial judge that a bill of exceptions was presented within the time allowed but was found to be incomplete, whereupon leave was granted to complete the same, and on a subsequent day the defendant presented the bill as a completed bill of exceptions and asked that the same be signed, filed, and made a part of the record, all of which was accordingly done, to which plaintiff objected and excepted, with the signature of the trial judge, sufficiently shows that the bill was "allowed." Harden v. Card, 85 Pac. 246, 250, 251, 14 Wyo. 479.

A statute, declaring that there shall be "allowed" to a widow the personal property of her deceased husband therein described, vests in the widow an unqualified right to the property on the husband's death, and selection thereof by her is not essential, but only necessary as a designation of the particular property she elects to claim. Sammons v. Higbie's Estate, 115 N. W. 265, 267, 103 Minn. 448 (citing Kellogg v. Graves, 5 Ind. 509; Singleton v. McQuerry, 8 Ky. Law Rep. 782; Mitcham v. Moore, 73 Ala. 542).

Where a secured claim due the administratrix was indorsed by the judge of the superior court, "Allowed and approved the 14th day of March, 1899, for $23,652.30 and interest," the words "allowed and approved" must be construed to refer to the claim on which they were indorsed, and constituted a sufficient allowance of the claim as a secured

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claim. In re McDougald's Estate, 79 Pac. 878, 879, 146 Cal. 191.

Knowledge implied

To allow a thing to be done is to acquiesce in or tolerate; knowledge, express or implied, being essential. Sawyer v. Mould, 122 N. W. 813, 814, 144 Iowa, 185, 25 L. R. A. (N. S.) 602. Hypothesis that a locomotive engineer "allowed" the water to get below the crown sheet of a locomotive boiler implies knowledge on his part. Houston & T. C. R. Co. v. Haberlin (Tex.) 125 S. W. 107, 109.

As permit

The meaning of the word "allow" is often controlled by the context. As employed in an averment in a declaration that defendant negligently "caused or allowed" cotton to be destroyed by fire, it is synonymous with "permit," one of its accepted meanings, and familiarly so in common parlance. When so read, the averment is that the defendant negligently caused or permitted the damage. Louisville & N. R. Co. v. Smith, 50 South. 241, 244, 163 Ala. 141.

ALLOWABLE DEBT

In bankruptcy an "allowable debt" is a valid obligation of the bankrupt for which his estate may be held, and so is necessarily a provable debt, although a provable debt may not be allowable. R. P. Williams & Co. v. United States Fidelity & Guaranty Co., 75 S. E. 1067, 1070, 11 Ga. App. 635.

ALLOWANCE

See Constructive Allowance; Just Allowance.

"Allowances" are made under discretion of court, while "fees" are sums fixed by law. Nease v. Smith, 73 S. E. 910, 912, 70 W. Va. 325.

"Proof" and "allowance" of claims in bankruptcy are separate and distinct steps. In re J. M. Mertens & Co., 147 Fed. 177, 180, 77 C. C. A. 473.

Within Const. 1901, § 96, prohibiting a law not applicable to all the counties, regulating "fees, commissions or allowances" of public officers, a "salary" is a fixed compensation, decreed by authority and for permanence, to be paid at stated intervals, and depending on the time, and not on the services rendered, while an "allowance" is of the same nature with fees, commissions, and percentages, which are uncertain and variable in amount, and depend on the rendition of services which may or may not be required or performed, and sometimes on the discretion of the court ordering their payment. Brandon v. Askew, 54 South. 605, 608, 172 Ala. 160.

The word "allowances," in Code Civ. Proc. § 3369, relating to condemnation proceedings, and providing that, if judgment be rendered for defendant, costs shall be taxed at the same rates as are allowed of course to the defendant prevailing in an action in the Supreme Court, including the "allowances for proceedings before and after notice of trial," does not mean "additional allowances," and, there being no provision for notice of trial in such proceedings, the court had no power to award an additional allowance of costs to a successful defendant therein. Erie & J. R. Co. v. Brown, 107 N. Y. Supp. 989, 123 App. Div. 655.

Where the purpose of a motion by plaintiff in attachment to retax and disallow certain items of expenditure mentioned in the report of the sheriff was to determine whether or not they were correct and chargeable as costs, and at the time of the hearing the return of the ex-sheriff was on file and considered as evidence at the hearing, and this embraced items to which objections were filed, an order eliminating some of the items and allowing the balance of the sheriff's report constituted an allowance of such balance as costs in the case within 3 Mills' Ann. St. Rev. Supp. §§ 1898, 1898a, providing that a sheriff in addition to fees shall be allowed his actual expenses incurred in executing an attachment writ, and also for custodian fees not exceeding a specified sum per day. First Nat. Bank v. Deane, 104 Pac. 954–956, 46 Colo. 452.

As judgment

As judgment, see Judgment.

ALLOWED BY LAW

See, also, Law.

The expression "allowed by law," employed in a statute, refers to statutory law. People v. Knapp, 132 N. Y. Supp. 747, 750, 147 App. Div. 436.

ALLOY

See Iron and Manganese Alloy.

ALLUREMENT

See Dangerous Allurement.

ALLUVION

"Alluvion" is an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous, and may be the effect of either natural or artificial causes. State of Kansas v. Meriwether, 182 Fed. 457, 463, 106 C. C. A. 191.

"Alluvium" is applied to the most recent sedimentary deposits, such as occur in the valleys of large rivers—an imperceptible deposit usually of mingled sand and mud resulting from the action of fluviatile currents. Wilson v. Watson, 138 S. W. 283, 284, 144 Ky. 352, Ann. Cas. 1913A, 774.

"'Jus alluvionis' is an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and

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for the most part by insensible degrees." Fowler v. Wood, 85 Pac. 763, 775, 73 Kan. 511, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534.

ALLUVIUM

See Alluvion.

ALMOST

The word "almost" implies uncertainty, want of precision, and one using it within certain limits does not commit himself to exactness or positiveness, but the word also implies that the limits are narrow, and when such limits are transcended, the expression may, and sometimes must, cease to be regarded as an opinion and become a representation of a fact. Hotchkiss v. Bon Air Coal & Iron Co., 78 Atl. 1108, 1113, 108 Me. 34.

ALONG

See Jogging Along; To and Along.

As across

The word "along" means by length of, as distinguished from "across." A grant of a telephone company to erect a line "over and along the property which I own or in which I have an interest," with a right to place poles along the highways adjoining the property, does not give a grant to erect a line diagonally across grantor's lot. Zimmerman v. American Telephone & Telegraph Co., 51 S. E. 243, 244, 71 S. C. 528, 110 Am. St. Rep. 589.

As adjoining

The word "along," as used in Civ. Code, § 485, making railroads liable for killing or maiming animals belonging to landowners through or along whose land the railroad runs, resulting from failure to maintain suitable fences, means "adjoining," and implies "contact," and hence the section did not give a right of action to an owner or lessee of land which was separated from the railroad right of way by a public road. Barbee v. Southern Pac. Co., 99 Pac. 541, 542, 9 Cal. App. 457.

As alongside of

The word "along," as used in Mills' Ann. St. § 3934, relating to the establishment of highways and providing that notices shall be posted in the most public places "along" the public roads, means by the side of or near (citing Standard Dict.) rather than through or by the length of. Consequently, a notice posted more than a mile from the proposed road was not posted "along" such road as required by statute. Williams v. Board of Com'rs of Routt County, 84 Pac. 1109, 1110, 37 Colo. 55.

As on or over

The word "along," referring to the sidewalk on which plaintiff was injured, is a relative term, and does not with any definiteness explain the location of the stone. It does not convey the thought that the stone was in or upon the sidewalk. City of Vincennes v. Spees, 74 N. E. 277, 279, 35 Ind. App. 389; Id., 72 N. E. 531, 532.

The words "along or across," as used in a statute prohibiting the discharge of a firearm "along or across" any public road, relate to the direction in which the gun is fired, and not to the position of the person firing it, so that a person standing near the margin of a public road and firing "away" from the road does not violate such section. Scott v. State, 44 South. 544, 545, 152 Ala. 63.

The statute requiring a drainage board to cause notices to be posted "along" the line of a proposed drain is sufficiently complied with though one of the notices is posted at a post office one mile from the drain. Edwards v. Cass County, 137 N. W. 580, 582, 23 N. D. 555.

Along the river or stream

A conveyance of land "along," a nontidal stream presumptively carries title as far into the stream as the grantor possesses. Leary v. Jersey City, 189 Fed. 419, 428.

ALPHABETICAL VOTING

To vote a precinct "alphabetically" is equivalent to holding a "fake election"; the term "alphabetical" being derived from the method of fraudulently voting the voters' names as they appear in the register in alphabetical order. Scholl v. Bell, 102 S. W. 248, 260, 125 Ky. 750.

ALREADY

In statutes as affecting application

In Laws 1905, p. 224, c. 175, § 1, authorizing county commissioners of any county not already owning a county courthouse to issue bonds, the word "already" does not limit the operation of the act to counties that had no courthouse at the time of its passage, but refers also to any future time, so that when a courthouse is destroyed by any cause the county commissioners may issue bonds in an amount not in excess of 1 per cent. of the valuation to build a new courthouse. Evenson v. Demann, 123 N. W. 930, 109 Minn. 328.

Money appropriated by county commissioners by ordinance remained "already appropriated" within Burns' Ann. St. 1901, § 5594e1, providing that no board of county commissioners shall bind the county by any contract, etc., to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of the obligation, notwithstanding attempt to repeal the appropriation by resolution. Kraus v. Lehman, 84 N. E. 769, 772, 170 Ind. 408, 15 Ann. Cas. 849.

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A second lease, executed prior to the expiration of the first lease, but not to take effect until such expiration, does not cover property "already under lease," so as to be precluded by an ordinance authorizing the committee on public property to lease any part of public buildings not already under lease; but the meaning of the ordinance is that the city shall not execute two leases covering the same property for the same period of time. City of Biddeford v. Yates, 72 Atl. 335, 337, 104 Me. 506, 15 Ann. Cas. 1091.

ALSO

See But Also.

As besides

Under Const. art. 19, § 2, providing that proposed constitutional amendments shall be published with the "Session Laws," and that the Secretary of State shall "also" cause the amendments to be published in newspapers for four successive weeks previous to the next general election, the publication for four weeks previous to the next general election relates only to newspapers and not to Session Laws, since the word "also" is used in the sense of "besides," and, "further," and means "in like manner," and since the "Session Laws" is not a serial publication or one that is made at a fixed period or at regularly recurring intervals, but is published only once as a permanent memorial for its designated contents. Pearce v. People, 127 Pac. 224, 226, 53 Colo. 399.

As in addition to

A secondary meaning of "also" is "in addition to." Platt v. Brannan, 81 Pac. 755, 756, 757, 34 Colo. 125, 114 Am. St. Rep. 147. Use of the word "also," in a testamentary clause reciting that it was "also" testator's will that, if either of his children should die without living issue, the child's share should revert, etc., was used in the sense of "additional," does not create any remainder interest in favor of the children of the testator's grandchildren. Hill v. Terrell, 51 S. E. 81, 86, 123 Ga. 49.

Tenants entered upon a five-year term January 1, 1907, and executed a bond with defendant as surety in the amount of two months' rent, conditioned for the full performance of all the obligations of the lease, and also the last two months' rent due and payable as provided by the lease being the rent for the months of November and December, 1911. Held that, as the word "also" preceding the last clause indicated an intention to include something not therefore included, there was no repugnancy in the two clauses of the obligation, and that the contract would be interpreted so as to give effect to the last clause relating to rent. Henne v. Summers, 116 Pac. 86, 88, 16 Cal. App. 67.

As in like manner

"The primary meaning of 'also,' as given in Webster's Dictionary, is 'in like manner.' The sense in which it is used depends largely upon the context. Most frequently in wills it is used in the sense of 'in like manner' or 'in the same manner.'" Where testatrix devised to her husband all her interest in a lot "in which I own an undivided one-half with my husband, 'also' all of my right" in two other lots, to have the said interests in said described portion of land for life, with a gift over, the husband acquired only a life estate in the three lots; testatrix intending but one general devise. Platt v. Brannan, 81 Pac. 755, 756, 757, 34 Colo. 125, 114 Am. St. Rep. 147 (citing the definition in Hauser v. Craft, 46 S. E. 756, 134 N. C. 319; Hysmith v. Patton, 80 S. W. 151, 72 Ark. 296; Safe Deposit & Trust Co. v. Stich, 59 Pac. 1082, 61 Kan. 474; Connecticut Trust & Safe Deposit Co. v. Chase, 55 Atl. 171, 75 Conn. 683; Hill v. Terrell, 51 S. E. 81, 86, 123 Ga. 49).

ALTENHEIM

"Altenheim" is a German word meaning "home for old people." German Pioneer Verein v. Meyer, 63 Atl. 835, 70 N. J. Eq. 192.

ALTER—ALTERATION

See Material Alteration; Person who Makes, Alters, or Repairs.

"An 'alteration' is defined as a change effected; a changing of form or state, especially one which does not affect the identity of the subject." Chicago Lumber & Coal Co. v. Garmer, 109 N. W. 780, 782, 132 Iowa, 282; Brill v. Miller, 125 N. Y. Supp. 865, 140 App. Div. 602 (citing Cent. Dict.).

Act

Under a constitutional provision that all laws not repugnant to the Constitution are continued in force until "altered" or repealed by the Legislature, the word "altered" means to make different without destroying identity; to vary without entire change. Butler v. City of Lewiston, 83 Pac. 234, 236, 11 Idaho, 393.

Bridge

A decision of county commissioners, made on petition of a mayor and aldermen, as authorized by Pub. St. c. 112, § 129, for alteration of a railroad bridge over a highway, requiring certain additions to the upper surface of the masonry to prevent the dripping of water on the street below, requires an "alteration," within the meaning of the act, and not mere "repairs," where it appears that the bridge has remained exactly as it was built, without any injury or dilapidation. Boston & A. R. Co. v. County Com'rs of Hampden, 42 N. E. 100, 101, 164 Mass. 551.

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Building

An "alteration" is generally understood as meaning a change or changes within the superficial limits of an existing structure. Brill v. Miller, 125 N. Y. Supp. 865, 867, 140 App. Div. 602.

Where improvements are limited to repairing interior arrangements of an old building to suit the convenience of the owner, they are "repairs" or "alterations," within the meaning of Mechanic's Lien Law, § 10. Grantwood Lumber & Supply Co. v. Abbott, 78 Atl. 1046, 80 N. J. Law, 564.

It cannot be said that as a matter of law that the installing of a sprinkling device is an "alteration" of a building within Labor Law, § 18, relating to unsafe scaffolds, hoists, stays, etc., since to be an alteration the system must be in some manner installed so as to become an integral part thereof and change its structural quality. Grady v. National Conduit & Cable Co., 138 N. Y. Supp. 549, 553, 153 App. Div. 401.

Labor and material necessary to put in a new sewerage system in a remodeled building were not "alterations," within a provision of the contract declaring that no alterations should be made in the work done or described by the drawings and specifications except on the written order of the architects. Mahoney v. Hartford Inv. Corp., 73 Atl. 766, 769, 82 Conn. 280.

Rev. Laws, c. 104, § 1, authorizing certain cities, for the prevention of fire, to regulate the alteration of buildings, does not authorize an ordinance prohibiting reshingling of a roof; "alteration," being used to denote a change or substitution in a particular of one part of a building for a building different in that particular. Commonwealth v. Hayden, 97 N. E. 783, 784, 211 Mass. 296.

A provision in a lease that "alterations, improvements and additions" made by the lessee at his own expense on the premises shall, at the option of the lessor, remain on the premises and become the property of the lessor at the expiration of the lease, does not apply to electric power and lighting appliances installed by the tenant for his printing presses, which are not imbedded in the walls or floors, except where it was necessary to pass the wires through the floors and which were attached to the walls by bolts and other fastenings; the quoted expression being intended to apply to alterations in the building only. Lindsay Bros. v. Curtis Pub. Co., 84 Atl. 783, 784, 236 Pa. 229, 42 L. R. A. (N. S.) 546.

The word "alteration" in a lease which contemplated construction by the lessee of a building according to specifications, and called for payment to lessor of a percentage of net profits, defined as the gross income, did not extend to initial construction, but to a modification of that already constructed, and hence less the cost of repairs and alterations, lessee was entitled to deduct from the gross income cost of the changes and alterations, or any part thereof, for proper use of the building, but not cost of additions, nor alterations in specifications under which it was constructed. Grosse v. Barman, 100 Pac. 348, 352, 9 Cal. App. 650.

Contract

A mere change in the site of a dwelling house, to be constructed under a contract, from one place to another in the same square, for the accommodation of the owner, and without causing any additional expense to the contractor, is not such an "alteration of the contract" as will discharge the surety of the contractor. Segari v. Mazzei, 41 South. 245, 247, 116 La. 1026.

Corporate by-laws

An "alteration" of a corporate by-law is a pro tanto repeal. Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith, 84 Pac. 271, 272, 2 Cal. App. 624 (quoting and adopting Kent v. Quicksilver Mining Co., 78 N. Y. 159).

Electric distribution line

Under a statute authorizing an electric company to "alter" its system of distribution, it can change its system from poles and wires to conduits. Allegheny County Light Co. v. Booth, 66 Atl. 72, 74, 216 Pa. 564, 9 L. R. A. (N. S.) 404.

Highway

"Alteration" of a highway and "location" of a highway do not amount to the same thing. Ford v. Erskine, 83 Atl. 455, 457, 109 Me. 164.

"Alteration," within Code Va. 1904, § 1294b, which provides that any county road may be altered by a railway corporation for the purpose of avoiding or reducing the number of crossings whenever it shall have made an equally convenient road in lieu thereof, the company having first obtained the consent of the board of supervisors of the county to the "alteration" of the road or highway, embraces a new location, construction thereon of a roadway as good as the present one, and discontinuance of the present road. Carolina C. & O. R. Co. v. Board of Sup'rs of Scott County, 63 S. E. 412, 413, 109 Va. 34.

Instrument

"Alteration" in a writing implies a change made after its execution, and an erasure or interlineation is not an alteration, if made before the final execution of the writing. Wicker v. Jones, 74 S. E. 801, 803, 159 N. C. 102, 40 L. R. A. (N. S.) 69; Tharp v. Jamison, 134 N. W. 583, 584, 154 Iowa, 77, 39 L. R. A. (N. S.) 100.

An "alteration" of a written contract such as to destroy it as a legal obligation is any change in its terms made by any party thereto, without the express or implied con-

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sent of all the parties, which varies its original legal effect and operation, whether in respect to the obligation it imparts or its force as matter of evidence. To erase the marginal figures "136$^{91}/_{100}$" in a note and write at the top of the instrument "118$^{09}/_{100}$ correct amount," in order to correct a mutual mistake, is not such an alteration as will render the note void. Chamberlain v. Wright (Tex.) 35 S. W. 707.

Forging the name of the payee of an instrument on the back thereof constitutes an "alteration" within White's Ann. Pen. Code, art. 531, providing that one who without lawful authority and with intent to injure and defraud alters an instrument in writing, etc., is guilty of forgery. Carter v. State, 114 S. W. 839, 840, 55 Tex. Cr. R. 43.

Railroad

The word "alteration," within St. 1890, c. 428, which provides for the alteration of railroads on the abolition of grade crossings, is sufficiently broad to include extensive alterations and a change in the location of a station. In re Selectmen of Westborough, 48 N. E. 763, 169 Mass. 495.

Street—Change of grade

Under a municipal charter giving power to lay out and open and change the grade of, or otherwise improve, roads, avenues, streets, etc., and for that purpose to take and appropriate any land of the village, but providing that no road, street, etc., shall be opened and "altered" unless all claims for damages on account of such opening or altering shall be released, the power to "alter" did not cover a change in the grade, and the village was not therefore bound to take any proceeding for the release of damages before changing the grade of a street. An alteration of a street, as the expression is used, generally refers to a change in the course thereof, and therefore necessarily involves, to some extent, the establishment of a new highway, and the vacation of a part of the old highway for which the substitution is made. Rogers v. Village of Attica, 98 N. Y. Supp. 665, 666, 113 App. Div. 603; Manufacturers' Land & Improvement Co. v. City of Camden, 59 Atl. 1, 2, 71 N. J. Law, 490 (citing Commonwealth v. Inhabitants of Westborough, 3 Mass. 406; Commonwealth v. Inhabitants of Cambridge, 7 Mass. 158).

Under North Adams City Charter, § 37, providing that the board of public works shall have control of the "alteration" and repair of streets, and section 23, giving the council exclusive power, except as therein otherwise provided, to act in all matters relating to the laying out and altering of streets, the board of public works had power to change the grade of a street in making ordinary repairs; such change in the grade not being an "alteration." Simpson v. North Adams, 54 N. E. 878, 879, 174 Mass. 450 (citing and adopting Callender v. Marsh, 18 Mass. [1 Pick.] 418; Brown v. City of Lowell, 49 Mass. [8 Metc.] 176; Proctor v. Stone, 33 N. E. 704, 158 Mass. 564, 567).

Same—Widening

The word "alteration" in a petition reciting that common convenience required "the alteration of [the street] by the widening, straightening, and relocation" of such street, and praying that the street might be "altered by widening, straightening, and relocating" the same, was intended to indicate the effect of relocating the street, and the petition would, notwithstanding the use of such word, be construed, in view of the situation of the street, the changes which were sought, and the language of the order granting the location for the railroad tracks, as a petition under Rev. Laws, c. 48, § 12, which provides for the relocation of a highway, either for the purpose of establishing the boundary lines or of making alterations in the course or width thereof, on petition of the town or by five inhabitants thereof. Bennett v. Town of Wellesley, 75 N. E. 717, 719, 189 Mass. 308.

Structure

Labor Law (Laws 1901, c. 257), § 1 (Sanborn's St. Supp. 1906, § 1636—81), provides that a person employing another in labor of any kind in erecting, repairing, altering, or painting of a house, building, or structure shall not furnish, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed. Held that, as "structure," as used in such act, included work below as well as above ground, and the word "erecting" was used in its broad sense to mean the creating of a particular thing out of its parts, an action for injury to an employé by the collapse of a derrick used to lower sections of water main pipe into place in a trench dug to receive it was within the statute; the derrick being within the prohibited instrumentalities, the setting up of the water main an "erection," and the putting in of new pipes an "altering," and the waterworks system a "structure" within the meaning of the act. Kosidowski v. City of Milwaukee, 139 N. W. 187, 188, 152 Wis. 223.

ALTERNATE

ALTERNATIVE CONTINGENT REMAINDER

The remainder created by deed to one for life, remainder to the heirs of her body, is an "alternative contingent remainder" within Civ. Code, § 696, providing that two or more future interests may be created to take effect in the alternative, so that, if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly. Los Angeles County v. Winans, 109 Pac. 640, 644, 645, 13 Cal. App. 234.

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ALTERNATIVE SENTENCE

An "alternative sentence" is not imposed by a judgment that accused pay a fine in a given amount, and in default of payment of the same within ten days that he work at hard labor on the streets. Williams v. Sewell, 49 S. E. 732, 121 Ga. 665.

ALTERNATIVE WRIT

The "alternative writ of mandamus" is not an original writ nor a final writ of execution, but is of the nature of an interlocutory rule to show cause. Hamlin v. Higgins, 67 Atl. 625, 629, 102 Me. 510.

ALWAYS

Provided always, see Provided.

AMBIGUITY

See Latent Ambiguity; Patent Ambiguity.

"Ambiguity" is defined as duplicity; indistinctness; an uncertainty of meaning or expression used in a written instrument. Barrett v. Kansas & Texas Coal Co., 79 Pac. 150, 151, 70 Kan. 649. "Ambiguity" also signifies of doubtful or uncertain nature; wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful import; open to various interpretations. Novelty Hat Mfg. Co. v. Wiseberg, 55 S. E. 923, 924, 126 Ga. 800 (adopting definition in Cent. Dict. and in Nindle v. State Bank, 13 N. W. 275, 13 Neb. 245, as cited in 1 Words and Phrases, p. 367).

AMBIGUOUS

"Ambiguous" means "doubtful and uncertain." Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co., 107 Pac. 499, 502, 40 Mont. 508.

AMEND—AMENDMENT

See Additional Amendment; Immediate Amendment; Implied Amendment; Power of Charter Amendments.

As substantial change, see Substantial Change.

As surprise, see Surprise.

The word "amend" is synonymous with correct, reform, and rectify. It means a correction of errors, an improvement or rectification, and necessarily implies something on which the correction, alteration, and improvement can operate. It indicates a change or modification for the better. McCleary v. Babcock, 82 N. E. 453, 455, 169 Ind. 228.

Bill or law

A statute which adds a provision to a section of an existing statute is an "amendment." Henderson v. City of Galveston, 114 S. W. 108, 111, 102 Tex. 163; Id. (Tex.) 115 S. W. 1198.

"Amendment" of a statute implies its survival and not destruction. City of Ensley v. Simpson, 52 South. 61, 63, 166 Ala. 366; Robinson v. City of Ensley (Ala.) 52 South. 69. It repeals or changes some provision, or adds something thereto. Board of Public Instruction of Polk County v. Board of Com'rs of Polk County, 50 South. 574, 58 Fla. 391.

Provision that another statute is repealed, so far as it applies to a particular city, is a partial repeal, and not an "amendment" within the provision of the Constitution that no law shall be amended by reference to its title or section only. Barron v. Smith, 70 Atl. 225, 227, 108 Md. 317.

The word "amend," in legal phraseology, does not generally mean the same thing as "repeal," but it does not follow that amendments of a statute may not often be accomplished by repeals of some of its parts. A constitutional provision providing that the Legislature shall not pass a special, private, or local law amending, confirming, or extending the charter of any private municipal corporation prohibits the Legislature from passing a special law repealing such charter. Little v. State ex rel. Huey, 35 South. 134, 136, 137 Ala. 659.

There is a distinction between a "repeal" and an "amendment" of a statute. A "repeal" necessarily involves a change in the law, whether the statute repealed is the only enactment on the subject dealt with in the repealed act. A statute in derogation of the common law is not an amendment of the common law. The fact that an independent act, full and complete in itself, repeals by implication any portion of a statutory system, does not render it an amendatory statute where it makes no reference to the statutes affected by it. It is true that such an act alters or changes the system, but this change or alteration is and must be ascribed to the repeal wrought by the independent act and not to the change or alteration consequent upon the repeal. An amendment also involves some change or alteration in the existing statute law and may also operate as a repeal of some of its provisions, but such change or alteration made by the amendment is direct and not consequential, as is the case of a repeal. There is also another marked difference between a "repeal" and an "amendment." An "amendment" may not, and often does not, operate as a repeal, but merely as an addition to the statute of which it is amendatory. This can never be the effect or operation of a repealing statute, whether the repeal be by implication or be direct. As stated in Bouvier's Law Dict. a "repeal" is "the abrogation or destruction of a law by a legislative act," while an "amendment" is "an alteration or change of something proposed in a bill or established as law." A "supplemental" act adds something that was left out of the original act and does not necessarily revise

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it or amend it in the technical sense, while an amendment is something that may be incorporated into the act amended on its passage. A supplemental act is an independent law, and a "healing act" is one that cures some defect in a proceeding which the Legislature could have authorized in the first instance. From this it is held that an independent legislative act, complete in itself and inconsistent with other statutory provisions on the same subject, is not an "amendment," but is a "repeal." State ex rel. Gamble v. Hubbard, 41 South. 903, 905, 906, 148 Ala. 391.

Charter

Under power to "amend" charters of colleges and universities, the court of common pleas cannot change the corporate location of a college from one county to another, particularly where the college was located permanently in the first county. In re Thiel College's Appeal, 66 Atl. 83, 84, 216 Pa. 630.

Constitution

The word "amendment" is clearly susceptible to a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject, as well as of the construction that every proposition which effects a change in the Constitution or adds to or takes from it is an amendment. People ex rel. Elder v. Sours, 74 Pac. 167, 178, 31 Colo. 369, 102 Am. St. Rep. 34 (citing State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785).

"Amendment" and "revision" of the Constitution mean the same thing. State v. Taylor, 133 N. W. 1046, 1049, 22 N. D. 362.

Court record

The power to "amend" must not be confounded with the power to create. The power of the court to amend a record presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed thereunder. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. A judgment of naturalization which has never been recorded, or, if recorded, the record of which has been lost, cannot be entered by a common-law court nunc pro tunc 33 years after its rendition, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered, especially where the declaration of intention was made before another court, in another state, and the territorial court which is alleged to have entered the judgment has itself been abolished and a state court substituted in its place. Gagnon v. United States, 24 Sup. Ct. 510, 511, 193 U. S. 451, 48 L. Ed. 745.

A motion to "correct" a judgment rendered by a municipal court justice is a motion to "amend" or modify the same, within Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254. Ryan v. Brown, 99 N. Y. Supp. 868, 869, 51 Misc. Rep. 67.

Pleading

Delivery by plaintiff of a notice setting forth matters called for by defendant's motion to make more definite does not constitute an "amendment." Choctaw, O. & G. R. Co. v. State, 87 S. W. 631, 75 Ark. 369.

It is not the office of an "amended and supplemental complaint" to unite allegation of facts stated in the original complaint, and which occurred prior to the service of his original complaint, with facts which occurred afterwards. Horowitz v. Goodman, 98 N. Y. Supp. 53, 55, 112 App. Div. 13.

A pleading which in its substance is a direct and full reply to the cause of action set up in the plaintiff's petition and contains, among other matter, a sworn denial of partnership of the defendants, should, under the rules of pleading, be denominated either an "original" or "amended" answer and is not a "supplemental answer." Chicago, R. I. & T. Ry. Co. v. Halsell, 83 S. W. 15, 98 Tex. 244.

The mere addition of a verification to the answer and cross-petition allowed by the court, when the point was raised that the original petition was verified and the answer was not, was not an "amendment" which materially changed the defense, within Civ. Code 1895, § 5068, so as to open the answer and cross-petition to a special demurrer. Neal v. Davis Foundry & Machine Works, 63 S. E. 221, 222, 131 Ga. 701.

Summons

The power given by Code Civ. Proc. § 723, to "amend" at any stage of an action, authorizes amendment of the summons, so that all the plaintiffs shall be represented by the same attorneys. Jones v. Conlon, 95 N. Y. Supp. 255, 257, 48 Misc. Rep. 172.

AMENDATORY LAW

Reference statutes and interpretative statutes are not "amendatory," within Const. art. 2, § 16, providing that no law shall be amended unless the new act contain the entire section or sections amended, and the section or sections so amended shall be repealed. State v. Board of Com'rs of Shawnee County, 110 Pac. 92, 94, 83 Kan. 199.

A new act which is complete in itself and which does not purport to be amendatory of any previous act and does not require a reference to any other law to discover its scope or meaning, is not "amendatory" within the meaning of the provision of Const. Nev. art. 4, § 17, that "no law shall be revised or

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amended by reference to its title only, but in such cases the act as revised or section as amended shall be re-enacted and published at length," although in general terms it repeals all acts and parts of acts inconsistent with its provisions. Southern Pac. Co. v. Bartine, 170 Fed. 725, 738–740.

Act May 12, 1869, is entitled "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies"; and it and subsequent amendatory acts authorize the granting of such aid. Held, that Acts 1903, p. 233, c. 134, declaring that wherever the word "railroad" occurs in either section of the act of May 12, 1869, or in any section of any subsequent act amendatory or supplemental thereto, the same shall include street railroads, suburban street railroads, or interurban street railroads, is a "supplemental" and not an "amendatory" act, and is therefore not void for failure to set forth in full any part of the act of 1869, as required in case of amendments by Const. art. 4, § 21. McCleary v. Babcock, 82 N. E. 453, 455, 169 Ind. 228.

AMENDED AND SUPPLEMENTAL PLEADING

An ex parte order allowing an "amended and supplemental pleading" allowed a pleading unknown to the code. Luckey v. Mockridge, 98 N. Y. Supp. 335, 337, 112 App. Div. 199.

AMENDMENT BY IMPLICATION

"Amendment by implication" is merely a phrase in common use, because convenient, to indicate that rule of construction by which a later repugnant provision in a Constitution or statute modifies or abrogates an earlier one. People ex rel. Elder v. Sours, 74 Pac. 167, 176, 31 Colo. 369, 102 Am. St. Rep. 34.

AMERCEMENT

An "amercement" is a money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty. It is a statutory proceeding, and, like all other penal statutes, must be strictly construed. The right to demand a judgment in amercement is based on no equitable grounds, and in its enforcement courts are bound to hold the party claiming it to a strict observance of the requirements of the statute. Stein v. Scanlan, 127 Pac. 483, 34 Okl. 801, 42 L. R. A. (N. S.) 895.

AMERICAN

The word "American" in regulation 68 (c) of the quarantine regulations, authorizing the placing in quarantine of vessels arriving between May 1st and November 1st from "a tropical American port," is to be construed as meaning the continent of America, or the Western Hemisphere, and not the United States. Gow v. Gans S. S. Line, 174 Fed. 215, 217, 98 C. C. A. 223.

AMERICAN FISHERY

Where a corporation consisting of American citizens formed a party and registered an American vessel which was manned with an American crew and engaged in the business of catching turtles in Central American waters, canning them aboard the vessel, it was an "American fishery" within the meaning of the Tariff Act Aug. 27, 1894, c. 349, § 2, Free List, par. 568, which exempts from duty all fish and other products of American fisheries, and the canned turtle meat is free from duty as the product of such fishery; such a fishery not being restricted as to its product to articles captured with hook and line, or net, or strictly to fish. Downing v. United States, 124 Fed. 107, 108.

AMERICAN PLAN

The phrase "American plan," as applied to the conducting of a hotel, means that the hotel keeper provides not only lodging but also meals for his guests. Sieward v. Denechaud, 45 South. 561, 564, 120 La. 720.

As applied to hotels, the term "American plan" means that meals are provided at regular hours for patrons, who pay a stipulated sum per day, which includes both meals and room rent, and the term "European plan" means that under it the guests patronize the hotel table or not, as they please, and, when they do so, pay for what they order. New Galt House Co. v. City of Louisville, 111 S. W. 351, 129 Ky. 341, 17 L. R. A. (N. S.) 566.

AMERICAN SEAMAN

Every sailor on an American vessel is an "American seaman," regardless of his nationality. The Laura M. Lunt, 170 Fed. 204, 205.

AMICUS CURIÆ

The term "amicus curiæ" implies the friendly intervention of counsel to remind the court of some matter which might otherwise escape its notice, and in regard to which it might go wrong. Such an intervention is granted, not as a matter of right, but a privilege, and the privilege ends when the suggestion has been made. Hamlin v. Perticuler Baptist Meeting House, 69 Atl. 315, 318, 103 Me. 343.

A person who was neither an officer, attorney, nor agent of a railroad company, and who did not appear to be authorized to act for it, had no power to file a notice of appeal from a judgment against it as "amicus curiæ." Southern Ry. Co. v. Locke, 84 S. W. 1069, 1070, 38 Tex. Civ. App. 191.

Where the defendants resisted a case through their attorney, that such attorney as-

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sumed the role of amicus curiæ does not affect the proceeding, for the office of an "amicus curiæ" is restricted to making suggestions as to questions apparent upon the record, or matters of practice presenting themselves for determination in course of proceedings in open court, and cannot take upon himself the management of the cause as counsel. State v. McDonald, 128 Pac. 835, 837, 63 Or. 467.

AMNESTY

An "amnesty" secures against the consequences of one's acts, and not against the acts themselves. It involves forgiveness; not forgetfulness. United States v. Swift, 186 Fed. 1002, 1017.

Pardon distinguished

"Pardon" is granted to an individual criminal by name, while "amnesty" is granted to classes of offenders or communities. They differ, not in kind, but solely in the number they severally affect. United States v. Hughes, 175 Fed. 238, 242.

"Amnesty," as defined by Black's Law Dictionary, is a sovereign act of pardon and forgetfulness for past acts of criminal nature. It is at least coextensive in its meaning with the word "pardon" so far as its effect is concerned, because it effaces or wipes out the offense which has been committed; the difference between the two being that a pardon is granted to one who is certainly guilty, sometimes before but usually after conviction, and the court takes no notice of it unless pleaded or in some way claimed by the person pardoned, and it is usually granted by the crown or by the executive; but amnesty is extended to those who may be guilty, and is usually granted by Parliament or the Legislature and to whole classes before trial. Amnesty is an abolition or oblivion of the offense. Pardon is its forgiveness. In re Briggs, 47 S. E. 403, 411, 135 N. C. 118 (citing State v. Blalock, 61 N. C. 242).

AMONG

The word "among" means intermingled with. The thing which is among others is intermingled with them. Commerce "among the several states," within the commerce clause of the federal Constitution, cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. Kelley v. Great Northern Ry. Co., 152 Fed. 211, 218 (quoting and adopting definition in Gibbons v. Ogden, 22 U. S. [9 Wheat.] 1, 189, 194, 6 L. Ed. 23).

The phrase "among the several states," in the constitutional provision giving Congress power to regulate commerce among the several states, marks the distinction for the purpose of governmental regulation between commerce which concerns two or more states and commerce which is confined to a single state, and does not affect other states. Mondou v. New York, N. H. & H. R. Co., 32 Sup. Ct. 169, 173, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

Between synonymous

See Between.

Distribution to each required

The words "among all such issue share and share alike" do not "necessarily mean that each of such issue shall have an equal share with every other, or with a child. It is satisfied if all such issue share in a division which is equal as between living children and the issue of deceased children, taking per stirpes." Coates v. Burton, 77 N. E. 311, 312, 191 Mass. 180 (quoting and approving Hall v. Hall, 2 N. E. 700, 140 Mass. 267).

Where a testator devised to a son W. certain land, he to pay a certain sum per acre for the same, and out of the proceeds pay debts and dower and specified bequests to two daughters, and the balance "to be divided equally among my children," and W. to pay to each of the other children the part that should fall to each of his children, the term "to be divided among my children" meant all of the children, and entitled W. to share with the other children, and the direction to him to pay was not inconsistent with the idea of retention by him of a portion of the fund. In re Hennershotz' Estate, 16 Pa. 435, 442.

AMORPHOUS

Calcium carbide in an "amorphous" condition is without definite form, or uncrystallized. Union Carbide Co. v. American Carbolite Co., 188 Fed. 334, 337.

AMOUNT

See Gross Amount; Reasonable Amount; Whole Amount.

Of expenditures actually made, see Expenditures Actually Made.

As value

In Transfer Tax Law, § 221a, subd. 1, providing for a tax of 1 per centum on any amount in excess of $5,000 up to the sum of $50,000, "amount" and "sum," though popularly used to denote money, mean value; the tax being upon all kinds of property. In re Elletson's Estate, 136 N. Y. Supp. 455, 456, 75 Misc. Rep. 582.

The word "amount" as used with reference to money is synonymous with value.

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People v. Hines, 89 Pac. 858, 859, 5 Cal. App. 122; Richburger v. State, 44 South. 772, 774, 90 Miss. 806.

Under the Constitution of West Virginia, providing that the stockholders of all corporations shall be liable for the indebtedness of such corporations to the "amount of their stock subscribed," and no more, the stockholders are liable to the amount of the par value of their stock subscribed. Security Trust Co. v. Ford, 79 N. E. 474, 475, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263.

As the whole

Plaintiff, a broker, wrote defendant, asking what he would take for his land, including the stock and a 5 per cent. commission, and defendant replied that: "$22,250 your commission $1,112.50 this amount will buy the place." Held, that the word "amount" referred to the total of the two sums; the word being defined by Webster as "the sum total of two or more particular sums or quantities, as the amount of 7 and 9 is 16." Smith v. Fears (Tex.) 122 S. W. 433, 435.

"In speaking of interest-bearing obligations, the word 'amount' is ordinarily used to designate the total of principal and interest." Cratty v. City of Chicago, 75 N. E. 343, 344, 217 Ill. 453.

AMOUNT COLLECTED

The "amount" collected, within an act imposing an annual state tax for the privilege of carrying on insurance business by domestic insurance companies, based on the gross premiums collected, is either the sum collected and retained, or else it includes something for the business not done or unrealized in the anticipation of business. While in a certain sense it may be said that payment of the premium in advance for one year involves insurance made for one year, notwithstanding the fact that according to its terms the policy is subsequently canceled, a majority of the court is of the opinion that this is inconsistent with the fair meaning of the words "business done," when looked back upon at the end of the year. The premium which represents business done is the amount which the company has the benefit of and furnishes an equivalent for. It is the money earned by the policy. When part of the premium is refunded, it is the same in effect as if it had never been paid. People ex rel. Continental Ins. Co. v. Miller, 70 N. E. 10, 11, 177 N. Y. 515.

AMOUNT DUE

The expenses of an execution sale of mortgaged property is a part of the "amount due on the execution," which amount is required by Court and Practice Act 1905, § 629, to be paid out of the proceeds of the sale after payment of the mortgage debt; and when the proceeds of an execution sale of personalty are insufficient to pay the mortgage debt the mortgagee is entitled to recover from the levying officer the full amount of the sale, without any deduction for such expenses. McKenna Bros. v. Brown, 71 Atl. 450, 29 R. I. 339.

The amount "due the county for unpaid county taxes," within a statute providing that all taxes returned as delinquent shall be collected by a county for its own use, but if such delinquent taxes exceed the sum then due the county for unpaid county taxes the excess, when collected with interest and charges thereon, shall be disposed of in a particular manner, is the sum which equals in amount the county tax, with interest allowed thereon by statute, and all the charges fixed by law, and those necessarily incurred in collecting the taxes. Town of Spooner v. Washburn County, 102 N. W. 325, 327, 124 Wis. 24.

AMOUNT IN CONTROVERSY

See Original Amount in Controversy.

Under Ky. St. 1903, § 978, authorizing appeals to the circuit court from judgments of the county court where "the amount in controversy" is over $50, orders of the county court removing and appointing sheriffs are not appealable; the word "amount" in the quoted phrase applying only to a judgment for money. Renshaw v. Cook, 111 S. W. 377, 384, 129 Ky. 347.

In an action on a bond given to secure payment of alimony, the "amount" involved for the purpose of determining the jurisdiction of the appellate court is not the penalty of the bond, but the actual damages sustained by reason of the breach. Burnside v. Wand, 84 S. W. 995, 996, 108 Mo. App. 539.

As amount claimed or sued for

The "amount in controversy," as determining appellate jurisdiction, is the amount claimed in the petition, and not the amount recovered. Barnes v. Metropolitan St. Ry. Co., 95 S. W. 971, 972, 119 Mo. App. 303.

Costs excluded

Where the sum recovered by plaintiff, exclusive of interest and costs, does not exceed $50, and he is satisfied with his judgment, and there is no set-off or counterclaim, the amount so recovered must be deemed, on defendant's appeal, the "amount in controversy." Hood v. Baker (Ind.) 75 N. E. 608, 609.

On appeal from a decree enforcing a judgment, the interest and costs included in such judgment constitute a part of the amount in controversy. Nashville, C. & St. L. R. Co. v. Mattingly, 40 S. W. 673, 674, 101 Ky. 219.

Counterclaim included

The "amount in controversy," within Code, § 4110, providing that no appeal shall be taken when the amount in controversy does not exceed $100, is determined from the pleadings, including the counterclaims,

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and the court has jurisdiction of an appeal in a suit in equity for an injunction and for the recovery of money, which, together with defendant's counterclaim, exceeds $100, though plaintiff, though obtaining judgment for a part of the amount claimed, complains of a disallowance of a sum less than $100. Davis v. Laughlin, 124 N. W. 876, 877, 147 Iowa, 478.

An "amount in controversy" is the amount sued for, less that admitted to be due, a reconventional demand not being considered in view of Const. art. 95, providing that an appeal from a judgment rendered on a reconventional demand shall lie to the court having jurisdiction of the main demand. Hood v. Wise, 55 South. 335, 336, 128 La. 731.

Interest included

Though a statute regulating appellate jurisdiction provides for the exclusion of interest and costs in determining the amount in controversy, yet on appeal from a decree enforcing a judgment the interest and costs included in such judgment constitute a part of the amount in controversy. Nashville, C. & St. L. R. Co. v. Mattingly, 40 S. W. 673, 674, 101 Ky. 219.

A contract of employment which specified a definite salary ascertained the amount payable, within Sayles' Ann. St. 1897, art. 3101, providing that interest shall be allowed at 6 per cent. per annum on written contracts "ascertaining the sum payable," when no rate is specified, and the interest due under the employment contract does not enter into the "amount in controversy," as constituting damages, as affecting the jurisdiction of the county court of a suit on the contract. Carter Grocer Co. v. Day (Tex.) 144 S. W. 365, 366.

Under an act forbidding appeals from a certain court where the amount in controversy is less than $100, the "amount in controversy" is the full amount recoverable by the plaintiff under the allegations of his petition, including interest at 6 per cent. per annum thereon to the date of the trial. Gulf, W. T. & P. Ry. Co. v. Fromme, 84 S. W. 1054, 1056, 98 Tex. 459 (citing Schulz v. Tessman, 49 S. W. 1031, 92 Tex. 488).

Where the damages recovered in an action against a telegraph company for negligence in the transmission of a message, together with interest thereon, amount to $100, the case is appealable to the Court of Civil Appeals; the interest being a part of the "amount in controversy." Western Union Tel. Co. v. Noland (Tex.) 77 S. W. 1031.

Burns' Ann. St. 1901, § 1337j, provides that a losing party may appeal from the Appellate Court to the Supreme Court only when the "amount in controversy," exclusive of the costs and interest on the judgment of the trial court, exceeds $6,000. In construing this statute the court held that the "amount in controversy" and "interest on the judgment" clearly imported the controversy measurable by a sum of money, ascertained and determined by the trial court, and it was held that no appeal lies to the Supreme Court from the Appellate Court unless there was a judgment of the trial court upon the merits for an amount in excess of sum stated. Avery v. Nordyke & Marmon Co., 73 N. E. 119, 120, 164 Ind. 186.

AMOUNT IN DISPUTE

Under the judiciary act the "amount in dispute" which determines the jurisdiction of the circuit court in suits for the recovery of money is the amount demanded by the plaintiff in good faith, and not the amount ultimately recovered. Denver City Tramway Co. v. Norton, 141 Fed. 599, 601, 73 C. C. A. 1 (citing Peeler v. Lathrup, 48 Fed. 780, 1 C. C. A. 93; Ung Lung Chung v. Holmes, 98 Fed. 323).

Where, under a statute providing that in case of death from negligent running of a train the railroad company shall forfeit and pay for every person so dying $5,000, which may be sued for, etc., and only $4,500 has been sued for and recovered, $4,500 is the "amount in dispute," as regards appellate jurisdiction, although a recovery might have been had for $5,000. Marsh v. Kansas City Ry. Co., 78 S. W. 284, 285, 104 Mo. App. 577.

Under Act June 12, 1909, giving the Courts of Appeals jurisdiction where the amount in dispute, exclusive of costs, shall not exceed $7,500, in view of other language in the act directing the transfer of causes pending in the Supreme Court, showing that it was intended to apply where appeals had been taken years before, the amount in dispute is to be determined as of the date the judgment appealed from was rendered, and not the passage of the act, so that, where the amount of the judgment appealed from was $7,500, interest to the time of the passage of the act could not be added to enable the Supreme Court to retain jurisdiction of the appeal; interest not being a part of the "amount in dispute," but an incident of the judgment added by operation of the law. Schwyhart v. Barrett, 122 S. W. 1049, 1050, 223 Mo. 497.

So far as jurisdiction of actions ex delicto depends upon the "amount in dispute," it is necessarily controlled by the amount demanded in the petition, but depends on the elements of damage sustainable by the facts proved. Vanderberg v. Kansas City, Missouri, Gas Co., 97 S. W. 908, 199 Mo. 455.

AMOUNT INVOLVED

In a suit to enjoin a threatened or continued commission of certain acts, the "amount" or "value" involved, for the purpose of determining the jurisdiction of the federal court, is the value of the right which

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complainant seeks to protect from invasion, and not the sum he might recover in an action at law, or the damage already sustained; nor is he required to wait until it reaches the jurisdictional amount. Board of Trade of City of Chicago v. Cella Commission Co., 145 Fed. 28, 29, 76 C. C. A. 28.

AMOUNT OF DEMAND

Where live stock has been killed by a railroad train, and the conditions exist under which the statute authorizes judgment for double the damage found to be due, double damages actually and in good faith claimed under the statute constitute the "amount of the demand" for determining the jurisdiction of the court. Georgia, F. & A. Ry. Co. v. Andrews, 54 South. 461, 462, 61 Fla. 246.

AMOUNT DISTRIBUTED

Ky. St. § 3883, providing that "the allowance to executors, administrators and curators shall not exceed five per cent., on all the 'amounts received and distributed,'" does not limit an executor to 5 per cent. on the cash distributed, but he is entitled to a reasonable allowance, not exceeding 5 per cent. on the entire personal estate, including that distributed in kind. Reed v. Reed (Ky.) 66 S. W. 819, 820.

AMOUNT RECOVERED

The "amount recovered," within Laws 1907, c. 5618, which allows, in an action against a carrier upon a claim for freight lost or damaged where the carrier fails to pay the claim in 60 days after presentation, a maximum sum as a reasonable attorney's fee of 15 per cent. of any amount recovered over $100, is the amount of the claim recovered, and not that amount plus the 50 per cent. per annum interest also allowed by the statute. Atlantic Coast Line R. Co. v. Coachman, 52 South. 377, 386, 59 Fla. 130, 20 Ann. Cas. 1047.

AMOUNT SUPERSEDED

Under Code Prac. § 764, providing that, upon the affirmance of a judgment which has been superseded, 10 per cent. damages "on the amount superseded" shall be awarded, the appellee is not entitled to damages on the interest accrued after the judgment was superseded. Popp v. Louisville & N. Ry. Co., 40 S. W. 254, 101 Ky. 157.

AMPERE

The unit of volume, called the "ampere," is one-tenth unit of the C. G. S. system. Peoria Waterworks Co. v. Peoria R. Co., 181 Fed. 990, 1001.

AMPLE

The words "ample" and "sufficient" are so nearly synonymous that no material error was committed in the use of the word "ample" in an instruction as to the time a train should stop at a station to permit passengers to alight, though the word "sufficient" would have been more appropriate. St. Louis Southwestern Ry. Co. of Texas v. Haynes (Tex.) 86 S. W. 934, 935.

AMUSEMENT

See Place of Amusement; Public Amusement.
Other amusements, see Other.

AMUSEMENT RAILWAY

The phrase "amusement railway" includes those devices in which a car or other vehicle moves along a track in startling and surprising evolutions or through imitation scenery for the gratification of the occupants. Frazer v. Rohr, 180 Fed. 773, 774.

ANARCHIST

The conclusion of the immigrant inspectors, approved by the Secretary of Commerce and Labor, that an alien came within the provisions of the immigration act of March 3, 1903, for the exclusion and deportation of alien anarchists, cannot be said, as a matter of law, to be wholly unsupported by the evidence, even though such act be so construed as to include only advocates of the forcible overthrow of the federal government or of all governments, or of the assassination of officials, where there was evidence that such alien advocated, "as an anarchist," a universal strike, and proposed to lecture upon "the legal murder of 1887," and to address mass meetings on that subject, in association with a person who had been convicted of advocating revolution and murder. United States ex rel. Turner v. Williams, 24 Sup. Ct. 719, 723, 194 U. S. 279, 48 L. Ed. 979.

ANARCHY

"Anarchy" is a term which has been used in recent years to describe a lawless and dangerous doctrine, and its advocates have been looked upon as persons dangerous to society, and some of its more outspoken and unbalanced disciples have become assassins. Von Gerichten v. Seitz, 87 N. Y. Supp. 968, 969, 94 App. Div. 130.

ANCESTOR

An "ancestor" is defined as "one who has preceded another in a direct line of descent; a lineal descendant; a former possessor; the person last seised; a deceased person from whom another had inherited land." Bowen v. Hackney, 48 S. E. 633, 635, 136 N. C. 187, 67 L. R. A. 440 (quoting Black's Dict.; 2 Bl. Comm. 201). The word is the correlative of "descendant." Parrish v. Mills (Tex.) 102 S. W. 184, 188.

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The term "ancestor," as used in the statutes of descent, means the person from whom an estate is inherited, and in determining from whom the estate came the title should be traced back to the person last seised. Gray v. Swerer, 94 N. E. 725, 727, 47 Ind. App. 384.

ANCESTRAL ESTATE

Land is to be considered an "ancestral estate" where it has come from or by or on the part of the father or mother of the owner by gift, devise, or descent either mediately or immediately from them or from any person in their respective lines, and will be a new acquisition if derived from any source other than by descent, devise, or gift from any relative in the paternal or maternal line, as by a son from father or mother for a valuable consideration. Martin v. Martin, 135 S. W. 348, 351, 98 Ark. 93.

ANCHOR

See Self Anchor.

ANCIENT

ANCIENT DOCUMENTS

An "ancient document" is one which is not less than 30 years old, the time to be computed from the date of its execution. Wright v. Hull, 94 N. E. 813, 815, 83 Ohio St. 385. A general warranty deed executed in 1878, reciting a consideration and through which plaintiff in ejectment claims title by mesne conveyances, is an "ancient document," and its recitals are admissible as evidence of the facts stated therein. Anderson v. Cole, 136 S. W. 395, 396, 234 Mo. 1.

Records of births and marriages in existence for a century, coming from a proper custody, are "ancient documents," and prove themselves. Layton v. Kraft, 98 N. Y. Supp. 72, 76, 111 App. Div. 842.

ANCILLARY

ANCILLARY LETTERS

Letters testamentary are of two kinds, "domiciliary letters" and "ancillary letters"; the first being issued at the place of the testator's domicile, and the latter at some place, other than domicile, where personalty of the testator is found. Such letters depend upon the situs of such personalty, and do not authorize the administrator or representative to perform any act or to reduce to possession personalty not within territorial authority of the court where issued. Lockwood v. United States Steel Corporation, 138 N. Y. Supp. 725, 727, 153 App. Div. 655.

ANCILLARY RECEIVER

An "ancillary" or "auxiliary" receiver is "a custodian of the property within the state where he is appointed for the purpose of preserving the assets belonging to the party or corporation proceeded against within the state, in order that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims." Frowert v. Blank, 54 Atl. 1000, 1002, 205 Pa. 299.

AND

While the word "and" is generally used in a conjunctive sense, it is not invariably so. It is often used to indicate connection of what follows with what has gone before it, in the way of narration or description. Territory v. Kimmick, 106 Pac. 381, 383, 15 N. M. 178. Thus upon demurrer to a declaration for negligence, a clause connected with the general allegation of negligence by the word "and" may be treated as a specification of the negligent conduct, rather than as an independent averment, thus making the whole one allegation, as if the word "and" should be read "by." Brothers' Adm'r v. Rutland R. Co., 42 Atl. 980, 71 Vt. 48.

Laws 1899, p. 797, c. 870, § 6, subd. 8, provides that the civil commissioner shall "make investigation concerning and report upon all matters touching the enforcement and defect of the provision of the act, * * * concerning the action of any examiner or subordinate of the commission and any person in the public service in respect to the execution of this act. Held that the word "and" preceding any person in the public service should not be interpreted "in collusion with" or "in connection with," but the natural interpretation of the statute authorizes an investigation on all matters touching the enforcement and effect of the act. People ex rel. Bender v. Milliken, 97 N. Y. Supp. 223, 225, 110 App. Div. 579.

Use of the word "and" in a devise of all of testator's property to his wife for life, remainder to be equally divided between four named persons, "and" his niece and her six children, showed an intention on the part of testator to group the niece and her children together, and so they are entitled to but one share. In re Myhill, 134 N. Y. Supp. 467, 468, 149 App. Div. 404.

A policy payable to "Alfred Atkins, trustee, and the children of Hiram Atkins," is payable to Alfred Atkins as trustee for the children of Hiram Atkins; "and" here meaning "for." Atkins v. Atkins, 41 Atl. 503, 504, 70 Vt. 565.

As as well as

"And" is sometimes construed in the sense of "as well as." Williams v. United States, 87 Pac. 647, 648, 17 Okl. 28.

As in addition to

The Utah Enabling Act granted to the state public lands to the extent of two townships to be reserved for the state university, and in addition 110,000 acres to be selected and located as provided, "and including" all the saline lands in said state, for the use of

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the university. Held, the word "and" before "including" was used to express the relation of addition. State v. Montello Salt Co., 98 Pac. 549, 551, 34 Utah, 458.

A lease, providing that the lessees were to take the premises for one year "and" the "privilege of four years," indicates the relation of connection or addition. Willis v. Weeks, 105 N. W. 1012, 1014, 129 Iowa, 525.

Construed as or

Or construed as and, see Or.

It is within common knowledge that the words "and" and "or" are frequently used interchangeably, not only by those unskilled in the use of language, but by those who are acquainted with the shades of difference in the two conjunctions, for oftentimes the idea of the user is as correctly expressed by the use of one as the other. Kennedy v. Haskell, 73 Pac. 913, 914, 67 Kan. 612.

To prevent an absurd or unreasonable result, the word "and," used in a contract, may be read "or," or vice versa. Manson v. Dayton, 153 Fed. 258, 269, 82 C. C. A. 588 (citing Endlich, Interpretation of Statutes, § 303; Thomas v. City of Grand Junction, 56 Pac. 665, 667, 13 Colo. App. 80, 84, 85).

A clause, in a contract for the sale of machinery, that the "agreement shall not be countermanded without the written consent of the said party of the first part, 'and' upon such terms as will indemnify the said party of the first part, against loss of profits, expenses, and other costs incurred," will be construed as though the word "and," between the words "part" and "upon," read "or," since otherwise the words following the word substituted would be meaningless. Gibbes Machinery Co. v. Johnson, 61 S. E. 1027, 1028, 81 S. C. 10.

An instruction that the employer was required to inclose "and" secure the elevators did not impose a higher duty on the employer than is prescribed by a statute providing that elevators shall be substantially inclosed "or" secured to protect the lives and limbs of employés. Fowler Packing Co. v. Enzenperger, 94 Pac. 995, 997, 77 Kan. 406, 15 L. R. A. (N. S.) 784.

Same—In bonds, deeds, or mortgages

A statutory bond to prosecute an appeal with effect, "and" to pay all costs, etc., requires the appeal to be prosecuted with effect, "or" the costs to be paid, etc. American Surety Co. of New York v. Koen, 107 S. W. 938, 939, 49 Tex. Civ. App. 98 (citing Robinson v. Brinson, 20 Tex. 438; Southern Pac. R. Co. v. Stanley, 13 S. W. 480, 76 Tex. 418; Blair v. Sanborn, 18 S. W. 159, 82 Tex. 687).

Same—In civil statutes

"And" will be construed "or" only where it appears from the context of the statute that the legislative intent can only be so given effect. In re Steinruck's Insolvency, 74 Atl. 360, 225 Pa. 461; James v. United States Fidelity & Guarantee Co., 117 S. W. 406, 409, 410, 133 Ky. 299; Same v. American Surety Co. of New York, Id.; Ransom v. Rutherford County, 130 S. W. 1057, 1062, 123 Tenn. 1, Ann. Cas. 1912B, 1356.

In Rev. Laws, c. 135, subd. 4, providing that any person of age who resides in any town and who holds ratable estate in his own right of a certain value shall gain a settlement in such town, "and" is to be construed conjunctively, and not meaning "or." Town of Washington v. Town of Corinth, 55 Vt. 468, 470.

Though Revisal 1905, § 3127, providing that a holographic will must be found among the valuable papers "and" effects of the deceased, changed the prior law by substituting "and" for "or," the word "and" should still be construed as "or," since otherwise a person owning effects of ever so much value, without any valuable papers, could not execute a holographic will. In re Jenkins' Will, 72 S. E. 1072, 1073, 157 N. C. 429, 37 L. R. A. (N. S.) 842 (citing Hughes v. Smith, 64 N. C. 493; Winstead v. Bowman, 68 N. C. 170; Brown v. Eaton, 91 N. C. 26).

The word "and" in "Water Code" (Laws 1909, p. 332) § 47, requiring the state engineer to approve all applications made in proper form which contemplate application of public water to a beneficial use, but providing that when the proposed use conflicts with determined rights, or is "a menace to the safety and welfare of the public," the application shall be referred to the board of control for consideration, etc., is evidently used with the meaning of "or." Cookinham v. Lewis, 114 Pac. 88, 91, 58 Or. 484.

"And," as used in St. 1878, p. 152, c. 209, which provides that when public buildings or public works are erected, on which liens might attach for labor or materials if they belonged to private persons, the officers or agents contracting on the part of the commonwealth must provide security for payment by the contractors "and subcontractors for all labor furnished, all materials used, etc.," was not used conjunctively, so as to require that the debts secured should be due from the contractor and a subcontractor jointly, but distributively, so as to require only that it should be due either from the contractor or some one of the subcontractors. Fosburgh Co. v. Hampden County, 90 N. E. 851, 856, 204 Mass. 494.

The provision in Tariff Act July 24, 1897, for printing paper suitable for books "and" newspapers, is not limited to such paper as is suitable for printing both books and newspapers; and paper used for printing covers of booklets, pamphlets, and the like, but not suitable for printing newspapers, is properly classified for duty under the provision. Hensel, Bruckmann & Lorbacher v. United States, 126 Fed. 576, 577.

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Same—In charter or ordinances

The word "and" in a law authorizing the dam company incorporated by that act to collect a toll for the passage of logs driven over its dams "and" improvements, means "or," so as to authorize the collection of toll not only on logs passing over dams, but also on those passing over a part of the stream improved to facilitate the driving of logs. Wilson Stream Dam Co. v. Boston Excelsior Co., 74 Atl. 115, 116, 105 Me. 249.

Under Laws 1895, c. 438, § 20, providing that a city treasurer should receive out of a sewer fund an amount fixed by the council, not to exceed $1,500 annually for his services relating to the collection of assessments "and" clerk hire. Under this act the city of Rochester passed an ordinance providing that the city treasurer should receive from moneys so collected $1,350 annually for the purpose of paying clerk hire. Held, that the word "and," as used in the act of 1895, could not be construed to mean "or," so that the ordinance was no restriction on the right of the treasurer to the compensation to which he was entitled by the express provisions of the act. People ex rel. Williams v. Monroe County Court, 93 N. Y. Supp. 452, 455, 105 App. Div. 1.

The word "and," as used in New York City Charter, § 951, providing that a grade shall be deemed established, when the street has been used by the public as of right for 20 years and has been improved by public authorities at the expense of the public or abutting owners, should be construed "or," so as to permit establishment of a grade by user for 20 years or by improvements. Triest v. City of New York, 105 N. Y. Supp. 571, 575, 55 Misc. Rep. 459.

The term "commission merchants and produce dealers," in an ordinance requiring commission merchants and produce dealers to obtain a license, may be construed to mean commission merchants or produce dealers, and require a license of both occupations, as there is no such general or prevailing custom of uniting produce dealers and commission merchants in one person, firm, or corporation to lead to the conclusion that the ordinance only applied to cases where the businesses were combined. City of Kansas City v. Grush, 52 S. W. 286, 151 Mo. 128.

Same—In constitution

Under Const. art. 5, § 8, providing that, when any office shall become vacant, and no mode is provided "by the Constitution and law" for filling the vacancy, the Governor shall fill it, the Legislature may specify what shall constitute a vacancy in any of the offices for which no provision is made in the Constitution, and may provide how the same shall be filled, though by virtue of article 1, § 22, the provisions of the Constitution are mandatory; the phrase, "Constitution and law" meaning "Constitution or law." People ex rel. Mattison v. Nye, 98 Pac. 241, 244, 9 Cal. App. 148.

Same—In criminal statutes

When necessary to give effect to any part of a statute or the intention of the Legislature, the word "and" may be substituted for "or," and vice versa. Williams v. State, 137 S. W. 927, 928, 99 Ark. 149, Ann. Cas. 1913A, 1056; State v. Hooker, 98 Pac. 964, 972, 22 Okl. 712; People ex rel. Cohen v. Butler, 109 N. Y. Supp. 900, 903, 125 App. Div. 384.

"And," as used in Rev. St. U. S. § 3318, providing that every rectifier and wholesale liquor dealer shall, at the time of sending out of his stock or possession any spirits, "and" before the same are removed from his premises, enter in a book the day when and the name and place of business of the person or firm to whom such spirits are to be sent, etc., means "or." Williams v. United States, 87 Pac. 647, 648, 17 Okl. 28.

Acts 1907, c. 11, § 1, relating to freight trains, requires 6 employés on trains of more than 50 freight or other cars, and 5 on trains consisting of less than 50 freight or other cars. Section 2 requires 5 employés other than baggage and express messengers on passenger, mail, or express trains, and section 3 declares that any railroad company doing business in the state who shall send out on its road any train not manned "in accordance with sections 1 and 2" shall be guilty of a misdemeanor. Held, that the conjunction "and" in the phrase "sections 1 and 2" should be construed disjunctively in order not to defeat the intention of the Legislature, though the statute is penal. Pittsburgh, C., C. & St. L. Ry. Co. v. State, 87 N. E. 1034, 1038, 172 Ind. 147.

Same—In wills in general

To effectuate the intention of a testator, the word "and" may be read as "or," or vice versa. Shropshire v. Gault (Ky.) 83 S. W. 590, 591 (citing Hunt v. Johnson, 49 Ky. [10 B. Mon.] 342; Robb v. Belt, 51 Ky. [12 B. Mon.] 647; Aulick v. Wallace, 75 Ky. [12 Bush] 531); Goldsborough v. Washington, 70 S. E. 525, 527, 112 Va. 104. "And," in the testamentary clause, "should either of my said sons W. A. and D. die without * * * issue and my said son G. die without leaving him surviving his said son, whom I call William," then the share of which such deceased received the income shall be paid to the survivors or survivor, provided that the issue of either of sons, W. A. and D., if deceased, shall receive the share to which the parent would be entitled, and the grandchild shall receive the share to which son G., his father, would be entitled if living, will not be construed conjunctively so as to show an invalid intention to suspend the absolute ownership of such property for more than two lives in

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being. In re Hinchman, 125 N. Y. Supp. 699, 701, 141 App. Div. 95.

The word "and" in an instrument will not be construed as meaning "or," except for strong reasons and to carry out the manifest intention of the parties. A contract to indemnify A. from certain obligations of a company "'and' himself personally" prima facie covers only the joint debts of such company and A. and does not, unaided, support an action for the separate indebtedness of either. Capital City Bank v. Hilson, 51 South. 853, 855, 59 Fla. 215.

Same—In wills naming devisees

The words "and heirs" may be construed as "or heirs," and the words "or heirs" may be construed as "and heirs," in order to effect the apparent intention of the testator. In re Allison, 102 N. Y. Supp. 887, 891, 53 Misc. Rep. 222.

Where, in a will containing three separate clauses devising property to each of testator's three children, the first two clauses providing that, if the devisees should die without children or grandchildren living at their death, the property was devised to the devisee's brother and sister or their children or grandchildren, and the third clause making provision for testator's son, and declaring that, if he should die without children or grandchildren, his share should pass to his brother and sister and their children or grandchildren, if there should be any living, the word "and" in the devise to testator's son should be construed as having been used instead of the word "or," and, where the son died without children or grandchildren, his share passed to his brother and sister in fee, and not to them and their children and grandchildren as tenants in common. Davie v. Davie (Ky.) 81 S. W. 246, 247.

A will of one who died survived by a widow and one daughter to whom 11 children were born, gave one-third of a residue of the estate in trust for the widow's life, one-third in trust for the daughter's life, and one-third in trust for the support of the grandchildren, and provided that at the widow's death the trust income should be divided between the daughter and the grandchildren, and that at the daughter's death the estate should "then" go to the grandchildren "and to the issue" of any grandchild who might have died leaving issue, per stirpes, share and share alike. The widow predeceased a grandchild, who died without issue, but leaving a will, and the daughter still lives. Held, that the deceased grandchild took a vested remainder in one-eleventh of the estate, and not jointly with the other grandchildren, nor as a member of a class; the gift to the "issue" of grandchildren being substitutional, and not original, "and" in the quoted phrase being subject to contruction as meaning "or," if necessary. Staples v. Mead, 137 N. Y. Supp. 847, 851, 152 App. Div. 745.

Not construed as or

A credit insurance policy limited defendant's liability as to old customers to those who possessed a rating expressed in "Schedule A," or possessed a capital "and" credit rating other than those contained in a specified list, or were rated entirely blank as to both capital and credit, or whose names were not printed in a designated mercantile agency book. Held, that the word "or" could not be substituted for "and" in the clause referring to customers possessing a capital and credit rating other than those contained in the list, and hence an old customer, rated by the mercantile agency as "——— 4," which referred to credit only, and not to capital, was not covered by the policy. Paskusz v. Philadelphia Casualty Co., 131 N. Y. Supp. 421, 423, 146 App. Div. 763.

Same—In contracts or deeds

"And," in a contract which required plaintiff to furnish terra cotta for a building "shown on drawings and described in specifications," is not necessarily to be construed in its disjunctive sense as "or," so as to require plaintiff to furnish terra cotta shown on either the drawings or described in the specifications. Atlantic Terra Cotta Co. v. Masons' Supply Co., 180 Fed. 332, 338, 103 C. C. A. 462.

Same—In civil statutes

"And," as used in Act March 26, 1891, creating a board of state assessors and fixing the term of office of the assessors first chosen by the Legislature to be one for two years, one for four years, and one for six years, "and" until their successors are elected and qualified, who are each elected by the Legislature for six years, cannot be interpreted to mean "or," as it is contemplated that the terms of office shall expire at definite times. Marshall v. State, 72 Atl. 873, 874, 105 Me. 103.

Under Levee Act, § 58, providing that the owner of land outside a drainage district who shall make a connection with a drainage ditch or whose land will be benefited by such ditch shall be deemed to have made voluntary application to be included in the district, it is not necessary that there should be both connection and benefit, but either in itself is sufficient, since this is the plain and unambiguous meaning of the language of the act, and there is no room for construction where there is no ambiguity, and, while "or" may sometimes be construed in statutes, contracts, or wills as "and" to effectuate the intention of the parties, this will be done only where the intention is clearly manifest, and a construction of the word according to its real meaning would involve an absurdity, or produce an unreasonable result. Gar Creek Drainage Dist. v. Wagner, 100 N. E. 190, 193, 256 Ill. 338.

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Same—In ordinance

A city ordinance providing that the city treasurer shall receive a monthly salary and a specified "per cent. of all moneys received and paid out by him as treasurer," which shall be payable monthly, is unambiguous, and comprehends both a receipt and disbursement of funds before any commission is payable; and under Code Civ. Proc. § 1858, requiring the court, in the construction of a statute, to declare its terms, and not insert what has been omitted, the court may not construe the ordinance so as to allow the percentage on all moneys received, and on all moneys paid out, by construing the word "and" in the quoted phrase to mean "or." City of Corona v. Merriam (Cal.) 128 Pac. 769, 770.

Same—In penal statutes

Penal Statutes being subject to construction in favor of the accused, the word "and" will not in general be construed "or," or vice versa, to the disadvantage of accused. Williams v. United States, 87 Pac. 647, 648, 17 Okl. 28 (citing United States v. Ten Cases of Shawls, 28 Fed. Cas. 35; Rice v. United States, 53 Fed. 910, 4 C. C. A. 104; United States v. Fisk, 70 U. S. [3 Wall.] 445, 18 L. Ed. 243).

A pleader should use the word "and" in an indictment when the word "or" is used in the statute, whenever the word "or" would leave the averment uncertain as to which of two or more things is meant, but not so where the complaint charges inaction as the violation of a statute commanding action, and the use of the conjunctive "and," instead of the disjunctive "or," would not make the allegation more certain. State v. Smith, 72 Atl. 710, 715, 29 R. I. 513.

In Civ. Code 1895, § 3090, providing that a tenant for life who commits acts tending to the permanent injury of the remainder or reversion shall "for the want of such care and the willful commission of such acts" forfeit his interest to the remainderman, the word "and" should be construed "or," and the section should read that "a forfeiture results from the want of such care or the willful commission of such acts," or should read "for the want of such care, as well as for the commission of such acts." While, in interpreting statutes, it is sometimes permissible to read "and" "or," this change in wording should not be permitted in penal statutes, when it is apparent that it was intended by the Legislature that there should be a concurrence of two things to work the forfeiture or impose the penalty, and the result of a change in the verbiage would have the effect to render the forfeiture or penalty operative by the existence of only one of the two things. Roby v. Newton, 49 S. E. 694, 696, 121 Ga. 679, 68 L. R. A. 601 (citing Hateley v. State, 44 S. E. 852, 118 Ga. 81).

Same—In wills

The word "and" will not be substituted for "or" in the clause in a will providing for the disposition of the testator's estate in case any of his sons should die "without leaving a wife or child," unless the whole context of the will plainly requires such substitution in order to give effect to the intention of the testator. Travers v. Reinhardt, 27 Sup. Ct. 563, 565, 205 U. S. 423, 51 L. Ed. 865.

Under a will making provision for testator's daughter, and providing that in case she should die unmarried and without leaving lawful issue surviving she was authorized to appoint persons who should take her share of the estate, the word "and" could not be read as "or," so that on her death without issue her surviving husband was not entitled to take such fund as the sole beneficiary under her will. Beers v. Grant, 97 N. Y. Supp. 117, 119, 110 App. Div. 152.

AND AFTER THAT

The partial exemption from taxation under a charter provision that the stock of a railway company and its branches shall be wholly exempt for seven years, "and after that" shall be subject to a tax not exceeding a given per cent. on the net proceeds of their investments, cannot be regarded as limited to the 36 years during which the company was to have exclusive rights within a defined territory, on the theory that the words "and after that" do not mean "thereafter," and do not refer to the limitation immediately preceding, but to the 36 years' limitation of the exclusive right regulated by the preceding part of the same section of the charter. Wright v. Georgia R. & Banking Co., 30 Sup. Ct. 242, 243, 216 U. S. 420, 54 L. Ed. 544.

ANEW

See Hearing Anew.

ANGER

"Anger" is defined to mean a strong passion or emotion of displeasure or antagonism excited by real or supposed injury or insult to one's self or others by the intent to do such injury; resentment, wrath, rage, fury, passion, ire, gall, choler, indignation, displeasure, vexation, grudge, spleen. "Anger" and "passion" are interchangeable and mean practically the same thing. Morris v. Territory, 99 Pac. 760, 768, 1 Okl. Cr. 617 (quoting Webster's Dict.). "Anger" is not ordinarily classed as mental suffering. The Standard Dictionary defines it as "violent and vindictive passion or emotion caused by injury or insult, real or imagined. * * * 'Anger' is commonly a sin." The antonyms of "anger," as given by the Dictionary cited, "amiability, forbearance, gentleness, patience, self-control, self-restraint," are emotions of the mind that

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we are taught to cultivate. Ft. Worth & R. G. Ry. Co. v. Jones, 85 S. W. 37, 39, 38 Tex. Civ. App. 129.

ANGLE BARS

"Angle bars" on a railroad track are pieces of steel bolted in the hollow of the rails, and holding ends of two rails together. Briley v. Atlantic Coast Line R. Co., 76 S. E. 231, 232, 160 N. C. 88.

ANGLO-INDIAN.

An "Anglo-Indian" is the name applied to a British subject domiciled in India. Mather v. Cunningham, 74 Atl. 809, 815, 105 Me. 326, 29 L. R. A. (N. S.) 761, 18 Ann. Cas. 692.

ANGOSTURA

"Angostura" is a common name in the Spanish language; one meaning is "narrow" or "contracted." Siegert v. Gandolfi, 139 Fed. 917, 919.

ANGUISH

See, also, Mental Agony or Anguish.

"Anguish" is intense pain of body or mind, and not mere disappointment and regret. It is derived from the Latin word "anguis," a snake, referring to the writhing or twisting of the animal body when in great pain. The term is used as indicating a high degree of mental suffering, without which the plaintiff could not recover substantial damages. Mere disappointment would not amount to mental "anguish" or entitle plaintiff to more than nominal damages. Hancock v. Western Union Telegraph Co., 49 S. E. 952, 953, 137 N. C. 497, 69 L. R. A. 403 (citing Stormouth's Dict.; Hunter's Case, 47 S. E. 745, 135 N. C. 459).

In an action for personal injuries, an instruction that plaintiff, in case of recovery by her, would be entitled to recover for pain and "anguish" shown to be the direct result of the injury, was not erroneous on the ground that the word "anguish" authorized an allowance of damages for humiliation or mental annoyance. City of Evanston v. Richards, 79 N. E. 673, 674, 224 Ill. 444 (citing Village of Sheridan v. Hibbard, 9 N. E. 901, 119 Ill. 307; Cicero & Proviso St. Ry. Co. v. Brown, 61 N. E. 1093, 193 Ill. 274).

A declaration in a servant's action for injuries, averring that he suffered pain and "anguish," is sufficiently explicit to warrant recovery for both mental and physical suffering, or for such mental suffering as was necessarily connected with, and resulted from, physical injury; the word "anguish" meaning pain of mind. Tomasi v. Donk Bros. Coal & Coke Co., 100 N. E. 353, 355, 257 Ill. 70.

ANIMAL

See Cruelty to Animals; Domestic Animals.
Increase of animals, see Increase.
Keeper of animal, see Keeper.
Other animal, see Other.

Dogs

A dog is an "animal," under Revisal 1905, § 3299, making it a misdemeanor to willfully injure or cruelly kill any useful animal, and defining the word "animal" as including every living creature. State v. Smith, 72 S. E. 321, 324, 156 N. C. 628, 36 L. R. A. (N. S.) 910.

Fish

An indictment for polluting a stream charging merely that filth and offal "destroyed 'animal life'" therein, does not charge an offense under Burns' Ann. St. 1908, § 2546, making it unlawful to pollute water so as to injure or destroy fish. United States Board & Paper Co. v. State, 91 N. E. 953, 955, 174 Ind. 460.

Fowls

In 1861 Congress exempted from duty "animals living of all kinds; birds singing and other; and land and water fowls." In 1866 it imposed a duty on "horses, mules, cattle, sheep, hogs and other live animals." Afterward the Supreme Court, in reversing a judgment which charged duty on imported live birds, held that in the act of 1861 Congress adopted the popular meaning of the word "animals" and applied it to quadrupeds only, placing birds and fowls in a different classification, and that accordingly that the act of 1866, when it spoke of "animals," also meant quadrupeds and intended to impose a duty upon domestic quadrupeds, leaving the act of 1861 to apply as before to all other quadrupeds and also to birds and fowls. Debitulia v. Lehigh & Wilkes-Barre Coal Co., 174 Fed. 886, 890.

As goods, wares and merchandise

See Goods.

Green turtles

Under Penal Law, § 180, declaring that the word "animal," as used in the article, includes every living creature other than the human race, green turtles imported and used for food are animals within section 189, providing that a person who carries or causes to be carried in or on any vessel or vehicle any animal in a cruel and inhuman manner, or so as to produce torture, is guilty of a misdemeanor. People ex rel. Freel v. Downs, 136 N. Y. Supp. 440, 443.

As personal property

See Personal Property.

As property

See Property.

As stock

Domestic animal as stock, see Stock.

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ANIMALS FERÆ NATURÆ

As private property, see Private Property.

ANIMUS ET FACTUM

See Factum.

ANIMUS FURANDI

As Element of Larceny, see Larceny.

ANNEALING

"Annealing" is the process used to render glass, iron, etc., less brittle by allowing them to cool very gradually from a high heat. Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 608, 112 C. C. A. 194.

ANNOUNCEMENT OF DECISION

As rendition of judgment, see Rendition of Judgment.

ANNOY—ANNOYANCE

"Annoy" means to disturb or irritate especially by repeated or continued acts. Hence the encroachments and unfair competition of a combination may annoy the community and cause a nuisance. Territory v. Long Bell Lumber Co., 99 Pac. 911, 920, 22 Okl. 890 (citing Webster's Dict.).

The word "annoyances," though used in a kindred sense with the word "inconveniences," in an instruction in condemnation proceedings, authorizing the jury in determining the amount of damages to consider the annoyances and inconveniences resulting from the appropriation, was an injudicious expression, as it ordinarily relates to injuries for which no damages can be recovered, because the amount is so uncertain, speculative, and indefinite. Toledo & C. I. Ry. Co. v. Wagner, 85 N. E. 1025, 1026, 171 Ind. 185.

ANNUAL

The word "annual," as used in an antenuptial contract providing for the annual payment of a certain sum to the wife after the husband's death in lieu of dower, not only denotes the amount to be paid, but the time of payment. It means not only that the wife is to receive the specified sum for each year, but that the sum is to be paid to her each year. An agreement to pay a fixed sum annually for each year, in the absence of language modifying the ordinary meaning of these terms, cannot fairly be construed as a promise to pay such sum annually in advance, or at the commencement of each year. Mower v. Sanford, 57 Atl. 119, 120, 76 Conn. 504, 63 L. R. A. 625, 100 Am. St. Rep. 1008.

ANNUAL COMPENSATION

As salary, see Salary.

ANNUAL DAMAGES

Gross damages equivalent, see Gross Damages.

ANNUAL INSTALLMENTS

See Payable in Equal Annual Installments.

ANNUAL MEETING

The expression "annual meeting," in Rev. St. § 3246, providing for the election in corporations not formed for profit of trustees who shall hold their office until the next "annual meeting," and "annual election," used in Rev. St. § 3246, providing for the annual election of such trustees, refer to the same thing, and the annual meeting is the time when the annual election is to occur. State ex rel. Wachenheimer v. Toledo & Lucas County Burial Ass'n, 28 Ohio Cir. Ct. R. 397, 412.

Acts 1902, p. 94, No. 90, § 2, provides, that the warning of "every town meeting to be held on the first Tuesday of March, 1903, and annually thereafter," shall contain an article providing for the vote on the question of whether license shall be granted for the sale of intoxicating liquors. P. S. 6, provides that the words "annual meeting" shall mean the annual town meeting in March, or an adjournment thereof. Section 3418 provides that town meetings shall be held annually on the first Tuesday of March, and may be adjourned to another time to complete the business, but that a failure to hold such meeting shall not prevent the election of officers at a subsequent meeting. Section 3419 requires that a town meeting be warned by the selectmen as to the business to be done. Section 5104 provides that the warning of each annual town meeting shall contain an article providing for a vote on the question whether license shall be granted for the sale of intoxicating liquors. The selectmen of a town failed to warn the annual town meeting at the proper time, and a special town meeting was warned and held on the 17th day of March. The warning for the special meeting contained an article calling for a vote on the question of license. Held, that a vote on that question at that meeting was not authorized, as the question of license can only be submitted at the annual meeting. State v. Sargent, 69 Atl. 825, 81 Vt. 266.

ANNUAL SALARY

A contract for an "annual salary" of $1,800 per year is a contract for an annual salary of such amount, payable in monthly installments, where the parties by their conduct have so construed the same. F. B. Tait Mfg. Co. v. Tinsman, 138 Ill. App. 76, 77.

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ANNUAL SESSION

Under County Law (Laws 1892, c. 686) § 23, providing that each supervisor shall receive $4 per day for attending sessions of the board, and mileage for once going and returning between his residence and the place of meeting for each regular and special session, and section 10, providing that the board shall meet annually, may hold special meetings, and may adjourn from time to time, the terms "annual meeting" and "regular session" are synonymous, and a "regular" or "special" session is measured by its actual duration; each day not being a session, within section 23, so as to entitle the supervisors to mileage for each day's actual attendance at sessions of their boards. Wallace v. Jones, 107 N. Y. Supp. 288, 290, 122 App. Div. 497.

ANNUALLY

As per annum see Per Annum.

"The words 'per year' are equivalent to the word 'annually.'" In the absence of terms indicating a contrary intention, a covenant in a gas and oil lease to drill a well on the leased premises within two years, or thereafter to pay $80 "annually" until a well is drilled does not require the annual payments to be made in advance, and the covenant is performed by a single payment of the entire sum at any time before the end of the year for which it is made. Rhodes v. Mound City Gas, Coal & Oil Co., 104 Pac. 851, 852, 80 Kan. 762 (citing Curtiss v. Howell, 39 N. Y. 211, 213).

ANNUITY

An "annuity" is a yearly sum stipulated to be paid to another in fee or for life or years. Wiegand v. Woerner, 134 S. W. 596, 603, 155 Mo. App. 227.

"An 'annuity,' in its strict sense, is a yearly payment of a certain sum of money granted to another in fee or for life or for years and chargeable only on the person of a grantor." Dulaney's Adm'r v. Dulaney, 54 S. E. 40, 41, 105 Va. 429.

An "annuity" is a sum payable annually, unless the language of the instrument creating it may properly be construed as providing for a different time of payment. Mower v. Sanford, 57 Atl. 119, 120, 76 Conn. 504, 63 L. R. A. 625, 100 Am. St. Rep. 1006.

An "annuity" is a fixed amount directed to be paid absolutely and without contingency. It is a stated amount payable annually. It is a yearly payment of a certain sum of money granted to another in fee for life or for years. It is a grant of a certain sum of money payable at the expiration of fixed consecutive periods, for a definite term or for life. Peck v. Kinney, 143 Fed. 76, 80, 74 C. C. A. 270 (citing Pearson v. Chace, 10 R. I. 455).

Where a testatrix devised property to a trustee to rent and pay the income to her four sons, the sons had neither a rent charge nor an annuity, for an "annuity" is a certain yearly sum granted to a person in fee or for life or for years, chargeable only on the person of the grantor, or in a broader sense a fixed sum payable periodically chargeable on real property as well as on the person. Routt v. Newman, 97 N. E. 208, 209, 253 Ill. 185.

Where an executor was to invest a sufficient sum to produce $1,200 annually, which was to be paid to the annuitant during her natural life, "in payments quarterly or three hundred dollars each," such bequest is an "annuity." Steelman v. Wheaton, 66 Atl. 195, 196, 72 N. J. Eq. 626.

The reservation, in a deed of a life estate, in the land conveyed by the grantor and his wife, from which rents and profits to the amount from $400 to $500 were received annually, was not an "annuity," which is a yearly sum of money granted by one person to another in fee for life or years, charging the person of the grantor only. White v. City of Marion, 117 N. W. 254, 256, 139 Iowa, 479.

Income or profits distinguished.

"An 'annuity' is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount varying according to the income or profits, though a certain sum may be payable out of which it is to be payable." A bequest to an executor of a sum sufficient to produce $1,200 annually to be paid to the annuitant "in payments quarterly of $300 each" is an "annuity." Steelman v. Wheaton, 66 Atl. 195, 196, 72 N. J. Eq. 626 (quoting and adopting the definition in Booth v. Ammerman [N. Y.] 4 Bradf. Sur. 129).

"An 'annuity' is a stated sum payable annually unless otherwise directed. It is not 'income' or 'profits' or indeterminate in amount, varying according to the income or profits, though a certain sum may be provided out of which it is to be payable, and hence, when a testator gave a beneficiary the interest upon a certain sum payable annually, it is not an annuity but merely an ordinary legacy, for it is not a stated sum, but may be more or less according to the earnings of the capital and is merely interest or income. There is a distinction between income and annuity. The former embraces only the net profits after deducting all necessary expenses and charges. The latter is a fixed amount directed to be paid above and without contingency. The income or interest of a certain fund (bequest) is not an annuity, but simply profits to be earned, and, although directed to be paid annually that relates only to the mode of payment and does not change the character of the bequest." Poe v. Raleigh & A. Air Line Co., 54 S. E. 406, 407, 141 N. C. 525 (quoting 1 Words and

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Phrases, p. 405; citing Bartlett v. Slater, 22 Atl. 678, 53 Conn. 102, 55 Am. Rep. 73, and Booth v. Ammerman [N. Y.] 4 Bradf. Sur. 129).

A gift of an income from a certain fund is not an "annuity," and interest does not begin thereon until one year from the death of the deceased. In re Brown's Estate, 77 Pac. 160, 162, 143 Cal. 450.

Rent charge distinguished

A "rent charge" is a charge against land in the hands of the purchaser and arises out of the land itself, while an "annuity" is a yearly payment of a certain sum of money granted to one for life, years, or in fee, chargeable upon the person of the grantor. A deed of land in consideration of the payment to the grantor of an annual sum until the grantor's death, and retaining a lien to secure such payments, imposed merely a personal obligation on the grantee to make the payments and created an "annuity," and not a "rent charge," the provision securing the payments by a lien not affecting the personal character of the obligation, and that the grantor rented the land and applied the rent on the annual payments with the grantee's acquiescence did not affect the character of the instrument. Lynch v. Houston, 119 S. W. 994, 995, 138 Mo. App. 167.

ANNUL

Under Rev. St. 1895, art. 1991, providing that, when a will has been probated, its provisions and directions, unless annulled or suspended by an order of court, shall be executed, the refusal of the county court to appoint the person named as executor did not annul the will; an annulment being a special proceeding. Shook v. Journeay (Tex.) 149 S. W. 406, 412.

Repeal synonymous

See Repeal.

ANONYMOUS

The word "anonymous" is defined in the Century Dictionary as "of unknown name; one whose name is withheld, as an anonymous author, or as an anonymous pamphlet; or without any name; wanting a name; without the real name of the author; nameless." A newspaper article signed "Smith," written by a person with such a surname, is not "anonymous," within a statute providing that the requirement of notice of intention to bring an action for libel published in a newspaper shall not apply to anonymous publications. Williams v. Smith, 46 S. E. 502, 503, 134 N. C. 249.

ANOTHER

See Debt of Another; House of Another; Right of Another.

Action arising in another state, see Arise —Arising.

The word "another," as used in Lien Law (Consol. Laws, c. 33) § 17, providing that, if the lienor is made a party defendant in an action to enforce another lien, the lien of such defendant is thereby continued, is equivalent to "other." John A. Philbrick & Bro. v. Ignatz Florio Co-op. Ass'n, 122 N. Y. Supp. 341, 344, 137 App. Div. 613.

Under Pen. Code, § 179, defining homicide as the killing of one human being by the act, procurement, or omission of "another," and section 180, providing that homicide is either murder or manslaughter, and section 193, subd. 3, making a homicide manslaughter in the second degree when due to the act, procurement, or culpable negligence of any "person" which does not constitute murder or manslaughter in the first degree, a corporation may not be indicted for manslaughter, since the word "another" means another human being, and since the word "person" does not include a corporation. People v. Rochester Ry. & Light Co., 88 N. E. 22, 24, 195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837.

Rev. St. 1895, art. 3017, which gives a right of action for death caused by the wrongful act, negligence, unskillfulness, or default of "another," makes a private corporation liable to the same extent as a natural person would be under the same facts; and whatever acts of its general manager, done for the corporation, would render him liable, if done for himself, will bind the corporation as it would bind him, but no further. Commerce Cotton Oil Co. v. Camp (Tex.) 145 S. W. 902, 903.

A house belonging to a married woman is the property of "another" than her husband under Gen. St. 1901, § 2046, providing that any person burning the property of "another" shall on conviction be adjudged guilty of arson, since the common-law idea that husband and wife are one does not prevail in this state. State v. Shaw, 100 Pac. 78, 79, 79 Kan. 396, 21 L. R. A. (N. S.) 27, 131 Am. St. Rep. 298.

Arson is an offense against the security of the habitation, and is defined as the malicious burning of another's house, and by "another's house" in the definition is meant another's to occupy. Peinhardt v. State, 49 South. 831, 832, 161 Ala. 70.

The word "another," as used in Rev. St. 1895, art. 3017, which gives a right of action for death caused by the wrongful act, etc., of another, means another person, and includes private corporations. Williams v. Coca-Cola Co. (Tex.) 150 S. W. 759, 761.

ANOTHER CARGO

Plaintiff, having sold to defendant a cargo of ties, by certain telegrams offered to sell defendant "another cargo" on certain terms, which offer defendant accepted. Held, that the contract was not objectionable for

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failure to fix the amount of ties to be furnished; the words "another cargo" being construed to mean another cargo of the same quantity as the former one. Maydwell v. Rogers Lumber Co., 159 Fed. 930, 931, 87 C. C. C. A. 110.

ANOTHER COUNTRY

The Phillippine Islands are not "another country" within the meaning of the provision of the commercial convention with Cuba (Act Dec. 17, 1903, art. 8, 33 Stat. 2136) that the rates of duty granted to Cuba by that treaty, being a reduction of 20 per cent. from the rates prescribed by Tariff Act July 24, 1897, c. 11, 30 Stat. 151, or any tariff laws subsequently enacted, shall continue preferential in respect to all like imports from other countries. Faber v. United States, 31 Sup. Ct. 659, 660, 221 U. S. 649, 55 L. Ed. 897.

ANSWER

See Full Answer; Held to Appear or Answer; Original Answer; Promise to Answer for Debt, Default, etc.; Quick Answer; Sham Answer; Supplemental Answer; Time for Answering.

Frivolous Answer, see Frivolous Pleading.

An "answer" must confute plaintiff's claim in fact or in law—in other words, being to defeat suit, it must contain matter of defense or avoidance—and hence a pleading admitting the debt sued on, alleging inability to pay and praying judgment according to law, is not, strictly, an answer; being a plea of confession. Arizona Mining & Trading Co. v. Benton, 100 Pac. 952, 954, 12 Ariz. 373.

Counterclaim or set-off

"The distinction between an 'answer' and a 'counterclaim' or set-off is an obvious one. The purpose of an answer is to defeat the action and bar recovery. A counterclaim or set-off, on the contrary, is a pleading by which defendant states a cause of action in his own favor and against plaintiff. It does not purport to answer the complaint, or to set forth any facts which bar a recovery on it. It has none of the properties of an answer. It neither admits nor denies the allegations of the complaint. It does not confess and avoid them. Where a defendant succeeds on an answer going to the whole complaint, the only judgment the court can pronounce is that plaintiff can take nothing by his complaint, that defendant go hence thereof without day, and by virtue of the statute that defendant recover his costs. If a defendant wishes to obtain affirmative relief against plaintiff, he must state his cause of action by way of counterclaim or set-off. It is settled beyond dispute that the same pleading cannot be treated both as an answer and as a counterclaim." It is provided in Burns' Ann. St. 1901, § 350, Rev. St. 1881, § 347, that set-off and counterclaim may be pleaded as answers, but to be sufficient they must allege facts sufficient to constitute a cause of action against the plaintiff." Stoner v. Swift, 74 N. E. 248, 164 Ind. 652 (quoting and adopting definition in Bird v. St. John's Episcopal Church, 56 N. E. 129, 133, 154 Ind. 138).

Under Gen. St. 1894, § 5236, providing that the "answer" may contain new matter constituting a counterclaim, and section 5240, declaring that sham, irrelevant, and frivolous answers may be stricken out, an answer consisting of a counterclaim may be stricken out as sham and frivolous, since a counterclaim, although consisting of new matter, may constitute an "answer." Monitor Drill Co. v. Moody, 100 N. W. 1104, 93 Minn. 232.

The word "answer," in Burns' Ann. St. 1908, § 352, providing that the answer shall contain a denial of each allegation of the complaint controverted by defendant, and a statement of new matter constituting a defense, counterclaim, or set-off, is a statement of a defense to the cause, and a pleading cannot perform the office of both an answer and a counterclaim or set-off. Duffy v. England, 96 N. E. 704, 707, 176 Ind. 575.

A "set-off," which was unknown to the common law, but is permitted by Burns' Ann. St. 1908, § 353, requiring a set-off to consist of matter arising out of debt, duty, or contract held by defendant when the suit was commenced, etc., is a counterdemand growing out of an independent transaction for which defendant may sue plaintiff, and pleaded by defendant to counterbalance plaintiff's recovery in whole or in part and to recover judgment in his own favor, but a set-off is not an "answer" in its ordinary meaning as a statement of a defense to plaintiff's cause of action, for it impliedly admits the cause of action. Duffy v. England, 96 N. E. 704, 707, 176 Ind. 575.

A "counterclaim," which was unknown at common law, and is defined by Burns' Ann. St. 1908, § 355, as any matter arising out of or connected with the cause of action which might be the subject of a cause of action for defendant, embraces both the chancery cross-bill and the common-law recoupment, and must arise out of or be connected with plaintiff's cause of action, but a counterclaim is not an "answer" in its ordinary meaning as a statement of a defense to plaintiff's cause of action. Duffy v. England, 96 N. E. 704, 707, 176 Ind. 575.

Cross-bill

Under Rev. Codes, §§ 6530, 6540, defining an "answer" as a general or specific denial of the complaint controverted by defendant, etc., and a statement of any new matter constituting a defense or counterclaim, and defining a counterclaim, without making any mention of a claim by one defendant against

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a codefendant, there is no such pleading as a cross-bill. Alywin v. Morley, 108 P. 778, 783, 41 Mont. 191.

Demurrer, motion, or plea

A motion directed to a defective statement in a pleading does not present an issue of fact or of law, and cannot be classed as an "answer." Brownell v. Salem Flouring Mills Co., 87 Pac. 770, 771, 48 Or. 525.

A motion to strike out a part of the complaint as frivolous, irrelevant, and redundant does not constitute an "answer," within B. & C. Comp. § 548, providing that any party to a judgment other than by confession, or for want of an answer, may appeal therefrom, the term "answer," contemplating a pleading raising a question of law or fact, and hence a defendant could not appeal from a judgment rendered upon denial of the motion. Multnomah County v. Faling, 104 Pac. 964, 55 Or. 45.

Leave to one in default to "answer" does not imply leave to file a demurrer or plea. Turpin v. Derickson, 66 Atl. 276, 278, 105 Md. 620.

ANSWER OF ANY GARNISHEE

The phrase, "the answer of any garnishee," in Rev. St. 1895, art. 245, providing that, where the garnishing plaintiff is dissatisfied with "the answer of any garnishee," he may controvert the same, applies to all answers, and in whatever way an answer of a garnishee is obtained the garnishing plaintiff may controvert it. American Surety Co. v. Bernstein, 105 S. W. 990, 992, 101 Tex. 189; Same v. Hockwald, 105 S. W. 992, 101 Tex. 197.

ANSWER OF JUROR

The "answer" of a juror, under Code 1896, § 5308, relative to the polling of the jury, and which speaks of the "answer" of any juror, need not be by word of mouth, but may be made by movement of the head. Brown v. State, 37 South. 408, 409, 141 Ala. 80.

ANSWERING

See Further Answering.

ANTECEDENT

ANTECEDENT DEBT

As value, see Value.

ANTERIOR

Where an information and complaint for the illegal sale of liquor alleged that the sale occurred "anterior" to the making and filing of the affidavit, and between certain hours, on a specified day, it sufficiently alleged that the offense was committed prior to the making of the pleading. Miller v. State, 115 S. W. 578, 579, 55 Tex. Cr. R. 174.

ANTHRACITE COAL

See Pure Anthracite Coal.

ANTICIPATION

"Anticipation" is defined as used in the present for what is to accrue; dealing with income before it is due. Gray v. Board of School Inspectors of Peoria, 83 N. E. 95, 99, 231 Ill. 63 (quoting Anderson's Law Dict.).

A patent is not "anticipated" by prior patents for devices which might by slight modifications have been made to perform the function of that of the later patent, where it does not appear that the patentees had in mind their use or adaption to accomplish such result. Gunn v. Bridgeport Brass Co., 148 Fed. 239, 242.

A device which does not operate on the same principle as that of a patent cannot be an "anticipation." It is not sufficient to constitute anticipation that the devices relied upon might, by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent. Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 284, 97 C. C. A. 446.

ANTIQUITIES

See Collection of Antiquities.

ANY

See By Any Device Whatever; Either, Any or All; If Any.

The word "any," in Rev. Codes, § 2315, as amended by Sess. Laws 1909, p. 174, giving to every city the power to issue municipal coupon bonds for "any" or all of the purposes named therein, and section 2316, providing the procedure whenever the common council of a city or the trustees of a town shall deem it advisable to issue coupon bonds for "any" of the purposes aforesaid, should be considered in connection with the entire body of existing statutory law relating to municipal improvements, keeping in mind the purpose of the Legislature and the object to be attained, and should not receive a technical or limited construction, but should be construed in harmony with the evident intention of the lawmaking body. Platt v. City of Payette, 114 Pac. 25, 27, 19 Idaho, 470.

Failure of a coal mine operator to provide a person to open and close a door in a coal mine gives the driver of a car, who was injured by his head striking the top of the doorway while trying to keep the self-closing door open while going through on his car, no right of action, under Act March 2, 1891, § 18, providing that the doors used in assisting or directing the ventilation of the mine when coal is being hauled through shall be opened and closed by persons designated to do the same, so that the driver shall not

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cause the doors to stand open, the provision of the statute being designated solely to prevent interference with the circulation of the air, and not to protect drivers from injury in opening the doors; and this, though section 13 of the statute provides that for "any" injury to a person occasioned by violation of the act a right of action shall accrue, the word "any" referring to such injury as the statute is designed to prevent. Indiana & C. Coal Co. v. Neal, 77 N. E. 850–852, 166 Ind. 458, 9 Ann. Cas. 424.

As all or every

The word "any," as used in an allegation that defendant, an abstractor of titles, made a false certificate that certain land was "free from any incumbrance," is to be construed as meaning that there were no incumbrances, or that there was not a single incumbrance. A contention that the words of the certificate were insufficient to convey the idea that the land was free from all incumbrances cannot be sustained. This construction of the language of the certificate is not affected by the construction of the word "any," in Webster's Dict.: "One out of many; indefinite, some; an indefinite number or quantity." Hershiser v. Ward, 87 Pac. 171, 174, 29 Nev. 228.

The word "any," as used in a will providing, after directing the payment of debts, that testator's wife should have the family residence for life, remainder to his three daughters, and then directing that his executor should have power to convert into money "any" property, real or personal, of which he might die possessed, and divide and distribute as follows: To his granddaughter one-fifth of a $2,000 life policy, the amount to be paid out of the estate if the policy was not paid in full, and to his wife the household and kitchen furniture, and also providing, "It is my special desire that my wife and three daughters shall share equally in the distribution of my estate after the 'bequests' already made are complied with," would be construed to mean "all," and was meant to include, besides the personal property, all his real estate, except his residence. Thomas' Ex'x v. Thomas' Guardian (Ky.) 110 S. W. 853, 855.

Section 11 of the Paris City Charter is as follows: "Provided, that the offices of assessor and collector and city secretary, as heretofore combined by the city council under the name of city secretary, may so continue at the option of the council. * * * Provided, further, that the city council may combine, or abolish any of the offices above named." Held, the word "any" refers to an indefinite number of objects, and, as "either" is singular, and has reference to only one group, "any" to give it its usual and ordinary meaning, must be construed to mean "all," rather than "either," and the proviso cannot therefore refer to section 11, as only two offices constitute the entire group therein, and the section itself combines such offices, leaving action by the council unnecessary, and the proviso cannot refer to a section dealing with the council itself, and, section 10 dealing only with offices and agencies which the council may create, it will be held to refer to section 9, enumerating all offices constituting the city government, except the city council; that section being the first appropriate section in proximity to the proviso. McCuistion v. Fenet (Tex.) 144 S. W. 1155, 1157.

Ky. St. § 3187, as amended by Acts 1910, c. 106, § 4, authorizing a direct action for judgment where "any property" subject to taxation has been omitted from assessment, includes all property subject to taxation, and, where the franchise of a corporation has not been assessed as prescribed by section 4077 because of the failure of the corporation to make a proper report, a direct action lies against the corporation for taxes on the franchise; the word "any" meaning "all."—City of Covington v. Cincinnati, C. & R. Ry. Co., 139 S. W. 854, 855, 144 Ky. 646.

The phrase "the answer of any garnishee," in Rev. St. 1895, art. 245, providing that if the garnishing plaintiff is dissatisfied with the answer of "any garnishee" he may controvert the same, includes all answers, and in whatever way an answer of a garnishee is obtained the garnishing plaintiff may controvert it. American Surety Co. v. Bernstein, 105 S. W. 990, 992, 101 Tex. 189.

In Const. art. 12, § 7, declaring that no corporation shall lease or alienate "any franchise" so as to relieve it from liabilities of the lessor or grantor, the words "any franchise" include all franchises, both primary and secondary. Cooper v. Utah Light & Ry. Co., 102 Pac. 202, 206, 35 Utah, 570, 136 Am. St. Rep. 1075 (citing 1 Words and Phrases, pp. 413, 414).

Loc. Acts 1883, No. 259, being an act providing for the payment of fees to the clerk of court in the county of W. in suits in the circuit court of that county, provides for a decree fee of $4, if there be no other answer or pleading filed by the defendant. Pub. Acts 1911, No. 267, prescribing the fees of clerks of courts and registers in chancery, declares (section 1) that before any suit at law or in chancery shall be commenced in any circuit court, or in the superior court of Grand Rapids, there shall be paid to the clerk or register of said court by moving party, before the entry of any final judgment by default in the action at law or pro confesso decree in chancery, the sum of $2. Held, that the word "any" meant "every," "each one of all"; that the two acts were in irreconcilable conflict; and that the general act repealed the local one. Hopkins v. Sanders, 137 N. W. 709, 713, 172 Mich. 227.

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As any one out of a number

The term "any," as used in V. S. 1183 (P. S. 1534), providing that where an execution on a judgment against a partnership or association is returned unsatisfied a suit for the amount unpaid may be brought against any or all of the partners or associates upon their original liability, should not be given its limited sense, but its enlarged and plural sense—meaning some; however few or many; an indefinite number. And a suit may be brought against one or more of the associates of an association, without making all the associates defendants. Tarbell & Whitham v. Gifford, 65 Atl. 80, 79 Vt. 369.

In Const. art. 12, § 7, declaring that "no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in operation, use or enjoyment of such franchise or any of its privileges," the word "any" means any one of a number. Cooper v. Utah Light & Ry. Co., 102 Pac. 202, 206, 35 Utah, 570, 136 Am. St. Rep. 1075 (citing 1 Words and Phrases, pp. 413, 414).

As either

The Paris City Charter, § 11, which follows several sections designating the city officers, and prescribing the manner of their election or appointment, their duties, and their terms of office, contains the following proviso: "Provided, that the offices of assessor and collector and city secretary * * * may so continue at the option of the city council. * * * Provided, further, that the city council may combine or abolish any of the offices above named." Held, that the last proviso refers only to the officers named in the next preceding clause of the same section and not to officers mentioned in the other section, and does not authorize the city council to abolish the offices of city attorney and city marshal; the word "any" having the sense of "either" or "any one." Fenet v. McCuistion (Tex.) 147 S. W. 867, 869.

Any action

The words "any action," as used in Hurd's Rev. St. 1901, c. 51, § 9, giving courts, in any action pending before them, power to compel the protection of books containing evidence pertaining to the issue, includes a suit at law as well as a bill in chancery, and the words exclude the idea that the evidence sought to be obtained can only be acquired by a bill of discovery. Swedish-American Tel. Co. v. Fidelity & Casualty Co. of New York, 70 N. E. 768, 773, 208 Ill. 562.

Any additions

A gas franchise to which plaintiff succeeded authorized it to lay gas pipes and extend the service throughout the city, and any additions thereafter made to it. A subsequent amendment authorized laying pipes and extending the service throughout the city and "any additions thereto," and later a new franchise authorized a factory to supply gas in the city and as the boundaries thereof were or might hereafter be. Held, that the words "any additions thereto" were not limited to unplatted areas within the then city limits, and that, on the addition of territory, the franchise attached to it at once and authorized plaintiff to extend its mains through it. Seattle Lighting Co. v. City of Seattle, 102 Pac. 767, 54 Wash. 9, 18 Ann. Cas. 1117.

Any agent

The words "any agent" in McIlwaine's Dig. art. 1223a, authorizing service of process on any agent making contracts for the transportation of passengers or freight over the line of railway of any foreign corporation doing business in the state, mean any agent who sells tickets or makes contracts of transportation over the line of a foreign railroad; and the section, so construed, provides for service in addition to the means provided by article 1223, providing for the service on enumerated officers of foreign corporations. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Tex.) 145 S. W. 623, 626.

Any alien

The provision of Naturalization Act June 29, 1906, § 4, cl. 6, that "when any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention," is precisely the same in effect as Rev. St. § 2168, which is repealed by the later act, and, being a re-enactment, the words "any alien who has declared his intention" must be construed to include persons who made their declarations under the old statute, and subsequently died, whose minor children may be naturalized under the new act without making any declaration of intention. In re Shearer, 158 Fed. 839, 841.

Any allotment

In the original Seminole Agreement of December 16, 1897 (Act July 1, 1898, c. 542, 30 Stat. 567), providing that all contracts for sale, disposition, or incumbrance of any part of any allotment made prior to patent shall be void, "any allotment" has reference to all allotted lands, whether set apart directly to the allottee or descending to the heirs of the allottee upon his or her death. Stout v. Simpson, 124 Pac. 754, 756, 34 Okl. 129.

Any and all liability

In a release of the parties to a lease from "any and all liability arising therefrom," the phrase quoted referred to liability arising from the lease and not to the time when the liability should cease, but covered any and all liability arising from the lease.

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Escambia Land & Mfg. Co. v. Ferry Pass. Inspectors & Shippers Ass'n, 52 South. 715, 716, 59 Fla. 239.

Any and all necessary expenses

The phrase "any and all necessary expenses," as used in a will devising the body of the testator's estate to the executors in trust to collect the income, and, after deducting any and all necessary expenses, to divide the net income in equal shares among the persons named, is sufficient to include the payment of taxes charged upon the legacies under the collateral inheritance tax law, the New York state transfer tax, and the United States war tax, and such taxes are payable out of the gross income, and not out of the principal of the estate. In re Brown's Estate, 57 Atl. 360, 208 Pa. 161.

Any and all suits, proceedings, causes or actions

The proviso of Pub. Acts 1907, p. 212, No. 161, that in any and all suits, proceedings, causes, or actions pending a change of venue may be had in the manner provided by Pub. Acts 1905, p. 483, No. 309, does not authorize a change of venue in condemnation proceedings, as it merely continues in force "any and all suits, proceedings, causes, or actions" pending under Pub. Acts 1905, p. 483, No. 309, which authorizes a change in a "criminal action" or a "civil action," but does not apply to condemnation proceedings. Grand Rapids & I. Ry. Co. v. Kalamazoo Circuit Judge, 117 N. W. 1050, 154 Mich. 493.

Any and every description

Where a deed provides that the grantee shall assume and pay existing mortgages, liens, taxes, and "claims of any and every description," the maxim of ejusdem generis has no application to restrict the phrase "and claims of any and every description" to such claims as are indicated by the preceding words "mortgages, liens, and taxes." Gage v. Cameron, 72 N. E. 204, 208, 212 Ill. 146.

Any and every kind of business

Where a policy provided for indemnity in case insured by reason of injury should be immediately and wholly disabled and prevented from prosecuting any and every kind of business for a period of not less than a week, the word "prosecution" indicated that the parties intended that the insured, in order to recover benefits, should be wholly disabled from doing that business which he had the ability to prosecute, and hence the term "disabled from prosecuting any and every kind of business" and did not mean that insured, who was a day laborer and able to do only manual work, could not recover because he was not so disabled as to be prevented from performing mental activities if he had the requisite education, and he was therefore wholly disabled within the policy when he was incapacitated from performing manual labor. Industrial Mut. Indemnity Co. v. Hawkins, 127 S. W. 457, 459, 94 Ark. 417, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029.

Any appreciable degree

See Appreciable Degree.

Any article of imported merchandise

Boxes containing lemons, which are treated in the tariff act as a dutiable entity by themselves, being subjected to a separate classification from the lemons they contain, are within the provision in Customs Administrative Act for the undervaluation of "any article of imported merchandise," and, when undervalued, are subject to the penalties provided by said section.—Phelps Bros. & Co. v. United States, 142 Fed. 213.

Any article or thing

A railroad entering into an agreement with other railroads to fix passenger and freight rates does not thereby violate the anti-trust act, prohibiting combinations to fix the price of articles of merchandise, manufacure, mechanism, commodity, convenience, repair, or the products of mining "or any article or thing whatsoever," since the quoted words do not include passenger and freight rates, and since the subject of transportation by carriers has been the subject of separate and independent legislation. State v. Chicago, R. I. & P. Ry. Co., 128 S. W. 555, 556, 95 Ark. 114.

Any bill

Plaintiffs, commission merchants, after doing business with defendant's son, refused to make any further sales to him unless they had a guaranty from defendant, whereupon defendant wrote plaintiffs that, "I will be responsible for any bill that my son James will make." Held, that the use of the word "any" did not limit the guaranty to the bill of goods purchased at the time of the delivery of the guaranty, but that the guaranty was a continuing one. Newcomb v. Kloeblen, 74 Atl. 511, 512, 77 N. J. Law, 791, 39 L. R. A. (N. S.) 724.

Any building

Gen. St. 1902, §§ 4135–4138, providing for the creation and enforcement of a mechanic's lien for material furnished and services rendered in the construction of "any building," do not authorize such lien on a public school building. National Fire Proofing Co. v. Town of Huntington, 71 Atl. 911, 81 Conn. 632, 20 L. R. A. (N. S.) 261, 129 Am. St. Rep. 228.

Any business connected with said railway

The term "any business connected with said railway or incident thereto," as used in a conveyance by citizens of a town to a railroad, making a donation of a right of way through lands suitable for residences only,

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ror the purpose of having railroad depots placed nearer the town and to enhance the value of their property, giving the right to the railroad to establish, on the land so conveyed, "any business connected with said railway or incident thereto," does not give the railroad the right to establish stockpens on the land so conveyed, to the damage of adjacent property. Missouri, K. & T. R. Co. of Texas v. Mott, 81 S. W. 285, 289, 98 Tex. 91, 70 L. R. A. 579.

Any car

Locomotives are embraced by the words "any car" in Act March 2, 1893, § 2, prohibiting common carriers from using any car in moving interstate commerce not equipped with automatic couplers, although locomotives were elsewhere in the statute in terms required to be equipped with power driving-wheel brakes. Johnson v. Southern Pac. Co., 25 Sup. Ct. 158–161, 196 U. S. 1, 49 L. Ed. 363.

Any case or cause

See If in Any Case.

The phrase "in any case," used in Act March 3, 1891, § 14, providing that if it shall appear that lands, or any part thereof, decreed to any claimant, shall have been sold by the United States, applies not only to proceedings brought by the claimant himself for confirmation, but to proceedings on behalf of the government in which the court is to determine the matter, subject to all lawful rights adverse to the claimant or possessor. Richardson v. Ainsa, 31 Sup. Ct. 23, 24, 218, 289, 54 L. Ed. 1044.

The reciprocal demurrage law requires railroads to furnish suitable cars to persons applying therefor in good faith, to provide suitable facilities for handling them, and to receive and transport empty and loaded cars furnished by connecting roads. Section 11 provides that the period during which the movement of freight is suspended by strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee is delayed by inclement weather, making loading or unloading impracticable, or by any cause not within the power of the shipper or consignee to prevent, shall be added to the free time allowed. Held, that the clause "any cause not within the power of the shipper or consignee to prevent," and the term "accident," are to be broadly construed, and include all causes not reasonably within the power of the carrier to prevent. Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co., 124 N. W. 819, 821, 110 Minn. 25, 19 Ann. Cas. 1088; Gray v. Minneapolis & St. L. R. Co., 124 N. W. 1100, 110 Minn. 527.

Under a statute requiring the court to appoint a special administrator when there is delay in granting letters of administration "from any cause," the phrase "from any cause" means from any legal cause. State ex rel. Eakins v. District Court of Second Judicial Dist., 85 Pac. 1022, 34 Mont. 226.

That from the tenor of the lease itself and the circumstances of the case the rule ejusdem generis is applicable in the construction of said saving clause; that the words "any cause beyond the control of the second party," as therein used, refer to causes of a temporary character, created and arising subsequent to the execution of the lease, and that, therefore, the unminable condition of a part of the mine as aforesaid, is not such a cause, within the meaning of the saving clause, as will relieve defendant from the production of the required minimum tonnage or payment of the agreed royalty therefor. New York Coal Co. v. New Pittsburgh Coal Co., 99 N. E. 198, 206, 86 Ohio St. 140.

Any cause whatsoever

A rule of a water company provided that it should not be liable for a deficiency of water whether occasioned by shutting off water to make repairs or for "any cause whatsoever." Held, that the phrase embraced every possible cause, not only those arising out of the exigencies of the company's business, but even those resulting from its negligence. Buchanan & Smock Lumber Co. v. East Jersey Coast Water Co., 59 Atl. 31, 32, 71 N. J. Law, 350.

Any certain kind of accepted kinds

Burns' Ann. St. 1908, § 8710, provides that residents on a street sought to be improved may require that it be payed with "any certain kind of the accepted kinds" of city pavements, and where the residents have petitioned for the use of bitulithic pavement, and the specifications of the proposed contract required its use, it is no objection that it could be had under open bids naming a bituminous macadam pavement, since the words "any certain kind of the accepted kinds" mean a kind which is fixed and determined when the specifications are filed for bids. Tousey v. City of Indianapolis, 94 N. E. 225, 227, 175 Ind. 295.

Any change increasing the risk

Rev. St. 1906, § 3643, makes an insurance company liable for the full amount mentioned in the policy in case of total loss, in the absence of "any change increasing the risk" without consent of the insurers. These words refer only to change in the insured building or structure itself, and were not intended to include or apply to anything distinct from or accidentally related to the corpus of the insured building or structure. These words do not include a violation of a stipulation that the policy should become void if any part of the property insured shall be incumbered by mortgage without the consent of the company or that the policy shall become void by the taking of ad-

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ditional insurance without the consent of the insurer. Germania Fire Ins. Co. v. Werner, 81 N. E. 980, 981, 76 Ohio St. 543, 12 L. R. A. (N. S.) 456, 118 Am. St. Rep. 891 (citing Sun Fire Office of London v. Clark, 42 N. E. 248, 53 Ohio St. 414, 38 L. R. A. 562; Webster v. Dwelling House Ins. Co., 42 N. E. 546, 53 Ohio St. 558, 30 L. R. A. 719, 53 Am. St. Rep. 658).

Any change in grade

The words "any change in the grade of such highway," in Gen. St. 1902, § 2051, providing that when the owner of land adjoining a public highway shall sustain special damages to his property by reason of any change in the grade of such highway he shall be entitled to the amount of such special damages, imply an already existing grade, and the statute contemplates the existence of a worked highway completed and in actual use. Gorham v. City of New Haven, 58 Atl. 1, 2, 76 Conn. 700.

Any child or children

Testator, after making certain bequests to his wife's sister and his nephew, directed his executor to sell certain land and invest the proceeds in the name of testator's wife, to be held by her during her life without impeachment of waste or hindrance from any person whomsoever, with power to sell and re-invest as she might think advisable. He also devised all the rest of his estate to her for life, "she to have sole control of my said estate without let or hindrance," etc., "and, in the event of my said wife having any child or children at the time of her death, I devise the whole of said estate to said child or children," etc. "But in the event of my said wife dying without issue living," etc., "I devise and bequeath all said estate to my heirs at law." Held, that the words "any child or children" embraced children of his wife by second marriage. Schapiro v. Howard, 78 Atl. 58, 62, 113 Md. 360, 140 Am. St. Rep. 414

Any city

The words "any city," as used in Act May 23, 1889 (P. L. 277) art. 12, § 2, providing that " 'any city' which now has the title to any water, gas, or electric light works * * * is hereby empowered to create a department to be called the water and light department," refers to cities individually, and, while they may include all cities, they do not necessarily do so. Commonwealth v. Heller, 67 Atl. 925, 926, 219 Pa. 65.

Any claim

The words "any claim for money," in Rev. St. 1895, art. 2082, providing that when any claim for money, against an estate, has been rejected by the executor or administrator, the claimant may, within a specified time, sue to establish the same, do not mean both the debt and the lien as security therefor, but mean only the debt, and the claim only need be allowed and proved, or established, by suit. Whitmire v. Powell (Tex.) 117 S. W. 433, 436.

The word "demand" is the largest word in law except "claim"; and a release of demands discharges all sorts of actions, rights, and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, and commons. Hence, in a statute providing that no action lies against a city on "any claim or demand" of any kind or character whatsoever until it has first been disallowed in whole or in part, etc., the words "any claim or demand" include a cause of action for negligence in supplying plaintiff with tools while in the employ of the city. McCue v. City of Waupon, 71 N. W. 1054, 1055, 96 Wis. 625 (quoting Lord Coke, Vedder v. Vedder, 1 Denio [N. Y.] 261; Bac. Abr; Litt. § 508; Co. Litt. 291b).

Any communication

"Any communication" is in form of words of broader import than the expression "confidential communication." Code, § 4607, providing that "neither husband nor wife can be examined in any case as to any communication made by one to the other while married," was intended to protect only marital communications. Sexton v. Sexton, 105 N. W. 314, 315, 129 Iowa, 487, 2 L. R. A. (N. S.) 708.

Any consideration

See On Any Consideration.

Under Rev. Pen. Code, § 618, making it an offense to buy or receive in any manner, upon "any consideration," property, knowing that it has been stolen, the gist of the offense is the buying or receiving with such knowledge, and an information is not bad for omitting to allege that the property was bought or received "upon any consideration"; that phrase being synonymous with "any motive" or "for any cause." State v. Pirkey, 118 N. W. 1042, 1044, 22 S. D. 550, 18 Ann. Cas. 192.

Any corporation

The term "any corporation," in General Corporation Law (Laws 1892, c. 687), conferring jurisdiction on the Supreme Court to review elections of "any corporation," includes an assessment insurance company as well as that of a stock corporation, and the Supreme Court may review an election of directors of a mutual insurance company which is not a stock corporation. In re Empire State Supreme Lodge, 103 N. Y. Supp. 465, 468, 53 Misc. Rep. 344.

The words "any corporation other than municipal," as used in Const. art. 1, § 16, providing that no right of way shall be appropriated for the use of "any corporation other than municipal" until full compensation shall have been made, irrespective of benefits, is intended to exclude public or political corporations, distinguished from

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private corporations. A county should be considered a municipal corporation under this section. Lincoln County v. Brock, 79 Pac. 477, 478, 37 Wash. 14.

Kirby's Dig. § 957, provides that any corporation may surrender its charter by a resolution, on filing a certified copy of the resolution with the Secretary of State and the clerk of the county in which "such corporation" is organized. When that section was adopted as a part of the act of April 12, 1893 (Laws 1893, p. 265), railroad corporations could be organized by filing the articles of association with the Secretary of State, while manufacturing and other business corporations were required by Kirby's Dig. § 845, to file their articles of association and certificate with the clerk of the county in which they were to have their principal place of business and also with the Secretary of State. Held, that section 957 does not apply to railroad corporations "such" meaning, previously mentioned or specified, and the phrase "in which such corporation is organized" limiting "any corporation" to those required to file their articles and certificate with the clerk of the county in which they are to have their principal place of business. Freeo Valley R. Co. v. Hodges (Ark.) 151 S. W. 281, 282.

Any county

In Act Sept. 19, 1908, relating to the letting out of convicts to counties and municipalities, and providing that any county may rent a farm on which to work the convicts, "any county" means every county in the state, and is not limited to counties having any particular system of road laws. Garrison v. Perkins, 74 S. E. 541, 137 Ga. 744, 745.

Any court

Cities and Towns Act 1905 (Acts 1905, c. 129) § 218, requiring the mayor to fill a vacancy in the office of city judge, does not violate Const. art. 5, § 18, requiring the Governor to fill any vacancy in the office of a "judge of any court," as the constitutional phrase refers to courts having the dignity of state courts mentioned in Const. art. 7, § 1, which the Legislature may establish, and not to inferior courts created by the Legislature in the exercise of its power under article 3, §§ 6, and 9, to provide for the appointment of municipal officers to administer local affairs. State ex rel. Gleason v. Gerdink, 90 N. E. 70, 71, 173 Ind. 245.

Where a state court having jurisdiction of the administration of an insolvent's estate authorized plaintiff to sue its receiver "in any court of competent jurisdiction" to enforce plaintiff's contract and to settle and determine the rights of the parties thereunder, the necessary jurisdictional facts appearing to entitle plaintiff to sue in a federal court, such court was not prevented by comity from assuming jurisdiction. James Freeman Brown Co. v. Harris, 139 Fed. 105, 108, 71 C. C. A. 303.

Rev. Laws, c. 167, § 126, provides that an attachment of property on mesne process shall be dissolved by the appointment by "any court of competent jurisdiction in this commonwealth" of a receiver to take possession of the property, etc. Section 127 provides that, when an attachment has been so dissolved, the proceedings for the appointment of a receiver shall not thereafter be dismissed, and the receiver discharged, until all the assets which have come into his hands as receiver have been fully distributed, or the claim upon which the attachment was made has been fully paid and discharged, etc. *Held*, that the words "any court of competent jurisdiction in this commonwealth" means any court which is subject to the legislation of the commonwealth, and the act does not apply to receivers appointed by federal courts. Reynolds v. Enterprise Transportation & Transit Co., 85 N. E. 110, 112, 198 Mass. 590.

Rev. St. Idaho 1887, § 2653, requiring foreign corporations to comply with certain conditions before doing business within the state, and declaring that no contract made in the name or for the use or benefit of a foreign corporation, not having performed such conditions, can be sued on or enforced in "any court of this state" by such corporation, did not preclude a foreign corporation, not having complied with the prescribed conditions, from resorting to the federal courts in Idaho to enforce a mortgage to it on land in that state. Colby v. Cleaver, 169 Fed. 206, 208.

Any creditor

Code 1896, § 4164, allowing "any creditor" to object to the allowance of a claim against an insolvent who has made an assignment for the benefit of creditors, gives the right to any creditor, whether preferred or not. Taylor v. Hutchinson, 40 South. 108, 145 Ala. 202.

Any criminal case or proceeding

The provision of the bankrupt act that no testimony which he may give on examination before the registrar should be used against him in "any criminal proceeding" refers to such as might arise out of the conduct of his business, the disposition of his property, and other past transactions about which alone the statute authorizes the examination in question to be made, and the immunity relates to the use of his evidence in such criminal prosecutions only. Edelstein v. United States, 149 Fed. 636, 643, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236.

The phrase "in any criminal case," in Const. art. 1, § 6, declaring that no person shall be compelled "in any criminal case" to be a witness against himself, applies to proceedings under the executive, legislative, or judicial powers of government directed against the person invoking the provision, or

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against co-offenders with such person, or against unrelated third persons, to such as are preliminary, collateral, or independent, and both to such as are pending and not pending at the time of the assertion of the privilege. People v. Rosenheimer, 128 N. Y. Supp. 1093, 1095, 70 Misc. Rep. 433.

Any dangerous condition

"Any dangerous condition" used in the mines and mining act is not, under the doctrine of ejusdem generis, limited in application to dangers and to the same kind of dangers expressly specified in the statute. Dunham v. Black Diamond Coal Co., 88 N. E. 216, 217, 239 Ill. 457.

Any deceased child

Testator died leaving him surviving a son and two daughters and two grandchildren, children of a deceased son and daughter, who died before the execution of the will. To these two grandchildren he bequeathed pecuniary legacies, and then directed that the residue of his property should be held in trust, to pay one-third of the net income monthly to each of his three remaining children, and, on the death of either of said children of testator without issue, to pay his or her one-third share of the net income to the survivors of them, share and share alike, and to the children of "any deceased child" by right of representation, and, on the death of the last survivor of testator's children, all the property and estate representing the one-third share or interest of any child who may have died without issue. *Held*, that the term "any deceased child" referred only to children living at the time of the execution of the will, and who had been made beneficiaries of the trust, so that, on the death of testator's son, who was one of the three surviving children, without issue, his one-third share of the net income passed to his surviving sisters, and was not to be divided among them and the grandchildren, whose parents died prior to the death of the testator and the making of his will. Cookson v. Hamilton, 118 Pac. 116, 118, 160 Cal. 743.

Any defect

The phrase "any defect in any sidewalk," in Rev. Codes, § 3289, requiring notice to municipalities of injuries received by reason of any defect in any sidewalk, includes any defect interfering with the proper use of a sidewalk, and accumulation of snow and ice so as to make the surface uneven and dangerous is a defect within the statute. Tonn v. City of Helena, 111 Pac. 715, 717, 42 Mont. 127, 36 L. R. A. (N. S.) 1136.

Any defendant

Under the statute providing that "any defendant," being a nonresident and a citizen of any state, who makes it appear to the satisfaction of the court that he cannot obtain justice in the state court where the action is pending, or in any court to which he may have the right to remove his case, on account of prejudice or local influence, is entitled to have the same removed to the federal court, the right of a defendant so to remove is not affected by the fact that a co-defendant is a resident and citizen of the state where the suit was brought. Parker v. Vanderbilt, 136 Fed. 246, 249.

A suit in which one of two defendants is a citizen of the same state as the plaintiff cannot be removed by the other defendant for prejudice or local influence from a state to a federal Circuit Court, under Act March 3, 1887, as corrected by Act Aug. 13, 1888, providing for removals on those grounds of suits embracing a controversy between a citizen of the state in which the suit is brought and a citizen of another state, by "any defendant, being such citizen of another state," since to hold otherwise would bring this provision into conflict with the rule that suits, to be removable, must be within the original jurisdiction of the circuit court. Cochran v. Montgomery County, 26 Sup. Ct. 58, 62, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451.

Any defense

An instruction, in a suit on a note, that if defendant sets up a failure of consideration he must establish it by a preponderance of the evidence, and that the burden of proving "any defense" is on defendant, followed by an instruction that by a preponderance of the evidence is meant the greater weight of the evidence, is not erroneous as leading the jury to believe that the word "any" refers to every other defense than those spoken of in the instruction. Ewen v. Wilbor, 70 N. E. 575, 578, 208 Ill. 492.

Any degree

The words "in any degree" are equivalent to the words "in any way" or "in any manner." An instruction that the rule that a carrier of passengers is required to exercise the highest degree of care for their safety, consistent with the practical operation of its railway, does not "in any degree" excuse passengers from the duty of exercising ordinary care for their own safety, was not erroneous, in that the use of the words quoted might mislead the jury to believe that plaintiff was held to the highest degree of care. Harvey v. Chicago & A. Ry. Co., 77 N. E. 569, 570, 221 Ill. 242.

Any deposit

Under Code 1892, § 1089, forbidding an officer of a bank conducting the business of receiving money on deposit from receiving any deposit, knowing or having good reason to believe the bank insolvent, without informing the depositor of such condition, a count of an indictment charging a violation of the statute by receiving deposits from divers persons without informing such persons and depositors of the insolvent condition of the bank, and a count charging that deposits were received from several persons named,

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were demurrable for joinder of separate offenses in a single count. The language of the statute clearly indicates that if an officer of a bank receives "any deposit" without notifying the depositor of the insolvency of the bank he shall be guilty of a crime. Every single act of receiving any deposit is a separate and distinct offense. State v. Walker, 41 South. 8, 88 Miss. 592.

Any description

The words "of any description," as used in Pub. Laws 1901, c. 240, regulating the packing of sardines for canning purposes, are of wide application, and prohibit all sardine canning within the time limits fixed by the statute. State v. Kaufman, 57 Atl. 886, 888, 98 Me. 546.

Any determination

Laws 1905, c. 724, providing for the acquisition of lands by the city of New York for its water supply, provides by section 16 that on application to confirm the report of commissioners the court at Special Term may confirm such report or, in its discretion, refer the report to the same commission or to a new commission for a new hearing, and that such report, except in case of an appeal, shall be conclusive. Section 22 provides that, within 20 days after notice of the confirmation of the commissioners' report, either party may appeal to the Supreme Court, and that such appeal shall be heard either at Special Term or by the Appellate Division as the appellant may choose, and that from any determination of the Special Term on appeal an appeal may be taken to the Appellate Division, and from any determination of the Appellate Division either party may appeal to the Court of Appeals. Held, that "any determination of the Special Term" meant any or every order of the Special Term, and that "any determination of the Appellate Division" meant any order of the Appellate Division, and that the Appellate Division had the power to review an order of Special Term setting aside the report of commissioners and ordering a rehearing before new commissioners. In re Simmons, 96 N. E. 456, 459, 203 N. Y. 241.

Any device

The words "or any device," used in Comp. Laws 1909, § 2422, providing for the punishment of any person conducting a gambling house, include every scheme by which a person who conducts such a house enables the public to bet on any kind of game whatsoever. James v. State (Okl.) 113 Pac. 226, 229, 33 L. R. A. (N. S.) 827.

Any devise

It was a rule "that, if a lapse occurred in the bequest of personal property outside of the residuary clause, the property bequeathed should pass to the residuum, and be distributed among the residuary legatees, because it ought to be held that the testator did not intend to die intestate as to any of his property if it could be avoided; that whilst this should be held true as to personalty, it ought not to prevail as to a devise of realty; and as to it, the rule was that, if a lapse in a devise of realty outside of the residuary clause occurred, it should not go to the residuum and pass to the residuary devisees, but should go to the heir; and the reason assigned for the distinction between a bequest and a devise was that as to personal property the will spoke as of the date of the testator's death, but as to real property it spoke as of the date of its execution; that the above-announced principles had no application whatever to lapses occurring in the residuary clause of the will; and that, if a lapse there occurred, it continued, and the testator as to this should be held to have died intestate; and that the bequest or devise, as the case might be, passed to the next of kin or the heir." Code Va. 1904, § 2524, relating to that rule, provided that, unless a contrary intention shall appear by the will, such of the real estate or interest therein as shall be comprised in "any devise" in such will which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will. Held, that the words "any devise" are to be limited to any devise other than the residuary clause, thereby placing real and personal estate on the same footing in respect to lapsed devises and legacies. Kent v. Kent, 55 S. E. 564, 565, 106 Va. 199.

Any disease

There is no kinship between the words, "orchitis, hernia, freezing, and sunstroke," and no sort of relationship between them, and the words "intoxicants, sleepwalking, narcotics," etc., as used in an accident policy providing that the insurance shall not cover injuries received while under the influence of, or resulting directly or indirectly, from intoxicants, sunstroke, vertigo, hernia, or "any disease" or bodily infirmity, and the phrase "disease or bodily infirmity" will not be limited by the preceding specific exceptions under such a policy recovery cannot be had for a fall from a window while delirious. Carr v. Pacific Mut. Life Ins. Co., 75 S. W. 180, 183, 100 Mo. App. 602.

Any election

A municipal election is included in the phrase "at any election," as used in Code 1906, § 1122, denouncing illegal voting. Sample v. Town of Verona, 48 South. 2, 3, 94 Miss. 264.

The words "any election," as used in the Kansas Bill of Rights, § 7, providing that no religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, relate only to elections and offices provided for in that instrument, and have no application to elections held in or officers chosen for a public

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corporation created by statute, such as a drainage district, and the Bill of Rights does not prevent the Legislature from authorizing the creation of drainage districts, the powers of which are exercised by directors who are required to be freeholders elected by the resident taxpayers. State v. Monahan, 84 Pac. 130–133, 72 Kan. 492, 115 Am. St. Rep. 224, 7 Ann. Cas. 661.

Any evidence

Evidence which only raises a mere surmise or suspicion of the existence of a fact sought to be established falls short of being "any evidence" and can never sustain a verdict. Cobb v. Bryan, 83 S. W. 887, 888, 37 Tex. Civ. App. 339.

Any extent

Appreciable extent distinguished, see Appreciable Extent.

Any game

A city ordinance, general in its terms, and prohibiting playing at any game of chance, played with dice for money or representatives of money, was broad enough to include a dice gambling game called "twenty-six" for the purpose of winning money, cigars, and articles representative of money by chance, although the game was not enumerated in the ordinance. City of Seattle v. MacDonald, 91 Pac. 952, 47 Wash. 298.

Any goods or chattels

A railroad ticket, though not yet stamped or delivered to a passenger, is a "railroad ticket," and also within the term "any goods or chattels," within L. O. L. § 1947, providing that any one stealing any goods or chattels or any railroad passenger ticket or other evidence of the right of a passenger to transportation should be guilty of larceny, although the stealing of railroad tickets was not larceny at common law. State v. Wilson, 127 Pac. 980, 982, 63 Or. 344.

Any heir

Under Rev. St. 1890, § 6098, authorizing any heir or creditor of a deceased person to request an administrator or executor to reject any claim presented for allowance, a widow may file a requisition on an executor to disallow a claim, as the words "any heir," or "creditor," include devisees and legatees or any person whomsoever whose property may be affected by the recovery of a judgment. Todd v. Todd, 27 Ohio Cir. Ct. R. 224, 227.

Any illegal official act

"Any illegal official act," as used in Laws 1892, c. 301, authorizing a taxpayer to sue to prevent "any illegal official act" on the part of any county officials, agents, commissioners, or other persons, etc., includes any action on the part of the sheriff of a county by which he procures the audit of a bill, the amount of which is in excess of the amount which the statutes of the state permit him to charge. Hicks v. Eggleston, 93 N. Y. Supp. 909, 910, 105 App. Div. 73.

Any incorporated company

Const. art. 12, § 4, which provides that the right of trial by jury shall be inviolate in trials of claims for compensation where, in the exercise of the right of eminent domain, "any incorporated company" shall be interested, gives to a railroad company the right to a jury to assess its damages for the taking of its lands by a city for a street; the railroad being within the statute although the municipality is not. City of St. Louis v. Roe, 83 S. W. 435, 184 Mo. 324 (citing Kansas City v. Smart, 30 S. W. 773, 128 Mo. 272; Kansas City v. Vineyard, 30 S. W. 326, 128 Mo. 75).

Any increase

Hurd's Rev. St. 1909, c. 140b, specifying securities in which trust funds may be invested, provides that any trustee may continue to hold any investment received by him under the trust or any increase thereof. At testator's death, he owned stock in various corporations which became a part of a trust created of the residue of his estate with power to the trustees to invest and reinvest, declaring that it was his desire that the trustees should retain for his estate the better class of securities, including mortgages, railroad, or other stocks and bonds, or other securities in which they might find any part of his estate invested at his death. Held, that the trustees were authorized to acquire and pay for their pro rata share of any increase of capital stock offered to them by a corporation at less than market value by reason of their ownership of shares of stock which belonged to testator at his death, or which came to them by reason of their ownership of stock belonging to testator at that time; the words "any increase thereof," as used in the statute, being inclusive of stock so issued. Merchants' Loan & Trust Co. v. Northern Trust Co., 95 N. E. 59, 250 Ill. 86.

Any incumbrance

The word "any" as used in an allegation that defendant, an abstractor of titles, made a false certificate that certain land was "free from any incumbrance," is to be construed as meaning that there were no incumbrances, or that there was not a single incumbrance. A contention that the words of the certificate were insufficient to convey the idea that the land was free from all incumbrances cannot be sustained. This construction of the language of the certificate is not affected by the construction of the word "any," in Webster's Dictionary: "One out of many, indefinite, some; an indefinite number or quantity." Hirshiser v. Ward, 87 Pac. 171, 174, 29 Nev. 228.

Any indebtedness

Laws Utah 1909, c. 124, § 1, authorized the regents of the university to expend $250,-

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000 for a central building, and section 2 directed the State Board of Land Commissioners to convert sufficient investments of the Utah University permanent land fund into cash, and pay the same over to the university as a loan, until such payments equaled $250,000, provided that the loan should be a debt of the university and not of the state, and that the interest on such land fund should be paid to the university, as before, for its general maintenance. Section 6 declared that the regents were authorized to pay out of the funds, appropriated or otherwise available, for its general maintenance, the principal and interest of such obligations as they became due. Held, that such indebtedness was in fact the indebtedness of the state, notwithstanding the legislative declaration to the contrary, and that the law was therefore in violation of Const. art. 14, §§ 1, 2, providing that the state shall never contract any indebtedness in excess of $250,000, except to repel invasions, etc.; the phrase "shall never contract any indebtedness" including any obligation which the state undertakes or is obligated to pay out of the future appropriations derived from an exercise of the state's power of taxation. State v. Candland, 104 Pac. 285, 292, 36 Utah, 406, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834.

Any individual or copartnership

The words "any individual or copartnership" do not include corporations, as used in Act May 27, 1841 (P. L. 396), directing the treasurer, on the payment of a certain sum, to grant to the individual or copartnership paying it a commission, under the seal of the county, authorizing him or them to purchase, and sell as agents, or for the use and benefit of others in the city or county to be designated. Commonwealth v. Real Estate Trust Co., 26 Pa. Super. Ct. 149, 152; Id., 60 Atl. 551, 553, 211 Pa. 51.

Any interest or rights

The president and controlling stockholder of two street railroad companies entered into a contract by which he agreed to sell his stock and to secure for the purchaser long term leases of the property and the two companies under the control of the board of directors, which he did, but, before the sale was consummated, he caused a side agreement to be made between the companies and another owning connecting lines of which he owned stock. This agreement provided that "any interest or rights" heretofore or hereafter acquired by the Union Traction Company in stock by the consolidated traction company or any of its companies formerly owned by any of the constituent lines or in any company succeeding to the ownership of any of said lines should, during the continuance of the leases, be held and owned for the joint benefit of all the parties to the agreement, etc. Held, that the words "any interest or rights," as so used, meant the legal title to the stock carrying full power of the control of the consolidated lines. North Chicago St. R. Co. v. Chicago Union Traction Co., 150 Fed. 612, 624.

Any issue in the case

The phrase "on any issue in the case," as used in a statute providing that, if a verdict shall be found on any issue in the case for plaintiff, costs shall be given at the discretion of the court, is very comprehensive, and the term "case" includes all the issues presented by the parties for judicial inquiry and determination and embraces issues tendered by defendant's counterclaim as well as those tendered by the petition. Ozias v. Haley, 125 S. W. 556, 557, 141 Mo. App. 637.

Any judicial officer

In Pen. Code 1910, §§ 919, 957, authorizing an arrest under a warrant issued by a judicial officer, and that "any judicial officer" in the county where the accusation was found may receive bail, the words "any judicial officer" mean any judicial officer of such county where the accusation was found and an official of another county cannot admit to bail. Weatherly v. Beavers, 76 S. E. 853, 139 Ga. 122.

Any kind

In an agreement between a man and a woman releasing the man from a claim of "any kind," the quoted expression was sufficiently broad to include bastardy proceedings which were set in motion against the man by the woman's agency. Schnurr v. Quinn, 82 N. Y. Supp. 468, 469, 83 App. Div. 70.

Any manner

A statute, providing that a borrower of money who afterwards paid "in any manner" might recover usury of the lender, would permit a recovery whether the lender received payment in money or other property. The manifest intention was not to restrict the right of reclamation to cash payments. Footman v. Stetson, 32 Me. 17, 20, 52 Am. Dec. 634.

Any means or force

The term "by any means or force," in Pen. Code, § 245, declaring that every person committing an assault with a deadly weapon, or by any means or force likely to produce great bodily injury, etc., is a general and comprehensive term, designated to embrace many and various means or forces which, aside from a deadly weapon or instrument, may be used in making an assault. People v. Perales, 75 Pac. 170, 171, 141 Cal. 581.

Any office

The words "any office," as used in Kansas Bill of Rights, § 7, providing that no religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, relate only to elections and offices provided for in that

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instrument, and have no application to elections held in or officers chosen for a public corporation created by statute, such as a drainage district, and the Bill of Rights does not prevent the Legislature from authorizing the creation of drainage districts, the powers of which are exercised by directors who are required to be freeholders elected by the resident taxpayers. State v. Monahan, 84 Pac. 130–133, 72 Kan. 492, 115 Am. St. Rep. 224, 7 Ann. Cas. 661.

Any one appointed

A city charter provision authorizing the mayor to remove for cause "any one appointed to office by him" refers to the officers appointed by the mayor, and not to individual appointments. O'Neil v. Mansfield, 95 N. Y. Supp. 1009, 1011, 47 Misc. Rep. 516.

Any order

The exclusive jurisdiction conferred on the Commerce Court by Act June 18, 1910, c. 309, § 1, 36 Stat. 539, creating such court, of "cases brought to enjoin, set aside, annul or suspend, in whole or in part, 'any order' of the Interstate Commerce Commission," includes a suit to annul an order of the Commission awarding reparation in damages to a complainant made under Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590, which is not affected by the provision excepting from the jurisdiction so conferred cases for the enforcement of orders of the Commission "for the payment of money"; such cases being actions based on such order in which there is a constitutional right to a jury trial, jurisdiction of which is reserved to the Circuit Court. Southern Ry. Co. v. United States, 193 Fed. 664, 665.

Railroad Commission Act (Acts 1905, c. 53) § 6, provides that, "if any such railroad company * * * shall be dissatisfied with any order or regulation of said commission, respecting the location or construction of sidings, switches or connections between railroads, or the crossing of one railroad by another, * * * such dissatisfied company * * * may file a written petition to the circuit or superior court of the county wherein any such * * * crossing * * * is situated and the court may affirm, modify or set aside, the action of the commission." Held, that the term "any order or regulation respecting crossings" was broad enough to include orders made by the railroad commission installing interlocking plants for the purpose of protecting such crossings. Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana, 40 Ind. App. 168, 81 N. E. 524, 526.

Any paper

Under Code 1896, § 934, subd. 14, providing that, when proper tender of fees is made, the clerk shall make and deliver to any person applying for the same "a correct transcript of 'any paper' in his office," the clerk must deliver, on application of the defendant in a criminal case, accompanied by a proper tender of fees, a correct transcript of subpœnas issued by the state and filed in the clerk's office. Jackson v. Mobley, 47 South. 590, 593, 157 Ala. 408.

Any part

The words "any part of or projection," as used in a deed providing that no dwelling or other house or building, or any part thereof or projection therefrom, shall be built on the grantor's remaining land within a certain distance of the premises conveyed, "evidently refer to bay windows or porches or things of that nature." Clark v. Lee, 70 N. E. 47, 185 Mass. 223.

In the original Seminole Agreement of December 16, 1897 (Act July 1, 1898, c. 542, 30 Stat. 567), providing that all contracts for sale, disposition, or incumbrance of any part of any allotment made prior to the date of patent shall be void, "any part" applies either to the homestead or surplus allotment. Stout v. Simpson, 124 Pac. 754, 756, 34 Okl. 129.

"Any part," as used in the anti-trust act, forbidding a person to monopolize "any part" of the trade or commerce among the several states, or with foreign nations, has both a geographical and a distributive significance; it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce. Standard Oil Co. of New Jersey v. United States, 31 Sup. Ct. 502, 516, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

The words "any part thereof" in the homestead exemption law, providing that the exemption shall not apply to debts "for the purchase price of property or any part thereof," has reference to any part of the purchase price and not to any part of the property. Where the vendor's claim affects only one undivided half of the homestead, and the homestead is sold as being worth more than $2,000, the homestead exemption may be claimed to the extent that the property is not affected by the vendor's right; that is to say, to the extent of one-half of the price. Iberia Cypress Co. v. Christen, 40 South. 529, 116 La. 53.

Any person

The words "any person," as used in Code N. C. § 210, allowing "any person" to sue in forma pauperis, on making affidavit that he is unable to give security, are "broad enough to include any litigant whatever, and hence residents of another state can sue here in forma pauperis." An administrator may sue in forma pauperis, and, where the action is for death of his intestate, he need not show that those who may share in the recovery

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cannot give security. Christian v. Atlantic & N. C. R. Co., 48 S. E. 743, 136 N. C. 321, 68 L. R. A. 418, 1 Ann. Cas. 803 (citing and adopting Allison v. Southern Ry. Co., 40 S. E. 91, 129 N. C. 336; Porter v. Jones, 68 N. C. 320).

The state may maintain ejectment under L. O. L. § 325, providing that any person having a legal estate in real property and a present right to the possession thereof may recover such possession by an action at law; the common-law rule that the king cannot be disseised having no application, since disseisin is not necessary under the statute, and "any person" being broad enough to include artificial as well as natural persons. State v. Duniway, 128 Pac. 853, 854, 63 Or. 555.

"Any person" entitled to redeem, within Code, § 1440, providing that any person entitled to redeem lands sold for taxes after the delivery of the deed shall do so by an equitable action, etc., "is not one having such an interest in or lien on property as that, but for the deed he might have paid the county auditor the necessary amount and procured a certificate of redemption." Where the treasurer's deed is given without certificates and proof of the statutory notice, a mortgagee, who, though not having title to the land, has an interest entitling him but for the deed to redeem by or without suit, may maintain an action to redeem. Busch v. Hall, 93 N. W. 356, 357, 119 Iowa, 279.

The language of St. 1892, c. 318, § 7, providing that "any person receiving under his care or control, or placing under the care or control of another for compensation, an infant under two years of age," etc., shall give notice to the state board of lunacy and charity within two days of such reception of the infant, is general, and includes "any person" receiving an infant, and any person placing an infant under the care or control of another; and it relates to the reception of one infant, and has no reference to the provisions of the statute requiring a license. Commonwealth v. Johnson, 39 N. E. 349, 162 Mass. 596.

Under Rev. St. 1899, § 2863, declaring it actionable to publish falsely that "any person" has been guilty of fornication or adultery, a false charge of the commission of unlawful sexual intercourse is slander, although the charge is made in language technically inaccurate, in that it charges unmarried persons with adultery. Brown v. Wintsch, 84 S. W. 196, 198, 110 Mo. App. 264.

Under the statute making it an offense for "any person" to seduce a female by means of any feigned or pretended marriage, or of any false or feigned express promise of marriage, the words "any person" include any male, whether married or single, if the female seduced is ignorant of such marriage. Davis v. State, 129 S. W. 530, 95 Ark. 555.

11 St. at Large (1845) p. 341; 8 St. at Large (1737) p. 470; 4 St. at Large (1783) p. 543; 5 St. at Large (1801) p. 397; and Cr. Code 1902, § 373—providing punishment for forgery, were intended to enlarge the offense and regulate the punishment thereof, and the use of the words "any person," in describing the party to be defrauded, does not abolish the common-law crime of forgery when committed with intent to defraud the state. State v. Zimmerman, 60 S. E. 680, 682, 79 S. C. 289.

"Any person," as used in Pen. Code 1895, § 109, declaring that one who forcibly abducts or steals away "any person" without lawful authority or warrant, and sends or conveys such person beyond the limits of the state against his will, is guilty of kidnapping, "means any man, woman or child of any age." Sutton v. State, 50 S. E. 60, 61, 122 Ga. 158.

Same—In limited sense

Burns' Ann. St. 1901, § 2766, providing that any person may contest the validity of a will, means any person having an interest in the subject-matter of the contest. Campbell v. Fichter, 81 N. E. 661, 662, 168 Ind. 645, 11 Ann. Cas. 1089.

The right of "any person" to contest the validity of a will, given by Burns' Ann. St. 1908, § 3154, is limited by section 251, providing that every action must be prosecuted in the name of the real party in interest; and hence only those having an interest in the subject-matter of a will may contest its validity. Crawfordsville Trust Co. v. Ramsey (Ind.) 98 N. E. 177, 180.

Same—In law of negligence by carriers

In an action by a railroad servant for personal injuries by being struck by runaway cars, the company's liability, if any, must result from the negligence of him who has charge or control of the train and not of the fellow servant, and "by the words, 'any person * * * who has charge or control' is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it. * * * The mere fact that a laborer or brakeman is put in such a position that for the moment he physically controls and directs its movements under the eye of his superior does not of itself constitute him a 'person in the charge or control' of the train." Denver & R. G. R. Co. v. Vitello, 81 Pac. 766, 770, 34 Colo. 50.

Section 3305, Rev. St., relating to the lease of railroads, and making the lessor and lessee "jointly liable upon all rights of action accruing to 'any person' for any negligence or default growing out of the operation and maintenance of such railroad," covers obligations of the lessor and lessee to the public; hence, does not apply to an action

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for negligence by an employé of lessee against the lessor and lessee. Powers v. Hocking Valley Ry., 31 Ohio Cir. Ct. R. 488.

Laws Kan. 1874, p. 143, c. 93, providing that a railroad company shall be liable for all damages done to any employé of it from any negligence of its agents or by any mismanagement of any employés "to any person sustaining such damage," adopted from the state of Iowa after the Supreme Court of the state had construed it as covering the case of death of an employé and creating a cause of action in favor of the administrator of deceased, was adopted with such construction. Iarussi v. Missouri Pac. Ry. Co., 155 Fed. 654, 656.

Same—As including particular persons

Laws 1903, c. 156, § 12, prohibiting "any person" from disturbing a public school, includes an enrolled pupil of the school disturbed. State v. Packenham, 82 Pac. 597, 599, 40 Wash. 403.

Pen. Code 1911, art. 622, denounces as a misdemeanor the selling or giving away of intoxicating liquor knowingly to a minor by a retail liquor dealer. Article 1054 denounces as a misdemeanor the selling or giving or being in any way interested in the gift or delivery of intoxicating liquors knowingly to a minor by "any person." Article 593 denounces as a misdemeanor the giving or delivery or being in any way concerned in the gift or delivery of intoxicating liquors to a minor "whether consigned to such person or to some other person" without the written consent of the parent or guardian of such minor. Held, as article 593 may properly be held to apply to express companies and common carriers alone, and article 1054 to all persons other than licensed retail liquor dealers and express companies and common carriers, article 622 will be held to apply to retail liquor dealers alone in order to effectuate all the provisions of the Code. Talley v. State (Tex.) 147 S. W. 255, 256.

Oleomargarine Act 1886 (Act Aug. 2, 1886, c. 840, § 3, 24 Stat. 209) as amended by Act May 9, 1902, § 2, 32 Stat. 194, imposes a tax on manufacturers of oleomargarine, and declares that every person who manufactures oleomargarine for sale, and "any person" that sells, vends, or furnishes oleomargarine for use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter, shall be held to be a manufacturer of oleomargarine within the act. Held, that the words "any person" are not limited to licensed wholesale or retail dealers in oleomargarine, but are comprehensive enough to embrace any or all persons, whether licensed dealers or not, selling, vending, or furnishing oleomargarine to which he has added coloring matter to represent butter. Vermont v. United States, 174 Fed. 792, 794, 98 C. C. A. 500.

Any person interested

The phrase "any person interested," in Starr & C. Ann. St. 1896, c. 3, par. 46, providing that, when any person dies seised of any real estate within the state and has no relative or creditor within the state who will administer on the estate, the county court, on application of "any person interested" therein, shall commit the administration to the public administrator, is used in its general sense and is not limited to a person residing in the state. Where a resident intestate died without a widow, next of kin, or creditors in Illinois, but was possessed of personal property in such state, his nonresident sister was entitled to nominate a resident to act as administrator as authorized by 4 Starr & C. Ann. St. 1902, c. 3, par. 6. Strong v. Dignan, 69 N. E. 909, 911, 207 Ill. 385, 99 Am. St. Rep. 225.

The words "any persons interested therein" as used in Code Ala. 1896, § 4287 (Code 1886, § 1989), permitting any person interested therein to contest a will, include only such persons as would take an interest in the estate of the testator under or by virtue of a provision of the will, and judgment creditors of the husband of a testatrix have not under the statute such an interest as gives them a right to contest the probate of the will of the testatrix by which a child is made the sole legatee and devisee and the husband is deprived of his distributive share in the property of the wife. Keeler v. Lauer, 85 Pac. 541, 544, 73 Kan. 388 (quoting Lockard v. Stephenson, 24 South. 996, 120 Ala. 641, 74 Am. St. Rep. 63).

The interest of a divorced husband in the estate of his divorced wife, contingent on the death of their minor child, is not sufficient to authorize him to contest her will, under Rev. Prob. Code, § 43, permitting contest only by a person interested. Under Rev. Civ. Code, §§ 107–127, relating to the custody and control of minor children and their property, the divorced husband of testatrix, the latter of whom was awarded the custody of their minor child on divorce being granted, is not authorized to contest her will, since he had no control over the property of the child, before the divorce proceedings, and no interest thereafter in the property of the wife, or child, except such as was contingent on the death of the child. Halde v. Schultz, 97 N. W. 369, 370, 17 S. D. 465.

Any person out of state

Ballinger's Ann. Codes & St. § 4808, providing that, if a cause of action shall accrue against "any person who shall be out of the state," such action may be commenced within the time limited after the return of such person into the state, applies not only to persons who have resided in the state and have removed therefrom, but to persons who

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have never at any time resided within the state. Omaha Nat. Bank v. Lindsay, 84 Pac. 11, 12, 41 Wash. 531.

Any personal estate

Laws (Ed. 1830) p. 333, tit. 77, c. 1, § 4, provides that an executor shall account in money for the debts due the deceased, by him received, or which by due diligence might have been collected and received; that he shall also be charged in money with the appraised value of the goods and chattels of the deceased, or, if sold under a license, with the proceeds of the sale, provided that if there be "any personal estate" specially bequeathed or undisposed of at the request of the heirs or legatees, or preserved for their greater benefit, and not wanted for the payment of debts, the executor or administrator shall be discharged therefrom by producing and delivering it to the heirs or legatees to whom it belongs; and Rev. St. 1842, c. 159, § 6, provides that any property may be reserved at a sale, unless needed for the payment of debts, for the benefit or on the request of heirs or legatees, and that the administrator shall be discharged by delivering the same to persons entitled thereto. Held that the term "any personal estate" was sufficient to include choses in action. Stevens v. Meserve, 61 Atl. 420, 422, 73 N. H. 293, 111 Am. St. Rep. 612.

Any place

The words, "in any place," in Pen. Code, § 675, as amended by Laws 1891, c. 327, providing that any person who shall, by any offensive or disorderly act or language, annoy or interfere with any person in any place, or with the passengers of any public stagecoach, railroad car, or other public conveyance, refers to a public place, and public stages, railroad cars, and other conveyances were doubtless specified to remove any question as to whether they were public places, and included in the words "in any place." People v. St. Clair, 86 N. Y. Supp. 77, 79, 90 App. Div. 239.

Pen. Code, § 287, declares that a parent, who deserts a child "in any place" with intent wholly to abandon it, is punishable by imprisonment. Section 288 makes criminal the omission to furnish a minor child with food, clothing, and shelter. The criminal abandonment of a child under 16 years of age in destitute circumstances, and the criminal omission to furnish food, clothing, or shelter, is punishable by imprisonment, etc., by section 287a. Held that: "Considering these three sections together, the punishment for the different offenses, the language of section 287, as well as its history, the words 'in any place,' in the sentence 'deserts in any place,' cannot be regarded as mere surplusage; they are significant, and have an important bearing upon the construction to be placed upon this section. To make out this crime, it is necessary to show that such a child is deserted in a place, and is so left with the intent wholly to abandon it, and leaving two children, two and three years of age, with their own mother, is not such a desertion and abandonment as section 287 intends to punish." People v. Joyce, 98 N. Y. Supp. 863, 867, 112 App. Div. 717.

Any property

In Rev. St. 1895, art. 2113, declaring that no sale of any property belonging to an estate shall be made by an executor or administrator without an order of the court authorizing the same, the term "any property" embraces promissory notes as well as all other kinds of property. Browne v. Fidelity & Deposit Co., 80 S. W. 593, 595, 98 Tex. 55.

Section 6, c. 67, Laws 1905, entitled "An act to abolish the state board of taxation and to create in lieu thereof a board for equalization, revision, review and enforcement of tax assessments," authorizes the state board of equalization, "after due investigation," to increase the assessment made upon "any property" that has been assessed at less than its true value, and for this purpose, if necessary, to direct a reassessment of such property to be made by an assessor or other taxing officer, or by some other person appointed by the board. The terms "any property" and "such property" import that its purpose is to secure an increase in valuation of some specific parcel of property, and, when the state board determines after due investigation that the property has been assessed at too low a rate, the board is to increase the assessment made upon such property. Jersey City v. Board of Equalization of Taxes of New Jersey, 67 Atl. 38, 40, 74 N. J. Law, 753.

Laws (Ed. 1830) p. 333, § 4, provides that an executor shall account in money for the debts due the deceased, by him received, or which by due diligence might have been collected and received; that he shall also be charged in money with the appraised value of the goods and chattels of the deceased, or, if sold under a license, with the proceeds of the sale, provided that if there be any "personal estate" specifically bequeathed or undisposed of at the request of the heirs or legatees, or preserved for their greater benefit, and not wanted for the payment of debts, the executor or administrator shall be discharged therefrom by producing and delivering it to the heirs or legatees to whom it belongs; and Rev. St. 1842, c. 159, § 6, provides that any property may be reserved at a sale, unless needed for the payment of debts, for the benefit or on the request of heirs or legatees, and that the administrator shall be discharged by delivering the same to persons entitled thereto. Held, that the term "any property," as so used, was sufficient to include choses in action. Stevens v. Meserve, 61 Atl. 420, 422, 73 N. H. 293, 111 Am. St. Rep. 612.

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Any proposed ordinance

Dallas City charter, granted by Sp. Acts 30th Leg., provides by chapter 71, art. 3, par. 1, that all powers conferred on the city, unless otherwise provided, shall be exercised by the mayor and four commissioners, designated as the board of commissioners. Article 2, § 8, par. 27, gives the city power, by ordinance, to regulate and fix the charges of local telephones. Paragraph 7 provides that "the right is hereby delegated to the city of Dallas, acting through its board of commissioners," to regulate the charges made by corporations, etc., exercising a public privilege, and to change such regulations, but forbids such change except after notice and a fair hearing. Article 8, par. 1, provides that "any proposed ordinance" may be submitted to the board by petition signed by 5 per cent. of the electors voting at the last mayoralty election, when the board shall submit such ordinance without alteration to a vote of the people, and upon its adoption by a majority of the electors it shall go into force. Article 2, § 1, par. 2, provides that the specification of particular powers shall not be a limitation upon the general powers granted, the intention being that the city shall exercise all powers of municipal government not otherwise prohibited. Held, that article 8, par. 1, did not authorize a submission to the electors of ordinances upon any subject of legislation named in the charter, but only upon subjects to which the initiatory method was applicable, and an ordinance regulating telephone rates could not be presented to the electors for adoption, since a fair hearing on the reasonableness of the rate fixed, as required by article 2, § 8, par. 7, could not be had by that method, and hence such an ordinance adopted by the electors was invalid. Southwestern Telegraph & Telephone Co. v. City of Dallas, 134 S. W. 321, 322, 104 Tex. 114.

Any question of fact

Under a rule of the district court that in all civil actions not more than five witnesses shall be examined as to "any question of fact or issue in the cause," the phrase quoted refers to any single, substantial allegation of the pleadings on which an issue is raised, and not to the ultimate fact to be determined. Hoskins v. Northern Pac. Ry. Co., 102 Pac. 988, 991, 39 Mont. 394.

Any railroad

The phrase "any railroad, steamboat, stagecoach or other vehicle for the conveyance of goods or passengers," in Rev. St. 1895, art. 3017, providing that an action for injuries causing death may be brought when the death is caused by the negligence of the proprietor, owner, charterer, or hirer of "any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers," does not include tram railroads owned and operated by private individuals on their own premises for private purposes; the statute being designed to apply to common carriers. Ott v. Johnson (Tex.) 101 S. W. 534.

Any real or personal property

The words "any real or personal property," used in Ky. St. 1903, § 4039, declaring that it shall be the duty of all persons owning "any real or personal property" to list the property for taxation, etc., are to be read in connection with other words of the section, and refer to things of like character to those named, and do not include notes and mortgages on property within the State, kept in another state. Callahan v. Singer Mfg. Co. (Ky.) 92 S. W. 581, 582.

Any reason

See If For Any Reason.

In a contract, where plaintiff subscribed money to be used to purchase property of a corporation and reorganize the same, the consideration to be that he should be given the position of business manager, and should render competent and efficient services as such, and "if for any reason" he should not be given such position defendants would purchase the stock of plaintiff in said company at a sum sufficient to reimburse him, the words "any reason" mean any reason other than the failure of the plaintiff to render competent and efficient services. Hall v. Hardaker, 55 South. 977, 979, 61 Fla. 267.

Any receipt

The words of Hurd's Rev. St. 1905, c. 38, § 124, forbidding the uttering of "any receipt or other written evidence of the delivery or deposit of any grain," etc., and those which forbid the utterance of the writing unless the goods are still in store and the property of the person to whom or to whose agent the receipt is issued, do not show that the statute does not cover a writing evidencing the deposit in a building of grain belonging to the owner of that building, but the requirements of the section are satisfied where such a writing is assigned, transferred, or delivered to another, and a receipt evidencing the deposit of corn in an elevator is within the section, and section 125, notwithstanding it reserved the right to store or intermingle the grain with other grain of the same grade. McReynolds v. People, 82 N. E. 945, 948, 230 Ill. 623.

Any record

"Any record," as used in Rev. St. U. S. § 5403, includes any part of a record. Therefore a few lines or even one line from a page of a record would be a record of the facts stated in such line or few lines and would be included in the term "any record," as used in such statute. McInerney v. United States, 143 Fed. 729, 733, 74 C. C. A. 655.

Any road crossing

The words "any road crossing," as used in Code, § 2072, providing that in moving a railroad train the engine whistle must be sounded at least 60 rods before any road

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crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, do not include private crossings, but include only roads as defined by section 48, cl. 5, providing that the term "road," as used in the Code, means any public highway, unless otherwise specified; and it is not otherwise specified in section 2072. Nicholas v. Chicago, M. & St. P. R. Co., 100 N. W. 1115, 1116, 125 Iowa, 236.

Any salary

Where, on the institution of a contest of the election of clerk of a city board of education, the board suspended payment of defendant's salary as clerk, and, after three months' salary had accrued, defendant executed a bond to save the board harmless by reason of a payment to him of "any salary now due him as clerk," such quoted clause referred to and included the three-months clerk's salary then due, which the board, having paid to defendant, was entitled to recover in an action on the bond after defendant's defeat in the contest. McLaughlin v. Board of Education of City of Covington (Ky.) 83 S. W. 568, 569.

Any sale

An ordinance of the city of Omaha granted a right of way in its streets for the construction and maintenance of waterworks, together with a contract to furnish a city with water for 25 years, and provided that the city, at any time after 20 years, might purchase the waterworks at an appraised value. The works were completed in 1883, and in 1896 the water company, which was then the owner of the waterworks and franchises, executed to a trust company in this state a prior lien mortgage of the waterworks, etc., to secure bonds due in 1916, which referred to the ordinance, and provided that the water company should pay the principal of the bonds issued, when due; that the water company might, at any time, redeem the bonds at 105 and interest, and that upon a default in interest or in any of the agreements of the water company, or on the appointment of a receiver, the principal of all outstanding bonds should become due, at the election of the trustee; that "upon any sale of the property * * * the principal of all the bonds secured and outstanding shall become due, if not already due"; and other provisions in case of default or foreclosure. In 1903 the city, under the reservation in the ordinance, elected to purchase, and the water company was decreed to file a power of attorney authorizing the trustee to discharge the mortgage upon payment of the amount of all outstanding bonds and interest, and that the balance of the proceeds be paid by the city direct to the water company; and thereunder the trustee claimed a sum equal to all of the bonds for redemption at 105 and accrued interest. Held, that the mortgage contemplated only a sale at the instance of the trustee in proceedings after default or a receivership; the provision as to "any sale of the property" referring only to a sale under the terms of the mortgage, and not to a sale under the reservation contained in the ordinance, and hence that the bonds must be redeemed at 105 and accrued interest. Harnickell v. Omaha Water Co., 131 N. Y. Supp. 489, 494, 146 App. Div. 693; Carlsen v. Same, 131 N. Y. Supp. 495, 146 App. Div. 702.

Any school district

Rev. St. 1899, c. 154, provides for the organization of school districts. Article 1 provides for subdistricts, or what are generally known as "country school districts." Article 2 provides for city, town, and village districts; article 3, for districts in cities of more than 50,000, and less than 100,000, inhabitants; and article 4, for districts in cities of 300,000 inhabitants and over. Section 9739, being the first section of article 1, declares that "all sub-districts [i. e., country districts] as organized and bounded shall hereafter be known as school districts," etc. Section 9747 of the same article provides that whenever "any school district" shall be divided by a county line, etc., an election may be held for the purpose of forming a separate district, or attaching either fractional part of the district to an adjoining district in the county in which such fractional part lies. Held, that the words "any school district" must be limited to country school districts, according to the subject-matter of the article of which section 9747 is a part, and a village school district lying in two counties cannot be divided under the provisions of such section. State ex rel. Balch v. Fry, 85 S. W. 328, 186 Mo. 198.

Any seaman

The phrase "any seaman," used in Act Cong. Dec. 21, 1898, § 24, amending Act June 26, 1884, § 10, providing that it shall be unlawful to pay "any seaman" wages in advance of the time when he has actually earned the same, includes not only American seamen, but foreign seamen shipping on foreign vessels from American ports. The Kestor, 110 Fed. 432, 439.

Any shad fish

Since the Legislature, in passing Act S. C. Feb. 16, 1904 (24 St. at Large, p. 385), prohibiting the transportation of "any shad fish" beyond the limits of the state, distinctly refused to limit the act to shad fish caught within the limits of the state, it could not be construed by the courts to be so limited, and as limited, held constitutional. McDonald & Johnson v. Southern Express Co., 134 Fed. 282, 283.

Any special order

Under Rev. Codes, § 4807, subd. 3, providing that an appeal may be taken to the Supreme Court from a district court from "any special order made after final judgment," an

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appeal may be taken from an order made after final judgment vacating and setting aside such judgment. Shumake v. Shumake, 107 Pac. 42, 44, 17 Idaho, 649.

Any species of seines

Setting a gill net is within Comp. Laws 1897, § 5857, designed to protect abutting landowners against the use of nets by other fisherman, and forbidding the building by any person in waters fronting or bordering land where fish are taken by the legal owner or occupant of such land of "any species of seines or continuous trap nets," or the placing or driving any net piles, or stakes, or any other piles or stakes or posts. Hilborn v. Smith, 111 N. W. 1082, 148 Mich. 474.

Any specific real estate

In St. 1898, § 2867, providing that in an action for divorce, where alimony or other allowance is made, the court may impose as the charge upon "any specific real estate of the party liable," the words "any specific real estate of the party liable" must include the homestead. Schultz v. Schultz, 113 N. W. 445, 446, 133 Wis. 125, 126 Am. St. Rep. 934.

Any stage

See At Any Stage.

Any stock of goods

Pierce's Code, § 5346, declares that it shall be unlawful to purchase "any stock of goods, wares or merchandise in bulk" for cash or on credit, without requiring the vendor or his agent, before payment is made, to give to the buyer a sworn statement of the names and addresses of his creditors. Held, that a sale of the business and appliances of a boarding house and restaurant was not exempt from the provisions of such section, and a failure to comply therewith rendered the sale invalid. The word "any" is comprehensive, and so is the word "stock." There is no limit placed by the Legislature on the meaning of the word "stock." A stock of goods may mean a great many different kinds of goods. Plass v. Morgan, 78 Pac. 784, 785, 36 Wash. 160.

Any street or public ground

The term "any street or other public ground," as used in an ordinance prohibiting the use of space thereunder without a permit, and prohibiting the granting of a permit for such use, includes public "alleys." J. Burton Co. v. City of Chicago, 86 N. E. 93, 95, 236 Ill. 383, 15 Ann. Cas. 965.

Any subsequent meeting

The phrase "any subsequent meeting of the board," as used in St. 1901, p. 27, § 2, providing that whenever the legislative branch of any municipal corporation, by resolution passed by a two-thirds vote and approved by the executive, shall determine that public necessity demands a municipal improvement, the cost of which will be too great to be paid out of the ordinary annual income of the municipality, it may at "any subsequent meeting" of such board call a special election and submit the question of incurring a debt for the purpose, includes a stated or special meeting, and no particular time is required to intervene. A resolution calling an election under such section, passed at an adjourned meeting of the board, and immediately succeeding the meeting at which the resolution of public necessity was adopted, is passed at a "subsequent meeting" as required. City of Redondo Beach v. Barkley, 90 Pac. 452, 453, 151 Cal. 176.

Any such place of public amusement

Rev. Codes, § 6825, provides that it shall be unlawful for any person to keep open on Sunday any theater, playhouse, race track, circus, or show, etc., "or any such place of public amusement." Held that, to bring a public amusement not enumerated by the statute under the general language of "any such place of public amusement," the likeness must be based on something other than the mere fact that it is a "public amusement," and must correspond to the amusement specified. A "scenic railway" is not "such a place of public amusement" as a "merry-go-round" enumerated by the statute. Ex parte Hull, 110 Pac. 256, 257, 18 Idaho, 475, 30 L. R. A. (N. S.) 465.

Any suit or proceeding

The phrase, "any suit or proceeding," in the federal Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087), in force January 1, 1912, declaring in section 299 that the repeal of laws shall not affect "any suit or proceeding," including those pending on writ of error, appeal, certificate, or writ of certiorari, includes an inquiry pending before a grand jury properly impaneled in the District Court, and an indictment returned by the grand jury after January 1st is valid. The word "proceeding," though frequently used in a restrictive sense, must be understood in its ordinary signification. United States v. New Departure Mfg. Co., 195 Fed. 778, 779.

Any time

See At Any Time.

A deed conveying timber, with the right to enter on the land and cut and remove it at "any time thereafter," entitles the grantee to a reasonable time after notice to remove the same. St. James v. Erskine, 119 N. W. 897, 155 Mich. 606.

Any township

Acts 1899, c. 97, providing that the county commissioners when petitioned therefor by 50 freeholders, voters of "any township" or townships contiguous to each other, and inhabitants of the county where the roads petitioned for are to be improved, shall submit to the voters thereof the question of such improvement, does not require that a petition for the improvement of roads in a

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district containing two or more contiguous townships should be signed by 50 or more voters in each township, but it is sufficient if it is signed by 50 petitioners in all, some of whom resided in each township. Davern v. Board of Com'rs of Decatur County, 72 N. E. 268, 269, 34 Ind. App. 44.

Any trade, manufacture or business

The phrase "in which any trade, manufacture, or business is carried on," in Acts 1891, c. 124, requiring certain fire escapes on public buildings, includes any business of any nature. Carrigan v. Stillwell, 59 Atl. 683, 685, 99 Me. 434, 68 L. R. A. 386.

Any trial, hearing, proceeding, or investigation

The phrase "trial, hearing, proceeding, or investigation," as used in a statute relating to the preservation of the purity of elections, which defines and punishes offenses against the elective franchise, and provides that a person offending against any provision thereof is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, as any other person, means some trial, hearing, proceeding, or investigation of a person other than the witness for the commission of such offense. Lindsay v. Allen, 82 S. W. 648, 649, 113 Tenn. 517.

Any two corporations

A consolidation of corporations under a statute authorizing the consolidation of "any two corporations" is not invalidated by the fact that one of the constituent corporations was itself created by a prior consolidation. Jones v. Missouri-Edison Electric Co., 135 Fed. 153, 157.

Any useful beast, fowl, or animal

The poisoning of chickens is within the purview of Revisal 1905, § 3299, relating to cruelty to animals, enumerating as the subjects protected from cruelty "any useful beast, fowl or animal." State v. Bossee, 59 S. E. 879, 145 N. C. 579.

Any way dispose of

The words "in any way disposes of," as used in a dramshop ordinance, construed in this case to signify more than to sell. City of Jerseyville v. Becker, 117 Ill. App. 86, 88.

Any way mentioned

2 Rev. St. (1st Ed.) pt. 2, c. 6, tit. 1, art. 3, § 49, as amended by Laws 1869, c. 22, provides that a child born after the making of his parent's will, not "provided for nor in any way mentioned in such will," shall take as if the parent died intestate. Held that the words "in any way mentioned" indicate that the expression was to be used in the broadest possible sense, so as to cover any form of reference that showed that a testator had in mind the possibility of after-born children, and where a testator gave his estate to his wife to her own use, and that of her heirs forever, and provided that in case of her death during the lifetime of the testator, leaving issue, the issue would take the estate, and, if the wife should die leaving no lawful issue, the estate should be divided in accordance with the intestate laws, and the testator at the time of the execution of the will was a married man, but had no children, a child born after testator's death was "mentioned" in the will, and he was bound by it, and could not take as if the testator had died intestate. Stachelberg v. Stachelberg, 101 N. Y. Supp. 178, 180, 52 Misc. Rep. 22.

Any will

Under Act Feb. 10, 1821 (Laws 1821, p. 119), § 5, authorizing contest of "any will," and, under Act 1819 (Laws 1819, p. 231, § 23), providing for authenticating and filing foreign wills, such wills could be contested as well as domestic wills. Dibble v. Winter, 93 N. E. 145, 151, 247 Ill. 243.

ANY ONE

The words "any one," in Act Cong. March 1, 1895, c. 145, 28 Stat. 697, § 8, punishing any person who shall manufacture, sell, give away, or by any means furnish to "any one" any intoxicating liquors, are words of general and comprehensive description, and an indictment for the sale of intoxicating liquors need not state the name of the person to whom the liquor is sold. Parmenter v. United States, 98 S. W. 340, 6 Ind. T. 530.

ANY OTHER

See, also, Other.

Ejusdem generis

Mansf. Dig. Ark. § 1640, defining embezzlement by "any carrier or other bailee," is not confined to bailees of the generic class "carriers," but embraces all bailees. Faggard v. State, 104 Pac. 930, 931, 3 Okl. Cr. 159.

An indictment for larceny after trust charged that the accused was intrusted by T. J. Moss with $250, "for the purpose of a cash bond for Roy Y. Moss for the space of six months, said Roy Y. Moss to be employed as a collector and office man for the General Adjusting Company (a corporation)," said accused claiming to be manager of the corporation, and the said sum of money was intrusted to the accused and to be paid back to said T. J. Moss at the expiration of six months from February 17, 1910, but that at the expiration of six months said T. J. Moss made a demand on the accused, and the accused wrongfully and fraudulently converted the said sum to his own use after being so intrusted, and without the consent of and to the injury of T. J. Moss, and without paying him the market value thereof. Held, that the indictment set forth an offense under section 189 of the Penal Code of 1910; the accused coming within the classification of "any other

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bailee," as used in that section. An intimation to the contrary in Sanders v. State, 12 S. E. 1058, 86 Ga. 717, was, in Cody v. State, 28 S. E. 106, 100 Ga. 105, expressly held to have been obiter; and it was in the latter case ruled that the words "any other bailee," as used in what is now section 189 of the Penal Code of 1910, "include any bailee, whether he be of the class enumerated or not." McCrory v. State, 76 S. E. 163, 11 Ga. App. 787. See, also, Weaver v. Carter, 28 S. E. 869, 871, 101 Ga. 206, 213; Belt v. State, 27 S. E. 451, 103 Ga. 12.

Where the concealing of an offender is first mentioned, and then there is added the giving of such offender any other aid, the "other aid" is of a similar character as that particularly specified. State v. Jett, 77 Pac. 546, 547, 69 Kan. 788 (citing State v. Doty, 57 Kan. 835, 48 Pac. 145).

Acts 33d Gen. Assem. c. 168, provides that all hotels shall be kept and maintained in a clean and sanitary condition, free from any effluvia, gas, or offensive odors arising from any sewer, drain or privy, or from any other source whatever within the control of the owner, manager, or person in charge, does not confer on the hotel inspector arbitrary power to declare a nuisance solely because of "offensive odors," since, under the rule ejusdem generis, the words "any other source whatever" refer to a source of like kind with "sewer, drain, and privy." Hubbell v. Higgins, 126 N. W. 914, 918, 148 Iowa, 36, Ann. Cas. 1912B, 822.

Under Burns' Ann. St. 1908, § 2356, making it unlawful to entice a female to enter "any house of prostitution, assignation, saloon or wineroom where intoxicating liquors are sold, or any other place for vicious or immoral purposes," an affidavit is insufficient which charges accused with enticing a female "to enter into a certain house situated at No. 202 East Broadway street" in a city, county, and state named, "for the purpose of having sexual intercourse with her," as "any other place" means place of like character with those previously enumerated. Wiggins v. State, 87 N. E. 718, 172 Ind. 78.

In the provision of Immigration Act Feb. 29, 1907, § 3, making it a felony to import into the United States any alien woman or girl for the purpose of prostitution or for any other immoral purpose, the words "any other immoral purpose" must be construed with reference to the preceding word "prostitution," and to relate only to a like immoral purpose, and, so construed, cannot be held to include concubinage. United States v. Bitty, 28 S. Ct. 396, 208 U. S. 393, 52 L. Ed. 543.

The term "or any other person entitled," in Code Civ. Proc. § 1368, providing that, if any person entitled to administration is a minor, letters must be granted to his guardian, or any other person entitled to letters, is general in its designation of persons, and must either apply to persons in the same class as the minor, or to persons in inferior classes, who, as provided in section 1365, are entitled, in the absence of others having superior rights, to a grant of letters. In re Turner's Estate, 77 Pac. 144, 146, 143 Cal. 438.

An action of trespass quare clausum fregit, in which an issue of title is adjudicated, is not within Civ. Code 1902, § 3096, providing that in any action "for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, or in any other action for damages for torts," the costs shall not exceed the recovery where that is less than $100, for there is nothing in the general expression "any other action for damages for torts" which compels an extension of meaning to cover classes of torts unlike those enumerated. Vassey v. Spake, 65 S. E. 825, 826, 83 S. C. 566.

Greater New York Charter, Laws 1897, p. 522, c. 378, § 1481, provides that it shall not be lawful to exhibit to the public on Sunday in any building, garden, grounds, concert room, or other room or place within the city of New York any interlude, tragedy, comedy, opera, ballet, play, farce, negro minstrelsy, negro or other dancing, or any other entertainment of the stage, or any part or parts therein, or any equestrian, circus, or dramatic performance, or any performance of jugglers, acrobats, or rope dancing. Held, that the phrase "any other entertainment of the stage" should not be limited, under the rule of ejusdem generis, to performances similar to those specified, but should be construed to enlarge the scope of the section, so as to forbid all performances of any character in a place of public amusement on Sunday. In re Hammerstein, 108 N. Y. Supp. 197-199, 57 Misc. Rep. 52.

Any other building

St. 1898, § 4409, prohibiting the breaking and entering "any office, shop, or warehouse, or any other building" with intent to commit a felony, when considered in connection with sections 4407-4411, defining burglary, and section 4412, providing a penalty for breaking, entering, and stealing in public buildings, does not make the breaking and entering a schoolhouse with intent to commit a felony a burglary; the words "any other building" not including a schoolhouse.—Howard v. State, 121 N. W. 133, 134, 139 Wis. 529.

Any other cause

The phrase as used in a statute providing that a tenant may surrender the premises if the building is destroyed or so injured by the elements or "any other cause" as to be untenantable, limits the "other causes" to physical destruction or injury to the demised premises of a permanent nature, and does not include untenantability by means of vi-

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bration caused by the operation of an adjacent electric light plant. Floyd-Jones v. Schaan, 109 N. Y. Supp. 362, 364.

A covenant in a lease binding the lessee at the expiration of the term to surrender the premises in the condition received except natural wear and decay, and to repair from time to time any damage done to the premises by the negligence of his employés, careless usage or from "any other cause whatever," does not bind the lessee to make repairs caused by natural wear and decay, for the words "any other cause whatever" mean any other cause except natural wear and decay. Herboth v. American Radiator Co., 123 S. W. 533, 537, 145 Mo. App. 484.

The words "or any other causes" do not enlarge the scope of the particular words in the midst of which they appear. The addition of the word "preventable" before the word "cause," in a contract providing that if the pavement is defective from overburning or improper mixing of material or "any other preventable causes," has relation to causes of the same kind as those particularized, and does not diminish or affect the scope of the contractor's obligation.—City of Mankato v. Barber Asphalt Pav. Co., 142 Fed. 329, 345, 73 C. C. A. 439.

Any other dangerous, noxious or offensive establishment

"The covenant that the grantee shall not at any time erect, suffer, or permit on the premises 'any brewery, or any other dangerous, noxious, or offensive establishment whatsoever,' is not one that restricts a business which would be injurious or offensive to the neighboring inhabitants, but, after specifying several specific uses to which the property is not to be put, couples with such restricted uses any other dangerous, noxious, or offensive establishment whatsoever; and, while the construction of this covenant would not be governed by the general laws as to nuisances, but by the force and effect of the covenant (Rowland v. Miller, 34 N. E. 765, 139 N. Y. 193, 22 L. R. A. 182), there must be evidence to justify the finding that the building or business to be conducted by the defendant is dangerous, noxious, or offensive." Grimm v. Krahmer, 98 N. Y. Supp. 523, 525, 112 App. Div. 489.

Any other felony

Under Rev. St. 1898, § 4334, as amended by Sess. Laws 1905, c. 19, making it burglary for any person to break and enter a building with intent to commit a "larceny" or any other felony, an information charging the breaking and entering a building at night with intent to steal goods, without stating their value, sufficiently charges a burglary in the first degree, as "larceny" within such section includes both a misdemeanor and a felony, and the words "or any other felony" are equivalent to "or any felony other than that embraced within the larceny." State v. Hows, 87 Pac. 163, 31 Utah, 168.

Any other house whatsoever

Under Gen. St. 1883, c. 29, art. 7, providing that if any person shall willfully and unlawfully burn a powder house, warehouse, storehouse, stable, barn, or any house or place where wheat, corn, or other grain, fodder, hemp, cotton, wood, fruit, etc., is usually kept, or "any other house whatever," or any stack, rick, or shock of hay, etc., he shall be confined in the penitentiary, etc., the words "or any other house whatever" are sufficiently broad to include the offense when committed by burning a church. McDonald v. Commonwealth, 4 S. W. 687, 86 Ky. 10.

Any other insurance

In the questions in the written application for life insurance, the words "any other insurance" did not include accident insurance; the preceding questions having reference wholly to life insurance. Mutual Reserve Life Ins. Co. v. Dobler, 137 Fed. 550, 554, 70 C. C. A. 134.

Any other liability

A deed given as security for a note and for "any other liability or liabilities" which may be hereafter contracted will secure advances for enterprises other than that in which the mortgagor was then engaged. Huntington v. Kneeland, 92 N. Y. Supp. 944, 945, 102 App. Div. 284.

Any other matter

Civ. Code 1902, § 806, providing for the auditing and payment by the county board of accounts for "labor performed, fees, services, disbursements or any other matter," covers a claim for injury to an automobile resulting from a defective highway, and confers jurisdiction on the county board to act judicially in the matter when presented to it. Du Pre v. Lexington County, 73 S. E. 70, 71 90 S. C. 180.

Any other means

Within the statute providing for the punishment of any person setting fire to any building or to any other material with intent to cause the building to be burned, or who shall by any other means attempt to cause a building to be burned, the phrase "by any other means" does not include a mere invitation to another person to burn the building. The statute intended to require some physical act and cannot be satisfied without some such act, committed in person or through another, reaching far enough to amount to the commencement of the causation. McDade v. People, 29 Mich. 50, 55.

Any other person

The words "any other person," as used in Acts, 1891, p. 131, § 19, providing that every dramshop keeper or any other person who shall sell, etc., any intoxicating liquor to any minor, etc., shall be deemed guilty

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of a misdemeanor, referred to any one representing a dramshop keeper or who may be temporarily in charge of his business when such offense is committed and did not include a merchant or druggist who might sell intoxicating liquor to a minor. State v. Hamill, 106 S. W. 1103, 127 Mo. App. 661.

The words "any other person," in an instruction in an action for injuries to a servant, that the servant could recover if his injury was due to the negligence of the employer's foreman, either with or without the negligence of "any other person," are broad enough to include the servant himself, and the instruction is for that reason erroneous because disregarding the question of the servant's contributory negligence. Texas Cent. R. Co. v. Waldie (Tex.) 101 S. W. 517, 519.

Rem. & Bal. Code, § 2004, providing for punishment of "the parent or parents, or persons having custody" of a delinquent or neglected child, "or any other person who contributes to the delinquency or neglect of such child," is not limited to parents or other persons in loco parentis, but protects delinquent children in the hands of all persons, as the first clause of the statute includes all persons of the class having custody of children, so that the second clause embraces all persons not having custody of children who contribute to their delinquency. State v. Plastino, 121 Pac. 851, 852, 67 Wash. 374.

Under the juvenile court law (St. 1909, c. 133), defining, in section 1, a "dependent child" as any child found wandering and not having any home or proper guardianship, or who has no parent or guardian capable of exercising proper parental control, or whose home, by reason of neglect of his parents or guardian or person in whose custody he may be, is an unfit place, and providing in section 26 that in all cases where any child shall be dependent or delinquent, the parent or parents, guardian or person having the custody of such child "or any other person" who shall, by any act, contribute to the dependency or delinquency of the child, shall be guilty of a misdemeanor, any one who contributes to the dependency of a child, whatever may be his relation thereto, becomes subject to punishment; the words "any other person" including all persons committing the acts specified. Ex parte Mills Sing, 112 Pac. 582, 14 Cal. App. 512.

Where plaintiff sued on an administrator's bond before a final decree had been entered on the administrator's account, and while exceptions thereto were pending, the action was prematurely brought, and could not be sustained under Act June 14, 1836 (P. L. 640, § 6) providing that, where suit has been brought on a bond, any other person to whom a cause of action has accrued at any time before judgment may be made a party; the designation "any other person" not applying to one who has brought an action on a bond when no one has a right of action thereon, and no one has intervened. Commonwealth v. Magee, 69 Atl. 805, 806, 220 Pa. 201.

The words "any other person" in the contributory delinquent law (Sess. Laws 1903, p. 198, c. 94), providing that the parent, guardian, or person having the custody of a delinquent child or "any other person" responsible for the delinquency shall be guilty of a misdemeanor, etc., mean such persons as occupy a relation similar to that of parent, legal guardian or person having the custody of such child, and no person is guilty unless he occupies towards the child a relation similar to those enumerated. Gibson v. People, 99 Pac. 333, 335, 44 Colo. 600; Wilson v. Same, 99 Pac. 335, 44 Colo. 608.

Rev. Codes 1899, § 4730, declaring that a grant absolute in form, but intended to be defeasible, is not affected as against any person other than the grantee, unless a defeasance is recorded, in the use of the term "any other person," refers to any person otherwise entitled to protection of the recording law, but does not include general creditors. Vallely v. First Nat. Bank of Grafton, 106 N. W. 127, 129, 14 N. D. 580, 5 L. R. A. (N. S.) 387, 116 Am. St. Rep. 700.

Any other place

Under Burns' Ann. St. 1908, § 2356, making it unlawful for a male person to entice a female to enter "any house of prostitution, assignation, saloon or wine room where intoxicating liquors are sold, or any other place for vicious or immoral purposes," an affidavit is sufficient which charges accused with enticing a female "to enter into a certain house situated at No. 202 East Broadway street" in a city, county, and state named, "for the purpose of having sexual intercourse with her," as "any other place" means place of like character with those previously enumerated. Wiggins v. State, 87 N. E. 718, 172 Ind. 78.

Any other purpose

An indictment under Rev. St. § 903, making a public officer who shall convert to his own use, or shall use by way of investment, or shall loan, or use in any other manner than as directed by law public money, or for any other purpose, guilty of embezzlement, is not bad because using the words "or otherwise" instead of "or for any other purpose," as the phrases are equivalent. State v. Dudenhefer, 47 So. 614, 618, 122 La. 288.

Any other railroad

Burns' Ann. St. Ind. 1894, § 5257, which authorizes any railroad company to intersect, join, and unite with "any other railroad," does not limit the right of consolidation to two companies. Bonner v. Terre Haute & I. R. Co., 151 Fed. 985, 987, 81 C. C. A. 476.

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Any other source

The statutory provision that a second or subsequent application for a continuance in a criminal case must show that the absent testimony cannot be procured from "any other source known to the defendant" does not contemplate accused's testimony as another source, but refers to other sources besides accused himself. Morgan v. State, 113 S. W. 934, 937, 54 Tex. Cr. R. 542.

Any other structure

A railroad is within the term "any other structure," as used in a statute providing that every person furnishing material of any kind to be used in the construction of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same for the materials furnished. Giant Powder Co. v. Oregon Pac. Ry. Co., 42 Fed. 470, 473, 8 L. R. A. 700; Ban v. Columbia Southern Ry. Co., 117 Fed. 21, 31, 54 C. C. A. 407.

Any other water

A nonnavigable pond is within the class of "any other water" in Civ. Code, § 830, providing that, except where a grant under which land is held indicates a different intent, the owner of upland bordering on tidewater takes to ordinary high-water mark, and bordering on a nontidal navigable lake or stream to low-water mark, and bordering on any other water to the middle of the lake or stream, so that, unless a different intent appears from a patent of land bordering on a nonnavigable pond, the patentee takes to its center. Foss v. Johnstone, 110 Pac. 294, 298, 158 Cal. 119.

Any other witness

The use of the term "any other witness," as used in an instruction declaring that, if the jury are of the opinion that any witness has willfully sworn falsely as to anything material to the issue, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as the jury may find it corroborated by the testimony of "any other witness," renders the instruction fatally defective, because the jury may disregard the entire evidence of a witness not corroborated by some credible witness. Hart v. Godkin, 100 N. W. 1057, 1060, 122 Wis. 646 (citing F. Dohmen Co. v. Niagara Fire Ins. Co., 71 N. W. 69, 96 Wis. 38; Allen v. Murray, 57 N. W. 979, 87 Wis. 41; Mercer v. Wright, 3 Wis. 645; Patnode v. Westenhaver, 90 N. W. 467, 114 Wis. 460).

ANYTHING ELSE

Substances which are not in themselves taxable under the laws of the United States are not embraced in the words "anything else," as used in Rev. St. U. S. § 3455, providing for a seizure, forfeiture, and penalty for selling packages which contain, at the time of sale, anything else than the contents when the same were lawfully stamped by a revenue officer, even where there is no intent to defraud, and for a much heavier penalty where there is such fraudulent intent. United States v. A. Graf Distilling Co., 28 S. Ct. 264, 266, 208 U. S. 198, 52 L. Ed. 452.

ANYTHING OF VALUE

"Anything of value," as used in Rev. St. § 7076, which makes it an offense to obtain by any false pretense, and with intent to defraud, "anything of value," includes obtaining by false pretense, with intent to defraud, title to real estate situate within the state. State v. Toney, 90 N. E. 142, 143, 81 Ohio St. 130.

APART

See Live Apart; Set Apart.

APARTMENT

APARTMENT HOTEL

The words "known as the B. apartment hotel," after the word "building" in a lease thereof, were merely descriptive of the character of the hotel at the time of the making of the lease, and not indicative of an agreement that no portion of the building might be devoted to purposes not inconsistent with the use of the building described as an "apartment hotel." Bristol Hotel Co. v. Pegram, 98 N. Y. Supp. 512, 514, 49 Misc. Rep. 535.

APARTMENT HOUSE

A restrictive covenant in a deed against "tenement houses" is not to be construed as relating to first-class apartment houses having all the conveniences and appliances of the best order of houses and externally in their architecture of the character and appearance corresponding with first-class dwellings in the immediate neighborhood. Kitching v. Brown, 87 N. Y. Supp. 75, 76, 92 App. Div. 160.

The term "apartment or community house" is not synonymous with "tenement" in a covenant precluding the erection of any tenement, apartment, or community house. McClure v. Leaycraft, 90 N. Y. Supp. 233, 234, 97 App. Div. 518.

An "apartment house" is either a building otherwise termed a "flat" or "flat house," or it is a building divided into separate suites of rooms intended for residence but commonly without facilities for cooking, etc. If what is known as a "flat" becomes an "apartment house" when higher rental is charged, the payment of a rental of from $35 to $40 per month does not turn what is otherwise a "flat" into an "apartment," so as to take it out of a building restriction binding the grantee not to erect a flat on the prem-

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ises. Lignot v. Jaekle, 65 Atl. 221, 224, 72 N. J. Eq. 233.

Laws 1901, c. 334, regulating tenement houses in cities of the first class, by section 2, subd. 1, defined a tenement house as any house or building, or portion thereof, rented to be occupied as a residence of three families or more, living independently of each other, and doing their cooking, or by more than two families on any floor so living and cooking, but having a common right to the halls, stairways, yards, water-closets, or some of them. Section 95 declares that in every tenement house hereafter erected there shall be a separate water-closet in a separate compartment within each apartment, provided that, where there are apartments consisting of but one or two rooms, there shall be at least one water-closet for every three rooms. Pursuant to Greater New York Charter (Laws 1897, c. 378) § 647, authorizing the city to amend its Building Code, the city defined an "apartment house" to include every building which should be intended or designated for, or used as, the home of three or more families or households, living independently of each other, and in which every such family or household shall have provided for it a kitchen, set bath tub, and water-closet, separate and apart from each other, and that such building should be under the control of the building department of the city of New York. Held that, since the Building Code was a special act and was not in conflict with the tenement house act, the Building Code was not repealed by the tenement house act either for repugnancy or inconsistency, so that, where the compartments in plaintiff's building contained a separate water-closet, set bath tub, and a separate kitchen, it was an "apartment house" within the jurisdiction of the building department, and not a tenement house within the jurisdiction of the tenement house commissioner. Grimmer v. Tenement House Department of City of New York, 97 N. E. 884, 886, 204 N. Y. 370.

A six-story elevator apartment house of brick and limestone, which, erected, will present a dignified and attractive appearance, and will consist of elegantly appointed apartments, is not a tenement house within a covenant prohibiting the owner of the property from erecting any "tenement house," etc., thereon. The court said: That there is a wide difference between a tenement house and an "apartment house" (and in the construction of covenants, such as that involved here, such difference is recognized by the courts) is well settled. While there is no actual legal definition of a tenement house, still, in the year 1889, when the covenant between these parties was made, and even prior thereto, the difference between such a house and an "apartment house" was a matter of common knowledge. Marx v. Brogan, 98 N. Y. Supp. 89, 90, 111 App. Div. 480 (citing Kitching v. Brown, 73 N. E. 243, 180 N. Y. 414, 70 L. R. A. 742; White v. Colling Bldg. & Const. Co., 81 N. Y. Supp. 434, 82 App. Div. 1).

APERTURE

See Contracted Aperture.

APOTHECARY

The keeping and selling by a retailer of some of the articles used by apothecaries does not constitute him an "apothecary," within the statute relating to sale of intoxicating liquors, but there must be combined therewith skill in the preparation of medicines. State v. Chandler, 15 Vt. 425.

A distiller of alcohol from oleoresin, obtained from ginger root in the manufacture of a ginger ale paste, which alcohol so obtained was again used in obtaining ginger extract by percolation, was not engaged in business as an "apothecary" and was not exempt from liability for internal revenue taxation as a rectifier, purifier, or refiner of distilled spirits by Rev. St. § 3246, exempting apothecaries from liability to taxation for the distillation of spirits used exclusively in the preparation of medicines. United States v. S. Twitchell Co., 184 Fed. 525, 528.

The alcohol so distilled and used in the further preparation of fluid extract of ginger was not used exclusively in the preparation of medicine so as to exempt the distiller from taxation under Rev. St. § 3246, providing that no special tax shall be imposed on "apothecaries" as to spirituous liquors used exclusively in the preparation of medicines. United States v. Hance, 184 Fed. 528, 530.

Defendant was not exempt from such tax as an "apothecary" under Rev. St. § 3246, providing that no special tax shall be imposed on apothecaries as to spirituous liquors used exclusively in the preparation of medicines. United States v. Hance, 184 Fed. 528, 530.

Defendant manufactured a fluid extract of ginger by pouring distilled spirits on ginger root. After drawing off the fluid, the distilled spirits remaining in the dregs were separated therefrom by distillation, and this product, less in quantity and lower in grade than that previously placed in the receptacle with the ginger root, was reused in repeating the process and in the manufacture of medicinal preparations. Held, that the defendant was not exempt from an internal revenue tax as an "apothecary" under Rev. St. § 3246, providing that no special tax shall be imposed on apothecaries as to spirituous liquors used exclusively in the preparation of medicines. United States v. Smith-Kline & French Co., 184 Fed. 532–534.

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APPARATUS

See Hoisting Apparatus.

Process distinguished

See Process.

Of trade

Even if keeping a restaurant is a trade, shelving, safes, furniture, tableware, and kitchen utensils used in a restaurant are not "apparatus," within Rev. St. 1895, art. 2395, subd. 5, exempting to every family apparatus belonging to any trade. Geise v. Pennsylvania Fire Ins. Co. (Tex.) 107 S. W. 555,

A paper cutter, weighing 685 pounds, and a card cutter, weighing from 3 to 8 pounds, both being machines operated by hand, necessary in conducting the business of a printer, the head of a family residing in the state, are exempt, under Comp. Laws 1909, § 3346, subd. 5, providing that there shall be reserved to every family residing in the state, exempt from forced sale for payment of debts, all tools, "apparatus," etc., belonging to and used in a trade. Brummage v. Kenworthy, 112 Pac. 984, 985, 27 Okl. 431, Ann. Cas. 1912C, 607.

APPAREL

See Ship's Rigging and Apparel; Ship's Tackle, Apparel, and Furniture; Wearing Apparel.

"Since 'apparel' is not confined to outer clothing, but 'is used in an inclusive sense, as embracing all articles which are ordinarily worn * * * dress in general,' it seems to me to be clear that shields are embraced within the meaning of that word," as used in the tariff act. Darlington, Runk & Co. v. United States, 136 Fed. 716, 718.

The word "apparel," as given by lexicographers, is not confined to clothing. The idea of ornamentation seems to be a rather prominent element in the word, and in this sense it is not improper to say that a person wears a watch or wears a cane. It has been said that the phrase "wearing apparel," as used in exemption laws, includes all the articles of dress generally worn by persons in the calling and condition of life and in the locality of the residence of the person claiming the exemption, including whatever is necessary to a decent appearance and protection against the weather and also what is reasonably proper and customary in the way of ornament. A ring valued at $20 and a watch and chain valued at $35 worn by decedent may be set apart as exempt to the widow and minor children as "wearing apparel" of decedent. Phillips v. Phillips, 44 South. 391, 392, 151 Ala. 527, 125 Am. St. Rep. 40, 15 Ann. Cas. 157 (citing 1 Words and Phrases, p. 440).

APPARENT

See Error Apparent; Open and Apparent; Reasonably Apparent.

The Century Dictionary defines "apparent" as "exposed to sense of sight;" "open to veiw;" "visible to the eye;" "within the range of vision." Louisville & N. R. Co. v. Calvert, 54 South. 184, 186, 170 Ala. 565.

"Apparent" means clear or manifest to the understanding; plain; evident; obvious; known; palpable; indubitable. Missouri, K. & T. R. Co. of Texas v. Reynolds (Tex.) 115 S. W. 340, 343.

"Evident" is synonymous with "apparent." State v. Kauffman, 108 N. W. 246, 20 S. D. 620 (quoting Webster's Dict.).

The word "apparent," as used in an instruction in a personal injury action in connection with the word "reasonable," is not erroneous, for the word "apparent" means plain or evident, and is the fair equivalent of "certain." Harrison v. Ayrshire, 99 N. W. 132, 133, 123 Iowa, 528.

There is no material difference between the words "apparent" and "reasonably apparent" as used in an instruction, in an action for injuries sustained in a railroad crossing accident, making the doctrine of discovered peril applicable if the employés on the engine saw the person injured on the track, and it was apparent, or reasonably apparent, that he would not get off, and the words "realized his peril." Webster defines "apparent" as clear or manifest to the understanding; plain; evident; obvious; known; palpable; indubitable. If the danger was apparent, or reasonably apparent to the employés operating the engine, it was known to them. Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Tex.) 115 S. W. 340, 343.

The court charged that where a party is assaulted, and his adversary "apparently" abandons the difficulty, he has no right to pursue or fire on him unless it is necessary to do so in order to protect himself from a renewal of the unlawful attack, in which case he may lawfully pursue, and his right to do so continues so long as the necessity continues. Held, that while the word "apparently" was used in the sense of "evidently," "obviously," or "clearly," the instruction was misleading, as calculated to lead the jury to believe that a mere retreat by decedent, apparently abandoning the difficulty, ended defendant's right to continue to shoot. Derden v. State, 120 S. W. 485, 490, 56 Tex. Cr. R. 396, 133 Am. St. Rep. 986.

As actual and real

The use of the word "apparent," in a charge that no one is justified in taking the life of another unless the necessity for doing so is "apparent," as the only means, etc., held objectionable on account of the dual meaning of the term; it being sometimes synonymous

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with actual and real. State v. Jones, 60 Atl. 396, 397, 71 N. J. Law, 543.

APPARENT AUTHORITY

An act is within the "apparent" scope of an agent's authority when a reasonably prudent person, having knowledge of the nature and usages of the business, is justified in supposing that he is authorized to perform it from the character of the duties which are known to be intrusted to him. Townsend v. Missouri Pac. Ry. Co., 128 Pac. 389, 390, 88 Kan. 260.

"The 'apparent authority' of an agent, which will bind his principal, is such as the agent appears to have by reason of the actual authority which he has." Northwest Thresher Co. v. Eddyville State Bank, 114 N. W. 291, 293, 80 Neb. 377 (citing Creighton v. Finlayson, 64 N. W. 1103, 46 Neb. 457); Cooper & Cole Bros. v. Cooper, 133 N. W. 243, 245, 90 Neb. 209.

The "apparent authority" of an agent is such authority as the acts or declarations of the principal give the agent the appearance of possessing. Farmers' Co-op. Shipping Ass'n v. George A. Adams Grain Co., 122 N. W. 55, 57, 84 Neb. 752.

"The "apparent authority" of an agent is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. Dispatch Printing Co. v. National Bank of Commerce, 124 N. W. 236, 240, 109 Minn. 440.

"Apparent authority" in an agent to represent his principal exists when the principal permits the agent to exercise powers not expressly granted; but such apparent power is to be determined, not by the acts of the agent, but by the acts of the principal, and it must appear that they were relied and acted upon in good faith to justify a third person in dealing with the agent. Dispatch Printing Co. v. National Bank of Commerce, 132 N. W. 2, 3, 115 Minn. 157.

Under the rule that the principal is liable upon a contract duly made by his agent with a third person (1) when the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his "apparent authority" unless the third person has notice that the agent is exceeding his authority, the term "apparent authority" includes the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business or to execute the commission which has been intrusted to him, and the principal cannot restrict his own liability for acts of his agent which are within the scope of his apparent authority by limitations thereon of which the person dealing with his agent has not notice. Bank of Morganton v. Hay, 55 S. E. 811, 812, 143 N. C. 326.

APPARENT DANGER

See Imminent and Apparent Danger.

An "apparent danger" is one which may be seen or otherwise comprehended, through the medium of the senses. Correll v. National Acc. Soc., 116 N. W. 1046, 1048, 139 Iowa, 36, 130 Am. St. Rep. 294.

APPARENT EASEMENT

Easement as, see Easement.

The word "apparent," as applied to an easement, as against a purchaser of the servient estate, does not necessarily mean "visible," but includes easements used by means of some artificial structure on the servient tenement, such as a pipe, sewer, or ditch, as distinguished from those using the servient easement in its natural state and at intervals, in the meantime leaving no visible sign of their existence, such as a way or right of fishery or pasture. Rubio Cañon Land & Water Ass'n v. Everett, 96 Pac. 811, 813, 154 Cal. 29.

APPARENT GOOD ORDER

"Apparent good order" ordinarily refers to the outward appearance of the goods or to their receptacles, and not to hidden or concealed conditions. Where a shipment delivered to the carrier in good order is received in bad order, it is presumed that it was damaged while in the carrier's possession. Kelly v. Southern Ry., 66 S. E. 198, 199, 84 S. C. 249, 137 Am. St. Rep. 842.

APPARENT ON THE FACE OF THE RECORD

In Rev. Civ. St. 1911, arts. 1607, 1612, requiring that errors at law not "apparent on the face of the record" be presented by timely assignments of error, the phrase quoted refers to such manifest error as when removed destroys the foundation of the judgment. Oar v. Davis (Tex.) 151 S. W. 794, 796.

In Rev. St. 1895, art. 1014, "apparent on the face of the record" means fundamental error which can be readily seen to go to the foundation of the action without looking into the record and considering the evidence, etc.; "apparent" meaning clear or manifest, plain, evident, obvious. Houston Oil Co. of Texas v. Kimball, 122 S. W. 533, 537, 103 Tex. 94.

The phrase "apparent on the face of the record," as used in Rev. St. 1895, art. 1014, providing that in all cases of appeal or writ of error to the Court of Civil Appeals the trial shall be on a statement of facts, or on an error in law either assigned or "apparent on the face of the record," signifies a prominent error, either fundamental in character, or one determining a question upon which the very right of the case depends. Adams v. Faircloth (Tex.) 97 S. W. 507 (quot-

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ing Wilson v. Johnson, 94 Tex. 272, 60 S. W. 242).

APPARENT ORGANIZATION

See Color of Apparent Organization.

APPARENT SOLAR TIME

"Apparent solar time" is time measured by the actual passage of the sun over meridian. Owing to the variability of this measure, apparent time is a varying quantity, and therefore for purposes of practical convenience an arbitrary measure was adopted known as mean solar time. Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co., 154 Fed. 13, 20, 83 C. C. A. 91.

APPEAL

See Case (On Appeal); Costs of Appeal; Due Prosecution of Appeal; Gave Notice of Appeal; Has Appealed; Statutory Writ of Error on Appeal; Taking Appeal.

Appealable judgment or order, see Final Decree or Judgment.

Appealable order, see Final Order.

Committee on appeal as court, see Court (Of Justice).

Enter appeal, see Enter—Entry (In Practice).

Probable cause for appeal, see Probable Cause.

Reason for appeal, see Reason.

An "appeal" is a continuation of the original action or proceeding in another jurisdiction. State ex rel. City of Duluth v. Northern Pac. Ry. Co., 109 N. W. 238, 239, 99 Minn. 280.

"An 'appeal' is a continuation of the original suit, for the purpose of obtaining a new trial and a new judgment. It is analogous in its effect to the award of a new trial, by which the previous verdict is entirely set aside, and the case is to be heard anew like an original action and as if no judgment had been rendered in the court below. In highway appeals and generally, the appeal vacates the judgment in the court below, and the judgment in the appellate court is a distinct and original judgment." Bickford v. Town of Franconia, 60 Atl. 98, 99, 73 N. H. 194 (citing Morse v. Wheeler, 45 Atl. 561, 69 N. H. 292; Cook v. Bennett, 51 N. H. 85, 91; Stalbird v. Beattie, 36 N. H. 455, 72 Am. Dec. 317; Wallace v. Brown, 25 N. H. 216, 220; Mathes v. Bennett, 21 N. H. 188, 203).

The word "appeal," as used in an undertaking reciting an appeal from a judgment and from an order denying a motion for a new trial, and binding the sureties to pay "all damages and costs which might be awarded on the appeal or on the dismissal thereof," means the whole appeal as described by the instrument, including the appeal from the judgment, and the appeal from the order denying the new trial, and therefore binds the sureties for any and all costs and damages that may be awarded on either of such appeals. Buckner v. Malloy, 92 Pac. 1029, 1030, 152 Cal. 484.

An "appeal" is a process of civil law origin and is the appropriate mode of review for causes originally in a court of chancery, and in the absence of statutes providing otherwise, it removes the cause entirely subjecting the facts as well as the law to a review and retrial. Where the statutes have so restricted the appeal that in its nature it only operates to review as does a writ of error, the appeal like the writ of error becomes a new suit and not a continuation of the suit, the proceedings of which are sought to be reviewed. Wingfield v. Neall, 54 S. E. 47, 49, 60 W. Va. 106, 10 L. R. A. (N. S.) 443, 116 Am. St. Rep. 882, 9 Ann. Cas. 982.

The word "appeal" refers to proceedings provided for in Code Civ. Proc. tit. 13, pt. 2, relating to the time and method of taking appeals. Under the Code, provision that, if an action is commenced within the time prescribed therefor and a judgment for plaintiff is reversed on "appeal," the plaintiff may commence a new action within a year after reversal, commencement of a suit and the bringing of an action within a year from the annulling of a decree therein on a "writ of review" does not prevent the bar of limitation. Fay v. Costa, 83 Pac. 275, 277, 278, 2 Cal. App. 241.

The word "appeal," as used in Rev. Laws, c. 100, § 4, providing for the removal of licensed commissioners by the mayor for cause, after charges preferred and reasonable notice of the hearing, and granting to the officer removed a right to review by the superior court, and declaring that the court after hearing shall affirm or revoke the order of the mayor removing such commissioner, "and there shall be no 'appeal' from his decision," is used in a broad general sense so as to cover all proceedings for a revision by a higher court, and where the superior court determines a controversy arising under the statute the officer removed is not aggrieved by the ruling of the court, since the same in binding upon him. Dow v. Casey, 79 N. E. 810, 811, 194 Mass. 48.

"The words 'intends to appeal,' 'will appeal,' or 'give notice of their application to appeal,' are equivalent to and have the same effect as the more direct phraseology of the statute ('appeals from the judgment'); that is each will effect an appeal. Of course, if the phrases above cited are sufficient to effect the appeal, the words 'has appealed' will likewise perform the same office." James v. James, 77 Pac. 1082, 35 Wash. 655 (citing Ranahan v. Gibbons, 62 Pac. 773, 23 Wash. 255; In re Murphy's Estate, 66 Pac. 424, 26 Wash. 222; Brown v. Calloway, 75 Pac. 630, 34 Wash. 175).

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The county commissioners, when permitting a liquor licensee to remove his business to a different location, sits as an administrative board and not as a court, and an appeal from their decision does not and cannot transfer to the superior court their jurisdiction to hear purely administrative questions, but transfers only judicial questions involving the legality of the commissioner's conduct, so that the term "appeal" applied to such transfer is a misnomer. Appeal of Bridgeport Malleable Iron Co., 85 Atl. 580, 582, 86 Conn. 378; Vaill v. McPhail, 83 Atl. 1075, 1078, 34 R. I. 361.

As civil action

See Civil Action—Case—Suit—etc.

Certiorari

As substitute for, see Certiorari.

Starr & C. Ann. St. 1896 (2d Ed.) c. 3, par. 68, in relation to administration, provides that in all cases of the allowance or rejection of claims by the county court either party may take an "appeal" to the circuit court of the same county, in the same time and manner that appeals are taken from justices to the circuit courts by appellant giving a bond, and it is provided that the appeal shall be tried de novo. Chapter 79, par. 115, in relation to justices and constables, provides for an appeal from a justice to the circuit court, and chapter 79, par. 177, provides that the judges of courts to which appeals may be taken from justices shall have power to grant writs of certiorari. At the time of the adoption of the statute upon administration, there was in force a general statute (Laws 1849, p. 62) establishing county courts, which provided that appeals might be taken from and writs of certiorari prosecuted on its judgments in the manner prescribed by law in case of similar judgments rendered by the probate court, and by a statute of 1845 it was provided that appeals from probate justices of the peace might be taken and writs of certiorari prosecuted upon their judgments in the same manner as from judgments of justices. Held, that a statutory writ of certiorari does not lie from a circuit court to a county court sitting in probate to review the proceedings upon a claim against the estate of a decedent, but the sole remedy is an appeal; the word "appeal" not including appeal by means of writ of certiorari. Schaeffer v. Burnett, 77 N. E. 546, 547, 221 Ill. 315.

As new trial

An "appeal" and trial de novo is an "appeal" and not exclusively a new trial. State ex rel. Hart v. Judge of First District Court, 37 South. 546, 547, 113 La. 654.

As original application

In Rev. St. 1909, §§ 11,405, 11,406, relating to the power of county boards of equalization on appeal from the valuation of property made by the assessors, the word "appeal" is not used in its technical legal sense, but simply authorizes the party who felt himself aggrieved by the assessment made by the assessor to review it by objecting or protesting against the same. In re Sanford, 139 S. W. 376, 380, 236 Mo. 665.

Gen. St. 1902, § 2660, provides that an aggrieved taxpayer may "appeal" to the superior court from the decision of the county commissioners granting a liquor license. Held, that the section in legal effect authorizes a proceeding by way of original application to the superior court to set aside the county commissioners' action in the matter of liquor licenses in excess, or in unlawful abuse of their power. Appeal of Coles, 66 Atl. 508, 79 Conn. 679.

Statutory proceedings for the improvement of streets and for the assessment of the cost thereof being special in character, so that no right of appeal can be asserted, except that expressly provided by the statute itself, under Burns' Ann. St. 1908, § 8716, which, before and after its amendment by Laws 1909, c. 172, provided that a petition seeking to modify an assessment must be filed within 10 days after the final order of the board approving the assessment, and that when the assessment roll was completed and delivered as therein provided the decision of such board as to all benefits should be conclusive, and that an appeal from the assessment made by the town board to the circuit court, and a trial of the case by the court, without a jury, as in other civil cases, might be had, an application for a reassessment of benefits is not an "appeal" to the circuit court, and that court acquired no jurisdiction and could exercise no judicial power in the proceedings, but can act only in a ministerial capacity, from which no further appeal would lie; and hence there was no further remedy, either under section 8716, or under the section as amended. Holderman v. North Manchester (Ind.) 96 N. E. 29, 30.

As perfected appeal

This term as used in a statute, "the appeal is held to have been perfected," referring to the giving of the notice of appeal in term time and filing the bond, means that the removal of a cause from an inferior to a superior court is brought to consummation or completeness. It is clear that the practical idea of the term "appeal is perfected" is that the act of the parties in the particular case, by giving notice of the appeal and filing the appeal bond, have completely lodged appellate jurisdiction in the appellate court. Nothing further is left to be done by the parties to the particular cause to give active jurisdiction or power to hear and review the action of the trial court. It follows therefore that the active jurisdiction in the particular case for all purposes attaches to the appellate court, when the appeal is per-

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fected. Gordon v. Rhodes & Daniels (Tex.) 104 S. W. 786, 787.

Cheyenne City Charter (Rev. St. 1887, § 146), giving the police court jurisdiction to hear cases arising under the ordinances of the city, and Comp. St. 1910, § 1383 (Rev. St. 1899, § 1291), providing that on appeal from the police court the case shall stand for trial in the district court on the transcript filed, and that no trial de novo shall be had in the district court, are not amended by sections 949, 950, 952, Comp. St. 1910, providing for municipal courts, and that appeals therefrom shall be taken in the manner provided by law for appeals from justices of the peace, which are regulated by sections 5260, 6119–6122, authorizing appeals from judgments of justices of the peace, and providing that a cause "when thus appealed" shall stand for trial anew in the district court, since section 952 relates only to the method of taking an appeal, and the proceedings after the taking of an appeal are subject to section 1383; the words "when thus appealed" meaning after the appeal has been taken or perfected, and the jurisdiction of the appellate court having attached to try the case. Stutsman v. City of Cheyenne, 113 P. 322.

Petition in error distinguished

See Petition in Error.

Petition in error included

The word "appeal" designates generally any method provided by statute for removing a case from an inferior to a higher court for review, including the proceeding under the statute by petition in error. Caldwell v. State, 74 Pac. 496, 12 Wyo. 206.

Plenary suit in equity distinguished

A proceeding in a circuit court by parties injuriously affected by orders of the interstate commerce commission, though not parties to the proceeding before the commission on which they are based, to suspend or annul such orders, is not an "appeal," but a "plenary suit in equity." F. H. Peavey & Co. v. Union Pac. R. Co., 176 Fed. 409, 417.

As proceeding

See Proceeding.

As removal of cause

The word "appeal," when used in a statute, does not necessarily imply the removal of a controversy from one tribunal to another, nor has it any absolutely definite meaning, but it is to be interpreted like other expressions by the ordinary rules of construction. Nash v. City of Glen Elder, 88 Pac. 62, 64, 74 Kan. 756 (citing 1 Words and Phrases, pp. 442, 444).

The word "appeal," as used in practice, is defined as "the removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial." Williamson v. Musick, 53 S. E. 706, 708, 60 W. Va. 59.

As special proceeding

See Special Proceeding.

Writ of error distinguished

An "appeal" is a statutory right, and is the continuation of the original suit; while a "writ of error" is an independent action, in the nature of a new and original suit. State v. Preston, 97 Pac. 388, 30 Nev. 301.

A "writ of error" is a process of common-law origin, and it removes nothing for examination but the law; while an appeal is a process of civil-law origin and removes a cause entirely, subjecting the fact as well as the law to a review and retrial. It is essential to the validity of a "writ of error" to a United States District Court of the Indian Territory that all defendants against whom judgment was rendered be made parties thereto, and a defect in a "writ of error," consisting of failure to make a party thereto one of the defendants against all of whom judgment was rendered, is not cured by entry of appearance of such party after the filing of the writ and expiration of the time for suing it out. Lewis v. Sittle (Ind. T.) 104 S. W. 850, 851.

"'Writs of error' are different from 'appeals.' An 'appeal' is the continuation of an old action. A 'writ of error,' however, is considered a new action." City of St. Louis v. Butler, 99 S. W. 1092, 201 Mo. 396.

A "writ of error" at common law when seasonably sued out, and an appropriate bond given, operated as a supersedeas, but left the judgment in full force; while a technical chancery "appeal" vacated the decree appealed from and brought up the whole case for retrial de novo. Fort v. Fort, 101 S. W. 433, 435, 118 Tenn. 103, 11 Ann. Cas. 964.

A marked distinction exists between proceedings in error to obtain a reversal of a judgment or final order in a law action, and an "appeal" in a suit in equity, which latter brings up the case for trial de novo, and is accomplished solely by the filing in due time in the Supreme Court of a transcript of the record containing the judgment, decree, or final order appealed from. In case of an appeal in a suit in equity, the filing of a transcript operates ipso facto as a removal of the cause to the appellate court and in the event of death, proceedings for a revivor and substitution are authorized, as though the action had been pending in the appellate court since prior to the death of the party; but the right to review by proceedings in error are regulated by an altogether different method of procedure, which must be followed in order to obtain such revivor. Ritchey v. Seeley, 97 N. W. 818, 819, 68 Neb. 120.

The distinction between a "writ of error," which brings up the record in an action at law for a review of questions of law only,

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and an "appeal," which involves a rehearing upon both the facts and law, is vital. These remedies have their origin and functions in the inherent difference between courts of law and courts of equity, differences which are recognized in the Constitution of the United States and the laws of Congress. The "writ of error" is a common-law writ, and searches the record for errors of law in the final judgment of a common-law court. If error is found, the judgment awards a venire facias de novo. The "appeal" is a procedure which comes to us from the civil law along with the fundamentals which go to make up the jurisprudence of a court of equity. Its office is to remove the entire cause, and it subjects the transcript to a scrutiny of fact and law, and is, in substance, a new trial. Nashville Ry. & Light Co. v. Bunn, 168 Fed. 862, 865, 94 C. C. A. 274 (citing Parsons v. Bedford, 3 Pet. 433, 446, 448, 7 L. Ed. 732.)

"'Appeal' was the process by which decrees in suits in chancery were reviewed, and the 'writ of error' was the process designed for the review of actions at law." Marinan v. Baker, 78 Pac. 531, 532, 12 N. M. 451.

A "writ of error" is a process of common-law origin, and it removes nothing for examination but the law. The distinction between a "writ of error" and an "appeal" has been observed by the court and recognized by the legislation of Congress. Choctaw, O. & G. R. Co. v. Rice, 104 S. W. 819, 821, 7 Ind. T. 514.

APPEAR

See Clearly Appear; Held to Appear or Answer; If It Appears.
See, also, Appearance.

An instruction directed that, in determining the weight of the testimony, the jury should consider any interest of the witnesses in the result of the case; their conduct and demeanor while testifying; their apparent fairness or bias; their opportunities for seeing or knowing the things about which they testify; the reasonableness of the "story told" by them, and all the evidence and circumstances proved tending to corroborate or contradict them, "if any such appears." Held, that such instruction was not erroneous in the use of the word "appears"; the word "appears" being used to mean the fairness or bias of the witness as disclosed by his conduct on the stand; his manner of testifying, etc. Nicholson v. State, 106 Pac. 929, 931, 18 Wyo. 298.

As being manifest or obvious

"Appear," as used in Code 1904, § 2871, requiring the names of the members of a limited partnership to appear conspicuously upon the front of the place of business, means to be obvious and manifest. R. S. Oglesby Co. v. Lindsey, 72 S. E. 672, 676, 112 Va. 767, Ann. Cas. 1913B, 913.

Kirby's Dig. § 718, with reference to the adoption of a constitutional amendment, declares that, if it shall "appear" that a majority of the electors voting at the election at which the amendment is submitted adopt such amendment, then the Speaker of the House of Representatives, on canvassing the returns, shall declare such proposed amendment duly adopted, etc. Held, that the use of the word "appear," in defining the duties of the speaker in this regard, was quite apt and properly imposed the formal and ministerial function of casting up and declaring in open session what would appear to be the result. Rice v. Palmer, 96 S. W. 396, 399, 78 Ark. 432.

As prove or proven

The word "appear," as used in instructions in a criminal case, that "it must be shown beyond a reasonable doubt," or "it must appear beyond a reasonable doubt," is synonymous with the word "prove" or "proven," and does not exact a less degree of proof than would have been exacted if the word "prove" or "proven" had been used. State v. Crofford, 110 N. W. 921, 925, 133 Iowa, 478.

APPEAR BY AFFIDAVIT

"Appear by affidavit" means that such legal evidence going to establish the fact must be given as would be received in the ordinary course of judicial proceedings, and not conclusions, opinions, or hearsay. The affidavit must contain a statement of the facts and circumstances upon which the applicant bases his belief of the truth of what he wishes to establish. It must be so full that the officer to whom it is presented may find, upon the evidence contained in it, that the facts exist satisfactorily to his mind. Mackubin v. Smith, 5 Minn. 367, 370 (Gil. 296, 298).

APPEAR FROM THE EVIDENCE

The statement of the bill of exceptions that certain facts "appeared from the evidence" is to be construed as meaning that they were undisputed or admitted. Neal v. Scherber, 93 N. E. 628, 629, 207 Mass. 323.

APPEAR ON ASSESSOR'S BOOKS

A statement that an assessment on real estate "appears on the assessors' books" means that the assessment was entered on the books specified in Pub. St. 1882, c. 11, §§ 50–54, relating to books for use in assessment of taxes; and hence a finding that the assessment was made by the board of assessors as a whole, or a majority thereof, is authorized, notwithstanding the testimony of a witness that a designated person was appointed assessor, and was the assessor for a specified ward, and who, with another as first assistant, and another as second assistant, assessed the land, the first assistant being the lo-

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cal man and having all the say. Welsh v. Briggs, 90 N. E. 1146, 1148, 204 Mass. 540.

APPEARANCE

See General Appearance; Same Appearance; Special Appearance; Voluntary Appearance.

As included in served with process, see Served.

The term "appearance" designates the act by which one against whom suit has been commenced submits himself to the court's jurisdiction. Rogers v. Penobscot Mining Co., 132 N. W. 792, 795, 28 S. D. 72.

The word "appear," when used to designate a step taken in litigation by a defendant, means the act or proceeding by which he places himself before the court, and does not necessarily imply the actual physical presence, either of the party or his attorney before the court. Thornhill v. Hargreaves, 107 N. W. 847, 848, 76 Neb. 582.

Answer or demurrer

An "appearance" is generally defined as the formal proceeding by which a defendant submits himself to the jurisdiction of the court, and, under Code Civ. Proc. § 1014, a defendant appears when he answers, demurs, or gives plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him. California Pine Box & Lumber Co. v. Superior Court of City and County of San Francisco, 108 Pac. 882, 884, 13 Cal. App. 65.

"A demurrer is an 'appearance' in the cause (New Jersey v. New York, 31 U. S. (6 Pet. 323, 8 L. Ed. 414), and by filing it a defendant waives all objections to the jurisdiction of the court over his person." Sayre & Fisher Co. v. Griefen, 60 Atl. 513, 72 N. J. Law, 1 (citing Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co., 63 N. Y. 176, 181; Handy v. Insurance Co., 37 Ohio St. 366; Rowland v. Coyne, 55 Cal. 1; Thompson v. Michigan Mut. Ben. Ass'n, 18 N. W. 247, 52 Mich. 522).

Where a national bank, in an action in a state court against it by attachment, pleaded to the merits after the dissolution of the attachment, the state court acquired jurisdiction under Code 1896, § 562, providing that, where a defendant appears and pleads, the cause proceeds as in suits commenced by summons, though Rev. St. U. S. § 5242, provides that no attachment shall be issued against a national bank in any action in any state court. Merchants' Laclede Nat. Bank v. Troy Grocery Co., 43 South. 208, 150 Ala. 128.

Under Civ. Code, § 118, providing that a party may by answer or other proper pleading object to the jurisdiction over the parties, and a failure to do so is a waiver of the objection, a party may in one answer plead both to the jurisdiction and to the merits, and the filing of such an answer does not constitute an "appearance." Louisville Home Telephone Co. v. Beeler's Adm'x, 101 S. W. 397, 398, 31 Ky. Law Rep. 19.

Application for removal

An application by a defendant not served to remove a cause from the state to a federal court is not an "appearance" to the merits. Northwestern State Bank of Hay Springs, Neb., v. Silberman, 154 Fed. 809, 813, 83 C. C. A. 525 (citing Wabash Western Ry. Co. v. Brow, 17 Sup. Ct. 126, 164 U. S. 271, 41 L. Ed. 431).

Application to set aside order or judgment

Certain orders were entered making allowances to a receiver of an insolvent bank, after which certain stockholders were granted permission to sue to vacate the orders, as granted ex parte, and without jurisdiction. This suit was prosecuted to judgment, which was adverse to the plaintiffs, whereupon they brought a writ of error to review the original orders as improvidently entered and void for want of jurisdiction. Held that, plaintiffs having proceeded in the trial court to set aside the orders, such proceeding constituted an "appearance" which cured the alleged jurisdictional defect. In re Bank of Newcastle, 89 Pac. 1035, 1037, 15 Wyo. 501; Kilpatrick v. Horton, Id.

Delivery bond in replevin

The giving by defendant in replevin, within the time allowed by law, of a redelivery bond conditioned that he will deliver the property to plaintiff if the delivery shall be adjudged against him and will pay the costs and damages awarded against him and retaining possession of the property, is an "appearance" in the cause, amounting to a waiver of the issuance of summons. Fowler v. Fowler, 82 Pac. 923, 927, 15 Okl. 529.

Demand for property of estate

A demand made through an attorney or agent upon an administrator for possession of the property of the estate which he represents, or a request made by an attorney of the judge of the probate court that he be notified if any further proceedings are to be taken in the estate, is not an "appearance" or claim within the purview and meaning of section 5715 of the Revised Codes sufficient to stop the running of the statute limiting the time within which such claim of the right of succession shall be made by a nonresident alien. Connolly v. Reed, 125 Pac. 213, 217, 22 Idaho, 29.

Exceptions to sureties on attachment bond

Under Code Civ. Proc. § 1014, providing that a defendant appears when he answers, demurs, or gives plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, a notice served by defendant's attorney on plaintiff's at-

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torney that defendant excepted to the sufficiency of plaintiff's sureties on an undertaking given by plaintiff to secure an attachment, and demanding that the sureties justify, did not constitute an "appearance." Written notice is required under this section only when defendant appears in pro. per. Salmonson v. Streiffer, 110 Pac. 144, 146, 13 Cal. App. 395.

The fact that a motion for a continuance is made orally does not affect the question of its constituting an "appearance." Zobel v. Zobel, 90 Pac. 191, 192, 151 Cal. 98.

As personal appearance

Where defendant appeared by attorney and asked for a continuance of a motion by plaintiff to strike from the files pleadings of the defendant which had not been served on plaintiff's attorney, such "appearance" was equivalent to personal service, since the relief could only be asked on the theory that defendant was submitting to the general jurisdiction of the court. Zobel v. Zobel, 90 Pac. 191, 192, 151 Cal. 98.

Prosecution of appeal or writ of error

The filing of an affidavit and bond for appeal by a defendant in justice court constitutes an "appearance," and gives the circuit court jurisdiction of defendant on appeal. Carden v. Bailey, 112 S. W. 743, 744, 87 Ark. 230.

The prosecution of a writ of error operates as an "appearance," and further process is unnecessary. Barwick v. Rouse, 43 South. 753, 53 Fla. 643.

Under the statutes of Nebraska, which abolish the common-law writ of error, and provide for proceedings in the Supreme Court to review a judgment of a district court by the filing of a petition in error and the issuance and service of a summons thereon, such proceedings are in effect an original action, and a foreign administrator who avails himself of the right given him by the statute of the state to sue in its courts by instituting such a proceeding in error to review a judgment of a district court subjecting lands of his intestate to an attachment voluntarily submits the question of the validity of such judgment to the Supreme Court of the state, and its decision is binding upon him and upon the property. Benker v. Meyer, 154 Fed. 290, 294, 295, 83 C. C. A. 270.

Questioning jurisdiction

Defendant appeared and filed pleas to the jurisdiction of the court, and after demurrers had been sustained thereto defendant elected to stand by the pleas and refused to plead further in the cause. The court thereupon proceeded to hear the evidence and assess the damages, defendant objecting to the court taking jurisdiction for that purpose and excepting to the action of the court in assessing damages and to the rendition of judgment, after which defendant moved to expunge the judgment from the record for want of jurisdiction. Held, that defendant's proceedings after refusing to plead further on demurrers being sustained to the pleas, though unnecessary to preserve its objection, were consistent with the purpose of limiting defendant's appearance to the sole purpose of questioning the court's jurisdiction, and did not, therefore, amount to an "appearance" waiving such objection. Supreme Hive of Ladies of Maccabees of the World v. Harrington, 81 N. E. 533, 537, 227 Ill. 511.

Stipulation for trial or judgment

"Appearance" ordinarily means the process by which a person, against whom a suit has been commenced, submits himself to the jurisdiction of the court; and where, in an action against a corporation and an individual, both defendants answered, and questions involved were decided by the court, and an agreement for a certain judgment, signed by the same attorneys who signed the pleadings of the respective parties, was filed, it authorized a recital, in the judgment entered on the stipulation, that all parties appeared and announced ready for trial. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Tex.) 111 S. W. 417, 419.

APPEARANCE DE BENE ESSE

"The 'appearance de bene esse' is peculiar to the courts of this state, and has invariably prevailed, from a time to which the memory of man runneth not to the contrary. I have known the practice to prevail for more than forty years, and have seen such entries long before my time. It was borrowed from the filing a declaration de bene esse; that is, conditionally, until special bail be put in. A declaration de bene must be delivered and filed before the time for putting in bail has expired. If it be delivered after appearance, it is called 'delivering it in chief.' The reason of filing it conditionally is this: that it is no waiver of bail; but demanding a plea is, because it is admitting the defendant to be in court. This declaration stands, without more said, where the special bail is put in, and remains without exception. The declaration is generally indorsed thus: 'This declaration is filed conditionally, till special bail is entered,' or 'Common bail is filed,' as the case may be. All our proceedings are short notes —memoranda—afterwards to be filled up. The appearance de bene esse, if filled up at length, is an appearance conditionally, if the summons of scire facias be returned served. If it is, there is a return, with a full appearance; so much so that, on the writ thus returned, I would consider the party in court, appearing by his attorney, unless on or before the return he entered a retraxit of his appearance. The court would hold the attorney to it; there should be no shuffling." Blair v. Weaver (Pa.) 11 Serg. & R. 84, 85.

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APPEARANCE OF DANGER

In a prosecution for homicide, the court charged that if the defendant, not the jury, honestly believed, without fault or carelessness on his part, that at the time he struck the blow that killed deceased that deceased was in the act of killing the father of the defendant, or of inflicting upon him great bodily injury, and that the danger "appeared" to defendant to be urgent and pressing, then defendant was justified in assaulting and striking deceased to prevent his father from being killed or receiving great bodily injury. Held, that the word "appeared" in such instruction had reference to the defendant and was erroneous, since the word "appears" should have been used so as to require that such conditions should appear not to defendant but to the jury. Mabry v. State, 97 S. W. 285, 287, 80 Ark. 345.

APPELLATE

"'Appellate' pertains to the judicial review of adjudications." In re Burnette, 85 Pac. 575, 579, 73 Kan. 609 (citing Ex parte Henderson, 6 Fla. 279).

APPELLATE COURT

The fact that a court is called an "appellate court" and was created as a court of appeal, and that strictly speaking an appellate court can review a decision of a court only, does not preclude the Legislature from conferring upon it jurisdiction other than strictly appellate jurisdiction. The question is whether the particular duty placed upon the court is a judicial duty. Chicago, I. & L. Ry. Co. v. Railroad Commission of Indiana, 78 N. E. 338, 346, 38 Ind. App. 439.

A condition in an appeal bond for the performance of the judgment when affirmed by the "appellate court" meant the court with jurisdiction to affirm the judgment, and the surety was not absolved from liability because the affirmance was by the Court of Appeals instead of the Supreme Court. Zellars v. National Surety Co., 108 S. W. 548, 549, 210 Mo. 86.

APPELLATE JURISDICTION

"Appellate jurisdiction" of a court is the power and authority conferred on a superior court to rehear and determine causes tried in inferior courts. Waters-Pierce Oil Co. v. State (Tex.) 106 S. W. 326, 331.

"'Appellate jurisdiction' is the power to take cognizance of and review proceedings had in an inferior court, irrespective of the manner in which they are brought up, by appeal or writ of error." In re Burnette, 85 Pac. 575, 579, 73 Kan. 609 (citing Ex parte Henderson, 6 Fla. 279).

"Appellate jurisdiction" is defined as the jurisdiction which a superior court has to rehear causes which have been tried in inferior courts, and the very expression "appellate jurisdiction" refutes and contradicts any idea of filing new pleadings, and framing and settling issues in a court of such jurisdiction. In re McVay's Estate, 93 Pac. 28, 32, 14 Idaho, 56 (citing Bouv. Law Dict.; State ex rel. Williams v. Anthony, 65 Mo. App. 543; State ex rel. Wallace v. Baker, 19 Fla. 19; In re Jessup's Estate, 21 Pac. 976, 22 Pac. 742, 1028, 81 Cal. 408, 6 L. R. A. 594; Dodds v. Duncan (Tenn.) 12 Lea, 731; People ex rel. Dickinson v. Board of Trade of City of Chicago, 193 Ill. 577, 62 N. E. 196).

"'Appellate jurisdiction' consists of many parts. The power to review by writ of error or by appeal is but one portion of that jurisdiction. The 'appellate jurisdiction' exercised by the issue of writs of habeas corpus is distinct and separate from that invoked by writs of error or by appeals. The former is limited to a consideration and determination of the existence and extent of the jurisdiction of the subordinate court which has confined the prisoner. The latter extends to a review of the regularity of its procedure, of its rulings upon questions of law and in suits in equity to a reconsideration of its findings of fact. The former presents the question whether the prisoner is confined without authority of law, the latter whether the case of the aggrieved party was lawfully tried. Those two powers do not occupy the same, but different portions of the entire 'appellate jurisdiction' of a court which may exercise both. Neither of them includes the other. Neither of them is identical with the other or with the 'appellate jurisdiction' of the court. But that jurisdiction includes them both." Ex parte Moran, 144 Fed. 594, 599, 75 C. C. A. 396.

"Appellate jurisdiction" necessarily implies that the subject-matter has been instituted in and acted upon by some other court whose judgment or proceedings are to be reviewed. While this jurisdiction may be exercised in a variety of forms and in any form which the Legislature may prescribe, the substance of the jurisdiction must exist before the form can be applied to it. It is the power vested in a superior tribunal to review and revise the judicial action of an inferior tribunal. Ex parte Evans, 52 S. E. 419, 420, 72 S. C. 547 (citing 3 Story, Const. p. 626).

The term "appellate" in the Constitution, providing that the original jurisdiction of the Supreme Court shall extend to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law, is not used in a restricted sense, but in its broadest sense as embracing the power and jurisdiction to review and correct proceedings of inferior courts in criminal cases, brought before it for determination in the manner provided by law. State ex rel. Eubanks v. Cole, 109 Pac. 736, 744, 4 Okl. Cr. 25.

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Act May 18, 1908 (Laws 1907-08, c. 28), creating the Criminal Court of Appeals, provides (section 2) that such court shall have exclusive "appellate jurisdiction" in all criminal cases appealed from county and district court, and that if any cause appealed to such court involves the construction of the Constitution of the state or of the United States, or any act of Congress, such court shall certify such questions for final determination to the Supreme Court, further proceedings in the Criminal Court of Appeals awaiting the Supreme Court's decision, which when made shall be certified to the Criminal Court of Appeals and shall govern it, establishes a Criminal Court of Appeals with exclusive appellate jurisdiction in all criminal cases not only appealed thereafter from judgments in the district or county courts, but also of criminal cases pending in the Supreme Court, including proceedings transferred from the Supreme Court of the territory after erection of the state, as contemplated by Const. art. 7, § 2, providing that the appellate jurisdiction of the Supreme Court as to criminal cases shall be coextensive with the state until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law; the procedure for certifying of questions to the Supreme Court not being the exercise of "appellate jurisdiction" within the constitutional provision. Buck v. Dick, 113 Pac. 920, 27 Okl. 854.

The terms "appellate jurisdiction" and "original jurisdiction" are relative terms, and, like the basic term "jurisdiction," dependent upon the manner of use, the context, and the understanding had of the term in the light of its application. The words "appellate jurisdiction," in Const. § 86, are used in the same sense as in section 103, defining the jurisdiction of the district courts. And when in the latter section it is declared that the district courts shall have such appellate jurisdiction as may be conferred by law, it is not meant that the Legislature may define appellate jurisdiction, and make it mean one thing in one case and a different thing in another case. It is only meant that it shall have appellate jurisdiction in such cases as the law may declare. In re Peterson's Estate, 134 N. W. 751, 762, 22 N. D. 480.

APPELLEE

By "appellee" is meant the party against whom the appeal is taken; that is to say, the party who has an interest adverse to setting aside the judgment. Slayton & Co. v. Horsey, 78 S. W. 919, 920, 97 Tex. 341; Hall Music Co. v. Hall, 120 S. W. 904, 905, 55 Tex. Civ. App. 610.

APPENDAGE

A water pipe under the roadbed of a public street laid for the distribution of water for the use of a city and of its inhabitants is not an "appendage" to or a part of the adjoining lot, as a sidewalk may be, and a charge of a definite sum per front foot, to be paid by the owner for the expense of such pipe, cannot be supported either under the power of general taxation or under the power to tax for local improvement. Doughten v. City of Camden, 63 Atl. 170, 172, 72 N. J. Law, 451, 3 L. R. A. (N. S.) 817, 111 Am. St. Rep. 680, 5 Ann. Cas. 902.

APPENDANT

See Power Appendant.

APPENDICITIS

As accidental injury, see Accident—Accidental.

APPLIANCE

See Attractive Appliance; Inadequate Appliances; Modern Appliance; Ordinary Appliances; Safe Appliance; Safety Appliance; Simple Appliance; Suitable Means and Appliances.

Reasonably safe appliance, see Reasonably Safe.

The word "appliances" is very broad, and includes anything applied or used as a means to an end. Cook v. Big Muddy-Carterville Mining Co., 94 N. E. 90, 249 Ill. 41.

A tram railroad was not an "appliance" of a manufacturing business within Rev. St. 1899, § 8486, taxing manufacturers on tools, machinery, and appliances. State ex rel. Western Tie & Timber Co. v. Pulliam, 135 S. W. 443, 444, 233 Mo. 229.

"Appliances" include machinery, apparatus, and premises. The failure of an employer to furnish a domestic servant with a lodging room in such repair as not to endanger her health is a violation of his legal duty to furnish safe appliances. Collins v. Harrison, 56 Atl. 678, 25 R. I. 489, 64 L. R. A. 156.

A rope furnished by a master for servants to use in rigging staging held not an "appliance" in itself, in view of the circumstances, notwithstanding a rope may be an appliance under some circumstances. Bort v. Quadt, 96 Pac. 815, 816, 8 Cal. App. 290.

A gate on the side of the platform of a surface street car is an "appliance," within the rule requiring a carrier of passengers to exercise the utmost human skill, care, and foresight in the maintenance of its "appliances" for the protection of its passengers. Stappers v. Interurban St. Ry. Co., 106 N. Y. Supp. 854, 855, 56 Misc. Rep. 337.

"A staging or scaffolding for workmen is an 'appliance' or instrumentality by the means of which the work is to be done." Phœnix Bridge Co. v. Castleberry, 131 Fed.

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175, 180, 65 C. C. A. 481 (quoting and adopting definition in Thomas, Neg. p. 790).

A scaffold, erected by carpenters for work on a building, is not an "appliance" within the rule requiring the master to furnish safe appliances, as his duty is performed when he employs competent men and furnishes them proper tools and lumber and materials with which to erect the same. McDonald v. Hoffman, 102 Pac. 673, 674, 10 Cal. App. 515.

Whether a crosspiece nailed across lumber on a flat car and from the standards on one side to those on the other for the purpose of staying the lumber was a way or "appliance" within the statute (Revisal 1905, § 2646), which defendant was bound to inspect and see that it was properly nailed, was, on the evidence, for the jury. Wallace v. Seaboard Air Line R. Co., 54 S. E. 399, 402, 403, 141 N. C. 646, 13 L. R. A. (N. S.) 384.

As regards the question of furnishing proper appliances, skids laid over a trench and onto which iron pipes are rolled, to rest there till raised and lowered into the trench by means of a derrick, are "appliances" within the meaning of the employer's liability act (Consol. Laws 1909, c. 31, §§ 200–204). Tamaseric v. Beckwith, 129 N. Y. Supp. 361, 364, 145 App. Div. 78.

An air pump intended to be set up for use in a plant to be erected to prepare material for street paving is not while being unloaded from a railroad car an "appliance" within the rule requiring the master to exercise reasonable care to furnish his servants with reasonably safe appliances to carry on the business. Westlake v. Murphy, 122 N. W. 684, 686, 85 Neb. 45, 19 Ann. Cas. 149.

A hoist was used for the purpose of elevating material to the second story of a building in course of erection. It was triangular in form, simple in design, and easily made. Its construction and operation on the roof was not immediately supervised by the foreman or master, but the material was selected and it was put together by the carpenters engaged upon the building. Such hoist was not an "appliance," within the rule that the master is obliged to use tools and appliances reasonably safe for the uses to which they are to be put. Gittens v. William Porten Co., 97 N. W. 378, 379, 90 Minn. 512.

A contract between a shipowner and a boss stevedore provided that the stevedore had permission to use the ship's winches, booms, falls, and tackle, or any other "appliances," but that no obligation or undertaking was assumed by the shipowner therefrom, except to furnish necessary steam to operate them, and that such permission should constitute a mere license to the stevedore and his men to use, at his own and their discretion, any winch, boom, fall, tackle, or any other appliance which may happen to be on or over the ship's deck, without any responsibility on the part of the ship in respect to the fitness or safety of such winch, boom, fall, or tackle, or other appliance, at any time. Held, that the word "appliance" did not include hatches, and that the stevedore's servants were not mere licensees in the use thereof. Crimmins v. Booth, 88 N. E. 449, 452, 202 Mass. 17, 132 Am. St. Rep. 468.

As materials

See Materials.

APPLIANCE OF TRANSPORTATION

"Appliances of transportation," within the rule as to the burden of proof as to negligence of a carrier, means the roadbed, tracks, cars, engines, and all other machinery and equipment furnished by the carrier and used in connection with the conduct and management of its business, but does not include property belonging to and taken by a passenger into a car. Burns v. Pennsylvania R. Co., 82 Atl. 246, 247, 233 Pa. 304, Ann. Cas. 1913B, 811.

APPLICABLE

See Money Applicable; So Far as Applicable.

Rules of practice, when controlling the form of process to be used on a pleading, are "applicable" to it. Farmers' Banking & Loan Co. v. Mauck, 97 N. W. 835, 836, 70 Neb. 586.

APPLICATION

See Interlocutory Application; Misapplication; Original Application; Summary Application.

The words "motion" and "application," as used in Code Civ. Proc. § 686, declaring that notwithstanding the death of a party after judgment execution may issue in case of the death of the judgment creditor on "application" of his executor, administrator, or successor in interest, and section 685, declaring that judgments may be enforced after five years from the date of its entry by leave of court on motion, have the same signification, and on the death of a judgment creditor his administratrix is not required to institute an action at law to enforce the judgment, but is entitled to an execution on "motion." Weldon v. Rogers, 90 Pac. 1062, 1063, 151 Cal. 432.

As pleading

See Pleading.

As special proceeding

See Special Proceeding.

For discharge of accused

The term "application," as used in Gen. St. 1909, § 6800, providing that accused is entitled to discharge after the third term unless the delay happened on his "application,"

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signifies the means to accomplish an end and denotes affirmative action, not passive submission. State v. Lewis, 118 Pac. 59, 60, 85 Kan. 586.

For insurance

Where an application for life insurance was incorporated in a policy by reference, the term "application" should be construed to include all the statements on both pages thereof, except the medical examiner's report. Paquette v. Prudential Ins. Co. of America, 79 N. E. 250, 251, 193 Mass. 215 (citing McCoy v. Metropolitan Life Ins. Co., 133 Mass. 82, 85; Millard v. Brayton, 59 N. E. 436, 177 Mass. 533, 52 L. R. A. 117, 83 Am. St. Rep. 294).

The meaning of the term "application," as employed in a question propounded to an applicant for insurance as to whether any application to insure his life had ever been made to any other company on which a policy had not issued, is not confined to a full and final completion of all the various parts into which the preliminary negotiations and examinations are divided by another company for its convenience. In the absence of an agreement, the completion, signing, and delivery of an application for insurance to the soliciting agent constitutes an application for insurance. An applicant for insurance answered the question as to whether any application to insure his life had ever been made to any other company, and refused, in the negative. Some five months previously he had signed two of the divisional parts of an application to another company, and had delivered them to the local agent and medical examiner, and had been partially examined by the latter. Subsequently he declined to complete the examination on the ground that he had been misinformed as to the character of the policy. The parts of the application signed were thereafter forwarded to the company, and the application was formally rejected, of which fact he was notified. The failure to disclose such facts in answer to the question avoided the policy issued to him, which policy provided that all the statements in the application should be deemed material, and that the policy should be void if any statement was not full and complete, or was untrue. Webb v. Security Mut. Life Ins. Co., 126 Fed. 635, 637, 61 C. C. A. 383.

A life insurance company furnished its agents a printed blank for use by applicants for insurance, which first had blanks, under the caption "Proposal for Insurance," to be filled and signed by applicants, next had a "memorandum for the solicitor to sign," followed by two questions as to amount of insurance now in force in the company and amount now applied for, and then, under the caption "Application for Insurance," questions as to health and other matters affecting the risk, to be answered over the signature of applicant, together with a declaration and warranty as to the representations and answers. Held, that neither the proposal for insurance nor the memorandum for the solicitor to fill was a part of the "application," within Rev. Laws, c. 118, § 73, requiring as a condition to the insurer introducing the application in evidence, that a correct copy of it shall have been annexed to the policy. Bonville v. John Hancock Mut. Life Ins. Co., 85 N. E. 1057, 200 Mass. 197.

For new trial

An appeal from a determination of the Appellate Term which either grants or refuses a new trial is in effect an "application to the Appellate Division for a new trial" within Code Civ. Proc. § 3251, subd. 4, regulating costs upon application to the Appellate Division for a new trial. Greenwald v. Weir, 116 N. Y. Supp. 172, 174, 131 App. Div. 568.

For receiver

The consent of a corporation to the appointment of a receiver for its property on an application by others is not equivalent to having "applied for a receiver," as an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546, as amended by Act Feb. 5, 1903, § 2, c. 487, 32 Stat. 797. In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 164.

APPLIQUÉ

It does not appear that there is any definition of "appliqué" in trade and commerce different from the dictionary definition of it as "any ornament laid out and applied on another surface, such as cloth"; and goods within this definition are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187, relating to "articles * * * appliquéed." Further, it is not necessary that the design should be regular, conventional, or highly ornamental; and the provision includes a fabric to which a gilt cord has been applied in irregular loops of a crude design, being in this form fairly durable, permanent, and salable. United States v. A. A. Vantine & Co., 166 Fed. 735, 737, 92 C. C. A. 397.

APPLY

See Misapply.

One of the definitions of the word "apply" is to declare or pronounce as suitable. This was used with reference to a provision of the Constitution defining a general law as one which "applies" to the whole state. State ex rel. Covington v. Thompson, 38 South. 679, 683, 142 Ala. 98.

APPOINT—APPOINTMENT

See Duly Appointed; During Appointment; Hereinafter Appointed Executrix; Illusory Appointment.

Any one appointed, see Any.

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An "appointment" may mean an appropriation of money to a specific purpose or the act of a person in directing the disposition of property by limiting a use, or the exercise of the right to designate a person; consequently an instrument which declared that it was an "appointment" of money deposited with a third person will not create a valid trust where the deposit was not irrevocable. Worthington v. Redkey, 99 N. E. 211, 213, 86 Ohio St. 128.

"Appointments" is used in the sense of designation to or selection for public office, not only as meaning the office or service to which one is appointed, but denoting the right or privilege conferred by an appointment, and the subject of a term of office is fairly included in a broad signification of the word. State v. Peake, 120 N. W. 47, 49, 18 N. D. 101.

Under Laws 1904, c. 9, § 1, providing that in every public department and upon all public works, etc., honorably discharged veterans of the Civil War who are citizens and residents of the state shall be entitled to preference in appointment and employment, etc., a position as janitor of a courthouse is one by "appointment or employment." Kitterman v. Board of Sup'rs of Wapello County, 115 N. W. 13, 14, 137 Iowa, 275.

Election distinguished

The words "elected" and "appointed" ordinarily are not synonymous. In its limited sense the word "elected" is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand, "appointed" is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word "elected" means merely "selected." When used in that sense, the word "elected" is synonymous with the word "appointed." Odell v. Rihn, 127 Pac. 802, 805, 19 Cal. App. 713.

Where a borough president of New York City has been removed by the Governor, and the aldermen vote to reinstall him under Greater New York Charter 1906, p. 227, § 302, providing that a vacancy in that office is to be filled for the unexpired term by a majority vote of all the members of the board of aldermen, their act, though termed an "election" by the charter, is an "appointment" within Const. art. 10, § 2, providing that all city officers whose election or appointment is not provided for by the Constitution shall be elected by the electors of the city or some division thereof, or appointed by such authorities thereof as the Legislature shall designate. People v. Ahearn, 115 N. Y. Supp. 664, 667, 131 App. Div. 30.

Organic Act, § 8, declares that all county officers shall be appointed or elected in such manner as shall be provided by the Governor and legislative assembly of the territory. Act July, 1851, provided for the election of sheriffs. *Held*, that a contention that the words "elected" and "appointed" had the same meaning, and that when the people were authorized by the Governor and assembly to "elect" certain officers, they were merely empowered to act in so doing as agents, possessing a mere revocable authority and incapable of binding their principals, who retained the right to be exercised through the Governor, as the executive, of removing at his discretion, all the officers whom the people should thus choose, was without merit, but the words were used to distinguish one method of selection from another, and the Governor did not have the right to remove a sheriff elected in accordance with the statute, as an incident to appointive power. Territory ex rel. Hubbell v. Armijo, 89 Pac. 267, 272, 14 N. M. 205.

Under Pol. Code, § 58, providing that, except where otherwise specially provided, an elector is eligible to an office for which he is an elector, and that no person is eligible who is not such an elector, and County Government Act, providing that no person shall be eligible to a county office who, at the time of his election, is not an elector of the county in which the duties of the office are to be exercised, a person who is not an elector of a county is not eligible to any office of that county, whether filled by election or appointment, the term "at the time of his election" not being limited in meaning to an election in the popular sense, in which all electors participate, but also including an "appointment" to office; and hence, prior to the constitutional amendment extending the elective franchise, a woman was not eligible to the office of assistant probation officer of a county. Reed v. Hammond, 123 Pac. 346, 347, 18 Cal. App. 442.

Employment distinguished

In the common acceptation, the meaning of the words "appointment" and "employment" is quite different. An officer is usually appointed, while a person employed is spoken of as an "employé," and but rarely, if ever, as an "officer." The Century Dictionary defines "appointment" as: "The act of appointing, designating, or placing in office. An office held by a person appointed." Among the definitions given to those words by the courts are the following: "Appointment is the designation of a person by the person having authority therefor to discharge the duties of some office or trust." State ex rel. Nicholls v. City of New Orleans, 6 South. 592, 41 La. Ann. 156. "Where the selection of an officer is referred to some functionary, it is called an 'appointment.'" Speed v. Crawford, 60 Ky. (3 Metc.) 207. The definition of "employé," as given by the Century Dictionary, is: "One who works for an employer; a person working for salary or wages; applied to any one so working but usually only to clerks, workmen, laborers, etc., and but rarely to

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the higher officers of a corporation or government or to domestic servants." In re Cortland Mfg. Co., 45 N. Y. Supp. 630, an "employé" is defined to be a person who is employed; one who works for wages or a salary. In Palmer v. Van Santvoord, 47 N. E. 915, 153 N. Y. 612, 38 L. R. A. 402, the court held: "An 'employé' is one who works for an employer; a person working for a salary or wage. The word is applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to officers of a government or corporation." United States v. Schlierholz, 137 Fed. 616, 624.

Nominate distinguished

The terms "nominate" and "appoint" are not synonymous, though there are some instances where the terms may be used to mean the same thing, as under St. Cal. 1887, p. 67, providing for the appointment of certain trustees by the Governor with the advice and consent of the Senate, an appointment is not completed by the transmission of the nomination by the Governor to the Senate and the confirmation of the nomination by the Senate. The appointment is not made until the commission is issued, and issuing the same is the last act, and in issuing the commission the Governor is performing an executive and not a ministerial act, and is therefore acting under his discretionary powers, and may or may not issue the commission, although the Senate may have advised it and consented that he should make the appointment. Harrington v. Pardee, 82 Pac. 83, 84, 1 Cal. App. 278 (citing Marbury v. Madison, 5 U. S. [1 Cranch] 137, 2 L. Ed. 60).

Officer or officers making appointment

The words "appointed by him," in Baltimore City Charter, § 25, authorizing the mayor to remove at pleasure during the first six months of their respective terms all officers appointed by him, means appointed by the mayor; and the mayor can remove the officers whom he has authority to appoint, whether appointed by him or his predecessor. MacLellan v. Marine, 56 Atl. 359, 360, 98 Md. 53.

Laws 1907, p. 1521, c. 661, creating a board of public works in New Rochelle, etc., provides (section 1) for their appointment by the mayor subject to the affirmative vote of one-half of the aldermen. Held, that the common council, which consists of the mayor and aldermen, does not appoint such members within the charter provision giving the council authority to remove officers "appointed" by it. People ex rel. Lathers v. Raymond, 114 N. Y. Supp. 365, 367, 129 App. Div. 477.

When complete

The word "appointment," as used in St. 1887, p. 67, providing for the appointment of certain trustees by the Governor with the advice and consent of the Senate, is not synonymous with nomination, as the "appointment" is not completed by the transmission of the nomination by the Governor to the Senate and the confirmation of the nomination by the Senate, but it is still discretional, after the confirmation, for the Governor to issue a commission or not, and unless the commission is issued the appointment is not completed. Harrington v. Pardee, 82 Pac. 83, 84, 1 Cal. App. 278.

The word "appoint," as used in Act No. 185, of 1898, amending and re-enacting Act No. 40, § 3, p. 39, of 1880, providing that in a case in which the district judge shall be recused because of interest he shall "appoint" some district judge of the adjoining district, means not only that there shall be a tender or order of appointment, but it shall be made to some one willing or obliged to accept. State ex rel. Le Blanc v. Twenty-First Judicial Dist. Democratic Committee, 47 South. 405, 406, 122 La. 83.

The appointment by the Governor of a commissioner of a city to fill a vacancy is not an "appointment" to a state office, within Code 1907, § 1474, requiring a commission to officers appointed to fill vacancies; and the act of the Governor in advising one by letter of his appointment as commissioner of the city, and the indorsement on the communication from the judge of probate, officially advising the Governor of the qualification of the appointee, of a direction to send a commission to the appointee, and the recital of the appointment for a specified term, followed by the words, "By order of the Governor: * * * Private Secretary," constituted a complete appointment without a commission, and the Governor could not thereafter cancel the appointment. Draper v. State (Ala.) 57 South. 772, 773.

APPOINTING POWER

"Appointing power," when employed with reference to matters pertaining to the government, or to the distribution of the powers of government, means the power of appointment to office; the power to select, and indicate by name, individuals to hold office and to discharge the duties and exercise the powers of officers. Under Tax Law, § 234, as amended by Laws 1905, c. 368, and Laws 1906, c. 699, providing that the State Comptroller may, on recommendation of the surrogate, "appoint" and may at pleasure remove certain assistants and clerks in the surrogate's office in certain counties, including a transfer tax assistant in a certain county, the surrogate is merely to determine the necessity of the appointment, and the Comptroller is not limited in making the appointment to a person recommended by the surrogate. Duell v. Glynn, 106 N. Y. Supp. 716, 717, 56 Misc. Rep. 41.

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APPOINTMENT OR AUTHORITY

"Appointment or authority," as used in section 110, Civ. Code, means a right to act for another, and an allegation to the effect that one has full right, power, and authority to act for himself is not taken as true when not denied under oath. Washbon v. State Bank of Holton, 121 Pac. 515, 517, 86 Kan. 468.

APPORTION

The word "apportion," as used by a testator in providing that a part of his estate should be "equally apportioned amongst my children," means to divide and assign in just proportions; to divide and distribute proportionately; to portion out. That is, whatever the children were to receive, they were to have in equal proportions. Robbins v. Smith, 73 N. E. 1051, 1053, 72 Ohio St. 1.

APPORTIONMENT

See Equal Apportionment by Lot.

Costs

Where plaintiffs in ejectment recovered a part of the land sued for, a judgment assessing all the costs against plaintiffs was not an "apportionment" within the rule that, where plaintiff recovers only a part of the land sued for, the court may apportion the costs. Daniels v. Smith, 96 N. E. 902, 904, 252 Ill. 222.

APPRAISE

Where the price named in a memorandum of sale of imported tobacco stored in a bonded warehouse was a certain sum per pound, including the estimated duty thereon of 70 cents per pound with an agreement that if it was appraised at less the difference should be allowed the buyers, the rights of the parties depend on the meaning of the expression "if appraised at less," which means a lawful appraisal, whether made by the collector or adjudged by the court. It means such an appraisal as the law required and justified, not such as was made by the collector, which was illegal and has been treated by the government as illegal. Since the purchaser advanced the duty as estimated simply for the protection of the seller, the word "appraised" should not be limited to the unlawful action of the collector, but should be extended to the method, whatever it was, by which the lawful duty was ascertained. M. & E. Solomon Tobacco Co. v. Cohen, 77 N. E. 257, 258, 184 N. Y. 308.

APPRAISAL

A fire policy provided that the insurer should not be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination therein provided for. Held, that the "appraisal" and "examination" did not cover acts of the assured's appraiser in demanding of and causing assured to incur trouble and expense in furnishing an estimate of the builder showing the value of the property insured and destroyed by fire. Scottish Union & National Ins. Co. v. Colvard, 68 S. E. 1097, 1100, 135 Ga. 188.

APPRAISEMENT

An "appraisement" denotes the valuation of goods and chattels or real estate by two persons of suitable qualifications, fair, impartial, and disinterested, having knowledge of the property, and with intelligence to ascertain its value after inspection and inquiry. Magin v. Niner, 73 Atl. 12, 14, 110 Md. 299.

Where an appraiser who has advanced the value of imported merchandise fails to give notice of the advance to the importer as required by the customs regulations, the importer thus being deprived of the right of appeal for reappraisement, the "appraisement" is invalid, and does not afford a proper basis for the forfeiture and condemnation of the goods for undervaluation, under Tariff Act July 24, 1897, § 32, 30 Stat. 211. Unless the appraisement is put in writing and signed or in some way identified by the officer making it, notice of it be given, it seems impossible to give effect in practice to the statutes intended to allow a review of the appraisement, which right of review is a valuable one, and a construction of the statutes ignoring it cannot be correct. The Lace House v. United States, 141 Fed. 869, 876, 73 C. C. A. 103.

Arbitration distinguished

Although the terms "appraisement" and "arbitration" are sometimes used interchangeably and frequently without any clear difference in meaning, there is a plain distinction between the two; arbitrators being appointed to settle a controversy and being required to observe certain rules of procedure as in a judicial inquiry, or their award will be void, while appraisers are selected to prevent disputes from arising and, unless restricted by the agreement under which they are appointed, are not required to give notice of hearings, hear evidence, or receive the statements of the parties, but are expected to act on their own knowledge and investigation, and have a wide discretion as to their methods of procedure and sources of information. Sebree v. Board of Education, 98 N. E. 931, 935, 254 Ill. 438.

APPRAISER

See Competent Appraiser; Merchant Appraiser.

APPRECIABLE

"Appreciable" is defined as "capable of being estimated; perceptible; as an appre-

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ciable quantity." Chaffin v. Fries Mfg. & Power Co., 47 S. E. 226, 228, 135 N. C. 95.

APPRECIABLE DEGREE

In an action for personal injuries, an instruction that if plaintiff's negligence contributed to her injury "in any appreciable degree" she could not recover was not erroneous; the phrase "in any appreciable degree" meaning any degree capable of being appreciated or ascertained or discerned, and not that plaintiff's negligence, to be a defense, must be important or material. Domke v. Gunning, 114 Pac. 436, 437, 439, 62 Wash. 629.

APPRECIABLE EXTENT

The words "appreciable extent," as used in an instruction, in an action for damages for maintaining a dam, that plaintiff is entitled to nominal damages if the dam caused water to be ponded on his land to any appreciable extent, without proof of substantial damages, cannot be held to be synonymous with the words "any extent," and hence the instruction was erroneous, as plaintiff is entitled to nominal damages if the water was ponded on his land to any extent. Chaffin v. Fries Mfg. & Power Co., 48 S. E. 770, 771, 136 N. C. 364.

APPRECIATE—APPRECIATION

"Appreciation of danger," as used in the law of master and servant relative to assumed risk, means that the servant formed a judgment as to the future, and that his judgment was right. Stewart v. Pittsburg & Montana Copper Co., 111 Pac. 723, 725, 42 Mont. 200.

To "appreciate the danger" incident to a condition of things signifies that the danger is recognized, and that possible accidental consequences are justly estimated. Rooney v. Brogan Const. Co., 86 N. E. 814, 194 N. Y. 32.

"Although the terms 'knowledge of danger' and 'appreciation of risk,' are frequently used in the discussion of due care, still these elements in and of themselves do not constitute contributory negligence as a matter of law." Frost v. McCarthy, 86 N. E. 918, 919, 200 Mass. 445.

The test of "knowledge of danger" is not the exercise of ordinary care to discover danger, but whether the danger was known to or plainly observable by the employé. The test of "appreciation of risk" is whether the servant understood the risk, or by the exercise of ordinary observation ought to have understood it. Rase v. Minneapolis, St. P. & S. S. M. Ry. Co., 120 N. W. 360, 366, 107 Minn. 260, 21 L. R. A. (N. S.) 138.

"Appreciate" is defined as follows: "To be sensible of; to distinguish as compared with estimate; it supposes a union of sensibility with judgment producing a nice and delicate perception." So, to be able to appreciate the danger of crossing a street car track in front of a moving car, a person must be capable of having at least some idea of the speed at which the car is moving and the distance it is likely to travel in a given time, and the distance such person may travel either running or walking, as the case may be, in the same time. So an allegation, in an action for injuries to a child struck by a work train of a street railway company, that she was too young to be capable of appreciating danger or to have caution and discretion, and the answer to special interrogatories that at the time of the injury the child was 5 years and 10 months old, and of average intelligence and ordinary judgment for a girl of her age, are not in irreconcilable conflict so as to defeat a general verdict against the company. Hammond, W. & E. C. Electric St. Ry. Co. v. Blockie, 82 N. E. 541, 543, 40 Ind. App. 497.

APPREHEND—APPREHENSION

"Apprehend" is defined as "to take or seize (a person) by legal process; to arrest; as to apprehend a criminal." "Arrest" is defined as "the taking or apprehending of a person by authority of law; legal restraint; custody." The words "apprehension" and "arrest," as used in Rev. St. 1899, § 2474, providing that any two judges of the county court may offer, for the county, a reward for the apprehension and arrest of a person committing a felony, are synonyms, and a reward offered for the apprehension of a felon is within the authority of the judges of the county court. Cummings v. Clinton County, 79 S. W. 1127, 1129, 181 Mo. 162 (quoting Webster's Dict.).

A., knowing of a murder and of a reward for the apprehension, arrest, and conviction of the murderer, became suspicious that a certain party was guilty, took steps to locate him, and, having done so, telegraphed to a sheriff to arrest such party, which the sheriff did, without knowing of what such party was suspected, telegraphing the fact of the arrest to A., at his expense, receiving a fee for the arrest, and turning the suspected person over to A., who elicited a confession from him on which he was convicted. Held, that A. was the "apprehender" of the criminal, and entitled to the reward. Ralls County v. Stephens, 78 S. W. 291, 292. 104 Mo. App. 115.

Rev. St. 1899, § 2474, authorizes the county court to offer a standing reward for the "apprehension and arrest" of any person committing a felony in the county, but prohibits the payment of the reward until the final conviction of the felon. A county court offered a reward for the "apprehension and conviction" of a felon. Held that, construing the offer with the statute under which it was made, it constituted an offer to pay a re-

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ward after conviction for the apprehension of the felon, and was complied with by a claimant who made such apprehension on his own initiative, and at his own expense and hazard, and put him in the hands of the proper officer, and gave evidence at the trial from which a conviction resulted. Smith v. Vernon County, 87 S. W. 949, 950, 188 Mo. 501, 70 L. R. A. 59, 107 Am. St. Rep. 324.

APPREHENSION AND CONVICTION

Rev. St. 1899, § 2474, authorizes the county court to offer a standing reward for the "apprehension and arrest" of any person committing a felony in the county, but prohibits the payment of the reward until the final conviction of the felon. A county court offered a reward for the "apprehension and conviction" of a felon. Held that, construing the offer with the statute under which it was made, it constituted an offer to pay a reward after conviction for the apprehension of the felon, and was complied with by a claimant who made such apprehension on his own initiative, and at his own expense and hazard, and put him in the hands of the proper officer, and gave evidence at the trial from which a conviction resulted. Smith v. Vernon County, 87 S. W. 949, 951, 188 Mo. 501, 70 L. R. A. 59, 107 Am. St. Rep. 324.

APPRISED

Under Const. art. 10, § 27, authorizing any incorporated city by a majority vote of the qualified property taxpaying voters to become indebted for the purchase or construction of public utilities to be owned exclusively by the city, a proposition, referring to the qualified property taxpaying voters of a city the question, "Shall the city of W. * * * incur an indebtedness by issuing its negotiable coupon bonds to the amount of $30,000 for the purpose of providing funds for the construction of an electric light plant, in and to be owned exclusively by said city?" sufficiently "apprised" the voters of the nature of the utility. City of Woodward v. Raynor, 119 Pac. 964, 966, 29 Okl. 493.

APPROACHES

The use of the word "approaches," in an instruction that it was the railroad company's duty to exercise ordinary care to keep its approaches to the track in a safe condition, meant those places where employés must approach the track to work, and not such an approach as a crossing. Gulf, C. & S. F. Ry. Co. v. Dickens, 118 S. W. 612, 618, 54 Tex. Civ. App. 637.

Of bridge or viaduct

As part of bridge, see Bridge.

Under the common law, and generally under the statutes in this country, a "bridge" includes the abutments and such approaches as will make it accessible and convenient to public travel. Ordinarily an "approach," as the term is used, is considered a part of a viaduct or bridge. The question what is a viaduct proper and what is an approach, where one begins and the other ends, and what is street or highway, as distinguished from an approach to a viaduct or bridge, are more questions of fact than law. For a block west of a viaduct over the tracks of defendant railroad company the approach was constructed of planking, with a substructure of woodwork and iron, and for another short block west of this the street was filled to its full width, according to the grade established for the approach, and the surface of the fill was paved, manholes provided, curbing set, and sidewalks built; the street, except for the slope or grade of six or seven feet for such blocks, having all the appearances of a city street. Held, that that part of the grade so filled and improved did not constitute a part of the "approach" to the viaduct, and that the city had no power to require that the same be repaved and improved at the expense of the railroad company. City of Chicago v. Pittsburgh, Ft. W. & C. Ry. Co., 93 N. E. 307, 308, 247 Ill. 319, 139 Am. St. Rep. 329; Id., 93 N. E. 309, 248 Ill. 100.

APPROACHING

St. 1903, p. 360, c. 473, § 7, requires that the driver of an automobile, approaching any vehicle drawn by a horse, shall operate such automobile so as to exercise every reasonable precaution to prevent the frightening of such horse, and declares that every automobile shall be provided with a suitable bell or horn or other means of signaling. Held, that an automobile coming up behind a vehicle drawn by horses is "approaching" the same, and that the operator thereof was bound to give signals of his approach. Gifford v. Jennings, 76 N. E. 233, 190 Mass. 54.

APPROBATION

The word "approbation" means the act of approving; an assenting to the propriety of a thing with some degree of pleasure or satisfaction; approval; sanction; commendation. Long v. Needham, 96 Pac. 731, 733, 37 Mont. 408.

APPROPRIATE—APPROPRIATION

See Debt Incurred After Appropriation Exhausted; Misappropriation; Notice of Appropriation; Original Appropriation; Prior Appropriation; Unappropriated.

To "appropriate" money, or anything else, is to set apart or assign it to a particular use or purpose. Kelley v. Sullivan, 87 N. E. 72, 201 Mass. 34.

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APPROPRIATE REMEDY

The words "appropriate remedy," in Greater New York Charter (Laws 1897, p. 188, c. 378, § 537), providing that, in the event of the removal of any member of the clerical or uniformed force of street cleaning, he shall have the right to sue out a writ of certiorari or other appropriate remedy for the purpose of reviewing the action of the commissioner or his deputy, means some remedy by which the proceedings taken by the commissioner can be brought before the court for review, and not by a proceeding independent of it, which commands the commissioner to do either one thing or the other. People ex rel. Holden v. Woodbury, 85 N. Y. Supp. 161, 163, 88 App. Div. 593.

APPROPRIATION OF LAND

Webster defines "appropriation" as "the act of setting apart or assigning to a particular use, in exclusion of all others; application to a special use or purpose, as of a piece of ground for a park." Kimball v. Salisbury, 56 Pac. 973, 975, 19 Utah, 161 (citing Kimball v. Salisbury, 56 Pac. 1040, 17 Utah, 381; Beecher v. Baldy, 7 Mich. 488).

The words "condemn or appropriate," used in the Constitution of Arkansas, mean a taking of private property under the right of eminent domain and not by contract. St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627, 629.

Where a town wrongfully built a road over the land of an owner, but it and the owner treated the act as a permanent taking, notwithstanding the illegality of its inception, and the court found that the town appropriated the land to itself for a highway, the owner could recover the full value of the land without deductions for benefits resulting from the improvement, and such compensation would bar any future action by the owner; an "appropriation" of land being more than a mere entry thereon, and including a setting apart, or applying the land to the use of a particular person for a particular purpose. Pinney v. Town of Winchester, 76 A. 994, 995, 83 Conn. 411.

Occupy as synonymous

As used in a deed relating to the occupation of a coal bed, the word "occupy" is synonymous with "work" or "appropriate." Hoysradt v. Delaware, L. & W. R. Co., 151 Fed. 321, 330.

APPROPRIATION OF MINING CLAIM

"Appropriation" of a mining claim is accomplished by the posting of notice at or near the point where the ledge is exposed, followed by the recording of notice and the marking of boundaries. McCleary v. Broaddus, 111 Pac. 125, 126, 14 Cal. App. 60.

By the law of Colorado, the location of a riparian gold placer claim is not in itself a valid appropriation of water to beneficial uses, but the actual application of the water to a beneficial use is the true test of "appropriation." Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, 66, 104 C. C. A. 136.

APPROPRIATION OF PUBLIC MONEY

By "appropriations" is meant the setting apart of public moneys by legislative vote or enactment, to be applied to specific objects and public expenditures. Trustees of Rutgers College v. Morgan, 60 Atl. 205, 207, 71 N. J. Law, 663. See Rap. & L. Law Dict. ad verbum, § 6; Century Dig.

An "appropriation" of state funds is a setting apart from the public revenue of a certain sum of money for a specified object, in such a manner that the executive officers are authorized to use that money, and no more, for that specific object. Jobe v. Caldwell, 125 S. W. 423, 428, 93 Ark. 503.

An "appropriation" is an authority of the Legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury in a given year for a specified object or demand against the state. Menefee v. Askew, 107 Pac. 159, 161, 25 Okl. 623, 27 L. R. A. (N. S.) 537.

The action of the council of the city in ordering the payment out of its general fund of an indebtedness represented by a warrant is not an "appropriation" within the charter prohibiting the payment of money except in pursuance of a previous appropriation specifying the purpose. Niles Bryant School of Piano Tuning v. Bailey, 126 N. W. 116, 118, 161 Mich. 193.

An objection to a bridge tax, on the ground that the county board adopted a resolution for issuing warrants to pay certain expenses connected with building the bridges against funds previously "appropriated" for that purpose, the resolution showing that there was no money in the treasury, was of no merit in not being essential to the validity of an "appropriation" that funds to meet the same should then be in the treasury. People v. Chicago & N. W. Ry. Co., 94 N. E. 57, 58, 249 Ill. 170.

An "appropriation" of "the proceeds of the one mill tax" for the years 1907, 1908 (Laws 1907, p. 465, c. 151), is an appropriation of the whole amount of the tax, and not that portion only actually collected during such time. State ex rel. Ledwith v. Brian, 120 N. W. 916, 917, 84 Neb. 30.

Acts 1869, c. 44, is entitled "An act to authorize aid in the construction of railroads by counties and townships taking stock in and making donations to railroad companies." The two methods of aiding railroads by taking stock or donating money are recognized all through the system of laws referring to such aid, but the generic word most frequently used is "appropriation." It is plain

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in practically every instance where this word is made use of that it is designed to cover both the taking of stock and the making of donations. State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County, 76 N. E. 986, 990, 166 Ind. 162.

Constitutional provisions

Under the Constitution, a legislative act, to constitute an "appropriation" authorizing the payment of funds, or the drawing of a warrant, must fix a limit on the amount which may be paid out under the subject covered by the act. State v. Holmes, 123 N. W. 884, 886, 19 N. D. 286.

Webster defines an "appropriation" as the act of setting apart or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose, as the money to carry out some public object. Laws 1907, p. 408, c. 185, created the state industrial and publicity commission, and provided (section 3, p. 409) that the chairman should receive from the state treasury $2,500 a year in monthly installments, and that the members of the commission should be allowed necessary mileage and traveling expenses on affidavit of the members claiming the same that the mileage and expenses were actually incurred in official business, etc. Held, that the act constituted a sufficient appropriation of the salary of the chairman; but, as it failed to prescribe any maximum expenditure for traveling expenses, the act was void in so far as it authorized payment of such expenses by the state, under Const. art. 4, § 19, providing that no money shall be drawn from the state treasury except under appropriations made by law. State ex rel. Davis v. Eggers, 91 Pac. 819, 823, 29 Nev. 469, 16 L. R. A. (N. S.) 630 (quoting and adopting the definition in People ex rel. McCauley v. Brooks, 16 Cal. 11; quoted in Proll v. Dunn, 80 Cal. 220, 22 Pac. 143).

Acts 1884, No. 11, granting aid from the state to a town excessively burdened in building its highways and bridges, appropriated no specific sum therefor, but directed the auditor to draw orders on the State Treasurer for the amount required by judgments rendered by the courts against the state in proceedings under the act; and at the same session a general appropriation act was passed "for the purpose of paying such demands against the state as may be allowed by the auditor of accounts." Held, that there was an "appropriation by act of Legislature" within the contemplation of the Constitution providing that "no money shall be drawn out of the treasury, unless first appropriated by act of the Legislature." Highgate v. State, 7 Atl. 898, 900, 59 Vt. 39.

The Barge Canal Act (Laws 1903, c. 147), providing for the improvement of a canal and requiring the replacement of railway bridges at state expense, is not a law "appropriating public moneys for private purposes," within Const. art. 3, § 20, requiring the assent of two-thirds of the members elected to each branch of the Legislature to every bill making such appropriations. Lehigh Valley R. Co. v. Canal Board, 125 N. Y. Supp. 227, 236, 237, 69 Misc. Rep. 251.

Disbursement distinguished

The appropriation of public money and its disbursement are two different and separate acts. Webster's definition of "appropriation," so far as here pertinent, is: "The act of setting apart or assigning to a particular use or person in exclusion of all other; application to a special use or purpose, as of money to carry out some object." "Disbursement" is, of course, the same as "payment." In our systems of government, federal and state, the appropriation and the payment of public moneys are always kept distinct, and appropriations are often coupled with some condition whose performance is to come after the appropriation, but before the actual payment. Brown v. Honiss, 68 Atl. 150, 158, 74 N. J. Law, 501.

Issue of bonds

Where a village charter authorizes the trustees to call a special tax meeting to vote on appropriations for special purposes, the word "appropriations" does not, on natural construction, well describe a proposed issue of bonds extending over a period of years. Village of Canandaigua v. Hayes, 85 N. Y. Supp. 488, 493, 90 App. Div. 336.

APPROPRIATION OF WATER

What constitutes valid "appropriation" of water to beneficial uses is a question of local law. Snyder v. Colorado Gold Dredging Co., 181 Fed. 62, 66, 104 C. C. A. 136.

A diversion of water not applied to some beneficial use does not constitute an "appropriation." Town of Sterling v. Pawnee Ditch Extension Co., 94 Pac. 339, 341, 42 Colo. 421, 15 L. R. A. (N. S.) 238.

"To constitute a valid 'appropriation of water' there must be (1) an intent to apply it to some beneficial use, existing at the time or contemplated in the future; (2) a diversion thereof from a natural stream; and (3) an application of it within a reasonable time to some useful industry." Beers v. Sharpe, 75 Pac. 717, 720, 44 Or. 386 (citing Simmons v. Winters, 27 Pac. 7, 21 Or. 35, 28 Am. St. Rep. 727; Hindman v. Rizor, 27 Pac. 13, 21 Or. 112; Low v. Rizor, 37 Pac. 82, 25 Or. 551; Nevada Ditch Co. v. Bennett, 45 Pac. 472, 30 Or. 59, 60 Am. St. Rep. 777).

The diversion of a definite quantity of water from the channel of a stream by the owner of land on the stream claiming right thereto as against other users not prior in time is a claim by "appropriation," regardless of whether the water is diverted from the channel on his riparian land or beyond its boundaries. Little Walla Walla Irr. Co. v. Finis Irr. Co., 124 Pac. 666, 670, 62 Or. 348.

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An "appropriation" consists of an actual diversion of water from a natural stream, followed within a reasonable time thereafter by an application thereof to some beneficial use. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 98 Pac. 729, 731, 44 Colo. 214.

To constitute an "appropriation of water" there must not only be a diversion from the stream and a carrying of it to the place of use, but it must be beneficially applied, and the measure of appropriation does not depend alone upon the amount diverted and carried, but the amount which is applied to a beneficial use must also be considered. Woods v. Sargent, 95 Pac. 932, 933, 43 Colo. 268.

Under Comp. Laws, § 1288x et seq., prescribing procedure for the appropriation of public water, an inceptive right to use such water upon or within an Indian reservation can be initiated or acquired after issuance of a proclamation restoring the lands to the public domain but before they are subject to entry, if the application be made in good faith to appropriate the water for a beneficial use, and not for speculation or monopoly. To constitute a valid "appropriation of water," there must be intent to apply it to a beneficial use, a diversion from the natural channel by a ditch, canal, or other structure, and an application of it to a useful industry within a reasonable time; the last-mentioned element being the most essential. An application to the state engineer for permission to appropriate public water is merely notice of intent to appropriate, and does not establish an "appropriation." Sowards v. Meagher, 108 Pac. 1112, 1115, 1116, 1117, 37 Utah, 212.

"Appropriation," in respect to water rights, is a much abused word. It is often loosely spoken of as the preliminary step, such as filing a notice, making a claim to water, or the like, but in its legal significance is embodied not only the claim to the water, but the consummation of that claim by actual use. Morris v. Bean, 146 Fed. 423, 426.

An "appropriation" of waters, under Act Feb. 25, 1899 (Laws 1899, p. 380), is initiated by posting the required notice, and an inchoate right thereby arises which may ripen into a complete appropriation upon the final delivery of the waters to the place of intended use. Sand Point Water & Light Co. v. Panhandle Development Co., 83 Pac. 347, 349, 11 Idaho, 405.

An "appropriation" of water is a grant by the general government to a settler on public land of the right to its use from a nonnavigable stream, to the injury of all public land above the point of diversion, which may be within or beyond the boundaries of the settler's claim. Morgan v. Shaw, 83 Pac. 534, 535, 47 Or. 333.

That a riparian owner has been using the water of a stream for more than 17 years for "domestic, culinary and household purposes, and for the use of his live stock," and that the water of the stream has continuously flowed through his land, "moistening the same," does not amount to an "appropriation" within the Constitution and statutes of the state. Hutchinson v. Watson Slough Ditch Co., 101 Pac. 1059, 1061, 1062, 16 Idaho, 484, 133 Am. St. Rep. 125.

The general government has power to reserve the waters on the public domain and exempt them from appropriation under state laws. Conrad Inv. Co. v. United States, 161 Fed. 829, 831, 88 C. C. A. 647.

The word "appropriation," as used in Const. Cal. art. 14, § 1, and Act March 12, 1885 (St. 1885, c. 115), providing that the use of all waters appropriated for sale, rental, or distribution is a public use, is not limited to water appropriated under the provisions of the Civil Code, but is general in its meaning, and includes all water, however acquired, which is devoted to public use, but where a number of persons owning the land are each entitled to take water from a common source for use on their land, either by authority of appropriation under the Code or by prescription, or as riparian owners, and they make a joint diversion and carry the water from that point in a common conduit, they still remaining owners in common of the works, but the water rights remain several and private, and not public, and, although they delegate the diversion and distribution to a corporation, they did not thereby dedicate the water to a public use. Hildreth v. Montecito Creek Water Co., 72 Pac. 395, 398, 139 Cal. 22.

As proceeding

See Proceeding.

APPROVAL

See Disapprove; On Approval.
Sale on trial or approval, see Sale on Trial.

The very act of "approval" imports the act of passing judgment, the use of discretion, and the determination as a deduction therefrom unless limited by the context of the statute. Fuller v. Board of University and School Lands of State of North Dakota, 129 N. W. 1029, 1032, 21 N. D. 212 (citing 1 Words and Phrases, p. 474).

To give "approval" is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. State v. Rhein, 127 N. W. 1079, 1081, 149 Iowa, 76.

The act of the school board of a district on the state line, which maintained no high school, in paying for the tuition of a child at a school outside the state, was a sufficient "approval" of her attendance there, within Laws 1909, c. 100, requiring such approval to charge

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the board for subsequent tuition not paid for. Pushee v. Lyme School Dist., 82 Atl. 718, 719, 76 N. H. 369.

Const. art. 7, § 21, providing that no general law shall be in force until published, and St. 1898, § 329, providing that publications shall be made immediately after the passage and approval of general laws, do not require publication of a statute after its "approval" by a vote of the people where the statute was complete when approved by the Governor, and published subject to the submission to the people for adoption or rejection; the word "approval" in the statute referring to executive approval. State ex rel. Van Alstine v. Frear, 125 N. W. 961, 967, 142 Wis. 320, 20 Ann. Cas. 633.

The instrument signed by the trial judge, reciting, "This statement of facts, filed as of * * * in accordance with an agreement of the counsel * * * at the time the above statement was agreed to by them," is not an "approval" of the statement of facts. Watkins v. Hale, 84 S. W. 386, 387, 37 Tex. Civ. App. 243.

Where a city council authorized the city treasurer to borrow money "from time to time with the approval of the committee on finance," the word "approval," as so used, contemplated the exercise of discretion by the committee as a whole, investigating and sanctioning according to their own independent judgment each separate loan made under its order; and hence it could not legally delegate such duty to the mayor as chairman of the committee. Brown v. City of Newburyport, 93 N. E. 504, 507, 209 Mass. 259, Ann. Cas. 1912B, 495.

Confirm synonymous

In Act June 2, 1887 (P. L. 306), relating to proceedings for condemnation of a turnpike road, providing (section 6) that exceptions may be filed to the report of the jury of view within 30 days from filing of such report, and the court, after considering such exceptions, may refer the report back to the jury or may set it aside or confirm it, and if no exceptions are filed to any such report, unless appeal is taken as provided for in section 8 (and in such case the final confirmation of the proceedings shall await the result of the appeal from the assessment within 30 days from the filing thereof), then such report shall be confirmed or dismissed by the court, and providing (section 8) that an appeal to the common pleas for the assessment of damages may be taken within 30 days after the approval of the report, the word "approval," as used in section 8, is synonymous with the word "confirm" in section 6. Chestnut Hill & Spring House Turnpike Road Co. v. Montgomery County, 76 Atl. 726, 727, 228 Pa. 1.

As judicial act

See Judicial Act.

APPROVE

See Disapprove.

To "approve" is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. State v. Rhein, 127 N. W. 1079, 1081, 149 Iowa, 76.

The highest lexicographic authority exists for the interchangeable use of the terms "approve" and "ratify." Baker v. Hammett, 100 Pac. 1114, 1116, 23 Okl. 489.

To "approve" means to sanction officially; to ratify; to confirm. Long v. Needham, 96 Pac. 731, 733, 37 Mont. 408.

The word "approve" is "to regard or pronounce as good; think or judge well of; admit the propriety or excellence of; be pleased with; commend." Under such definition, the approval by the president of an insurance company provided for in the policy, reciting that after forfeiture the insured could be reinstated provided his application was first "approved" by the president of the company, was not a mere ministerial act, but involved the exercise of judgment and discretion, and hence the insurer was not liable for refusal to reinstate the insured, if such refusal was neither fraudulent nor purely arbitrary. Lane v. Fidelity Mut. Life Ins. Co., 54 S. E. 854, 855, 142 N. C. 55, 115 Am. St. Rep. 729 (quoting 1 Words and Phrases, p. 475, Webster's International Dict.).

The word "approve," as used in an instruction in a prosecution for murder to the effect that it was the duty of the jury to find defendant guilty as charged, if they believed her present with the design to give assistance, if necessary, to the person killing deceased, or present with the design to encourage, incite, or approve of such killing of deceased, conveys the meaning of a deed already accomplished and one committed by another party, and one who tacitly approves of or consents to the killing of any person cannot under any rule of law be held to have aided or abetted in such killing, and such an instruction is erroneous. Harper v. State, 35 South. 572, 574, 83 Miss. 402.

An indictment, alleging that the local option law had been legally "approved," did not allege that it had been legally "adopted," since one may approve, and at the same time fail to adopt, a thing. State v. Campbell, 119 S. W. 494, 495, 137 Mo. App. 105.

Under an ordinance requiring that the street committee of a village should certify to a bill of costs for the construction of a public improvement, the marking of the bill of costs "approved" did not amount to a certification of the bill. People v. Patton, 79 N. E. 51, 52, 223 Ill. 379.

APPROVED NOTE

An "approved note" is a note with a surety. Hale v. Jones, 48 Vt. 227.

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APPROVER

An "approver" is defined as one charged with a felony who confessed the fact before pleading, and appeals, or accuses others as his accomplices in the same crime, in order to obtain his own pardon. Stevens v. People, 74 N. E. 786, 789, 215 Ill. 593.

One serving a term in state's prison for forgery against whom other unnamed indictments are pending is not an "approver" and incompetent as a witness under Gen. St. 1906, § 3975, against one being tried for larceny. Menefee v. State, 51 South. 555, 557, 59 Fla. 316.

APPROXIMATE—APPROXIMATELY

Land is "approximate" to a street in which is a pipe of the sewer, within Laws 1899, p. 244, c. 126, as amended by Laws 1903, p. 30, c. 27, authorizing a city to assess the expense of constructing a sewer on land contiguous or approximate to any street in which any pipe of the sewer is placed, only where the property is so situated as to be capable of using the sewer or of deriving from its construction a special advantage different in character from that enjoyed by the public generally. Monk v. City of Ballard, 84 Pac. 397, 399, 42 Wash. 35; McCurdy v. Same, 84 Pac. 399, 42 Wash. 697.

The word "approximately" is to be construed with reference to the subject-matter. The representation of an engineer on which complainants, who had contracted to do foundation work according to a certain plan, agreed to do it on another plan, that the cubical contents of the walls, to be filled with cement would be "approximately" the same under both plans, was not sustained by proof that under the substituted plan there was only an excess over the other plan of 1,049 feet in a total of 170,837 feet. An estimate of the cost of constructing a building, where uncertain factors enter into the estimate, might well be held to be approximately correct, although the actual cost exceeded the estimated cost by more than the difference in this case. But where, as in this case, the problem is a mathematical one of figuring the cubical contents of figures of definite dimensions admitting of accurate results, the representation cannot be said to be approximately correct. Vaughan v. Ford, 127 N. W. 280, 282, 162 Mich. 37.

A contract for street paving required the work to be done as a whole, and not in sections, according to specifications under the direction of the city's engineer. The notice to bidders and specifications alone provided for payment on semimonthly estimates as the work progressed, with a retention of 10 per cent. on each "approximate estimate." The contract also provided that the contractor should be responsible for any work until its completion and final acceptance, and that the acceptance should not relieve the contractor of any obligation to do reliable work previously described. Held, that the word "approximate" was tautologically used to accentuate the word "estimate," which was not to be construed as a final mathematical ascertainment of what was set forth, and hence the acceptance of sections of the work by the city engineer and issuance of approximate estimates thereon to the contractor did not bar the city's right to defend, when sued for the balance due under the contract, on the ground that the work in the sections estimated did not constitute a compliance with the specifications. City of Greensboro v. Southern Pav. & Const. Co., 168 Fed. 880, 886, 94 C. C. A. 292.

Proximate synonymous

An instruction on contributory negligence, in an action for death at an interurban railway crossing, was not defective in the use of the word "approximately," instead of "proximately"; the two words being so closely allied in meaning that the use of the former, in a clause requiring such negligence to have "approximately" contributed to the injury, could not have misled the jury. Brooks v. Muncie & P. Traction Co., 95 N. E. 1006, 1008, 176 Ind. 298.

Where, in an action for injuries to an employé, the court defined proximate cause and used in its instructions the word "proximate" several times, the use of the word "approximately" for "proximately" in a charge relating to proximate cause was not erroneous. Choctaw, O. & T. Ry. Co. v. McLaughlin, 96 S. W. 1091, 1093, 43 Tex. Civ. App. 523.

APPROXIMATE CAUSE

See Proximate Cause.

APPURTENANCE—APPURTENANT

Easement as appurtenant to land, see Easement.

An "appurtenance" is a thing belonging to and going with the transfer of a principal thing; used with, dependent upon the thing, and essential to it. Shrader v. Gardner, 74 S. E. 990, 991, 70 W. Va. 780, 40 L. R. A. (N. S.) 1145 (citing 1 Words and Phrases, p. 478).

The word "appurtenant" means attached to, or belonging to, and in law the term "appurtenance" usually means something appertaining to another thing as principal, and passing as an incident to such principal. Whittelsey v. Porter, 72 Atl. 593, 595, 82 Conn. 95.

To gas pipe line

In a proceeding to condemn a right of way for a natural gas pipe line, where the conveyance to petitioner spoke of its use for laying its "gas pipe line and appurtenances," an argument by the owner on appeal to the

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circuit court that petitioner could lay pipe lines other than the one then maintained by it was not improper, since the term "appurtenances" might be held to include the laying of additional pipes if required, without a new condemnation proceeding. Cincinnati Gas Transp. Co. v. Cartee, 147 S. W. 925, 927, 149 Ky. 89.

To land

The term "appurtenance" includes everything necessary to the beneficial use of the property leased, and, where the business of a tenant requires a considerable amount of coal, it is essential that the tenant should have a suitable place for storing coal. Greenblatt v. Zimmerman, 117 N. Y. Supp. 18, 21, 132 App. Div. 283.

Same—Buildings

A storehouse erected on a lot purchased with the proceeds of a sale of a homestead was an "appurtenance" within Ky. St. 1903, § 1702, giving a homestead exemption in a quantity of land including the dwelling house and the appurtenances owned by debtors who are actual bona fide housekeepers with a family, and to exceed $1,000 in value, and hence was not subject to the payment of debts of the owner who was a bona fide housekeeper with a family, where the value of the lot and the buildings erected thereon, including the storehouse, did not exceed $1,000, though a small rental was obtained from the use of the storehouse. Green & Sons v. Pennington, 97 S. W. 766, 767, 30 Ky. Law Rep. 203.

Same—Easements

An "easement appurtenant" being one which inheres in the land, and is necessary to the enjoyment thereof, and is in the nature of a covenant running with the land, attached to the land to which it is appurtenant, an issue as to the existence of such an easement involves title; and the facts are not reviewable on appeal. Kershaw v. Burns, 74 S. E. 378, 379, 91 S. C. 129.

An easement of way is "appurtenant" if the dominant estate is clearly indicated, and the easement is beneficial to such estate, and it is not necessary that the dominant and servient estates should be contiguous, or that the right of way should terminate on the dominant estate. D. M. Goodwillie Co. v. Commonwealth Electric Co., 89 N. E. 272, 284, 241 Ill. 42.

A right of way for an irrigation ditch, and the right to receive water from or discharge the same on land, constitute easements which may attach to other lands as incidents or "appurtenances." A deed providing that the grantee should not use an irrigation ditch except to convey water to the north half of a certain section for use thereon, unless by the consent of the grantor, created an "easement" which by use became "appurtenant" to such section, and was not a mere easement in "gross" personal to the grantee. Jones v. Deardorff, 87 Pac. 213, 215, 4 Cal. App. 18 (citing Hopper v. Barnes, 45 Pac. 874, 113 Cal. 636).

Under the express terms of Civ. Code, § 662, a thing is deemed to be incidental or "appurtenant" to land when it is by right used with the land for its benefit, e. g., a way, water course, or passage for light, air, or heat from or across the land of another. Corea v. Higuera, 95 Pac. 882, 884, 153 Cal. 451, 17 L. R. A. (N. S.) 1018.

Easements of light, air, and access, "appurtenant" to real property abutting on a public street or highway, are inseparable from the dominant estate, and on a conveyance of the latter such easements pass to the grantee, notwithstanding the grantor's attempted reservation of the same, or of any rights of action for the invasion or destruction thereof. McKenna v. Brooklyn Union Elevated R. Co., 77 N. E. 615, 616, 184 N. Y. 391.

A release by a mortgagee releasing and quitclaiming the lot conveyed, together with the "appurtenances" thereto belonging, was ineffectual to create a right of way over an adjoining lot or to extend the easement of a right of way to the legal estate belonging to the mortgagee. Hazeldine v. McVey, 63 Atl. 165, 166, 67 N. J. Eq. 275.

A right of way which had never existed as such previously to the lease, and over the remaining premises of the lessor, is not created by, and cannot pass under, the general word "appurtenances" in the lease. On severance of the premises, it may, as a way of necessity, pass with the lease of a portion of the premises by implication of law, as appurtenant to the premises, without the use of the word "appurtenances." Georke Co. v. Wadsworth, 68 Atl. 71, 73, 73 N. J. Eq. 448 (citing Stuyvesant v. Woodruff, 21 N. J. Law, 133, 57 Am. Dec. 156; Fetters v. Humphreys, 19 N. J. Eq. 475, 476; Hazeldine v. McVey, 63 Atl. 165, 67 N. J. Eq. 275; Newhoff v. Mayo, 23 Atl. 265, 48 N. J. Eq. 619, 27 Am. St. Rep. 455).

Same—Growing crops

In the absence of a reservation, growing and unmatured crops upon lands conveyed by warranty deed pass with the land as "appurtenances," which are defined by Sess. Laws 1897, p. 101, c. 8, § 41, and Id. p. 94, c. 8, § 10, as all improvements and every right, of whatever character, pertaining to the premises described. Marshall v. Homier, 74 Pac. 368, 370, 13 Okl. 264.

Same—Heating plant

Where certain floors of a building were leased with the "appurtenances," a furnace, constituting the only means for heating the leased premises, was included in the word "appurtenances." Stevens v. Taylor, 97 N. Y. Supp. 925, 926, 111 App. Div. 561.

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Same—Other lands

Lands under water adjacent to uplands are "appurtenant" to the uplands, within the condemnation law. New York Cent. & H. R. R. Co. v. Mathews, 129 N. Y. Supp. 828, 830, 144 App. Div. 732.

Same—Timber

"Unless the right to the timber cut passed to the respondent by his patent, he had none, and it could only pass as a 'fixture' on or 'appurtenance' to the realty; but timber felled by the act of man, or wood cut, is personal property." Longino v. Wester (Tex.) 88 S. W. 445 (quoting and adopting definition in Peck v. Brown, 5 Nev. 81).

Same—Water right

A water right is an appurtenance to the land on which it is used, and a deed to the land, "together with appurtenances," carries with it the water right appurtenant to the land at the time of the conveyance, unless the same is excepted from the grant. Russell v. Irish, 118 Pac. 501, 502, 20 Idaho, 194.

A lease of a house "with the appurtenances," though giving the lessee the right to the use of water supplied to the house at the time of leasing from a water system owned by the lessor, does not obligate the lessor to keep the system in repair. Bradbury v. Higginson, 123 Pac. 797, 799, 162 Cal. 602.

A lease of premises and "appurtenances," supplied with water from a private main, which provides for the installation of a water meter and for the payment by the tenant of the water rent, covers the right to use the water from the private main as an appurtenant; the term "appurtenances" including incorporeal easements, rights, and privileges, though not land. Kahlen v. Davenport, 135 N. Y. Supp. 730, 731, 76 Misc. Rep. 454.

Where the owner of land, on selling a portion thereof on which there were springs, reserved the right of taking water from the springs, and conveying it to buildings on the remainder of the land, such right became an "appurtenance" to the remainder. Mason v. Thwing, 87 N. Y. Supp. 991, 995, 94 App. Div. 77.

A right of way for an irrigation ditch, and the right to receive water from or discharge the same on land, constitute "easements" which may attach to other lands as incidents or "appurtenances." A deed providing that the grantee should not use an irrigation ditch except to convey water to the north half of a certain section for use thereon, unless by the consent of the grantor, created an easement which by use became "appurtenant" to such section, and was not a mere easement in "gross" personal to the grantee. Jones v. Deardorff, 87 Pac. 213, 215, 4 Cal. App. 18 (citing Hopper v. Barnes, 45 Pac. 874, 113 Cal. 636).

Civ. Code, § 662, provides that a thing is "appurtenant" to land when it is by right used with the land for its benefit. Defendant, owning the waters of a creek, sold to plaintiff the right to receive and use one-fifth thereof with the right to convey them across defendant's land to plaintiff's land with the covenant, "that all the interest, rights, estate and privileges hereinabove described as passing or accruing to or vesting in" plaintiff "shall be deemed and treated as appurtenant to and as a part and for the benefit of said lands of" plaintiff "hereinabove described, and that" defendant "is bound by the terms of this instrument to all subsequent owners of said land of" plaintiff, "as well as to" plaintiff, "but to no other person or persons." Held that the agreement, while making the water rights appurtenant to plaintiff's land, did not limit the use of the waters thereto, so that he could sell, for limited periods, surplus water to which he was entitled and which had been carried to his lands. Calkins v. Sorosis Fruit Co., 88 Pac. 1094, 1096, 150 Cal. 426.

An "appurtenance" is a thing belonging to another thing as principal and which passes as incident to the principal thing. Plaintiff's grantor while the owner of an entire tract, including land subsequently conveyed to plaintiff, constructed an open ditch, in which water continually flowed which was of benefit, not only to the land conveyed, but to that conveyed by the grantor. At the time of the sale the drain ditch was pointed out to plaintiff, and he was charged $25 per acre additional for land purchased as a consideration for the right to use the water in such ditch to irrigate the land, in addition to water in another ditch also conveyed. Held, that the right to maintain such drainage ditch was a quasi easement, which passed to plaintiff under his deed conveying privileges and "appurtenances" to the land conveyed. Fayter v. North, 83 Pac. 742, 751, 30 Utah, 156, 6 L. R. A. (N. S.) 410 (citing 1 Words and Phrases, p. 477; 3 Cyc. p. 565).

An "appurtenance" is that which belongs to another thing, but which has not belonged to it immemorially. The thing appurtenant need not be one of necessity. It may be one of convenience only; but it must be connected in use with the principal thing. In other words, "a thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter. All that can be reasonably claimed is that the word 'appurtenance' will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created." Only such easements as are directly necessary to the proper enjoyment of the land granted pass as appurtenant thereto. The necessity measures both the extent and duration of the

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right. The word "appurtenances" in a deed covers only what is legally appurtenant to the land described. It does not, without particular mention, convey any rights which do not naturally and necessarily belong to the thing granted in the hands of the grantor. Indeed, the word "appurtenance" is not necessary of anything that is merely incident to the land granted; for the incident follows the principal thing without words, and includes everything reasonably necessary to the enjoyment of the land. A grantee of a lot with all the rights and "appurtenances" thereto acquired by the conveyance the right to the use of a water main constructed in a public street by a former owner to supply the lot with water, but did not acquire any right to the main itself to the prejudice of others, to whom the former owner had sold rights to connect, as the title to the main remained in the former owner. Hunstock v. Limburger (Tex.) 115 S. W. 327, 329 (quoting and adopting definition in Humphreys v. McKissock, 11 Sup. Ct. 779, 140 U. S. 304, 35 L. Ed. 473; Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531; Tabor v. Bradley, 18 N. Y. 109, 72 Am. Dec. 498; Swazey v. Brooks, 34 Vt. 451).

To railroad

The phrases "connected with" and "appurtenant to" are not necessarily synonymous. A mortgage given by a railroad company limited the lien on after-acquired property to such property and to such rights, acquired by liens from other railroad companies, as should be connected with or appurtenant to the railroad of the mortgagor, specifically described in the mortgage. The lien of the mortgage embraces rights acquired by leases made after the date of the mortgage to the mortgagor by other railroad companies, owning railroads connected with the mortgagor's road and being operated by the mortgagor in connection with its own railroad and as a part of its railway system. These rights, if not appurtenant to, are, within the meaning of the language of the mortgage, "connected with," the mortgagor's railroad. Guaranty Trust Co. of New York v. Atlantic Coast Electric Ry. Co., 132 Fed. 68, 70.

To ship

A chronometer supplied on account of the owners of a schooner as a necessary part of her equipment for a special service, and necessary part of her equipment, is to be regarded as "appurtenant" to the "ship," and as included in the term "vessel." The Frolic, 148 Fed. 921, 922 (citing Abbott, Merchant Ships & Seamen [14th Ed.] pp. 33, 34, 280; Richardson v. Clark, 15 Me. 421; The Witch Queen, 3 Sawy. 201, 30 Fed. Cas. 396).

AQUATIC RIGHTS

See Littoral and Aquatic Rights.

AQUEDUCT

L. O. L. § 5136, provides that the owner of a "ditch or mining flume, or water right appurtenant thereto," who fails to operate or exercise ownership over such property for a period of five years shall lose the title, claim, and interest therein, etc. Held that, as a "ditch" is an "aqueduct," which is a water carrier or leader, and "flumes" are usually portions of ditches, a reservoir is not included within the statutory provisions; and nonuser thereof for the period named would forfeit no right. Moore v. United Elkhorn Mines (Or.) 127 Pac. 964, 966.

ARABLE LAND

Swamp land is simply land that is too wet for cultivation; the characteristic by which it is distinguished from "arable land." McCarter v. Sooy Oyster Co., 75 Atl. 211, 215, 78 N. J. Law, 394.

ARBITRARILY

The word "arbitrarily" means in an arbitrary manner, and "arbitrary," as defined by the Standard Dictionary, means: "Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic." Central of Georgia R. Co. v. Mote, 62 S. E. 164, 170, 131 Ga. 166.

An unreasonable exercise of discretion by a city license board in refusing a license is within the rule authorizing an appeal if discretion of the board has been "arbitrarily" exercised. Rehearing, 116 S. W. 745, denied. City of Louisville v. Gagen, 118 S. W. 947, 948, 132 Ky. 502.

A trade-name may be such as indicates the purpose of the association or may be arbitrary or fanciful, such fanciful or arbitrary words or phrases, as applied to an association organized for legitimate purposes, constituting a valid trade-name, and such words or phrases are deemed "arbitrary" or "fanciful" when they do not by their usual and ordinary meaning denote the purposes of the association, but come to indicate their purpose by application and association. Creswill v. Grand Lodge K. P. of Georgia, 67 S. E. 188, 191, 133 Ga. 837, 134 Am. St. Rep. 231, 18 Ann. Cas. 453.

Rev. Laws, c. 63, § 7, provides that no person or corporation shall issue, negotiate, or sell any bonds, certificates, or obligations of any kind which are by the terms thereof to be redeemed in numerical order, or in any arbitrary order, without reference to the amount previously paid thereon by the holder thereof, whether they are sold on the installment plan or otherwise. Held that the word "arbitrary" as used therein meant

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nothing more inflexible than a numerical order, or the order in which the applications were made. Attorney General v. Preferred Mercantile Co., 73 N. E. 669, 671, 187 Mass. 516.

A stipulation in a contract that a party for whom work is to be done, or to whom an article is to be furnished, may reject the work or article unless it is satisfactory to him, gives that party the right to reject it as unsatisfactory in any respect if he acts in good faith, but does not give him the right to reject it arbitrarily; and the words "good faith" and "arbitrarily" we take to mean that the rejecting party must find some substantial fault in the work or the article itself which renders it unsatisfactory, and not merely a reason for changing his mind regarding the project he had in view, and for which he ordered the work or the article. That such a term in a contract requires good faith and a just motive, in the party to be pleased, in declining the stipulated service, is the law. Cann v. Rector, Wardens & Vestrymen of Church of Redeemer, 85 S. W. 994, 1002, 111 Mo. App. 164.

ARBITRATION

See Compulsory Arbitration; Court of Arbitration.
See, also, Submission.

An "arbitration" is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in deference between parties. City of Omaha v. Omaha Water Co., 30 Sup. Ct. 615, 617, 218 U. S. 180, 54 L. Ed. 991.

"'Arbitration' is the investigation and determination of the matters of difference between the contending parties by the arbitrator chosen." Millsaps v. Estes, 50 S. E. 227, 228, 137 N. C. 535, 70 L. R. A. 170, 107 Am. St. Rep. 496.

To constitute an "arbitration," the matter submitted must be one in dispute between the parties, and not some matter which it is expected may arise between them or a matter of accounting or appraisal. Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 397, 106 C. C. A. 501.

An "arbitration" is a judicial proceeding, and the "arbitrators," being alike the agents of both parties, and not of one party alone, are bound to exercise a high degree of judicial impartiality, without the slightest regard to the manner in which the duty has devolved upon them. Produce Refrigerating Co. v. Norwich Union Fire Ins. Soc., 97 N. W. 875, 876, 91 Minn. 210.

An agreement to submit to arbitration the value of real estate sought to be acquired by a railroad company is not an agreement for a statutory "arbitration," within Code Civ. Proc. §§ 1281–1290, authorizing the submission to arbitration "of any controversy which might be the subject of an action" except a question of title to real property, but it is an agreement for a common-law arbitration to afford the parties a hearing and an opportunity to offer evidence to enable the arbitrators to adjudge the value on a consideration of the evidence as well as their own opinion. Dore v. Southern Pacific Co., 124 Pac. 817, 819, 163 Cal. 152.

Appraisement distinguished

Although the terms "appraisement" and "arbitration" are sometimes used interchangeably and frequently without any clear difference in meaning, there is a plain distinction between the two; "arbitrators" being appointed to settle a controversy and being required to observe certain rules of procedure as in a judicial inquiry, or their award will be void, while "appraisers" are selected to prevent disputes from arising and, unless restricted by the agreement under which they are appointed, are not required to give notice of hearings, hear evidence, or receive the statements of the parties, but are expected to act on their own knowledge and investigation, and have a wide discretion as to their methods of procedure and sources of information. Sebree v. Board of Education, 98 N. E. 931, 935, 254 Ill. 438.

As judicial proceeding

See Judicial Proceeding.

As special proceeding

See Special Proceeding.

ARBITRATOR

Board of Arbitrators as Court, see Court (Of Justice).

Where parties refer disputed or doubtful matters pending between them to the final decision and award of another party, the one to whom the reference is made is called an "arbitrator." Millsaps v. Estes, 50 S. E. 227, 228, 137 N. C. 535, 70 L. R. A. 170, 107 Am. St. Rep. 496.

"Arbitrators" are judges chosen by the parties to the controversy to decide the matter submitted to them finally and without appeal. Burrell v. United States, 147 Fed. 44, 48, 77 C. C. A. 308 (citing Burchell v. Marsh, 58 U. S. [17 How.] 344, 15 L. Ed. 96).

"Arbitrators" are instruments of the court appointed under statute to expedite its business, and their awards are not effective until approved by the court, but when so confirmed are as available in law as the verdict of a jury. The acts of arbitrators are subject to investigation by the court which may hear and determine any allegation of fraud and collusion practiced upon its arbitrators and investigate the manner in which any award was made. Pepper v. Pepper, 62 Atl. 232, 233, 5 Pennewill (Del.) 450.

While an "arbitrator" of loss by fire, appointed by a party in pursuance of an arbitration clause in a policy, is not the agent of

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the party selecting him, yet, where the proper act or conduct of such arbitrator prevents the selection of an umpire, the consequences of the failure of arbitration should be visited on the party who selected the arbitrator. Fowble v. Phœnix Ins. Co. of Hartford, Conn., 81 S. W. 485, 487, 106 Mo. App. 527.

ARCADE

See Penny Arcade.

ARCHITECT

Plans and specifications as material, see Materials.

An "architect" is one who makes it his occupation to form or devise plans and designs and to draw up specifications for buildings or structures and to superintend their construction. People v. Lower, 96 N. E. 346, 347, 251 Ill. 527, 36 L. R. A. (N. S.) 1203.

An "architect" is one skilled in practical architecture, one whose profession is to devise plans or ornamentation of buildings or other structures or to direct their construction. Pen and ink drawings of an artistic character, of a proposed building, produced by an architect, are within paragraph 703, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 203, relating to "works of art, the production of American artists." Young v. Bohn, 141 Fed. 471, 472.

A building contract required the erection of the building in conformity with the plans and specifications made by the owner's authorized architect, and provided that when payment became due certificates in writing should be obtained from the architect. Held, that the contractor and builder who was employed by the owner to make the plans and specifications for the building and to superintend its construction, though not a professional architect, was the "architect" authorized to make the certificates upon which payments were made. Bacigalupi v. Phœnix Bldg. & Const. Co., 112 Pac. 892, 895, 14 Cal. App. 632.

As artist

See Artist.

As mechanic

See Mechanic.

ARCHIVE

Sayles' Ann. Civ. St. 1897, art. 4124, required the Land Commissioner to issue an unlocated balance certificate when the location of the original certificate is found to be in conflict with previous claims on the application and affidavit of the rightful claimant of the certificate so located. Held, that a letter written by a claimant of land located on the certificate, protesting against the floating of the certificate on other land so far as it affected the land located and awarded to him, but not objecting to the floating of the balance of the certificate, constituted an "archive" of the Land Commissioner's Office so that a certified copy of the same was admissible as provided by article 2308. Robertson v. Brothers (Tex.) 139 S. W. 657, 658.

ARDENT SPIRITS

"Ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whisky, brandy, and gin. Burch v. City of Ocilla, 62 S. E. 666, 668, 5 Ga. App. 65.

Under Acts 1908, p. 275, c. 189, § 1, declaring that all mixtures, preparations, and liquids which will produce intoxication shall be deemed "ardent spirits," within the meaning of the act, an indictment charging the sale of spirituous and malt liquors, whisky, brandy, wine, ale, beer, or mixtures thereof is insufficient to sustain a conviction, on proof of sale of cider which would produce intoxication, since while all spirituous liquors are intoxicating, and all intoxicating liquors are ardent by force of the statute, all ardent liquors are not spirituous liquors. Donithan v. Commonwealth, 64 S. E. 1050, 109 Va. 845.

An indictment, alleging that accused in a designated magisterial district unlawfully sold and delivered "intoxicating liquors and mixtures thereof," sufficiently charges a violation of Revenue Law (Acts 1904, p. 42, c. 20) § 141, forbidding the sale without a license of "wine, ardent spirits, malt liquors or any mixture thereof," and further providing that "all mixtures, preparations, and liquors (except pure apple cider) which will produce intoxication shall be deemed 'ardent spirits' within the meaning of this section." Fletcher v. Commonwealth, 56 S. E. 149, 151, 106 Va. 840.

ARGUE

ARGUMENT

"Argument" is a connected discourse based upon reason; a course of reasoning tending and intended to establish a position and to induce belief. Rahles v. J. Thompson & Sons Mfg. Co., 119 N. W. 289, 290, 137 Wis. 506, 23 L. R. A. (N. S.) 296.

ARGUMENTATIVE PLEADING

The statements that certain parties "conspiring to defraud," or "conspiring to appropriate unlawfully," or "further conspiring to defraud," did certain acts, were "argumentative" and not plain and direct pleading. Bliss v. Parks, 56 N. E. 566, 569, 175 Mass. 539, 546.

In an action for commissions claimed to have accrued under a certain contract, an answer setting up, in effect, that the sale in question was made under a different contract, constituted an "argumentative denial," and was subject to a motion to strike. Ir-

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win v. Buffalo Pitts Co., 81 Pac. 849, 851, 39 Wash. 346.

ARID

In an action to determine the right to use irrigating waters, the question as to the quantity of water which might be used depended upon whether or not the land for which the water was to be used was in an arid portion of the state, and in determining such question the trial court instructed the jury that "by 'arid portions of the state' is meant those portions of the state where rainfall is insufficient for agricultural purposes, and irrigation, therefore, necessary. Where the rainfall is sufficient for agricultural purposes, that portion is not within the arid region, even though irrigation might or would increase the productiveness of the soil there." Appellant contended that an arid portion of the state should have been defined as one "in which, by reason of insufficient rainfall, irrigation is necessary for successful farming for successive years." The appellate court, in passing on the correctness of the instruction of the trial court, said: "The question whether this was an 'arid portion of the state' was, of course, an important one in this case. If it was not an arid portion of the state, then the use of water for irrigation was subordinate to the use for domestic purposes. In those portions of the state called 'arid,' by reason of the necessity for irrigation, the use is put upon an equal footing with such other necessary uses as water for stock, and domestic purposes. We realize the difficulty of framing an accurate definition. Irrigation might be necessary for some crops, and not for others. It might be necessary for one year, or a number of years, and not for other years. The jury cannot be instructed definitely with reference to all this. The prime question, however, seems to us to be whether the conditions are such that a jury can say that the use of water for irrigation is a necessity. We believe that this question was submitted about as clearly and accurately as possible in the charge given." Hall v. Carter, 77 S. W. 19, 21, 33 Tex. Civ. App. 230.

ARISE—ARISING

The words "originating" and "arising," as used in the section of the Constitution relating to the appellate jurisdiction of the Supreme Court and the circuit court, refer to cases which the circuit and county courts, respectively, exercise original jurisdiction of and determine. Mugge v. Warnell Lumber & Veneer Co., 50 South. 645, 646, 58 Fla. 318.

Accrue distinguished

Code, § 3447, authorizes actions on notes within 10 years after the "causes of action accrue," and section 3452 provides that, when a cause of action has been barred by the laws of any country where the defendant has previously resided, such law shall be the same in Iowa as if it had arisen under the provisions of the chapter, except that the sections shall not apply to a cause of action "arising within this state." Held, that a cause of action "accrues" when by maturity of the note and default in payment the holder may sue thereon, but it "arises" and has its origin in the transaction which brought the obligation into existence, the two words not being synonymous, so that where M., a resident of Michigan, executed a note which he sent to his father in Iowa by mail, on receipt of which the father mailed him a draft for the face of the note as a loan, the contract was made in Iowa, and the cause of action "arose" there within section 3452. Moran v. Moran, 123 N. W. 202, 204, 144 Iowa, 451, 30 L. R. A. (N. S.) 898.

Sand. & H. Dig. § 4124, requires insurance companies to annually give a bond to the state, conditioned for the prompt payment of all claims "arising and accruing" to any person during the term of the bond by virtue of any policy issued; section 4127 declares that a company failing to comply with the statute shall not be entitled to do business in the state; and section 4130 requires the Auditor to issue to companies complying with the statute a certificate of such compliance. Held, that a claim on a fire policy arises and accrues, within the meaning of the statute and of a bond issued in compliance therewith, when the loss by fire occurs, though the policy postpones the time for payment of the loss until 60 days after furnishing proofs of loss. United States Fidelity & Guaranty Co. v. Fultz, 89 S. W. 93, 95, 76 Ark. 413.

The word "arise" is used in various senses with the words "begin, mount, appear, happen, proceed from, exist." It has not the same significance as the word "accrue," which signifies "result, add, acquire, receive, benefit." A cause of action "arises," within Wilson's Rev. & Ann. St. 1903, § 4220, providing, where the cause of action has arisen in another state between nonresidents of the territory, and by the laws of the state where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in the territory, when the obligation was created which gave rise to a right of action as soon as such right accrued thereon. Doughty v. Funk, 84 Pac. 484, 486, 15 Okl. 643, 4 L. R. A. (N. S.) 1029.

Cause of action

The words "cause of action arising," as used in Rev. St. 1851, c. 2, § 38, providing that, when the court has jurisdiction of the parties it may exercise it in respect to any cause of action, wherever arising, except for the specific recovery of real property situated out of the territory or an injury thereto,

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and except as also provided by statute in relation to proceedings by foreign corporations, do not mean simply "cause of action accruing," but the word "arising" is also used in the sense of "originating"; that is, the court is given jurisdiction of any cause of action, wherever its subject-matter originated, except as therein stated. Powers Mercantile Co. v. Blethen, 97 N. W. 1056, 1058, 91 Minn. 339.

A cause of action on a contract for the payment of money "arises," within Code Civ. Proc. § 21 (Gen. St. 1909, § 5614), at the time of the maturity of the obligation, on default in payment, and in the state and county where the obligor at the time resides and may be summoned. Hays Land & Investment Co. v. Bassett, 116 Pac. 475, 477, 85 Kan. 48.

Plaintiff, from its office in G. county, by telephone, agreed with defendant's manager at its office in F. county to sell cotton seed delivered f. o. b. in G. county, payable in F. county by draft with bill of lading attached, the seller to pay the freight and to sell cotton seed from other points and divert it to F. county. Rev. St. 1895, art. 1194, subd. 23, provides that a suit against a private corporation may be commenced in any county in which the cause of action arose. Held, that the "cause of action" comprehended the agreement between the parties, its performance by one, and its breach by the other, and that the acts to be done under the agreement constituted a performance in F. county, so that no cause of action "arose" in G. county; and hence that the defendant was entitled to a change of venue. Planters' Cotton Oil Co. v. Whitesboro Cotton Oil Co. (Tex.) 146 S. W. 225, 226.

Counterclaim

In a suit in admiralty to recover for lighterage services rendered under a contract with respondent corporation, a claim by respondent for damages, based on alleged excessive charges paid libelant by respondent under a prior contract between them, made on behalf of respondent by a former officer who was also interested in libelant company, is not one "arising out of the same cause of action for which the original libel was filed," and cannot be set up as a counterclaim under the fifty-third admiralty rule. United Transportation & Lighterage Co. v. New York & Baltimore Transp. Line, 185 Fed. 386, 388, 107 C. C. A. 442.

In an action for the amount of a judgment against plaintiff and defendant for negligent injury to a third person, paid by plaintiff, a counterclaim for an amount paid by defendant in settlement of actions by others growing out of the same accident does not "arise out of the transaction set forth in the complaint" as a foundation of plaintiff's claim, and is not "connected with the subject of the action," within Code Civ. Proc. § 501, authorizing a counterclaim in either of such cases. Fulton County Gas & Electric Co. v. Hudson River Telephone Co., 93 N. E. 1052, 1054, 200 N. Y. 287.

Doubts in minds of jury

The use of the word "arises," in an instruction that if, from the testimony, there arises in the minds of the jurors a reasonable doubt as to defendant's guilt, they cannot find him guilty, was properly refused, since it implies that the reasonable doubt which will prevent a conviction is not that doubt that may come to a juror without careful weighing and considering of the evidence, and after full, fair, and free discussion with his fellows, but such reasonable doubt as may readily arise in his mind, be it only for a moment. Baldwin v. State, 35 South. 220, 222, 46 Fla. 115.

Arising in another state

Hurd's Rev. St. 1899, p. 1119, § 20, enacts that when a cause of action has arisen "in another state and by the laws thereof limitations have run against an action," an action cannot be maintained in the state. Held, that where a cause of action "arose" in Virginia, and subsequently the debtor moved to New York, and an action thereon became barred under the laws of New York, and subsequently the debtor moved to Illinois, no action could be maintained in the latter state; the phrase "when a cause of action has arisen" meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action. Strong v. Lewis, 68 N. E. 556, 204 Ill. 35.

Rev. St. 1887, § 4079, provides that when a cause of action has arisen in another state or territory, and by the laws thereof an action cannot be there maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state. Held, that the phrase "has arisen in another state" means the state in which the foreign contract is to be paid or discharged, and has no application to an intermediate state through which the debtor may subsequently travel, or in which he may reside long enough to raise the bar of the statute of limitations of such state prior to coming to this state. West v. Theis, 96 Pac. 932, 933, 15 Idaho, 167, 17 L. R. A. (N. S.) 472, 128 Am. St. Rep. 58.

Code Civ. Proc. N. Y. § 390a, which provides that "where a cause of action arises outside of this state" an action thereon cannot be maintained in a court of the state after the expiration of the time limited for bringing action thereon by the laws of the state or country where such cause of action arose, is not limited by the word "arises" to causes of action, which arose after its enactment or taking effect. Lehigh Valley R. Co. v. Comar, 151 Fed. 559, 560, 81 C. C. A. 39.

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The words, "when a cause of action has arisen," in a foreign state, as used in the statute of limitations (Code Civ. Proc. § 22; Gen. St. 1901, § 4450), mean when the plaintiff has a right to sue the defendant in the courts of such foreign state, and have no reference to the origin of the transaction out of which the cause of action "arose." Bruner v. Martin, 93 Pac. 165, 167, 76 Kan. 862, 14 L. R. A. (N. S.) 775, 123 Am. St. Rep. 172, 14 Ann. Cas. 39.

Arising in the state

A cause of action on a contract, executed in a sister state between a nonresident and a foreign corporation, which stipulated for the performance of work in North Carolina for the corporation, based on the nonpayment for work performed, arose in North Carolina within Revisal 1905, § 440, allowing suits against a foreign corporation on a cause of action "arising in the state." McDonald v. MacArthur Bros. Co., 69 S. E. 832, 833, 154 N. C. 122.

Arising under the Constitution or laws

"A case in law or equity 'arises under the Constitution or laws of the United States' whenever its correct decision depends upon the construction of either." Macon Grocery Co. v. Atlantic Coast Line R. Co., 30 Sup. Ct. 184, 186, 215 U. S. 501, 54 L. Ed. 300 (quoting Cohens v. Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257, 285).

An original application in the state Supreme Court for a writ of mandamus to compel railroad companies owning and operating a bridge over a navigable river to replace it with another bridge according to plans and specifications to be approved by the court, is a case "arising under the laws of the United States," within Act Aug. 13, 1888, c. 866, 25 Stat. 433, giving the United States Circuit Court jurisdiction of such cases. State ex rel. Clark v. White River Valley R. Co., 129 N. W. 1034, 1036, 27 S. D. 65.

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit 'arising under the Constitution or laws.' And it must appear on the record by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." The assertion, in a bill filed by a water company against a municipality and its common council, that the obligation of the municipality's rental contract with the company was impaired by an ordinance which, while denying the validity of the contract, allowed a claim for rentals, with a saving clause to prevent estoppel, is too clearly unfounded to present a case "arising under the Constitution or laws" of the United States. Defiance Water Co. v. City of Defiance, 24 Sup. Ct. 63, 66, 191 U. S. 184, 48 L. Ed. 140 (citing Western Union Telegraph Co. v. Ann Arbor R. Co., 20 Sup. Ct. 867, 178 U. S. 239, 44 L. Ed. 1052; Little York Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656; Blackburn v. Portland Gold Min. Co., 20 Sup. Ct. 222, 175 U. S. 571, 44 L. Ed. 276; Shreveport v. Cole, 9 Sup. Ct. 210, 129 U. S. 36, 32 L. Ed. 589; New Orleans v. Benjamin, 14 Sup. Ct. 905, 909, 153 U. S. 411, 424, 38 L. Ed. 764, 769.

A direct appeal lies to the federal Supreme Court from a Circuit Court in a revenue case in which, in addition to an objection to the classification and the rate of duty, there is involved the construction of a federal law, or the validity or construction of a treaty, within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 826, 827, 828, governing such direct appeals, notwithstanding the provision of section 6 of that act, making the Circuit Courts of Appeals the proper and final tribunals in revenue cases, and the special provision of Act May 27, 1908, c. 205, 35 Stat. 403, amendatory of Revenue Act June 10, 1890, c. 407, 26 Stat. 131, for the review by the Circuit Courts of Appeals of decisions as to the construction of the tariff laws and the facts respecting the classification of merchandise, and the rate of duty imposed thereon under such classification. B. Altman & Co. v. United States, 32 Sup. Ct. 593, 596, 224 U. S. 583, 56 L. Ed. 894.

An action brought against a corporation created by an act of Congress and against two of its employés to establish a joint liability for negligence is, as to the individual defendants, as well as to the corporation, a suit "arising under the federal Constitution or laws," within the meaning of the removal provisions of Act Aug. 13, 1888, c. 866, 25 Stat. 433, and is therefore removable to a federal Circuit Court on petition of all the defendants. In re Dunn, 29 Sup. Ct. 299, 302, 212 U. S. 374, 53 L. Ed. 558.

An action brought against a corporation chartered under an act of Congress and a local defendant, upon a joint liability, is a suit "arising under the laws of the United States," and, as such, is removable from a state court to a federal Circuit Court on petition of both defendants. Texas & P. Ry. Co. v. Eastin & Knox, 29 Sup. Ct. 564, 566, 214 U. S. 153, 53 L. Ed. 946.

A suit to enjoin the diversion or intended diversion by a municipality of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, but which were not applied to that object, on the theory that such failure of duty on the part of the municipality may ultimately cause increased taxation, and

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thereby deprive the taxpayers of their property without the due process of law guaranteed by Const. Amend. 14, if the full amount originally intended to be applied to the particular object named by the Legislature is to be collected, is not one "arising under the Constitution of the United States," of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties. Owensboro Waterworks Co. v. City of Owensboro, 26 Sup. Ct. 249, 251, 200 U. S. 38, 50 L. Ed. 361.

A suit to enjoin the enforcement of state enactments regulating railroad rates, on the ground that the same are confiscatory and would deprive the railroad companies of their property without due process of law and deny them the equal protection of the laws, in violation of the fourteenth constitutional amendment, is a "suit arising under the Constitution of the United States," of which a federal court has jurisdiction on that ground. Perkins v. Northern Pac. Ry. Co., 155 Fed. 445, 450.

A suit against an insolvent national bank which has gone into voluntary liquidation to enforce a specific lien, or to enforce and judicially administer a trust previously created by contract, or arising from the insolvency and liquidation proceedings, is a suit "arising under the laws of the United States," within the jurisdiction of the federal Circuit Court, as prescribed by Act Cong. Aug. 13, 1888, c. 866, § 1, 25 Stat. 434, and expressly excepted from the provisions of section 4 thereof. George v. Wallace, 135 Fed. 286, 291, 68 C. C. A. 40.

Arising upon contract

An action to recover damages for false and fraudulent representations whereby one was induced to enter into a certain contract to engage in a certain business is not a right of action "arising upon contract." In re Harper, 175 Fed. 412, 418.

Arising during course of trial

As to whether or not a view by a jury in a criminal case constitutes a part of the trial of the case there is a diversity of conclusions, which appears to be due largely to a restriction of the term "the trial" to the permanent proceedings in the courtroom, and an effort of the courts to evade the apparently inevitable result of that construction of the case under consideration. Every step taken in a criminal case by, or in, the court wherein the case is pending, from issue joined to verdict rendered, is a step or proceeding "arising during the course of the trial." In this extensive sense the trial would include may occasions when the judge need not be personally present exercising control or conducting the trial. This is the case where the jury are kept together during the entire trial. Between the sessions of the court they are under the control of the sheriff, and if they make an unauthorized visit in a body to the place where the crime was committed, while in charge of that officer, the error may be waived, and the court can consider whether or not the view influenced the minds of the jurors in ruling on a motion for a new trial. People v. White, 90 Pac. 471, 477, 5 Cal. App. 329 (citing People v. Turner, 39 Cal. 370; Warner v. State, 29 Atl. 505, 56 N. J. Law, 686, 44 Am. St. Rep. 475).

ARM

A policy insuring against an accidental breaking of a "leg or arm" covers fractures of bones of the limbs whether in the hands or feet or in the upper or central divisions of the limbs. Rogers v. Modern Brotherhood of America, 111 S. W. 518, 519, 131 Mo. App. 353.

ARMED

The word "armed," as used in a statute prohibiting one to organize, maintain, and employ an armed body of men, does not necessarily mean that all the men in the body were armed, but it would be sufficient, so far as the arming was concerned, if any considerable number of them were armed, and their purpose was unlawful, and the others were aiding and abetting those that were armed. State v. Gohl, 90 Pac. 259, 261, 46 Wash. 408.

Where the evidence showed that accused had a pocketknife, with a blade three to three and one-half inches in length, that he carried it in his coat pocket with the blade open, and made threats to use it on decedent, and stabbed decedent with it, an instruction that, if accused "armed himself" and went to the decedent for the purpose of provoking the decedent to make an attack on him, etc., was not erroneous for using the quoted words, on the ground that the knife was not a weapon, though not within Pen. Code, art. 338, punishing the carrying of arms. Lahue v. State, 101 S. W. 1008, 1010, 51 Tex. Cr. R. 159.

ARMENIAN

As white person, see White Person.

ARMORY

As military purpose, see Military Purpose.

As public corporation, see Public Corporation.

ARMS

See Force and Arms.

Bear arms, see Bear.

Within Const. Ga. art. 1, § 1, par. 2, providing that "the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms shall be borne," and within the Constitution of the

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United States, providing that, a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed, "the word 'arms' evidently means the arms of a militiaman, the weapons ordinarily used in battle, to wit, guns of every kind, swords, bayonets, horseman's pistols, etc. The very words 'bear arms' had then, and now have, a technical meaning. The 'arms-bearing' part of a people were its men fit for service on the field of battle. That country was 'armed' that had an army ready for fight. The call 'to arms' was a call to put on the habiliments of battle, and I greatly doubt if in any good author of those days a use of the word 'arms,' when applied to a people, can be found, which includes pocket pistols, dirks, sword canes, toothpicks, bowie knives, and a host of other relics of a past barbarism or inventions of modern savagery of like character." The act of the General Assembly, approved August 12, 1910 (Laws 1910, p. 134), entitled "An act to prohibit any person from having or carrying a revolver without first having obtained a license from the ordinary of the county of said state, in which the party resides, and to provide how said license may be obtained and a penalty prescribed for a violation of the same and for other purposes," is not void because in violation of article 1, § 1, par. 22, of the Constitution of the state, or in violation of article 8, § 2, of the Constitution of the United States. Strickland v. State, 72 S. E. 260, 264, 137 Ga. 1, 36 L. R. A. (N. S.) 1115, Ann. Cas. 1913B, 323 (quoting and adopting definition in Hill v. State, 53 Ga. 472).

The term "arms," as used in the Oklahoma Constitution providing that the right of a citizen to carry and bear arms, shall never be prohibited, when construed in connection with article 5, § 40, declaring that the Legislature shall provide for organizing, disciplining, maintaining, and equipping the militia of the state, applies solely to such arms as are recognized in civilized warfare, to wit, guns, swords, bayonets, horseman's pistols, etc., and not those used by a ruffian, brawler, or assassin, such as pocket pistols, dirks, sword canes, bowie knives, etc. Ex parte Thomas, 97 Pac. 260, 263, 1 Okl. Cr. 210, 20 L. R. A. (N. S.) 1007.

ARMY

ARMY OFFICER

A West Point cadet is not an "officer in the army," within the meaning of a statute prohibiting dismissals from service in time of peace except after trial and conviction by court-martial; the word "officer" being limited by a subsequent section to commissioned officers. Hartigan v. United States, 25 Sup. Ct. 204, 206, 196 U. S. 169, 49 L. Ed. 434.

As officer

See Officer.

ARNICA

As medicine, see Medicine.

AROUND

"The word 'around' means: Primarily, in a circle or sphere; round about. Secondarily from place to place; here and there; about; as to travel around from city to city. Third, near; about; as he waited 'around' until the fight was over." Edison General Electric Co. v. Crouse-Hinds Electric Co., 146 Fed. 539, 547.

ARRAIGN

See Duly Arraigned.

The word "arraigned" means practically the same thing as being personally present at the time; for it could not be true that defendant was in fact arraigned and pleaded to the indictment, if not personally present. State v. Hunter, 80 S. W. 955, 959, 181 Mo. 316.

In Burns' Ann. St. 1901, § 1023, providing that, whenever any person shall be arraigned for a direct contempt, no affidavit, charge in writing, or complaint shall be required to be filed against him, the word "arraigned" is used synonymously with "accused" or charged," and not in the sense in which that term is used in criminal law. Mahoney v. State, 72 N. E. 151, 153, 33 Ind. App. 655, 104 Am. St. Rep. 276.

ARRAIGNMENT

According to the present prevailing practice, the "arraignment" is the mere calling of accused to the bar of the court and reading and explaining the indictment; its only purpose being to obtain from him his answer or plea thereto. Howard v. State, 50 South. 954, 958, 165 Ala. 18.

In an "arraignment" three steps are necessary: The information must be read to the defendant, he must be given a copy thereof, and he must be asked whether he pleads guilty or not guilty to the information. State v. De Wolfe, 74 Pac. 1084, 1085, 29 Mont. 415.

Under Kirby's Dig. § 2274, requiring a copy of the indictment to be delivered before arraignment to a person charged with a capital offense, and section 2272, defining "arraignment" as the reading of the indictment by the clerk to defendant, etc., failure of the defendant to object upon arraignment to a defect in the copy of the indictment furnished him waives the defect. Powell v. State, 85 S. W. 781, 782, 74 Ark. 355.

ARRANGE

ARRANGEMENT

See Beneficial Arrangement; Common Arrangement; Family Arrangement.

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The word "arrangements," as used in a lease providing that the lessee may make arrangements with the lessor for renewal for another term, etc., means the meeting of the parties for the execution of the necessary writing to effect such renewal. Christian Feigenspan v. Popowska, 72 Atl. 1003, 1005, 75 N. J. Eq. 342.

The word "arrangement" in the anti-monopoly act (Consol. Laws, c. 20, §§ 340–346), making every "contract, agreement, arrangement or combination" whereby a monopoly may be created, or whereby competition may be restrained, unlawful, has a broader meaning than either the word "contract," "agreement," or "combination," and it may include each and all of these things, and more, and means the disposition of measures for the accomplishment of a purpose, and a structure or combination of things in a particular way for any purpose, and one buying the business of his competitors under an agreement binding them not to engage therein for a specified time within specified territory, for the purpose of creating a monopoly, or whereby competition may be restrained, makes an "arrangement" prohibited by the act. People v. American Ice Co., 120 N. Y. Supp. 443, 447.

ARRAY

See Challenge to the Array.

ARREAR

See Nothing in Arrear.

ARREARAGE

The word "arrearage" means something that is to the rear of, i. e., behind one. Jersey City v. Speer, 72 Atl. 448, 451, 78 N. J. Law, 34.

ARREST

See Warrant of Arrest.

Probable cause for arrest, see Probable Cause.

An "arrest" is the seizing of a person and detaining him in the custody of the law; the officer being authorized to use such force as is necessary to accomplish the purpose. Baltimore & O. R. Co. v. Strube, 73 Atl. 697, 700, 111 Md. 119 (citing 1 Bouv. Law Dict. 166).

The apprehension of a person under a mesne civil process to answer in a civil action is an "arrest." Town of Hamden v. Collins, 82 Atl. 636, 638, 85 Conn. 327.

To constitute an "arrest," there need not be an application of actual force, or such physical restraint as is visible to the naked eye. McAleer v. Good, 65 Atl. 934, 935, 216 Pa. 473, 10 L. R. A. (N. S.) 303, 116 Am. St. Rep. 782.

Technically, any detention of the person of another by the laying on of hands, or by the exercise of force or threats, may be an "arrest." At common law, a private person might make an arrest for a breach of the peace, or a misdemeanor committed in his presence, as well as an officer. This, however, has been changed by Cr. Code Prac. § 35, providing that an arrest may be made by a peace officer or by a private person, and section 37, declaring that a private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony. Rich v. Bailey, 97 S. W. 747, 748, 123 Ky. 827.

The term "arrest," as used in Bankr. Act July 1, 1898, c. 541, § 9, 30 Stat. 549, providing that a bankrupt shall be exempt from arrest on civil process, applies to the continued detention of a person in custody, and not merely to the original taking of a person into custody; so that an adjudication in bankruptcy against a debtor after his arrest on civil process entitles him to be discharged. Turgeon v. Emery, 182 Fed. 1016.

Where defendant, as sheriff of a county, offered a reward "for the arrest of each of the parties convicted" of a certain bank robbery and murder, the reward was not accepted merely by the giving of information concerning the whereabouts of the suspect, but could only be accepted by the party assuming the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him. Minnesota & D. Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 463, 467, 77 C. C. A. 607.

Bankr. Act July 1, 1898, c. 541, § 9, 30 Stat. 549, which provides that a bankrupt shall be exempt from civil "arrest," should be construed to exempt from arrest made after a bankruptcy petition is filed, and not to apply to an arrest on civil process properly made before filing of the petition. Turgeon v. Bean, 83 Atl. 557, 558, 109 Me. 189 (citing 1 Words and Phrases, p. 501).

The "arrest" referred to in Rev. St. § 1624, art. 43, as the time when the person accused is to be furnished with a copy of the charges and specifications on which he is to be tried by a naval court-martial, is not the preliminary arrest or detention while awaiting the action of higher authority to frame charges and specifications and order the court-martial, but is the arrest resulting from the preferring of the charges by the proper authority and the convening of the court-martial. United States v. Smith, 25 Sup. Ct. 489, 491, 197 U. S. 386, 49 L. Ed. 801.

Under Penal Law, § 1692, making it an offense to rescue a prisoner from lawful custody if the prisoner was held on a charge, commitment, arrest, conviction, or sentence of felony or misdemeanor, the terms "charge" and "arrest" relate to a case where an officer or other person holds a prisoner under

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lawful custody upon a charge of or arrest for a felony or misdemeanor. People v. Marks, 135 N. Y. Supp. 523, 525, 75 Misc. Rep. 404.

Apprehension synonymous

See Apprehend.

ARREST OF JUDGMENT

By Code, § 5426, a motion in "arrest of judgment" is an application to the court in which the trial was had on the part of the defendant that no judgment be rendered on a verdict against him or on a plea of guilty. State v. Heft (Iowa) 134 N. W. 950, 953.

ARREST OR RESTRAINT OF PRINCES, RULERS, OR PEOPLE

A clause exempting a carrier from liability for loss or damage occasioned "by arrest or restraint of princes, rulers, or people" in a contract of affreightment by a neutral to carry contraband of war, made when conditions of war exist and are known to both parties, must be construed as intended to apply only to actual arrest or seizure and confiscation and affords no ground for repudiation of the contract by the carrier because of the danger of seizure. Balfour Guthrie & Co. v. Portland & Asiatic S. S. Co., 167 Fed. 1010, 1014.

ARRESTER

See Lightning Arrester.

ARRESTMENT

"Arrestment," a word derived from the English statute, is a word of Scotch origin, and derived from the Scottish law, and it is defined by Bouvier as "the order of a judge, by which he who is debtor in a movable obligation to the arrestor's debtor is prohibited to make payment or delivery till the debt due to the arrestor be paid or secured. Erskine, Inst. 3. 6. 1; 1. 2. 12." Where "arrestment" proceeds on a depending action, it may be loosed by the common debtor's giving security to the arrestor for his debt, in the event it shall be found due. And in the Century dictionary is defined to be: "A process by which a creditor may attach money or movable property which a third person holds for behoof of his debtor. It bears a general resemblance to foreign attachment by the custom of London." Neither of the words "attachment" or "arrestment," as used in Rev. St. § 4536, providing that no wages due or accruing to a seaman shall be subject to attachment or arrestment from any court, and declaring that payment of wages to seamen shall be valid notwithstanding any previous sale, or assignment, or any attachment, incumbrance, or arrestment, etc., when considered literally, has reference to execution or proceedings in aid of execution to subject property to the payment of judgment, but refers to process of holding property to abide the judgment, but, when liberally construed in the light of other provisions of the statute to affect the protection intended to be secured to seamen, will include proceedings in aid of execution. Wilder v. Inter-Island Steam Nav. Co., 29 Sup. Ct. 58, 61, 211 U. S. 239, 53 L. Ed. 164, 15 Ann. Cas. 127 (citing Thomson v. Baltimore & S. Steam Co., 33 Md. 318).

ARRHA—ARRHES

There is intended by the French word "arrhes" an amount which one of the parties hands to the other at the moment a contract is made. According to ancient usage at Rome, "arrhes" were given as a token of a concluded bargain, as an evidence on the price. The word is used as near as it can be to the common law term "earnest money." Capo v. Bugdahl, 42 South. 478, 479, 117 La. 992.

The original idea of "earnest," in the Roman law, signified the conclusion of the contract, and it is that idea which obtains in the common-law jurisdiction and under the statutes of fraud of England and of some of the states of this Union. But now, the giving and receiving of earnest money, though evidence of a completed bargain, is considered of no importance, or of the smallest importance, in ascertaining whether property has passed by virtue of such bargain; that question being determined by the nature of the bargain concluded by the giving of the earnest. Under Justinian, the effect of the giving and receiving of "arrha" was to enable the contractants to retain the privilege of withdrawing from the contract, on certain conditions, and the same effect is attributed to the giving and receiving of the equivalents "arrhes" and "earnest," by the codes of France and of Louisiana, respectively. An agreement for the sale of real estate, therefore, which contemplates the passing of property, not immediately and by virtue thereof, but by an act to be executed at a later date, and which in other respects contains the elements essential to a sale, is a "promise of sale," and when made with the giving of earnest may be receded from by either of the parties; "he who has given the earnest, by forfeiting it, and he who has received it, by returning the double," as expressly provided by article 2463, relating to when a "promise to sell amounts to a sale." Civ. Code, arts. 2462, 2463; Smith v. Hussey, 43 South. 902, 904, 119 La. 32 (citing Statutes of Fraud of Eng. [29] Car. 11, c. 3, § 17; Elgee Cotton Cases, 22 Wall. 195, 22 L. Ed. 863; Benj. Sales [2d Ed.] pp. 260, 262; Howe v. Hayward, 108 Mass. 55, 11 Am. Rep. 306; Gut. Brac. [Am. Transl.] 145; Just. Inst. Ill. 24; Marcade, art. 1590, Code Napoleon [our Code, art. 2463]; Marcade, vol. 6, p. 172; Laurent, vol. 24, p. 37).

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ARRIVE—ARRIVAL

See On Arrival; Selling To Arrive.
Date of arrival, see Date.
Subject to arrival, see Subject To.

Delivery of an interstate shipment of intoxicating liquors to the consignees is essential to constitute their "arrival in the state," within the meaning of Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313, subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power. The mere placing of an interstate shipment of intoxicating liquors in the carrier's warehouse to await delivery to the consignees does not constitute their "arrival in the state," within the meaning of Wilson Act August 8, 1890, subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power. Heymann v. Southern R. Co., 27 Sup. Ct. 104, 105, 203 U. S. 270, 51 L. Ed. 178, 7 Ann. Cas. 1130.

ARRIVE—ARRIVAL (Of Vessel)

As arrival at place of discharge

Under a clause in a bill of lading which entitles the ship to "commence discharging immediately upon arrival," her "arrival" dates from the time she actually reaches a berth where she can unload, provided there has been no delay on the part of the consignee in providing such berth, and the lay days for discharging commence to run from that time. Tweedie Trading Co. v. Pitch Pine Lumber Co., 156 Fed. 88.

ARROWROOT IN ITS NATURAL STATE

The term "arrowroot in its natural state" is the equivalent of the term "arrowroot in a state of nature," and that description would hardly fit an article which had been subjected to various processes by which it is converted into starch. The words "arrowroot in its natural state," as used in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 478, 30 Stat. 195, relate to the tubers or roots of the arrowroot plant, and do not include the article commercially known as "arrowroot," consisting of starch made from arrowroot tubers. Leaycraft & Co. v. United States, 130 Fed. 106, 107, 64 C. C. A. 440.

ARSON

See, also, Burn.

"At common law to constitute 'arson' the house burned must be the house of another; * * * arson at common law being an offense against the house as a habitation and not as property. The house of another is the house of the occupant and not the owner of the fee." State v. Perry, 54 S. E. 764, 765, 74 S. C. 551.

"Arson," which is a felony at common law, is the unlawful and malicious burning of the house of another. At common law, an intent to injure or defraud is not an essential element of the offense, but under Starr & C. Ann. St. 1896, c. 38, par. 48, providing that whoever willfully and maliciously burns any building or goods which are at the time insured against loss by fire, "with intent to injure the insurer," whether such person is owner or not, shall be imprisoned, etc., the intent is the controlling element, and must be alleged and proven. Mai v. People, 79 N. E. 633, 634, 224 Ill. 414 (citing State v. McCarter, 4 S. E. 553, 98 N. C. 637).

Under an act making it "arson" to willfully set fire to a "corncrib, or corn pen containing corn," the firing of a corncrib is "arson," irrespective of whether it contains corn. Davis v. State, 44 South. 545, 546, 152 Ala. 82.

The corpus delicti consists, first, in the burning of a house described; and, second, in the fact that a criminal agency was the cause of the burning. West v. State, 64 S. E. 130, 6 Ga. App. 105.

To justify a conviction of "arson" under the statute, defining "arson" as the willful and malicious burning or setting on fire of any dwelling house in which there shall be at the time some human being the state must prove the burning, which is the entire destruction of the dwelling, or the setting of the dwelling on fire, and that the building was a dwelling in which at the time of the burning or the setting on fire, there was a human being, and that the act was committed willfully and maliciously. State v. Dineen (Del.) 76 Atl. 623, 624, 7 Pennewill, 505.

At common law "arson" was the malicious burning of the house or dwelling of another. The offense was not against property, but against human life and safety. It was intended to protect the habitation of man. The offense has, however, been materially enlarged by the legislation of several cities so as to include in the term "arson" burning of structures other than dwelling houses. United States v. Cardish, 143 Fed. 640, 642.

Under the term "arson," as defined by the Code, the offense is against property, and it is not necessary that the "house, edifice, structure, vessel or other erection" should have been intended for or used as a habitation, but it is sufficient if it be "capable of affording shelter for human beings." State v. Lintner, 104 N. W. 205, 206, 19 S. D. 447.

In a prosecution for "arson," defined by statute as the willful and malicious burning of the property of another of the value of $20 or more, the question of occupancy or possession is immaterial. Hinkle v. State, 91 N. E. 1090, 1092, 174 Ind. 276.

"At common law 'arson' is the malicious burning of another's house." Rev. St. § 6831,

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declaring that whoever maliciously burns or attempts to burn any dwelling house, kitchen, smokehouse, shop, office, barn, stable, storehouse, etc., shall be imprisoned in the penitentiary for a specified term, or fined, extends the offense of arson at common law, and also comprises it, and does not make it an offense to burn one's own building. Jones v. State, 70 N. E. 952, 70 Ohio St. 36, 1 Ann. Cas. 618.

"Arson" at common law is a crime against the security of the dwelling house as such and not against the dweling as property; thus, if the occupant is in possession rightfully and burns the house, he cannot, in a legal sense, be guilty of burning the dwelling of another, as he burns his own dwelling house. Williams v. State (Ala.) 58 South. 921, 922 (citing 1 Words and Phrases, p. 509).

Under Cr. Code Prac. §§ 122, 124, providing that an indictment must contain a statement of the case constituting the offense in ordinary language, etc., an indictment, charging accused with the offense of arson, and alleging that he feloniously and maliciously set fire to and burned the storehouse of a person named, sufficiently charges a violation of Ky. St. § 1169, punishing the willful burning of a storehouse, and the defect therein, arising from designating in the accusative part one offense and describing another in the body, is not ground for reversal, within Cr. Code Prac. § 340, prohibiting the reversal of a judgment for error not affecting the substantial rights of accused; the word "arson" being commonly understood as meaning the unlawful burning of the property of another. Overstreet v. Commonwealth, 144 S. W. 751, 754, 147 Ky. 471.

A tenant who willfully and maliciously sets fire to and burns a storehouse, the property of his landlord, of which the tenant is in possession, is guilty of "arson," under Crim. Code, § 54, making it arson for one willfully and maliciously to burn any warehouse, the property of another. State v. Martin, 127 N. W. 896, 87 Neb. 529, Ann. Cas. 1912A, 1125.

"Arson" at common law, as well as under the statute defining arson in the first degree, as it existed prior to Code 1907, § 6301, making the relation of husband and wife or landlord and tenant no defense to arson, was an offense against the possession rather than the property. Peinhardt v. State, 49 South. 831, 832, 161 Ala. 70.

ARSON IN THE SECOND DEGREE

There is a marked distinction between the terms "corncrib" and "barn," as used in a statute providing that "any person who willfully sets fire to or burns * * * any corncrib or corn pen containing corn, or any barn, * * * is guilty of arson in the second degree." The word "corncrib," as used in the statute, means a building or structure in its entirety and not a room or apartment in a building or structure. Therefore an indictment charging the burning of a corncrib is not sustained by proof that the building destroyed was a barn in which one room was partitioned off as a corncrib. Jackson v. State, 40 South. 979, 980, 145 Ala. 54 (quoting and adopting definition in Cent. Dict. and Webster's International Dict.).

ART

See New and Useful Art; Works of Art.

A system of transacting business, disconnected from the means for carrying out the system, is not, within the most liberal interpretation of the term, an "art," and, unless the means used are novel and disclose invention, such system is not patentable. Hotel Security Checking Co. v. Lorraine Co., 160 Fed. 467, 469, 87 C. C. A. 451, 24 L. R. A. (N. S.) 665.

"In the sense of the patent law, an 'art' is not a mere abstraction. A system of transacting business, disconnected from the means of carrying out the system, is not within the most liberal interpretation of the term 'art.' Advice is not patentable." It is further said that "the statute term 'art,' used as it is in the sense of the employment of means to a desired end or the adaptation of powers in the natural world to the uses of life, is perhaps a better term than the word 'method,' used by the patentee or the word 'process,' the term of description used by the experts. A process, eo nomine, is not made the subject of a patent in the act of Congress; an art may require one or more processes or machines in order to produce a certain result or manufacture. It is for the discovery or invention of some practical method or means of producing an essential result or effect that a patent is granted, not for the result or effect itself. 'Process' or 'method,' when used to represent the means of producing a beneficial result, are in law synonymous with 'art,' provided the means are not effected by mechanism or mechanical combination." A patent for a code message, but which is merely for a system of devising code messages, is not an "art" in the sense of the patent law, but is for an art only in the sense that one speaks of the art of painting or the art of curving the thrown baseball, and such arts, however ingenious, difficult, or amusing, are not patentable within any statute of the United States. Berardini v. Tocci, 190 Fed. 329, 332 (quoting Hotel Security Co. v. Lorraine Co., 160 Fed. 469, 87 C. C. A. 451, 453, 24 L. R. A. [N. S.] 665).

ART GALLERY

As educational corporation, see Educational Corporation.

ARTESIAN

The word "artesian" is sometimes used in reference to underground water which, by

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reason of pressure, will rise above its natural level, though not the surface of the ground, when the stratum in which it lies is pierced by a well. Burr v. Maclay Rancho Water Co., 98 Pac. 260, 262, 154 Cal. 428.

ARTFUL CONCEALMENT

"Artful concealment" is some unfair practice by which a party is intentionally deceived. Lake v. Gilchrist, 7 Ala. 955, 959.

ARTICLE

See Completed Manufactured Article; Crude Article; Family Article; Lienable Article; Patented Article; Smoker's Articles; This Article.
Any article or thing, see Any.
Other articles, see Other.

The term "article" is commonly accepted, in trade and elsewhere, as something different from bulky and heavy commodities. Harrison Supply Co. v. United States, 171 Fed. 406, 407, 96 C. C. A. 362.

Article of commerce

While a commodity may be an "article of interstate commerce," it does not become an article of trade from one state to another until it begins to move in its transportation from one state to another. Ware v. Mobile County, 41 South. 153, 155, 146 Ala. 163, 14 L. R. A. (N. S.) 1081, 121 Am. St. Rep. 21 (citing Kidd v. Pearson, 9 Sup. Ct. 6, 128 U. S. 25, 32 L. Ed. 346; distinguishing Stratford v. City Council of Montgomery, 20 South. 127, 110 Ala. 619).

Article of manufacture

See Manufactures—Manufactured Articles.

Article of value

Money is comprehended by the term an "article of value," within an indictment of a railway postal clerk for secreting and embezzling a letter containing "articles of value." Shaw v. United States, 180 Fed. 348, 352, 103 C. C. A. 494 (citing Bromberger v. United States, 128 Fed. 346, 63 C. C. A. 76).

Articles of gold and silver manufacture

A gold watch and chain are not "articles of gold and silver manufacture," within Pub. Laws 1905, Act 42, § 2, exempting an innkeeper who has a safe or vault fit for the custody of money, jewelry, articles of gold and silver manufacture, personal ornaments, etc., and who keeps suitable locks on the sleeping rooms, from liability for the loss of a guest's property, where such guest does not offer to deliver it for custody in the metal safe or vault. Weadock v. Swart, 128 N. W. 734, 735, 163 Mich. 602, Ann. Cas. 1912A, 959.

Literary composition

The "headline" of a newspaper or other publication is a summary or index of that which follows. An "article" is defined to be "a literary composition on a specific topic, forming an independent portion of a book or literary publication, especially of a newspaper, magazine, review or other periodical." In a certain sense, the "headline" is a part of the "article" or chapter which follows, but strictly speaking it is separate, and the term conveys a different meaning than that of the "article" or chapter itself. Proof of a "headline" attached to a newspaper article is insufficient to sustain an allegation in an indictment charging that the "article" itself was libelous. Miller v. State, 99 S. W. 533, 534, 81 Ark. 359 (quoting from Webster's Dict. and Cent. Dict.).

ARTICLES WITHIN TARIFF ACT

The ordinary use of the word "articles" in tariff acts is a broad one; and there is nothing in Tariff Act July 24, 1897, c. 11, § 1, Schedule L. par. 390, 30 Stat. 187, which would require the restriction of that term to completed articles. It may include woven fabrics in 25-yard pieces. United States v. A. A. Vantine & Co., 166 Fed. 735, 738, 92 C. C. A. 397.

The word "article," when used in a tariff law, should be given a broad, liberal meaning; and in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 179, 30 Stat. 166, relating to "laces, embroideries * * * or other articles" of metal threads, the doctrine of ejusdem generis does not operate to exclude fabrics in the piece from classification as "articles" under that provision. G. Hirsch's Sons v. United States, 167 Fed. 309, 311, 93 C. C. A. 61.

Articles appliquéd

Fabrics to which tinsel cord has been attached by an appliqué process, resulting in goods which are fairly ornamental, durable, permanent, and salable, but not in the highest sense, are "articles appliquéd" within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187, though only 60 per cent. of the material imported was used in the form in which imported; the cord being removed from the remainder because the goods were more salable in that condition. A. A. Vantine & Co. v. United States, 155 Fed. 149, 150.

Articles commonly known as jewelry

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192, for "articles commonly known as jewelry," does not include miniature frames composed of precious metals set with diamonds and pearls, which are not used as articles of personal adornment but for utility, but they are dutiable under paragraph 193. United States v. M. Knoedler & Co., 154 Fed. 928.

Women's silver hand bags or purses used for holding money, articles of wearing apparel, etc., are not dutiable as "articles

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commonly known as jewelry." Tiffany v. United States, 131 Fed. 398, 399.

Slides or buckles, made of steel or a base metal, some ornamented with rhinestones and some colored in imitation of precious metals, and used in ornamenting slippers, are not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192, as "articles commonly known as jewelry," but are dutiable as manufactures of metal, not specially provided for, under paragraph 193 of said act, Schedule C, 30 Stat. 167. E. H. Bailey & Co. v. United States, 135 Fed. 917, 918.

Loose drilled pearls, imported in separate packages, which had been assembled into a necklace abroad and tentatively worn by a person who contracted to purchase them, delivery to be made in the United States, and who, after receiving them here, added six more pearls and had them made into a necklace, were not "jewelry" within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192, but were dutiable as "pearls in their natural state," by similitude, under paragraph 436. Citroen v. United States, 166 Fed. 693, 697, 92 C. C. A. 365.

In construing the provision in paragraph 434, Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 192, for "articles commonly known as jewelry," held, that it does not include so-called "millinery ornaments," used in trimming hats, which are flimsy articles, intended for ephemeral use, are not made by jewelers, and contain no gems or precious metals, but are made of base metal either wholly or in combination with imitation jet or imitation precious stones. United States v. S. Schiff & Co., 139 Fed. 549, 550, 71 C. C. A. 533.

Chatelaine purses of metal, gilded or plated in imitation of gold and silver, and set with imitation precious stones, which range in value from 34 marks per gross to 30 marks per dozen, are not within the provision in paragraph 434, Schedule N, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 192, for "articles commonly known as jewelry." A. Steinhardt & Co. v. United States, 148 Fed. 512.

Articles composed in part of steel

Needle cases in which steel needles constitute the element of chief value should be considered as "manufactures in chief value of needles," rather than as "articles composed in part of steel," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167, and as needles are on the free list and there is no tariff provision for manufactures of needles, such articles are dutiable as unenumerated manufactured articles under section 6, 30 Stat. 205. Dieckerhoff, Raffloer & Co. v. United States, 151 Fed. 957, 958.

Articles composed of carbon

"Blood charcoal," a substance which, like bone char, is composed chiefly of carbon, and is used for decolorizing sugar, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 87, 30 Stat. 156, as an "article composed of carbon," but either under paragraph 10, Schedule A, 30 Stat. 152, as "bone char" by similitude, or at the similar rate provided in section 6, 30 Stat. 205, for unenumerated manufactured articles. United States v. George Lueders & Co., 148 Fed. 398, 399.

Articles composed of gelatin spangles

Spangled hat crowns are in a general way of the same character as the class of materials considered under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189, for fabrics, wearing apparel, trimmings, etc., including "other articles * * * composed wholly or in part" of gelatin spangles, and are dutiable under said provision for "articles," rather than under paragraph 450 (30 Stat. 193), as manufactures of gelatin. Louis Metzger & Co. v. United States, 141 Fed. 381, 382.

Articles embroidered

Held, that embroidered woolen dress goods are dutiable as "dress goods * * * of wool, and not specially provided for," under paragraph 369, Schedule K, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 184, and not under paragraph 371 of said act (30 Stat. 185), as "articles embroidered, * * * made of wool." Hall v. United States, 136 Fed. 774, 775, 69 C. C. A. 494.

Articles in chief value of metal thread

Fabrics in the piece, composed chiefly of metal thread, but in part of silk, are more specifically enumerated in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 179, 30 Stat. 166, as "articles * * * in chief value of * * * metal threads," than under Schedule L, par. 387, 30 Stat. 186, as "woven fabrics in the piece, not specially provided for, * * * weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, * * * dyed in the thread or yarn, and containing not more than thirty per centum in weight of silk, * * * if other than black." G. Hirsch's Sons v. United States, 167 Fed. 309, 311, 93 C. C. A. 61.

Articles in imitation of lace

Held, that certain woven flax articles, in portions of which ornamental effects have been produced by drawing out certain of the threads and interjecting different, independent threads, producing openwork effects, are not "articles * * * in imitation of lace," as enumerated in paragraph 339, Tariff Act July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181. United States v. B. Ulmann & Co., 139 Fed. 3, 4, 5, 71 C. C. A. 415.

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Articles in part of metal

Millinery articles, made almost wholly of feathers, but containing a small quantity of wire, which was an important feature of their construction, are dutiable as "articles in part of metal," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167, rather than as "feathers advanced or manufactured," under Schedule N, par. 425, 30 Stat. 191. United States v. Berlinger, Brown & Meyer, 167 Fed. 800, 801, 93 C. C. A. 190.

Articles in part of beads

Curtains in chief value of rice paste formed into regular-shaped particles are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189, relating to "articles * * * in part of beads," not being excluded by the doctrine of ejusdem generis, though the paragraph also enumerates laces, wearing apparel, ornaments, etc. Morimura Bros. v. United States, 169 Fed. 279, 280, 94 C. C. A. 555.

Ladies' hand bags in chief value of leather and ornamented with beads are dutiable as "articles * * * in part of beads," rather than as "manufactures of leather, finished or unfinished, * * * or of which [leather] is the component material of chief value," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, pars. 408, 450, 30 Stat. 189, 193. United States v. Guthman, Solomons & Co., 159 Fed. 273, 274.

Articles made of lace

Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181, relating to "articles made * * * of lace," includes goods made by sewing together pieces of lace produced in shapes designed to be used in making the articles; the term "lace" not being restricted to articles made up from lace that is bought and sold by the yard. Goldenberg Bros. & Co. v. United States, 152 Fed. 658, 659.

Articles manufactured from imported materials

Imported corks used in bottling beer for export are not "articles manufactured from imported materials," within the meaning of Act Oct. 1, 1890, 26 Stat. 617, c. 1244, § 25, allowing a drawback of duties on such articles when exported, although such corks are subjected to a special treatment after importation to make them fit for the purpose intended. Anheuser-Busch Brewing Ass'n v. United States, 28 Sup. Ct. 204, 205, 207 U. S. 556, 52 L. Ed. 336.

Articles manufactured from wire

In Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161, the provision for "articles manufactured from * * * wire" cannot be restricted to manufactured articles which contain the round wire in its integrity; and "steel wool," consisting of filaments shaved from steel wire, and constituting a finished commercial article, is embraced in said provision. Buehne Steel Wool Co. v. United States, 159 Fed. 107, 109, 86 C. C. A. 297.

Held, that a cable used for making connections with a telephone switch board, consisting of 64 wires bound together, which, both individually and in the group, are covered with various materials for insulating and water-proofing purposes, is an "article," within the meaning of the second proviso in paragraph 137, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161, relating to "articles manufactured from * * * copper wire," and is not dutiable under the provision in the same paragraph for "wire not specially provided for, * * * whether uncovered or covered," nor under paragraph 193 of said act, 30 Stat. 167, as a manufacture of metal not specially provided for. Salt v. United States, 127 Fed. 890, 891.

Articles of glass ornamented, decorated, etc.

Glassware ornamented with metal filigree work held dutiable as "articles of glass, * * * ornamented, decorated," etc., under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, regardless of whether glass or metal is the component of chief value. Gallenkamp v. Rachman, 147 Fed. 769, 770.

Glass eyes for dolls, in which, in order to complete the resemblance to the human eye, the iris and the pupil have been skillfully painted or traced, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, for "articles of glass, * * * painted * * * or otherwise ornamented, decorated," etc. R. Hoehn Co. v. United States, 139 Fed. 301, 302.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, the provision for articles of glass ornamented, decorated, or ground is not limited to articles in which the grinding is done for ornamental or decorative purposes, but includes plain goods ground for utility purposes only. United States v. Heil Chemical Co., 178 Fed. 537, 540, 102 C. C. A. 47.

Articles of blown glassware

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, the term "blown glassware" includes articles blown in a mold as well as freehanded. Articles in chief value of blown glass, but in part of other glass or other material, are not within the provision for "blown glassware," but are dutiable as manufactures of glass under paragraph 112, 30 Stat. 158. The term "molded," as applied to glassware, is synonymous with "pressed." United States v. Heil Chemical Co., 178 Fed. 537, 540, 102 C. C. A. 47.

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Articles of imported merchandise

Imported boxes containing lemons are "articles of imported merchandise" and a dutiable entity by themselves, subject to separate classifications from the lemons they contain, within Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134, and are therefore subject to the penalties provided for undervaluation. Phelps Bros. & Co. v. United States, 142 Fed. 213, 214.

Articles of iron

Iron castings, which by careful additional work have been fitted as parts of machines, are no longer dutiable as "castings," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 148, 30 Stat. 162, but have been advanced to the condition of "articles * * * of iron * * * partly * * * manufactured," under paragraph 193. John Bromley & Sons v. United States, 156 Fed. 958, 959, 84 C. C. A. 458.

Articles of metal

Small disks produced in the manufacture of tin cans, being a by-product in the process of cutting an aperture for filling, and being of much less value than the tin from which they were cut, are not articles "wholly or partly manufactured from tin plate," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 140, 30 Stat. 162, nor "waste" under Schedule N, par. 463, 30 Stat. 194, but are dutiable as "articles of metal, whether partly or wholly manufactured," under Schedule C, par. 193, 30 Stat. 167. Shallus v. United States, 162 Fed. 653, 656, 89 C. C. A. 445.

Articles of utility

Splash mats or screens, which have been crudely decorated at an expense of about 2½ cents apiece by stenciling and by hand painting, which are worth about 4 cents apiece, and which primarily are "articles of utility" rather than for decoration, are not dutiable as paintings in oil or water colors under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194. F. W. Woolworth & Co. v. United States, 152 Fed. 483, 484.

Articles used as coffee

A liquid extract of the coffee bean held not to be dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 283, 30 Stat. 172, relating to "articles used as coffee, or as substitutes for coffee," but under section 6, 30 Stat. 205, as an unenumerated manufactured article. E. C. Hazard & Co. v. United States, 164 Fed. 907, 908.

ARTIFICE

The elements of the offense of devising an "artifice" to defraud, to be effected by means of the post office establishment of the United States, in violation of Rev. St. § 5480, are: (1) That defendant devised the "scheme" to defraud, as alleged; (2) that he intended to effect such "scheme" or "artifice" by opening correspondence or communication with the persons intended to be defrauded, by means of the post office establishment of the United States, or by inciting them to open correspondence with him respecting such "scheme" or "artifice"; and (3) that in the furtherance and execution of the "scheme," or in attempting to further the same, defendant deposited or caused to be deposited in the United States post office letters, papers, writings, or circulars, or took from the post office papers or writings connected with the furtherance of such "scheme." A "scheme" is a design or plan formed to accomplish some purpose. An "artifice" is an ingenious contrivance or device of some kind, and when used to defraud corresponds with "trick" or "fraud." Hence, a "scheme" or "artifice" to defraud, within the meaning of the statute, is to form some plan or device some trick to perpetrate the fraud upon another. United States v. Dexter, 154 Fed. 890, 893, 896.

ARTIFICER

"Artificer" commonly implies power of contrivance or adaptation in the exercise of one's craft. State v. City of Ottawa, 113 Pac. 391, 393, 84 Kan. 100.

ARTIFICIAL

ARTIFICIAL COLORATION

See Free from Artificial Coloration.

The use of palm oil as an ingredient in the manufacture of oleomargarine to the extent of one-half of 1 per cent. for the sole purpose, from a business standpoint, of giving to the oleomargarine a yellow color in resemblance to butter, is an "artificial coloration" within the meaning of Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 210, as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 194, and subjects the product to a tax of 10 cents per pound, and it is immaterial that palm oil is a substance not foreign to oleomargarine, and that incidentally, and in the proportions used in a very slight degree, it affects its quality. Moxley v. Hertz, 173 Fed. 728, 731.

ARTIFICIAL FLOWERS

Imitation roses of celluloid and metal, which are worn as boutonnieres, chiefly by children on occasions of frolic and fun, and are also used as gifts in prize packages, are not "toys" within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par, 418, 30 Stat. 191, but are dutiable as "artificial * * * flowers," under paragraph 425, 30 Stat. 191. Hamburger & Co. v. United States, 180 Fed. 632, 633.

Artificial shamrocks are not "toys," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191,

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but are dutiable as "artificial leaves," under paragraph 425, 30 Stat. 191. United States v. Cattus, 167 Fed. 532, 93 C. C. A. 64.

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191, relating to "artificial or ornamental leaves," held to include leaves elaborately prepared so as to restore their natural appearance and prevent decomposition; also to include them when made up into wreaths and attached to wire frames. Kreshower v. United States, 152 Fed. 485.

ARTIFICIAL PERSONS

Corporation as, see Corporation.

" 'Artificial persons' are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." John C. Orr Co. v. Cushman, 104 N. Y. Supp. 510, 511, 54 Misc. Rep. 121 (quoting and adopting Abbott's Law Dict. vol. 2, p. 151).

ARTIFICIALLY PRECIPITATED

The article produced by the "artificial precipitation" of chalk, and bolting and packing it in bags, is not "manufactures" of chalk, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 13, 30 Stat. 152, but is chalk itself, and is dutiable under the provision in the same paragraph for "chalk artificially precipitated." United States v. P. E. Anderson & Co., 175 Fed. 961, 962, 99 C. C. A. 451.

ARTISAN

An "artisan" is one who is employed in an industrial or mechanic art or trade. State v. City of Ottawa, 113 Pac. 391, 393, 84 Kan. 100.

ARTIST

The term "artist" is broad enough to include an architect. Pen and ink drawings of an artistic character, of a proposed building, produced by an architect, are within paragraph 703, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 203, relating to "works of art, the production of American artists." Young v. Bohn, 141 Fed. 471, 472.

AS

A verdict finding defendant guilty of embezzlement "by" bailee, instead of "as" bailee, is defective, if not bad. State v. Jones, 89 S. W. 366, 367, 114 Mo. App. 343.

As in same manner

V. S. 2532, as amended by Laws 1896, p. 82, No. 44, § 5 (P. S. 2925), provides that, where a husband's will makes provision for his widow, intended in lieu of dower, the widow may within eight months after the will is proved, or in such further time as the court allows, waive the provisions of the will, and take one-third as in other cases. Section 2543 (2935), declares that if a married woman dies without issue, and leaving a will, her husband may waive its provisions "as" a widow may waive the provisions of her husband's will. Held, that the word "as" in section 2543 was used in the sense of "in the same manner with or in which," so that the probate court could extend the time for a husband to waive the provisions of his wife's will and elect to take under the law. In re Peck's Estate, 68 Atl. 433, 434, 80 Vt. 469.

P. S. 2935, provides that a husband may waive the provisions of his wife's will when she dies without issue "as a widow may waive the provisions of her husband's will." Section 2925 (3) requires that the widow shall notify the court in writing of her election under her husband's will within eight months after the will is proved, or after letters of administration have been granted. Held, that a verbal notification of waiver made to the probate court by the attorney for the husband where the will was presented for probate was insufficient, where it was not followed by the filing of a written waiver within the time allowed by the statute. In re Baker's Estate, 71 Atl. 190, 81 Vt. 505.

As when, importing a contingency

The word "as," in a will creating a trust to pay the income to beneficiaries until they have respectively reached a specified age, and providing that "as" each arrived at that age he should have his share, imports contingency, though the word may not be directly conditional. In re Blake's Estate, 108 Pac. 287, 294, 157 Cal. 448.

In an action against a street railroad for injuries received in a collision between plaintiff's wagon and a car, the petition alleged that plaintiff saw the car in question coming from the north "as" he turned off to cross from the east to the west track on which the car was approaching. Held, that "as" meant that he saw it "when," "at some time," or "while" he was driving across the track; and hence a contention that it meant that plaintiff saw the car coming from the north at the moment he turned to drive across the west track, and that he was thereby convicted of contributory negligence by his pleadings, and that his evidence that he looked and did not see the car should be rejected as contradicting his petition, was untenable. Schroeder v. St. Louis Transit Co., 85 S. W. 968, 972, 111 Mo. App. 67.

AS A BEVERAGE

See Beverage.

AS ABOVE DESCRIBED

The words "as above described," in a deed reciting that the owner granted to trustees of a church a parcel of land described, "to be used as a church location. * * * to have and to hold the said premises as above described unto the trustees and their

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successors," refer back to the description of the land, and not to words "to be used as a church location," and do not limit the use of the premises to a use for the purposes of a church location. Downen v. Rayburn, 73 N. E. 364, 365, 214 Ill. 342, 8 Ann. Cas. 36.

AS AFORESAID

In a declaration for negligence, an allegation that plaintiff was injured by reason of defendant's failure to give such signals, "as aforesaid," must be deemed to refer to signals previously mentioned in the declaration. Wabash R. Co. v. Bhymer, 73 N. E. 879, 881, 214 Ill. 579.

The phrase "rules established as aforesaid," within Civil Service Law, § 25, providing that no appointment within the rules established "as aforesaid" shall be affected by political opinions or affiliations, refers to the rules established by the preceding sections or to be established by the state or municipal civil service commission pursuant thereto. People ex rel. Garvey v. Prendergast, 132 N. Y. Supp. 115, 117, 148 App. Div. 129.

AS ALLEGED

A denial of the allegations of a complaint "as alleged" therein does not operate as a denial of the substance of the allegation and is a negative pregnant which is insufficient. Hutchinson v. Bien, 93 N. Y. Supp. 189, 190, 46 Misc. Rep. 302; Hutchinson v. Bien, 93 N. Y. Supp. 216, 217, 104 App. Div. 214.

AS BEING A CONVEYANCE

An instruction that possession of a part of a tract under a claim made under an invalid deed would give possession of the whole was correct, under Code Civ. Proc. § 102, providing that whenever the occupant, or those under whom he claims, entered under claim of title founded on a claim that a written instrument was a conveyance of the premises and there has been a continued possession of the premises included in such instrument, or some part thereof, under such claim for 10 years, the premises so included shall be deemed to have been held adversely; the words "as being a conveyance of the premises" indicating that the extent of the claim is not dependent on the validity of the instrument. Kennedy v. Kennedy, 68 S. E. 664, 669, 86 S. C. 483.

AS CHARGED

See Guilty As Charged.

AS CHARGED IN THE INFORMATION

In a prosecution under Rev. St. 1909, § 4729, charging defendant with unlawfully living and cohabiting with ——— in a state of open and notorious adultery, they not being married to each other, but defendant being a married man, a special verdict that defendant was "guilty as charged in the information, and assess his punishment at one year and $1,000," but failing to include the essential fact that defendant was a married man, was insufficient; and the defect was not cured by the use of the words "as charged in the information," since, where there is a special finding of a fact, those words mean as that fact was charged. State v. Holland, 145 S. W. 522, 524, 162 Mo. App. 678.

AS CONVENIENT

See Early As Convenient.

AS CUSTOMARY

The term "as customary," in contracts for the carriage of coal from San Francisco to Honolulu, which provided for the delivery "at the wharf" and "on wharf 'as customary'" meant the mode of discharging freight at Honolulu, and the custom at San Francisco cannot prevail against it. Moore v. United States, 25 Sup. Ct. 202, 203, 196 U. S. 157, 49 L. Ed. 428.

AS DIRECTED

Under the terms of a written contract in which it was agreed to furnish and to plant oak trees on the neutral ground of St. Charles avenue "as directed" by the board of commissioners, the words "as directed" refer to the particular places upon the neutral ground at which the trees were to be placed, and do not imply that the board was to supervise the mode of planting. La Groue v. New Orleans, 38 South. 160, 161, 114 La. 253.

AS DOWER

The expressions "as dower," and "in lieu of dower," are often used interchangeably. Perry v. Dance (Ky.) 112 S. W. 911, 913.

AS FAR AS

The duty of a passenger carrier to carry safely those whom they admit into their coaches, "as far as human care and foresight will go," means for the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the slightest, neglect. Kline v. Santa Barbara Consol. Ry. Co., 90 Pac. 125, 127, 150 Cal. 741 (quoting Fairchild v. California Stage Co., 13 Cal. 604).

Where a party to a logging contract in response to a demand to perform the contract in a certain way stated, "I will comply with this as far as practicable," he did not thereby give an unqualified accedence to the demand. Des Allemands Lumber Co. v. Morgan City Timber Co., 41 South. 332, 344, 117 La. 1.

AS FAST AS

Where the owner of a sawmill agreed to saw a party's logs "as fast as I can," the quoted expression was not ambiguous, and

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it was the duty of the owner of the sawmill to put such party's logs through his sawmill without interruption except for cause making such progress substantially impossible, and hence evidence of a custom that, where the sawing of the logs of one party was interrupted for any cause and those of another taken up, the latter were completed before returning to the former, which custom was confined to cases where the contract did not provide for continuous sawing, was incompetent. Mowatt v. Wilkinson, 85 N. W. 661, 662, 110 Wis. 176.

AS HEREIN PROVIDED

The phrase "as herein provided," as used in a statute imposing a fine on persons who shall hunt without being in possession of a license "as herein provided," means that the hunter must have in his possession a hunting license issued in pursuance of the other provisions of the statute. Ex parte Helton, 93 S. W. 913, 914, 117 Mo. App. 609.

AS HERETOFORE

The words "as heretofore enjoyed," as used in Const. art. 2, § 28, providing that the right of trial by jury is limited to the right "as heretofore enjoyed," refers to the right of trial by jury as it existed prior to the adoption of the Constitution in 1875, and, there being at that time no right to a jury trial accorded to a widow to determine her interest in her husband's personal property, she is accorded no such right by the Constitution. Howard v. Strode, 146 S. W. 792, 795, 242 Mo. 210, Ann. Cas. 1913C, 1057.

The phrase "as heretofore provided," in a city ordinance providing in section 1 that it shall be unlawful for any one to sell intoxicating liquors within the limits of two miles of the city, and prescribing in section 2 the procedure for obtaining a liquor license, and declaring in section 3 that any person who shall within the limits of the city or within two miles thereof sell intoxicating liquors, without having first taken out a license "as heretofore provided," shall be guilty of a misdemeanor, and on conviction thereof shall be fined, should be construed as heretofore lawfully and legally provided, and only embracing such portions of section 2 as are within the powers of the mayor and council to enact, and as thus construed section 3 contains a valid prohibition against the sale of intoxicating liquors within the city without a city license. Territory v. Robertson, 92 Pac. 144, 146, 19 Okl. 149.

AS HIGH AS

An electrical company contracted to furnish a cement company with electrical power. The contract provided that the cement company should have an equipment of motors and transformers guarantied to have a power factor and efficiency "as high as any obtainable in the market." The manufacturers of the equipment which the cement company procured guarantied the apparatus "to be one of our highest standard manufacture, both mechanically and electrically." Held, that this did not constitute sufficient performance of the terms of the contract. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 95 N. Y. Supp. 421, 425, 107 App. Div. 548.

AS IN OTHER CASES

Rev. St. 1899, § 2932, provides that no petition for review of any judgment for divorce shall be allowed, but there may be review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody, and maintenance of the children, or any of them, as in other cases. Held, that the phrase "as in other cases" refers to a petition for review, the sole matter with which the section is concerned, and not to a writ of error, and the section means that there shall not be a petition for review of a divorce judgment, but may be a petition for review of the alimony and custody of children, as in ordinary cases where the petition may be had under sections 777–783 (pages 752–754). Elliott v. Elliott, 115 S. W. 486, 487, 135 Mo. App. 42.

AS INTEREST MAY APPEAR

A rider or mortgage clause attached to a policy of insurance at the time it was delivered, and upon the request of a mortgagee's agent, by its terms made the loss or damage under the policy payable to the mortgagee "as interest may appear." The mortgagee afterwards took a second mortgage on the property without notice to the insurer. Held, that the words "as interest may appear" should be construed to mean such interest as by proper proofs was shown to appear at the time of loss, so that the second mortgage was not a breach of a condition in the policy calling for notice of any change of ownership or increase of hazard, etc. Fenton v. Cascade Mut. Fire Ass'n of Washington, 111 Pac. 343, 344, 60 Wash. 389.

In an indorsement made upon a policy of fire insurance by the agents of the insurer at the request of the insured as follows, "Subject to all the conditions of the policy, loss, if any, payable to D. & S., etc., as their interest may appear," the words "as their interest may appear" were plainly prospective, and referred, not to an interest existing at the time when the indorsement was written, but to such interest as might appear at the time of the loss, if any, without regard to the character of the interest or the time when it may have arisen. The interest referred to is not an interest in the property insured, but is an interest in the payment of the loss, whether predicated upon an interest in the property or otherwise. In this respect the terms of the indorsement may be properly said to be broad and embracive. Atlas Reduction Co. v. New Zealand Ins.

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Co., 138 Fed. 497, 504, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433.

AS IS REQUIRED

To give bond and security or make affidavit in one case "as is required" in another is to give the same kind of a bond or make the same kind of an affidavit. Brown v. State, 52 S. E. 745, 747, 124 Ga. 411 (citing Memmler v. State, 75 Ga. 576).

AS IT ACCRUES

See Payable As It Accrues.

AS IT MAY THEN BE

Where testator devised all of his property to his wife, with a provision that, if his son survived her, he should have one-half of all the property devised to his mother "as it may then be," his interest was not confined to the personal estate. Bailey v. Pittsburg, C., C. & St. L. Ry. Co., 57 Atl. 58, 59, 208 Pa. 45.

AS JUSTICE MAY REQUIRE

Section 5 of the federal judiciary act (Act March 3, 1875, c. 137, 18 Stat. 472), as amended by Act March 3, 1887, c. 373, § 6, 24 Stat. 555, and Act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436, which provides that, if at any time it shall appear that a Circuit Court is without jurisdiction in a suit brought in or removed into such court, the court shall dismiss or remand such suit "as justice may require," does not give the court power to choose the forum for litigants and dispense with rights created by statute from motives of interest or sympathy with the litigants and, where the jurisdiction of a state court has been terminated by the action of a party under the removal statute and jurisdiction exclusively established in the federal court over the cause of action and the parties before it, such court cannot remand the cause for lack of an indispensable party, without whose presence it cannot be determined and which cannot be brought in, but must dismiss it, even though such dismissal may deprive the plaintiff of the right to maintain the suit in any forum because wherever brought it will be removable, and then subject to dismissal for the same reason. Lawrence v. Southern Pac. Co., 180 Fed. 822, 831.

AS LONG AS

The proper words to be used in creating a limitation upon the term granted by a lease are, "while," "as long as," "until," and "during." Vanatta v. Brewer, 32 N. J. Eq. 268, 270.

AS MODIFIED

The phrase "as modified by the provisions of this act," as used in the repealing section of the Elkin's Act, saving the rights of causes then pending and rights which had already accrued, by providing that such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and "as modified by the provisions of this act," being subjective rather than active in terminology, cannot operate to make the Elkin's Act relate backward, so as to vitalize an order which was a dead letter when made. United States v. Atchison, T. & S. F. Ry. Co., 142 Fed. 176, 189.

AS MUCH AS

A deed, the parties to which are citizens of the Choctaw Nation, which conveys "as much as [grantees] can legally hold for themselves or others," together with all the privileges thereunto belonging, as fully and entirely, under the laws of the United States of America, and under the laws and by the customs and usages of the said Choctaw Nation, the grantor "may lawfully convey," conveys the amount the grantees were entitled for their allotments and those of their children under treaty, together with the right of occupancy and improvements and the right to select the allotments, which is equivalent to the equitable title to the land described; the phrase "as much as the grantees can legally hold for themselves or others" meaning their allotments and those of their children, and the phrase "together with all the privileges thereunto belonging as fully and entirely under the laws of the United States of America and under the laws and customs of the said Choctaw Nation, the grantor may lawfully convey" meaning that the grantees take the right of occupancy and improvements, and the right to select the allotments of themselves and their children therefrom. Taylor v. Southerland, 104 S. W. 874, 876, 7 Ind. T. 666.

AS NEAR AS MAY BE

An ordinance requiring tracks to coincide, "as near as may be," with the center of the street, means as nearly as practicable. Longenecker v. Wichita R. & Light Co., 102 Pac. 492, 493, 80 Kan. 413.

The purpose of Bill of Rights, § 9, prohibiting unreasonable searches or seizures, and providing that no warrant to search a place or seize anything shall issue without describing the same "as near as may be," is to define and limit the power to invade the premises of the citizen by a specification of that which he may search for and seize, and, though descriptions must necessarily vary according to the nature of the things on which process is to operate, all description cannot be dispensed with to meet the necessities of cases. It is not intended to prohibit reasonable searches and seizures nor to prescribe a test which shall make impracticable the legitimate use of the search warrant. Hence the phrase "as near as may be." Dupree v. State, 119 S. W. 301, 307, 102 Tex. 455.

The general election law (Comp. Laws 1897, § 3617) provides that the township

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clerk shall furnish a township election seal of a specified character, and that, after the ballots have been counted, they shall be replaced in the ballot box, which shall be securely sealed, so that it cannot be opened without breaking such seal. Pub. Acts 1909, No. 281, § 2, declares that all primary elections, except as otherwise provided, shall be conducted "as near as may be" as prescribed by law for the regulation of elections, and that the provisions of the general election law shall apply to primary elections as to the providing of ballot boxes, with the necessary equipment and supplies. Sections 36 and 37 declare that, after the close of the poles, ballots shall be counted and preserved as provided by the general election law. Held, that the words, "as near as may be," referred to the provisions of the general election law which could not for any reason be made applicable to primary elections, and that where the primary ballot box was sealed after the ballots were counted by a sealed paper over the opening and the keyholes, without impressing on the wax an election seal, no such seal having been furnished to the election officers, the ballots were not preserved so as to justify a recount. Ritze v. Vivian, 137 N. W. 964, 966, 172 Mich. 423.

A charter providing that on the opening of a street it shall be lawful for the city council to appoint five disinterested freeholders of the city residing "as near as may be," in different wards, commissioners, etc., is not complied with where a street is laid in the third of the city's six wards and two of the commissioners reside in the sixth ward, two in the fourth and one in the second, and where none were appointed from the first, third, and fifth wards. State v. City of Elizabeth, 32 N. J. Law, 357, 359.

Federal practice act

The conformity "as near as may be" to the state practice, enjoined upon the federal courts by Rev. St. § 914, does not prevent a federal court, under the broad powers conferred by section 716, from framing its process and writs so as to give the full relief in one action by way of the forfeiture and penalties prescribed by section 4965 in case of the infringment of a copyright in engravings, although the state practice may afford no form of action in which this double remedy may be enforced. Hills & Co. v. Hoover, 31 Sup. Ct. 402, 405, 220 U. S. 329, 55 L. Ed. 485.

The expression "as near as may be," in Rev. St. U. S. § 914, possesses elasticity, and the expression was doubtless intentionally employed to enable the national tribunal to reject such provisions as would unwisely incumber the administration of the law and tend to defeat the ends of justice. Especially in the matter of the amendment of pleadings has plenary power been conferred by Congress upon those courts, and whether amendments when authorized and made work a waiver of substantial rights or a release of errors should be determined by the principles which obtain in those jurisdictions, and not those which prevail in the state tribunals. Williamson v. Liverpool & London & Globe Ins. Co., 141 Fed. 54, 58, 72 C. C. A. 542, 5 Ann. Cas. 402.

The federal conformity statute (Rev. St. § 914) does not require the federal court in the district of Connecticut, in an action against a town, to deviate from its long-established practice, under which service is made by the marshal by having copies of the process made and attested by the clerk, and to follow Gen. St. Conn. 1902, § 571, which provides that in actions against towns a true and attested copy of the process, including the declaration or complaint, shall be served on the clerk or a selectman of the defendant, and which, under the decisions of the state courts, requires the copies to be attested by the officer making the service. Elson v. Town of Waterford, 135 Fed. 247.

AS NEARLY EQUAL AS MAY BE

The Constitution requiring that taxes be "as nearly equal as may be" does not mean as nearly equal as a mathematical calculation can make them, but as nearly equal as is consistent with the general welfare of the people, and an equitable distribution of the public burdens. Such Constitution does not require a theoretical equality at the expense of substantial equity. Tekoa v. Reilly, 91 Pac. 769, 771, 47 Wash. 202, 13 L. R. A. (N. S.) 901 (quoting State v. Ide, 77 Pac. 961, 35 Wash. 576, 67 L. R. A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634)

AS NOW CONSTITUTED

A town was incorporated by uniting two old towns; the incorporation act providing that the location of the town house should not be changed "unless a majority of each town 'as now constituted' shall otherwise decide." Held, that the phrase "as now constituted" was intended to apply, not to the inhabitants, but to the geographical limits of the two old towns. Anderson v. Parker, 64 Atl. 771, 772, 101 Me. 416.

AS NOW PROVIDED

Rem. & Bal. Code, § 7504, provides that on petition of qualified voters of any municipality having adopted a charter under the laws of the state asking for adoption of a specific charter amendment, providing for any matter within the realm of local affairs, the amendment shall be submitted to the voters at the next regular election occurring thirty days or more after the petition is filed, etc. Section 7506 provides that the act shall not be construed to deprive the city council from submitting proposed charter amendment to the voters "as is now provided," but shall be held to offer a concur-

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rent and additional method for proposing and submitting charter amendments. Held, that the words "as is now provided" related to the charter of a city, not as it was at the time the act was passed, but at the time the amendment was proposed; and hence, where the charter of a city provided for the submission of amendments at a special election to be called for that purpose, such city was exempted from the operation of the requirements that the amendments should be submitted at a general election. State ex rel. Hindley v. Superior Court for Spokane County, 126 Pac. 920, 923, 70 Wash. 352.

AS NOW USED

Where the owner of a water privilege and dam used to work the wheels of a tannery, deeded a part of the land with a right to take water and machinery from his dam, reserving sufficient water at all times to work the tannery wheels "as now used," the water reserved was the quantity and (no more than the quantity) actually used by the tannery at the time when the deed was given. Wyman v. Farrar, 35 Me. 64, 71.

AS OF COURSE

See Costs as of Course.

AS OUR OWN

The words "as our own," in a statement for adoption made by husband and wife reciting that they thereby voluntarily adopted a child "as our own" and agreed to maintain, clothe, and educate the child, must be given a natural meaning, and, so construed, the statement supports a decree of adoption rendered under Rev. St. 1866, tit. 25, c. 2, p. 536, conferring on the child full rights, privileges, and immunities of children born in lawful wedlock. Ferguson v. Herr, 94 N. W. 542, 545, 64 Neb. 649.

AS PER

Plaintiff agreed to sell defendants a half interest in mining property, advances to be made by defendants for litigation and improvements to be applied on the purchase price. By a subsequent contract the advances were to be repaid to defendants, and by a third contract a corporation to which the property had been conveyed assumed and agreed to pay the moneys advanced "as per" the first contract. It was held that the phrase "as per" referred to the advancements and did not qualify "assume and agree to pay," and hence did not abrogate the provisions of the second contract providing for repayment of the advancements. Gisborn v. Milner, 79 Pac. 556, 558, 28 Utah, 438.

AS PRESCRIBED

Under Code Civ. Proc. § 1013, providing that the court may of its own motion or on the application of either party direct a trial of the issues of fact by a reference where the trial will require the examination of a long account, etc., and that in an action triable by the court without a jury a reference may be made "as prescribed in this section," etc., the words "as prescribed in this section" refer to where the trial will require the examination of a long account; and in actions in equity, as well as at law, there can be no compulsory reference, unless the trial involves such determination. Roome v. Smith, 107 N. Y. Supp. 1088, 1089, 123 App. Div. 416.

AS REPRESENTED

An instruction relating to an inspection of goods to be made before trade, limiting the right to ascertaining whether the goods were such as were stipulated for, had substantially the same meaning as "as represented," used in the contract, and hence was not erroneous; to "represent" meaning to "describe or portray," and to "stipulate" meaning to "bargain or to contract." Beck v. Budd, 88 N. E. 785, 786, 44 Ind. App. 145.

AS REQUIRED

A finding, reciting that a certain work was not done "as required," may well mean that it was not done properly, or in the manner required by the contract, and cannot be construed to mean that the work was not done at all. Siebert v. Roth, 95 N. W. 118, 119, 118 Wis. 250.

AS SHE MAY NEED

Where a will gave testator's widow the income of certain moneys, with the right to use the principal " as she may need it," she was the sole judge of such necessity. In re Trelease, 96 N. Y. Supp. 318, 319, 49 Misc. Rep. 205 (citing In re Grant, 16 N. Y. Supp. 716, 61 Hun, 624, Id., 33 N. Y. Supp. 193, 86 Hun, 617; In re Parsons, 78 N. Y. Supp. 975, 39 Misc. Rep. 126; Swarthout v. Ranier, 38 N. E. 726, 143 N. Y. 499).

AS SHE MAY WISH

The words "as she may wish," as used in a will providing that testator's property, real and personal, should go to his wife to have, to hold, and to use as she may wish, modify not only the words "to use" but also the words "to have and to hold," and did not restrict the wife's interest to a life estate. Scott v. Scott (Ky.) 105 S. W. 896, 897.

AS SHE THINKS PROPER

A devise of testator's property to his wife, to will to his children "as she thinks proper," vests in the wife a discretion in the exercise of the power conferred, which includes the right of unequal distribution. Allder v. Jones, 56 Atl. 487, 488, 98 Md. 101.

AS SOON AS ABLE

"Some of the cases seem to recognize a difference between the expressions 'as soon as I am able' and 'as soon as I can.' The latter form, being more informal and col-

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loquial, may perhaps be regarded as a shade less definite; but the difference is too slight to justify a refusal to give it the same effect as the former." A written instrument by which the maker acknowledges an indebtedness and agrees to pay it "as soon as I can" is to be considered as a promissory note payable within a reasonable time. Benton v. Benton, 97 Pac. 378, 379, 78 Kan. 366, 27 L. R. A. (N. S.) 300, 130 Am. St. Rep. 376 (citing 8 Words and Phrases, 7744).

AS SOON AS POSSIBLE

Where a notice is required to be given "as soon as possible," it will meet the requirements, if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. Routt v. Dils, 90 Pac. 67, 69, 40 Colo. 50 (quoting 2 May, Ins. [3d Ed.] § 462).

"At once" synonymous

"At once" is synonymous with the words "as soon as possible," and is usually construed to mean within such reasonable time as shall be required under all circumstances for doing the particular thing. It is doubtful whether the same vigilance should be exacted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. Lucas v. Western Union Telegraph Co., 109 N. W. 191, 193, 131 Iowa, 669, 6 L. R. A. (N. S.) 1016.

Manufacture and delivery of goods

The words "as soon as possible," in a contract for the manufacture of certain specified goods, mean "with all reasonable diligence" or "without unreasonable delay." S. D. Childs & Co. v. Omaha Paraphernalia House, 114 N. W. 941, 942, 80 Neb. 673.

The phrase "as soon as possible," which is equivalent to "with as little delay as possible," means within a reasonable time. A contract requiring plaintiff to fill defendant's orders for lumber "with as little delay as possible" meant within a reasonable time. Wm. Cameron & Co. v. Matthews (Tex.) 124 S. W. 192, 193 (citing 1 Words and Phrases, p. 528).

The phrase "as soon as possible," in a written contract for the delivery of certain bicycles "by April 1st or as soon as possible," had a definite legal meaning, and bound the vendor to fill the order within a reasonable time after April 1st if not then filled. Williams v. Gridley, 96 N. Y. Supp. 978, 980, 110 App. Div. 525; Id., 96 N. Y. Supp. 978, 980, 110 App. Div. 525 (citing Brink v. Hanover Fire Ins. Co., 80 N. Y. 112; Atwood v. Emory, 1 C. B. [N. S.] 110).

A manufacturer, who received an order for a soda fountain to be sent by freight, with "as soon as possible" written on the order form requesting an exact diagram of how the edges were to be finished and where it was to be placed, was not bound to ship it forthwith, but was "entitled to a reasonable time after receiving the order to procure or prepare the apparatus conformable to the order, not to manufacture an entire new one throughout; for it is quite clear from the order itself that many and most of its parts were, or might be, already prepared and equally adapted to an apparatus of any size and for any place, but a reasonable time for procuring or manufacturing the parts necessary to adapt it to the place for which it was ordered, and make it conform to the specifications of the order as given by the defendants." Tufts v. McClure Bros., 40 Iowa, 317, 318.

Defendants ordered a safe from plaintiff to be shipped "as soon as possible." Upon receipt of the order plaintiff had no finished safes on hand, but rushed to completion one in process of manufacture, using all proper diligence, and shipping it 19 days after receipt of the order. It appeared that the customary time for filling an order by the manufacture of a new safe was 30 days. Held, that the shipment was a substantial compliance with the order. Victor Safe & Lock Co. v. O'Neil, 93 Pac. 214, 215, 48 Wash. 176.

Notice of loss

A requirement that proofs of loss must be furnished "as soon as possible" after loss means that they must be presented within a reasonable time, having due regard to all the circumstances. What is a reasonable time is generally a question for the jury. Great American Co-op. Fire Ass'n v. Jenkins, 76 S. E. 159, 160, 11 Ga. App. 784 (citing 1 Words and Phrases, p. 528).

Where an accident policy provided that notice should be given insurer "as soon as possible" after the accident, the phrase "as soon as possible" was equivalent to "immediate" or "forthwith," which means that notice should be sent with reasonable promptness. Insured was injured in a lonely camp in New Brunswick in the early morning by such a burning of his hand as to require amputation two days later. He was far from home and kindred, and the notice of the accident was not sent till the fourth day thereafter. Held, that whether the notice was sent "as soon as possible," pursuant to the policy, was a question for the jury. Everson v. General Accident Fire & Life Assurance Corp., Limited, of Perth, Scotland, 88 N. E. 658, 660, 202 Mass. 169.

If the notice be required to be "forthwith," or "as soon as possible," or "immediately," it will meet the requirement if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would in most cases

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strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud. A provision in a policy of life insurance requiring proof of death to be furnished within two months from the date of insured's death, in default of which all claims under the policy should be forfeited, is a condition subsequent, and is fulfilled by a submission of proofs within a reasonable time after insured's death under all the circumstances of the case. Munz v. Standard Life & Accident Ins. Co., 72 Pac. 182, 183, 26 Utah, 69, 62 L. R. A. 485, 99 Am. St. Rep. 830 (quoting and adopting 2 May, Ins. § 462, and citing and adopting Kentzler v. American Mutual Accident Ass'n, 60 N. W. 1002, 88 Wis. 589, 43 Am. St. Rep. 934; Solomon v. Continental Fire Ins. Co., 55 N. E. 279, 160 N. Y. 595, 46 L. R. A. 682, 73 Am. St. Rep. 707; Woodmen Accident Ass'n v. Pratt, 87 N. W. 546, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777; McElroy v. John Hancock Life Ins. Co., 41 Atl. 112, 88 Md. 137, 71 Am. St. Rep. 400; Trippe v. Provident Fund Society, 35 N. E. 316, 140 N. Y. 23, 22 L. R. A. 432, 37 Am. St. Rep. 529).

On a bond being given to secure the performance of a contract by the principal in the bond providing that notice of his failure to perform the contract shall be given to the bonding company "as soon as possible," the notice will meet the requirements if given after due diligence under the circumstances of the case and without unnecessary and unreasonable delay of which the jury are ordinarily to be the judges. To give the notice a literal interpretation would in most cases strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud. Routt v. Dils, 90 Pac. 67, 69, 40 Colo. 50.

"The phrases 'immediate notice,' 'notice forthwith,' 'as soon as possible,' 'as soon as practicable,' used in policies of guaranty insurance providing that notice of loss shall be given to the insurer by the insured within a certain designated time, have practically the same meaning, to wit, that the insurer shall, with all promptitude considering the probable amount of the loss, and the probability of the 'risks' endeavoring to escape, give notice to the insurer of the occurrence of the loss." Fidelity & Guaranty Co. of New York v. Western Bank (Ky.) 94 S. W. 3, 5 (quoting and adopting the definition in Frost, Guaranty Ins. § 104).

Order for cars

Under Rev. St. 1895, arts. 4498, 4499, imposing a penalty on a carrier for failure to furnish cars on application, and requiring the application to state the time when they are desired, an application for a car "as soon as possible" was not sufficient to bring the applicant within the statute, since such words specified no time whatever. Texas & P. Ry. Co. v. Hughes, 91 S. W. 567, 568, 99 Tex. 533, 70 L. R. A. 946, 122 Am. St. Rep. 603.

The phrase "as soon as possible" specifies no time whatever. Where, in an action to recover a penalty, under the statute, for the failure of a railroad company to furnish cars to plaintiff on demand and for damages for the delay, it appeared that the order requested that the cars be delivered "as soon as possible," plaintiff was not entitled to recover the penalty or to recover damages based only on the failure of the company to furnish the cars on such order within the time specified by the statute. Texas & P. Ry. Co. v. Shipman (Tex.) 98 S. W. 449.

Promise to pay

A promise to pay "as soon as possible," made after a discharge in bankruptcy, is not a conditional promise, and as such insufficient to support an action on the original demand. Sundling v. Willey, 103 N. W. 38, 40, 19 S. D. 293, 9 Ann. Cas. 644.

AS SOON AS PRACTICABLE

"It is well settled that 'immediately' means 'as soon as practicable,' and, conversely, it is proper to construe 'as soon as practicable' to mean 'immediately.'" The statute relating to a meeting of the state board of equalization and assessment of railroad property provides a day on which the railroad companies shall make returns. It provides a place where the meeting of the state board shall be held, and provides expressly that such meeting shall take place as soon as practicable after the returns are filed. The statute must be construed to furnish notice of the time and place of the meeting of the state board, and where the statute names the time and place personal notice is not necessary. Chicago, B. & Q. R. R. v. Richardson County, 100 N. W. 950, 952, 72 Neb. 482.

An imperative power in executors to sell the residue of the estate "as soon as practicable * * * having in mind the interest of all concerned," does not warrant its compulsory exercise though three years have elapsed, though the land could be sold "without difficulty," and though the executors have refused to sell to beneficiaries at the "fair and reasonable value" of the property; the will permitting purchase at the market value at testator's death as valued by the executors. Walbridge v. Brooklyn Trust Co., 128 N. Y. Supp. 686, 689, 143 App. Div. 502.

"The phrases 'immediate notice,' 'notice forthwith,' 'as soon as possible,' 'as soon as practicable,' used in policies of guaranty insurance providing that notice of loss shall be given to the insurer by the insured within a certain designated time, have practically the same meaning, to wit, that the insurer shall, with all promptitude considering the probable amount of the loss, and the probability of the 'risks' endeavoring to escape, give notice to the insurer of the occurrence of

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the loss." Fidelity & Guaranty Co. of New York v. Western Bank (Ky.) 94 S. W. 3, 5 (quoting and adopting the definition in Frost, Guaranty Ins. § 104).

AS STIPULATED FOR

An instruction as to inspection, to be made before a trade, limiting the right to ascertaining whether goods were such "as stipulated for," meant substantially the same as "as represented" used in the contract, and was not erroneous. Beck v. Budd, 88 N. E. 785, 786, 44 Ind. App. 145.

AS SUCH

Crimes Act 1905, § 392, denounces as embezzlement the purloining, secreting, etc., of money deposited with or held by a person, firm, corporation, or association, by its officer, agent, or employé, who has access to or possession of the money converted. An affidavit purporting to present a charge of embezzlement alleged that a certain person was treasurer of an Odd Fellows Lodge, "and as such treasurer * * * had control and possession" of a sum of money, "the property of the said * * * order of Odd Fellows," and while such treasurer and so possessed of the money converted it. Held that, although the affidavit does not allege that the money was in possession of such defendant "by virtue of his employment," a "treasurer" is one who is intrusted with money, and "as such" means "in that particular character," so that the allegation that the defendant was a treasurer, and as such had control of the funds which he converted, means that the character of his possession was in his trust relationship, and renders the affidavit sufficient to charge the offense denounced. Frost v. State (Ind.) 99 N. E. 419, 421.

An affidavit, founded on Acts 1905, p. 671, c. 169, § 392, providing that every employé, who, having access to, control, or possession of any money, to the possession of which his employer is entitled, shall, while in such employment, appropriate the same to his own use, shall be guilty of embezzlement, which avers that accused was the employé of a designated association, and "as such employé" had possession of money of the association, which he appropriated to his own use, is fatally bad for failing to aver that he obtained possession of the money by virtue of his employment. Wright v. State, 81 N. E. 660, 168 Ind. 643.

AS THE CASE MAY BE

The statute (Rev. St. 1895, art. 3996) which governs in elections for independent school districts declares, as above shown, that the order for the election shall "state the amount of the tax to be levied or the amount of the bonds to be issued, as the case may be." This does not mean the amount of the tax "or" the amount of the bonds, when the election is to determine, as in this case, whether or not both the bonds shall be issued and the tax levied. The words "as the case may be" mean that, if the purpose is to levy the tax alone, then the amount of the tax shall be stated; if the issuance of the bonds alone, then the amount of the bond; but if the purpose is to determine both, then both the amount of the tax and the amount of the bonds shall be stated in the order. Parks v. West (Tex.) 108 S. W. 466, 471.

AS THE DIRECT AND PROXIMATE CAUSE

The use of the words "by reason of" instead of "as the direct and proximate cause of," was not misleading to the jury, as the words first quoted were the equivalent of the last and perhaps would have been more easily understood by the average jury. Houston & T. C. R. Co. v. Anglin, 99 S. W. 897, 898, 45 Tex. Civ. App. 41.

AS THEIR INTEREST MAY APPEAR

See As Interest May Appear.

AS THEIR NECESSITIES MIGHT REQUIRE

A will created a trust of $5,000 of the residue of testatrix's estate for five grandchildren, share and share alike, directing the trustee to pay such portion of the principal or interest for the maintenance and education of such children as he in his judgment and discretion might think necessary for them from time to time "as their necessities might require." Held, that the words quoted limited the trustee's discretion to the payment of such items as the wards should need, the intent being that each should receive $1,000 diminished by whatever was necessary for his maintenance and education, and that the trustee therefore did not have discretion to expend for the wards such portion of the total fund as he might deem necessary irrespective of the purpose of the expenditure. Elias v. Loeb, 65 S. E. 724, 725, 83 S. C. 518.

AS THEY SHALL DEEM BEST

See Deem Best.

AS TO

Under Rev. St. 1895, art. 2302, providing that neither party shall be allowed to testify against the other as to any transaction with, or statement by, testator, intestate, or ward, in an action to recover plaintiff's interest in the community property of their mother, her alleged husband was incompetent to testify that he had never been married to decedent. The phrase "as to" means "so far as it concerns," "as regards," "as respects," "in regard to," "in respect to." Edelstein v. Brown, 100 S. W. 129, 100 Tex. 403, 123 Am. St. Rep. 816.

AS UPON THE TRIAL

Code Civ. Proc. § 2444, providing that on an examination in supplementary proceedings either party may be summoned as a wit-

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ness in his own behalf, and may produce and examine other witnesses "as on the trial of an action," relates to the manner in which the examination shall be had after the witness has been properly summoned, and not to the manner of summoning the witness to appear by subpœna. Lowther v. Lowther, 100 N. Y. Supp. 965, 967, 115 App. Div. 307.

ASCERTAIN—ASCERTAINMENT

To "ascertain" a matter is to make a thing certain to the mind; to free from obscurity, doubt, or change; to make sure of, to fix, to determine. Wicecarver v. Mercantile Town Mut. Ins. Co., 117 S. W. 698, 702, 137 Mo. App. 247.

Since according to Webster's Dictionary to "ascertain" means "to find out," a reference to a commissioner to "ascertain" in what property, real and personal two persons "were jointly interested," did not amount to a final adjudication as to the existence or nonexistence of joint property, but was a mere direction to the commissioner to ascertain and find out whether there was such property and to report the findings to the court. Coons v. Coons, 56 S. E. 576, 578, 106 Va. 572.

The word "ascertain" is defined as "to make certain to the mind; to free from obscurity, doubt, or chance; to make sure of; fix; to determine;" and also as "to make certain; determine; establish; to establish with certainty; to fix." Under Illinois Central Railroad Charter (Priv. Laws 1851, p. 71) § 18, requiring the company to file accounts of gross receipts to the state, and declaring that, for the purpose of verifying and ascertaining the accuracy of such accounts, full power is vested in the Governor to examine the corporate books and papers and the officers, agents, and employés of the company, under oath, etc., the Governor was not only authorized to fix and determine whether the accounts were correct, but to correct them, if found erroneous, and finally to adjust and settle them. State v. Illinois Cent. R. Co., 92 N. E. 814, 832, 246 Ill. 188 (citing Webster's Dict. and Cent. Dict.).

In Code Civ. Proc. § 2472a, as added by Laws 1910, c. 576, providing that the Surrogate's Court has jurisdiction, on a judicial accounting or proceeding for the payment of a legacy, to ascertain the title to any legacy or distributive share, to set off a debt against the same, and for that purpose to ascertain whether the debt exists, the word "ascertain" is used as equivalent to "hear, try, and determine," though in its commonly accepted signification it means simply to become apprised of the existence of an undisputed fact. In re Cary's Estate, 138 N. Y. Supp. 682, 685, 77 Misc. Rep. 602.

A contract of employment which specified a definite salary ascertained the amount payable, within Sayles' Ann. St. 1897, art. 3101, providing that interest shall be allowed at 6 per cent. per annum on written contracts "ascertaining the sum payable," when no rate is specified, and the interest due under the employment contract does not enter into the "amount in controversy," as constituting damages, as affecting the jurisdiction of the county court of a suit on the contract. Carter Grocer Co. v. Day (Tex.) 144 S. W. 365, 366.

Determine equivalent

See Determine.

ASCERTAINED BY LAW

See Previously Ascertained by Law.

ASCERTAINED MEMBERSHIP

See Certain Ascertained Membership.

ASCERTAINMENT

As used in a petition in an action on an insurance policy averring that under the policy the amount of the loss shall be due and payable 60 days after the "ascertainment" thereof, it signifies that the loss was payable 60 days after its character, amount, and extent had been ascertained by the plaintiff; that is, after plaintiff had determined the character, amount, and extent of the loss. Wicecarver v. Mercantile Town Mut. Ins. Co., 117 S. W. 698, 702, 137 Mo. App. 247.

Code 1896, § 2069, provides that, if an estate is not insolvent, the widow takes only a life estate in the homestead set apart; but, if the estate is ascertained to be insolvent, the absolute fee vests in her. A bill to set aside a judicial sale of land, deeded to complainant by his deceased wife, alleged that no administration was had on the estate of the former husband of the wife, but that after complainant's marriage to her she had the land in controversy set off from her former husband's estate as a homestead by commissioners appointed by the probate court, whose report showed that the estate was insolvent. There was no averment that the lands set apart as the homestead constituted all the real property owned in the state by the deceased husband, or that the homestead was at the time less in value than the amount exempted by law. Held, that the "ascertainment" necessary was a judicial ascertainment, so that the bill did not show the insolvency contemplated by section 2069, and hence did not show that the wife had a fee in the land under that section, but at most only a life estate, which left complainant with no interest in the land after her death. Carroll v. Draughon, 45 South. 919, 922, 154 Ala. 430.

ASIDE

See Stepping Aside.

ASPHALT

As lawful merchandise, see Lawful Merchandise.

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ASPHALT ROADWAY

See Modern Asphalt Roadway.

ASPHALTIC CEMENT

Where an ordinance provided for the use of asphaltic cement in the improvement of a street, parol evidence was admissible to show that the term "asphaltic cement" had a well-defined meaning among contractors and to explain its meaning. Chicago Union Traction Co. v. City of Chicago, 79 N. E. 67, 223 Ill. 37.

ASPORTATION

As element of larceny, see Larceny.

Where defendant by trespass obtains complete possession and control of property belonging to another with the felonious intent to deprive the owner thereof, and carries it or removes it in the slightest degree from the place where he found it, the "asportation" is complete, and the crime of larceny has been committed. State v. Rozeboom, 124 N. W. 783, 786, 145 Iowa, 620, 29 L. R. A. (N. S.) 37.

ASSAIL

Impeach equivalent, see Impeach—Impeachment.

ASSAILANT

An "assailant" is one who assails or assaults; the aggressor. Gregory v. State, 42 South. 829, 832, 148 Ala. 566 (quoting Scales v. State, 11 South. 121, 96 Ala. 75).

ASSAULT

See Aggravated Assault; Criminal Assault; Did an Assault; Felonious Assault; Indecent Assault; Simple Assault; Son Assault.

"An 'assault' is defined to be an attempt to commit violent injury upon the person of another." Harris v. State, 58 S. E. 680, 681, 2 Ga. App. 487; Id., 60 S. E. 127, 3 Ga. App. 457.

An "assault" is an intentional attempt by force to do violence to the person of another. Stark v. Epler, 117 Pac. 276, 278, 59 Or. 262.

An assault is an attempt with force and violence to do injury to the person of another. State v. Pepe (Del.) 76 Atl. 367, 369, 1 Boyce, 282.

An "assault" is any unlawful attempt by force or violence to do injury to the person of another. State v. Truitt, 62 Atl. 790, 791, 5 Pennewill (Del.) 466.

Under Snyder's Comp. Laws 1909, § 2332, an assault is defined as any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another. Clark v. State (Okl.) 106 Pac. 803, 804.

An assault is an intentional infringement on the absolute right of personal security. William Small & Co. v. Lonergan, 105 Pac. 27, 29, 81 Kan. 48, 25 L. R. A. (N. S.) 976.

In law the term "assault" is a willful attempt to do bodily harm to another and involves a wrongful purpose. In its mere lexiconic sense it means the doing of violence by one to another which may or may not include the element essential to criminality. Holmes v. State, 102 N. W. 321, 323, 124 Wis. 133.

The offense of "assault with intent to murder" is an "assault," which is an attempt with force and violence to do injury to the person of another, inspired or accompanied by an intent to murder. State v. De Paolo (Del.) 84 Atl. 213, 214.

The term "assault" implies an attempt or offer by force or violence to do injury to another. It has been defined as an unlawful setting upon one's person, and assault with intent to commit an offense is sometimes spoken of as an attempt to commit such an offense. State v. Custer, 116 Pac. 507, 85 Kan. 445 (citing 1 Words and Phrases, p. 532).

An "assault" is defined to be any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another. To charge this offense, the averments must show that some force or violence was attempted or offered by the accused, and that it was with the purpose to do a corporal hurt or injury to another. Baysinger v. Territory, 82 Pac. 728, 729, 15 Okl. 386.

An "assault" implies repulsion, or at least want of consent on the part of the one assaulted. People v. Dong Pok Yip, 127 Pac. 1031, 1032, 164 Cal. 143.

Where an intoxicated passenger, on being requested by a brakeman to deliver up a pistol which he was brandishing, gave it to his wife, who placed it under her, whereupon the brakeman reached under her for it, it did not constitute an "assault" upon her. Friar v. Orange & N. W. Ry. Co., 101 S. W. 274, 276, 45 Tex. Civ. App. 564.

An "assault" is an attempt, with unlawful force, to inflict bodily injuries on another, accompanied with the apparent present ability to effectuate the attempt if not prevented, the apprehension created in the mind of the assaulted person being more important in determining whether there was an assault than the undisclosed intention of the assaulter; and an instruction that an assault is an action or conduct on the part of defendant, and, for instance, if the jury believe plaintiff's testimony that defendant shook his fist in front of her face angrily and unlawfully, when he was in such proximity to her, as that he could, or might have, struck her, also near enough to produce a feeling on her part that she might be struck, that would

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be an assault, substantially defined an assault. Howell v. Winters, 108 Pac. 1077, 1078, 58 Wash. 436.

Where the court charged that an assault was an unlawful physical force, partially or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being, the refusal of a portion of an instruction that any demonstration with a deadly weapon which puts another in fear is an assault, as well as any act done which constitutes menace and the beginning of violence toward another, was not error. Ball v. United States, 147 Fed. 32, 41, 78 C. C. A. 126.

That a police officer came between complainant and another officer who was assaulting him, whether for the purpose of separating them or not, did not constitute an "assault" on complainant. People ex rel. Clinton v. Bingham, 107 N. Y. Supp. 1055, 1057, 123 App. Div. 286.

After a person on private premises has raised a disturbance and been requested to leave, he may be lawfully ejected from such place and no assault is committed if no unnecessary force is employed in such ejectment. Hayes v. People, 146 Ill. App. 596, 599.

Battery distinguished

An "assault" is simply an attempt to hurt with the power to hurt, as distinguished from battery, which is where the hurt is done pursuant to the assault. Montgomery v. State, 37 South. 835, 836, 85 Miss. 330.

An assault is an attempt or offer, coupled with present ability, to do hurt to the person of another; while a battery includes an assault, and is the actual striking or shooting of another. State v. Handy (Del.) 66 Atl. 336.

An "assault" is an unlawful attempt, with violence, to do injury to the person of another; and a "battery" is the actual accomplishment of such attempt. State v. Brittingham (Del.) 80 Atl. 242, 243.

By the common law an "assault" must be accompanied by physical force creating a reasonable apprehension of immediate physical injury to a human being, and a "battery" was not committed unless the act alleged to constitute it was committed against the will of the injured party. Ross v. State, 93 Pac. 299, 301, 16 Wyo. 285 (citing 2 Bish. New Crim. Law, §§ 23, 28, 70).

The words "assault" and "battery" each have a clear popular significance as well as statutory definition; an "assault," as defined by statute, being an attempt to commit a violent injury on the person of another, and a "battery" being an unlawful beating of another. So that the charge of an offense of assault and battery necessarily charges accused both with an attempt to commit violent injury on the person and with an unlawful beating of another. Badger v. State, 63 S. E. 532, 533, 5 Ga. App. 477.

Intent

Though defendant was not as considerate and gentle in assisting a person who had become helpless as one more humane or tender might have been, this will not authorize a conviction of "assault" in the absence of evidence of intent to injure. Jordan v. State (Tex.) 84 S. W. 823.

"An 'assault' is an intentional attempt by violence to do an injury to another. If there is no such intention—no present purpose to do such injury—then there is no assault. The intention to do harm is of the essence of an assault, and this intent is to be collected by the jury from the circumstances of the case. In the case of a mere assault, the quo animo is material, as without an unlawful intention there is no assault. St. 1898, § 4222, subd. 5, provides that no action for damages for a personal injury shall be maintained unless within one year after the event causing such damages notice in writing shall be served on the person by whom the damage was caused, stating the time and place of damage, description of the injuries, manner in which they were received, the ground on which the claim is made, and that satisfaction is claimed of such person; and the amendment of 1899 (Laws 1899, p. 540, c. 307) provides that, when an action is brought and a complaint actually served within one year, the notice need not be served. Held, that an action to recover for injuries sustained by being accidentally struck with a beer glass is governed by section 4222, sud. 5, and not by section 4224, subd. 2, providing a limitation of two years for actions for libel, slander, assault, battery, or false imprisonment, and will be barred where such notice of claim was not served nor action begun within one year. Donner v. Graap, 115 N. W. 125, 127, 134 Wis. 523 (quoting and adopting definition in Degenhardt v. Heller, 68 N. W. 411, 93 Wis. 662, 57 Am. St. Rep. 945).

As misdemeanor

See Misdemeanor.

Present ability to commit

By Pen. Code, § 240, an "assault" is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another. People v. Wells, 78 Pac. 470, 471, 145 Cal. 138.

An assault is an unlawful attempt, by violence, to do injury to the person of another; the person making the attempt having the present ability to commit the injury. State v. Wilson (Del.) 62 Atl. 227, 230, 5 Pennewill, 77; State v. Truitt (Del.) 62 Atl. 790, 791, 5 Pennewill, 466; State v. Honey (Del.) 80 Atl. 240.

Under the provisions of section 6727, Rev. Codes, an "assault" consists, not only in

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an unlawful attempt to commit a violent injury upon the person of another, but such unlawful attempt to commit a violent injury must be coupled with the present ability to commit such injury. State v. Yturaspe, 125 Pac. 802, 809, 22 Idaho, 360.

A charge to convict if accused feloniously, willfully, and with malice aforethought, with a deadly weapon, to wit, an ax, did strike at prosecuting witness with intent to murder and kill him, was erroneous, since the acts recited would not be an assault unless, when accused struck at or made an effort to strike prosecuting witness, he was in striking distance; Kirby's Dig. § 1583, defining an assault as an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another. Jones v. State, 116 S. W. 230, 231, 89 Ark. 213.

An "assault" is an inchoate violence to the person of another with present means of carrying the intent into effect. Luther v. State, 98 N. E. 640, 641, 177 Ind. 619.

An actionable "assault" is a wrongful threat to do bodily violence to another, with present ability of the one who threatens to carry such threat into effect. Cressy v. Republic Creosoting Co., 122 N. W. 484, 108 Minn. 349 (citing 1 Words and Phrases, p. 532).

An assault is an attempt to do violence to the person of another, with the means at hand of carrying the intention into execution. State v. Dyer, 58 Atl. 947, 948, 5 Pennewill (Del.) 88.

"It is not always necessary, to constitute an assault, that the person whose conduct is in question should have the present capacity to inflict injury; for if, by threats or a menace of violence, which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose, he commits an assault. It is the apparent imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from assault." A mere threat or violence menaced, accompanied by insulting or abusive words, as distinguished from violence begun to be executed, is insufficient to constitute an assault. State v. Daniel, 48 S. E. 544, 545, 136 N. C. 571, 103 Am. St. Rep. 970.

Putting in fear of violence

Mere words of solicitation or persuasion do not constitute an "assault." State v. Sullivan, 84 S. W. 105, 109, 110 Mo. App. 75.

At common law "an 'assault' is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being; as raising a cane to strike him, pointing in a threatening manner a loaded gun at him, or the like." Anderson v. State, 90 S. W. 846, 77 Ark. 37 (quoting and adopting definition in 2 Bish. New Crim. Law, § 23).

A conditional threat of injury, accompanied by an act calculated to put the person assailed in fear, and with present ability to inflict the threatened injury, is sufficient to constitute an assault. State v. Mitchell, 116 N. W. 808, 811, 139 Iowa, 455.

To constitute an assault, defined by Rev. Pen. Code, § 310, as any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another the attempt or offer to do a corporal hurt to another must be without the consent of the latter, and under such circumstances as to cause a well-founded apprehension of immediate peril. State v. Archer, 115 N. W. 1075, 1076, 22 S. D. 137.

"An 'assault' is an intentional offer or attempt by violence to do an injury to the person of another. There must be an offer or attempt. Mere words, however insulting or abusive, will not constitute an assault; nor will a mere threat or violence menaced, as distinguished from violence begun to be executed. * * * If therefore the defendant had threatened the prosecutor with violence, and the threat had been accompanied by any show of force, such as drawing a sword or knife, or if he had advanced towards the prosecutor in a menacing attitude, even without any weapon, and had been stopped before he delivered the blow, and the prosecutor had been put in fear, and compelled to leave the place where he had the lawful right to be, the 'assault' would have been complete, although he was not at that time in striking distance." State v. Garland, 50 S. E. 853, 855, 138 N. C. 675 (quoting and adopting definition in State v. Daniel, 48 S. E. 544, 136 N. C. 571, 103 Am. St. Rep. 970).

An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote a present intention to do it, coupled with a present ability to effectuate such intention; any unlawful physical force partly or fully put in motion creating a reasonable apprehension of immediate injury to a human being. An assault may be committed without actually touching the person of the one assaulted. People v. Carlson, 125 N. W. 361, 160 Mich. 426, 136 Am. St. Rep. 447.

An "assault" consists of an offer to do great bodily harm, made by a person who is in a position to inflict it; an essential element being a reasonable apprehension of imminent physical injury, so that any movement, however threatening, which does not produce fear of physical harm, is not an assault. Henry v. Cherry & Webb, 73 Atl. 97, 109, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 18 Ann. Cas. 1006 (citing State v. Hunt, 54 Atl.

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937, 25 R. I. 75; Tuberville v. Savage, 1 Mod. 3; 1 Ames, Cas. Torts, 2).

In an action against a sleeping car company for injuries to a passenger assaulted and robbed while asleep in her berth, a charge that the law does not allow a recovery of damages for mental suffering, in the absence of bodily injury, that the passenger could recover such damages as she actually sustained by reason of the assault, that it was not necessary to touch a person to constitute an assault, which was an attempt to apply even the least actual force causing apprehension of immediate peril, and that the amount of damages for mental suffering depended on the circumstances, was not objectionable as making a well-founded apprehension of immediate peril elements of damage, irrespective of whether they were caused by physical injury, or the result of "assault," as technically defined. Calder v. Southern Ry. Co., 71 S. E. 841, 846, 89 S. C. 287, Ann. Cas. 1913A, 894.

An "assault" is an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with an attempt to carry such attempt into execution. While it is true that under this definition of an assault, as under the common-law definition of that offense, there must be some physical effort to carry into execution the violence menaced before it can be said an assault has been committed, it is also true that the question does not depend upon the degree of effort put forth, nor upon how far the defendant had gone towards the accomplishment of his purpose. The line between violence menaced and violence actually begun may be a narrow one, yet when it is apparent that the defendant's acts, if not stopped or diverted, will lead to the corporal hurt of another, the execution of the purpose has begun and there is a sufficient attempt to satisfy the definition. Consequently, one making threats of violence, advancing towards the person threatened and proceeding to draw a revolver, and ceasing only from the expressed purpose of killing the person threatened when interfered with by third persons, is guilty of "assault." State v. McFadden, 84 Pac. 401, 42 Wash. 1.

Unlawful arrest

Arrest of a person accused of an offense by police officers, after he had been admitted to bail, and the taking of his photograph and measurements by the Bertillon system, constituted an assault, for which those participating therein might be prosecuted under Pen. Code, § 219, defining such offense. People ex rel. Gow v. Bingham, 107 N. Y. Supp. 1011, 1018, 57 Misc. Rep. 66.

Use of dangerous weapon

The pointing of a loaded gun at another by accused in range and shooting distance would constitute an "assault" if nothing more followed; but clearly the pointing of a loaded gun with threatening attitude at one a few feet away by an intruder in one's home, who persistently refuses to leave when requested to by the occupant, is more than a simple assault. O'Neal v. Commonwealth (Ky.) 85 S. W. 745, 746.

"The pointing of a loaded revolver at another, if within range, is an assault; and the same is true if it is not loaded, if the person aimed at is not aware of the fact." Where one points a loaded pistol at another, although he has some reason to think it is not loaded, and he pulls the trigger, causing the pistol to be discharged, and the person assaulted is killed thereby, he is guilty of manslaughter. Ford v. State, 98 N. W. 807, 808, 71 Neb. 246, 115 Am. St. Rep. 591.

2 Ballinger's Ann. Codes & St. § 7055 (Pierce's Code, § 1572), defines assault as an attempt in a rude, insolent, and angry manner to touch, strike, beat, or wound another, coupled with the present ability to carry such threat into execution; and Const. art. 1, § 22, provides that in criminal prosecutions accused may demand the nature and cause of the accusation against him. Held, that a complaint charging that defendant on a certain day did commit the crime of assault with a deadly weapon, with intent, etc., and did assault S. with a shotgun, thereby showing a willful and abandoned heart, contrary, etc., did not sufficiently charge a simple assault; the term "to assault" being a conclusion of the pleader, and not an averment of a material fact. State v. Heath, 106 Pac. 756, 757, 57 Wash. 246.

Self-defense

In a prosecution for simple "assault," where defendant's evidence was that he was unlawfully assaulted by a person of greater strength, who had him around the neck and was likely to produce great bodily injury, and there was nothing to show that defendant used extreme means or violence, it was error to charge that one is guilty of an "assault" if, in necessary self-defense, he resorts to extreme means or uses excessive violence. Harmon v. State (Tex.) 84 S. W. 831.

ASSAULT IN THE FIRST DEGREE

Pen. Code, § 217, provides that "assault in the first degree" is an assault with intent to effect death. People v. Huson, 79 N. E. 835, 187 N. Y. 97.

ASSAULT IN THE SECOND DEGREE

Laws 1909, c. 249, § 162, defines an "assault in the second degree" as an assault with an intent to commit a felony. State v. Kruger, 111 Pac. 769, 770, 60 Wash. 542.

ASSAULT IN THE THIRD DEGREE

"Assault in the third degree" is the offense formerly known as "assault and battery." Ex parte Bartholomew, 94 N. Y. Supp. 512, 514, 106 App. Div. 371 (citing Pen. Code N. Y. § 219).

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Laws 1909, c. 249, § 163, defines an "assault in the third degree" as an assault not amounting to one in the first or second degree. State v. Kruger, 111 Pac. 769, 770, 60 Wash. 542.

ASSAULT AND BATTERY

See, also, Battery.

Any touching by one person of the person or clothes of another in rudeness or in anger is an assault and battery. Hyde v. Cain, 47 South. 1014, 159 Ala. 364; Seigel v. Long, 53 South. 753, 754, 169 Ala. 79, 33 L. R. A. (N. S.) 1070.

Any application of unlawful force to another is an assault and battery. Luttermann v. Romey, 121 N. W. 1040, 1041, 143 Iowa, 233.

Merely laying one's hand upon another's person does not constitute assault and battery; it being essential that the act be accompanied by anger or other circumstances evincing hostility. Courtney v. Kneib, 110 S. W. 665, 667, 131 Mo. App. 204.

The unlawful striking of one with a hard substance is an "assault and battery." Miles v. United States, 103 S. W. 598, 599, 7 Ind. T. 11.

An instruction that a battery is any unlawful or willful use of force or violence on the person of another is incorrect, as the force or violence must be both willful and unlawful. State v. Magill, 122 N. W. 330, 331, 19 N. D. 131, 22 L. R. A. (N. S.) 666.

Assault is included in the specific offense of assault and battery, and judgment may follow for the minor offense, though the verdict finds the defendant guilty of assault and battery; for the word "battery" may be rejected as surplusage State v. Henry, 57 Atl. 891, 893, 98 Me. 561.

In a trial for assault with intent to murder another, the evidence tended to show that accused shot such person intentionally, or that he intentionally discharged the rifle at a place where it was likely some one would be hurt, or that he intentionally pointed the rifle at such person, in violation of Code 1896, § 4342, or that the discharge of the rifle resulted from his gross negligence in handling it, or that he discharged it along or across a public road, in violation of section 5354. Held that, if the battery resulted from any one or several of such acts, accused was guilty of "assault and battery with a weapon." Medley v. State, 47 South. 218, 220, 156 Ala. 78.

An essential element of assault and battery, defined by Kirby's Dig. § 1584, as the unlawful striking or beating of the person of another, is a battery, and the material fact of the battery must be alleged in the indictment. Jones v. State, 139 S. W. 1126, 1128, 100 Ark. 195.

"Battery" is defined by Pen. Code 1895, § 102, as the unlawful beating of another. A charge of "assault and battery" is a charge of an attempt to commit a violent injury on the person of another, and an unlawful beating of another, and every assault and battery is presumed to be unlawful. An accusation of the offense of assault and battery, charging after the formal statutory beginning that on a day named accused "with force and arms did assault and beat" a person named contrary to the law, good order, peace, and dignity of said state, charges an assault and battery, though the word unlawful is not used. Badger v. State, 63 S. E. 532, 533, 5 Ga. App. 477.

Intent

Generally, the intent to injure is an essential element of the offense of assault and battery; an "assault" being an attempt or offer with force and violence to do a corporal hurt to another, and the touching of another in an angry, revengeful, rude, or insulting manner being a "battery." McGee v. State, 58 South. 1008, 1009, 4 Ala. App. 54.

As infamous crime

See Infamous Crime.

Included in rape

See Rape.

ASSAULT ON A WOMAN

It is an "assault on a woman" to fondle or to lay hands on her without her consent. Combs v. State, 116 S. W. 595, 596, 55 Tex. Cr. R. 332.

ASSAULT TO COMMIT OTHER OFFENSE

"An assault to commit another offense," within Pen. Code 1895, art. 611, providing that an assault to commit any other offense is constituted by facts which bring it within the definition of an assault coupled with intent to commit such other offense, is an assault that is intended to be or is in its nature the procuring or instrumental means of accomplishing or carrying out the completed act. Cromeans v. State (Tex.) 129 S. W. 1129, 1131.

ASSAULT WITH DANGEROUS OR DEADLY WEAPON

To constitute an "assault with a dangerous weapon," the only specific intent necessary is the intent embraced in the act of making an assault with a dangerous weapon, which is merely an intentional and unlawful use of a dangerous weapon by means of which an assault is committed with such weapon. State v. Erickson, 110 Pac. 785, 786, 57 Or. 262.

Holding a loaded pistol within a few inches of another's face, pointed directly at him, where the act is accompanied by threatening language, warrants a conviction of an "assault with a deadly weapon," although defendant's intention was to assault a differ-

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ent person. People v. Wells, 78 Pac. 470, 471, 145 Cal. 138.

The pointing of an unloaded gun at another, accompanied by a threat to shoot him, without any attempt to use it otherwise, does not constitute an "assault with a deadly weapon." People v. Montgomery, 114 Pac. 792, 793, 15 Cal. App. 315.

A verdict of assault and battery may be based upon evidence showing personal violence under circumstances in aggravation or mitigation of the offense, relevant to the penalty, which need not be averred. One was indicted for felonious assault with intent to kill, being armed with a dangerous weapon. The jury rendered a verdict of guilty of "assault and battery with a dangerous weapon." The words in the verdict meant no more than assault and battery. State v. Henry, 57 Atl. 891, 893, 98 Me. 561.

On an indictment for feloniously, maliciously, and unlawfully beating and wounding with a dangerous weapon called a club, with intent to maim, disable, and kill, the jury returned a verdict finding that defendant is "not guilty of the felonious and malicious assault charged in the within indictment with the intent therein charged, but we do find him guilty of the unlawful assault therein charged with the intent therein also charged." Held, that the word "assault" in the verdict refers to the beating and wounding charged, and does not mean the common-law offense of assault. State v. Arbruzino, 68 S. E. 269, 270, 67 W. Va. 534.

In a prosecution for assault, where the weapon used was not a deadly one in itself, the question whether the assault was one with a deadly weapon depends on its use; and an assault with an ordinary saw was not an "assault with a deadly weapon," where the injuries inflicted were very slight. Fisher v. State (Tex.) 151 S. W. 544, 545.

ASSAULT WITH INTENT TO COMMIT FELONY

Under Rev. Pen. Code, §§ 297, 298, 310, defining an "assault" as any willful and unlawful attempt, with force or violence, to do a corporal hurt to another, and providing that an "aggravated assault" must be perpetrated with the intent to commit a felony, an information that accused feloniously assaulted a married woman with intent to have unlawful voluntary sexual intercourse with her, does not charge an assault with intent to commit a felony, since, if the unlawful act had been committed, both parties would have been guilty of adultery, under section 338, which requires the concurrence of consenting parties. State v. Archer, 115 N. W. 1075, 1076, 22 S. D. 137.

ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER

To constitute an assault with intent to commit manslaughter the assault must be made with intent to commit manslaughter on the person of the assaulted person, and, if such intent was directed against a third person not named in the indictment, the conviction of assault with intent to commit manslaughter will be set aside. Johnson v. State, 43 South. 779, 780, 53 Fla. 45 (citing Williams v. State, 26 South. 184, 41 Fla. 295, 302).

If an assault be committed unlawfully and with intent to take life, but not from a premeditated design, and not from any act imminently dangerous to another, and evincing a depraved mind regardless of human life, it would be an assault with intent to commit manslaughter. Feagle v. State, 46 South. 182, 183, 55 Fla. 13.

ASSAULT WITH INTENT TO COMMIT MURDER

In order to constitute an assault to murder, it must be made with the specific intent to kill, as well as upon malice aforethought. Williams v. State (Tex.) 77 S. W. 447.

The offense of "assault with intent to murder" is an "assault," which is an attempt with force and violence to do injury to the person of another, inspired or accompanied by an intent to murder. State v. De Paolo (Del.) 84 Atl. 213, 214.

To constitute the offense of assault with intent to murder, there must be an assault with a specific intent to kill actuated by malice; but many cases may arise where there is a specific intent to kill, and yet where the assault would not be an assault with intent to kill where no killing resulted. Young v. State (Tex.) 151 S. W. 1046, 1047.

The gist of the offense of the crime of "assault with intent to commit murder" in the first degree consists in the intent with which the alleged assault is made. Lindsey v. State, 43 South. 87, 89, 53 Fla. 56 (citing Williams v. State, 26 South. 184, 41 Fla. 295, text 297; Gray & Hopkins v. State, 33 South. 295, 44 Fla. 436; Drummer v. State, 33 South. 1008, 45 Fla. 17; McDonald v. State, 35 South. 72, 46 Fla. 149).

The offense of "assault with intent to murder" embraces an "assault," which is an attempt with force and violence to do injury to the person of another, and also embraces an intent to commit murder. State v. Moore (Del.) 74 Atl. 1112, 1114, 1 Boyce, 142; State v. Johnson (Del.) 78 Atl. 605.

The crime of "assault with intent to murder" embraces not only an assault, viz., an attempt with force and violence to do injury to the person of another, but in addition an intent to commit murder. State v. Lee (Del.) 74 Atl. 4, 5, 1 Boyce, 18.

To constitute an "assault with intent to murder," the assault must be such that, if successful, the crime would be murder. State v. McGuire, 80 Atl. 761, 765, 84 Conn.

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470, 38 L. R. A. (N. S.) 1045; State v. Mills (Del.) 69 Atl. 841, 842, 6 Pennewill, 497; Burris v. State, 58 S. E. 545, 2 Ga. App. 418.

The essentials of an "assault with intent to commit murder" are an assault which is an attempt with force to do injury to the person of another and also which must be committed with intent to murder, so that, if the injured party had died, his assailant would have been guilty of murder. State v. Stockley (Del.) 82 Atl. 1078, 1079.

An assault which, if it had been completed by the death of a victim, would have been murder in either the first or second degree, constitutes the crime of "assault with intent to commit murder." State v. Pepe (Del.) 76 Atl. 367, 369, 1 Boyce, 232.

Under the Code, defining assault with intent to murder, such offense includes all lesser degrees of personal violence, so that, under an indictment for that offense, the court, in submitting aggravated assault, may submit either ground that may be developed by the evidence directly growing out of the assault charged, including assault by an adult male on a female, though not specifically alleged in the indictment. Lofton v. State, 128 S. W. 384, 385, 59 Tex. Cr. R. 270.

An "assault," as included within the offense of assault with intent to murder, is an attempt by force and violence to do injury to another's person. State v. Hill (Del.) 82 Atl. 221, 222.

An assault accompanied with the specific intent to kill is an "assault with intent to murder" if malice is present, and the infliction of injury on the person assaulted is not necessary to a conviction. Olds v. State, 113 S. W. 272, 273, 54 Tex. Cr. R. 411.

Whoever unlawfully assaults another with intent to kill, but not from a premeditated design to effect his death, and the assault is accompanied by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, is guilty of an assault with intent to commit murder in the second degree. Feagle v. State, 46 South. 182, 183, 55 Fla. 13.

The offense of "assault with intent to murder" was held to be properly defined in an instruction as "an assault with a weapon likely to produce death, with intent unlawfully, willfully, feloniously, and by malice aforethought to kill and murder." Napper v. State, 51 S. E. 592, 593, 123 Ga. 571.

An "assault with intent to murder" is an assault with intent to commit a felony, and an indictment charging the commission of an assault with intent to commit the highest degree of unlawful homicide likewise includes the charge of an assault with intent to commit the same felony in all its degrees, as the degrees do not constitute separate and distinct offenses, but merely degrees of the same offense, or lesser offenses of the same nature, but necessarily included in the higher. Pyke v. State, 36 South. 577, 578, 47 Fla. 93.

The intent essential to constitute an "assault with intent to murder" relates to the condition of the mind of accused, and it may arise from improper motives, as from hatred toward the person assaulted, or from an evil design in general, a wanton and depraved spirit, a mind devoid of social duty and fatally bent on mischief. To constitute an "assault with intent to murder" within Gen. St. § 1146, the assault must be made with intent to kill, and when an assault is actuated by malice, no matter how short a time it existed previous to the forming of the intent to kill, the assault committed is assault with intent to murder. State v. McGuire, 80 Atl. 761, 765, 84 Conn. 470, 38 L. R. A. (N. S.) 1045.

To constitute an "assault with intent to murder" within Gen. St. § 1146, the assault must be made with malice aforethought, and when an assault is actuated by malice, no matter how short a time it existed previous to the forming of the intent to kill, the malice is "malice aforethought." State v. McGuire, 80 Atl. 761, 765, 84 Conn. 470, 38 L. R. A. (N. S.) 1045.

Evidence that defendant entered prosecutor's house at night, under circumstances showing burglary, and that prosecutor discovered him therein and attempted to make him get out, whereupon he assaulted prosecutor with a large knife, cutting him severely, is sufficient to sustain a conviction of "assault with intent to murder." Martinus v. State (Tex.) 84 S. W. 827.

To shoot at another is not necessarily an "assault with intent to murder." Cooper v. State, 132 S. W. 355, 356, 60 Tex. Cr. R. 411.

Shooting at an officer without killing him to prevent an illegal arrest is prima facie not an assault with intent to murder, but the crime of shooting at another defined by Pen. Code 1895, § 113, or assault and battery. Jenkins v. State, 59 S. E. 435, 436, 3 Ga. App. 146.

Where, if death had resulted from the assault of accused, the crime would have been manslaughter, and not murder, accused is not guilty of assault with intent to commit murder. State v. Johnson (Del.) 78 Atl. 605.

Defendant was not guilty of assault with intent to murder his wife if the assault was committed so that, if death had occurred, the homicide would have been manslaughter, or if he struck her in defense of his person to protect himself from death or serious bodily injury. Bagley v. State (Tex.) 103 S. W. 874, 875.

Under Rev. St. 1892, § 2403, and Gen. St. 1906, § 3230, providing that whoever commits an assault on another with intent to

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commit any felony punishable with death or imprisonment for life shall be punishable by imprisonment in the State Prison, not exceeding 20 years, it is not necessary to the crime of assault with intent to murder that assault be made with a deadly weapon. Lindsey v. State, 43 South. 87, 89, 53 Fla. 56.

Where two persons join in a fight with another who stabs one of them and runs away, and the two others pursue him, at a time when they are in no immediate danger, real or apparent, of loss of life or great bodily harm, and fall upon him, stabbing him until they are separated by bystanders, they are guilty of assault and battery with intent to kill and murder. Canterbury v. State, 43 South. 678, 679, 90 Miss. 279.

ASSAULT WITH INTENT TO COMMIT RAPE

See Attempt to Commit Rape.

"The word 'assault' as used in Pen. Code, § 220, providing that every person who assaults another with intent to commit rape, etc., implies force by the assailant and resistance by the one assaulted." People v. Collins, 91 Pac. 158, 159, 5 Cal. App. 654.

The gravamen of the offense of assault with intent to rape is the intent with which the assault was made, which intent must be shown to have so possessed accused that his determination was to consummate the rape, regardless of resistance and want of consent. Bell v. State, 54 South. 799, 61 Fla. 6.

"The crime of assault and battery is not an essential element of assault with intent to commit rape; for the latter offense may be committed without actual violence to or contact with the person assaulted, and upon trial for assault with intent to rape the accused can be convicted of assault and battery only where the indictment, in addition to the charge of assault, sets forth facts amounting to a battery." State v. Miller, 100 N. W. 334, 335, 124 Iowa, 429 (citing State v. Hutchinson, 64 N. W. 610, 95 Iowa, 566, 569).

"Assault" does not convey the idea that the act of sexual intercourse was against the will of the female. A man may put his arms around a woman or lay his hands on her unlawfully and against her will, intending to arouse her passions and to secure her consent to sexual intercourse. She may resist for a time and finally yield. In such case there would be no rape, though at any moment prior to the time of consent he would be guilty of an assault on her. Moreover, the term "assault," used in connection with rape, is a generic term used to describe what the prisoner did. Beard v. State, 97 S. W. 667, 671, 79 Ark. 293, 9 Ann. Cas. 409.

By Kirby's Dig. § 1583, "assault" is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another. Held, that where defendant, meeting a female child in a railroad station, kissed her and tried to pull her into an alley, but on her commencing to cry released her, there was no "assault with intent to rape." Anderson v. State, 90 S. W. 846, 847, 77 Ark. 37.

Pen. Code, § 240, defines assault to be an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another. Held that, where defendant, charged with assault with intent to commit rape, was shown to be sexually impotent, he might be convicted of assault on evidence that his acts were such as to create a well-founded fear on the part of prosecutrix that he intended to rape her. People v. Bradbury, 91 Pac. 497, 151 Cal. 675.

Under the statutes of Arizona, defining rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator * * * where she resists, but her resistance is overcome by force or by violence," an indictment in a prosecution for assault with intent to commit rape charging defendant with making an assault on prosecutrix with intent to commit rape upon her, and without her consent, by force, threats, and violence attempting to have sexual intercourse with her, was defective in failing to charge that the intent was to accomplish the act of sexual intercourse without prosecutrix's consent, and against her resistance, since it was not sufficient that defendant attempted sexual intercourse with the woman without gaining her consent, but he must have accompanied the attempt with the intention of pressing his threats or violence to the point of overcoming her active resistance. Daggs v. Territory, 94 Pac. 1106, 11 Ariz. 446.

Under Pen. Code 1911, art. 1063, defining "rape" as the carnal knowledge of a female person under the age of 15 years other than the wife of the person, with or without her consent, and article 1008, defining "assault" as any unlawful violence on the person of another with intent to injure him and that any attempt to commit a battery or any threatening gesture showing an immediate intention coupled with an ability to commit a battery, an assault to rape a child under 15 may be committed without force, and proof that accused lay in wait for prosecutrix, a child under 15, as she was going to school, and after making an indecent proposal to her chased her until she outran him, was sufficient to sustain a conviction of assault with intent to rape. Gage v. State (Tex.) 151 S. W. 565, 567.

A solicitation or demand by a man that a woman submit to sexual intercourse with him, with the intention of enforcing his demand by violence, while a heinous moral offense, did not constitute the crime of an assault with intent to ravish, where he made no demonstration or effort to carry out his intention, but fled at the prospect of resist-

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ance; no "assault" having taken place. State v. Sanders, 75 S. E. 702–704, 92 S. C. 427, 42 L. R. A. (N. S.) 424.

Under Pen. Code 1895, § 633, providing that "rape is constituted by the carnal knowledge of a woman without her consent, obtained by force, threats or fraud," and section 634, providing that the force "must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case," where prosecutrix was a passenger in a sleeping car occupied by 18 white people, and during the night had arisen and was sitting in her berth, awaiting transfer to another car, acts of the porter of the car in catching hold of a watch pinned on her breast and laying his hand on her wrist and asking her to follow him to the ladies' dressing room would not constitute force sufficient to authorize conviction of assault with intent to commit rape. Collins v. State, 107 S. W. 852, 854, 52 Tex. Cr. R. 455.

Under Pen. Code 1895, art. 21, providing that the word "woman" includes a female of any age, and article 608, punishing a person assaulting a woman with intent to rape, and article 611, providing that an assault to commit any other offense is constituted by the existence of facts which bring the offense within the definition of an assault coupled with an intention to commit such other offense, solicitation accompanied by the expectation of consent and laying on of hands without the use of such force as indicates a purpose to obtain intercourse at the very time is not an assault with intent to rape a female under the age of consent, but where a man puts his hand on a female child and at the time intends instantly to have intercourse with her without suspension of action, and without waiting to ascertain whether or not she will consent, and thereby places her in such attitude that the final act may be performed, whether the purpose is to place her in such attitude by force alone or by her free co-operation, he has gone far enough to commit an assault with intent to rape. The word "assault," in Pen. Code 1895, arts. 608, 611, punishing an assault with intent to rape, but declaring that an assault to commit any other offense is constituted by facts which bring it within the definition of an assault coupled with an intention to commit such other offense, means the commission of unlawful violence with an intent to injure, and any violence except that permitted by article 490, defining violence not amounting to an assault, is unlawful, and an "assault with intent to rape" is the use of violence forbidden by law, coupled with an immediate intent to have present carnal intercourse forbidden by law, and when the female is under the age of consent she cannot consent to the use of unlawful violence so as to prevent the act from amounting to an assault with intent to rape. Accused, 16 years of age, met prosecutrix, 14 years of age, and solicited her to have intercourse with him. She refused. He then placed his hand on her hand, and she jerked it away. He then took hold of her arm; she again jerked loose and left him. He made no attempt to pursue her. The parties had known each other for years. Held not to constitute an assault with intent to rape. Cromeans v. State (Tex.) 129 S. W. 1129, 1132.

Rape distinguished

"Assault with intent to rape" may justly be termed an incompleted rape. If there is a complete entry of the private parts of the male into those of the female, it is rape. If there is not a complete entry, the other steps having taken place, it is an assault with intent to rape. Bourland v. State, 93 S. W. 115, 116, 49 Tex. Cr. R. 197.

ASSAULT WITH INTENT TO DO GREAT BODILY INJURY

In a prosecution for assault with intent to commit great bodily injury, the form of the verdict prepared by the court read "assault with intent to commit great bodily injury," and the verdict, as actually returned, read "assault with intent to do great bodily injury." The form of the verdict was sufficient, as no one could possibly be misled by the variation in terms. State v. Leuhrsman, 99 N. W. 140, 142, 123 Iowa, 476.

ASSAULT WITH INTENT TO KILL

To constitute the crime of assault with intent to kill, there must be malice, either express or implied. Satterwhite v. State, 100 S. W. 70, 73, 82 Ark. 64.

The gravamen of the offense of assault with intent to kill is the intent with which the assault was made, and evidence that the accused shot at one person and that the shot took effect upon another is not sufficient. State v. Williamson, 102 S. W. 519, 520, 203 Mo. 591, 120 Am. St. Rep. 678.

To justify a conviction of "assault with intent to kill," the state must prove that the assault was made with such intent, and not accidentally, and with malice, and not as a result of a sudden heat of passion caused by a provocation sufficient to make the passion irresistible, so that if death had ensued the crime would have been murder in the first or second degree. Clardy v. State, 131 S. W. 46, 47, 96 Ark. 52.

Ind. T. Ann. St. 1899, § 4352, provides that every white person who shall make an assault on an Indian or other person within the Indian country with a gun, pistol, or other deadly weapon with intent to kill or maim shall be punishable, etc. Held that, to sustain a conviction for assault with intent to kill, it was only necessary to show facts sufficient to have convicted defendant of some degree of homicide had death ensued; the prosecution not being required to es-

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tablish the elements of murder. Tyner v. United States, 103 Pac. 1057, 1058, 2 Okl. Cr. 689.

A publication charging a person with a statutory offense, designating it as "assault and battery with intent to kill," is actionable, though the offense was not charged in the words of the statute as "assault with intent to kill," since the words, construed according to their plain and natural import, convey to readers the idea that the person charged has committed the offense. Gordon v. Journal Pub. Co., 69 Atl. 742, 744, 81 Vt. 237.

As felony

See Felony.

ASSAULT WITH INTENT TO ROB

Pen. Code, § 950, requires an information to contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended"; and section 952, subd. 3, provides that "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense" must be stated. Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Held, that an information under section 220, providing that "every person who assaults another with intent to commit * * * robbery * * * is punishable," etc., need not allege how or by what means the assault was made, nor set forth the means used to constitute force or excite fear, nor that the prosecuting witness was in possession of personal property, and that an information was sufficient which charged that the assault was made with force and violence, and that the intent was to feloniously, and by force, violence, and intimidation, steal, take, and carry away the property of the prosecuting witness, and against his will. People v. Holden, 109 Pac. 495, 496, 13 Cal. App. 354.

Evidence held not to show an "assault with intent to rob," within Pen. Code 1895, art. 611, providing that an assault with intent to commit any other offense is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intent to commit such other offense. Walters v. State, 118 S. W. 543, 544, 56 Tex. Cr. R. 10.

ASSEMBLAGE—ASSEMBLY

See General Assembly; Unlawful Assembly.

Member of assembly as city officer, see City Officer.

See, also, Public Gathering.

A political convention is an assemblage within Const., Bill of Rights, art. 1, § 19, declaring that the right of assembly shall never be abridged. State ex rel. Ragan v. Junkin, 122 N. W. 473, 474, 85 Neb. 1, 23 L. R. A. (N. S.) 839.

Defendant, who, by loud talking, disturbed a sleight of hand performance given at a schoolhouse under an arrangement with the trustees, is not guilty of violating Pen. Code 1910, § 424, such a meeting not being "a public school, private school, or Sunday school, or any assemblage or meeting of any such school," within the statute. Harwell v. State, 72 S. E. 936, 10 Ga. App. 115.

Where a congregation "assembled" for divine worship after the morning service had adjourned for dinner to be served on the church grounds, with the intention of returning after the meal to the churchhouse for an afternoon service, in contemplation of the statute the congregation had not dispersed while partaking of their dinner, but were still "assembled" for the purpose of divine worship. Folds v. State, 51 S. E. 305, 307, 123 Ga. 167.

ASSENT

See Mutual Assent.

An assent is evidenced by a proposition emanating from one side and acceptance of it on the other, such proposition and acceptance together constituting what is called a meeting of the minds, and, where a meeting of the minds does not appear, there is no contract. Wm. J. Lemp Brewing Co. v. Secor, 96 Pac. 636, 639, 21 Okl. 537.

Const. art. 8, § 6, declares that no city shall become indebted for any purpose in excess of 1½ per cent. of the taxable property without the assent of three-fifths of the voters voting at an election held for that purpose. Held, that the word "assent" as there used implies a vote cast with his approval of the object sought, and to require that the election shall be held in such a way as to obtain a free expression of the voter's approval or disapproval of the object of the contemplated indebtedness. Blaine v. City of Seattle, 114 Pac. 164, 165, 62 Wash. 445, Ann. Cas. 1912D, 315.

Act March 29, 1907, penalizing every officer of any bank who "receives any deposits" knowing that the bank is insolvent, does not penalize the act of assent to the reception of a deposit, and, where a receiving teller of an insolvent incorporated bank received a deposit, the president, though knowing of the insolvency, cannot be punished on the theory that he assented to the reception of the deposit; the word "receives" involving an affirmative act, and does not include an assent to the reception involving only a mere passive acquiescence. Ex parte Rickey, 100 Pac. 134, 139, 31 Nev. 82, 135 Am. St. Rep. 651.

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An indictment charging the accused with assenting to the receipt of bank deposits was framed under Act March 13, 1909 (St. 1909, c. 92), which by section 1 makes it a crime for a bank officer to receive deposits or to assent to the receipt of deposits when the bank is known to be insolvent, and by section 2 provides that any officer of an incorporated bank, having authority to close the bank or to prevent the receipt of deposits, who shall not exercise such authority when he knows that the bank is insolvent, shall be deemed to have assented to the receipt of deposits. The indictment contained no allegations that the accused had any authority to close the bank, or to prevent the receipt of deposits, or that the accused personally received deposits knowing the bank to be insolvent. Held that, under section 2, considered with the direct definition of section 1 as to the offense of assenting to the receipt of deposits, the "assent" required by the statute implied permission, and presupposed some inherent power to withhold assent. Ex parte Smith, 111 Pac. 930, 938, 33 Nev. 466; Ex parte Griffin, 111 Pac. 939, 33 Nev. 490.

Consent distinguished

See Consent.

Receive as including

See Receive.

ASSENTING

See Participating and Assenting.

ASSERTION OF TITLE BY THE COMMONWEALTH

The issuance of a patent at the instance of a patentee is not an "assertion of title by the commonwealth," but her mere grant or her right as it exists, so that, if one has acquired title by right of possession and lapse of time, he cannot be ousted by the patentee. Asher v. Howard, 91 S. W. 270, 272, 122 Ky. 175.

ASSESS

See Duly Assessed; Erroneously Assessed; Legally Assessed; Persons Assessed.

"Assess" means "to adjust or fix a proportion of a tax which each person of several liable to it has to pay; to apportion a tax among several; to distribute taxation in a proportion founded on the proportion of burden and benefit; to place a value upon property for the purpose of apportioning a tax." State v. Camp Sing, 44 Pac. 516, 519, 18 Mont. 128, 32 L. R. A. 635, 56 Am. St. Rep. 551 (quoting and adopting definition in Black's Law Dict.; citing Rap. & L. Law Dict.; Cent. Dict.; Anderson's Law Dict.).

The word "assessed," used in the notice under Section 17, which sets forth the method by which the list of persons not returning an inventory is made up, is not to be construed in a technical sense, but is to have the meaning that "plain people give it in dealing with questions touching the making of a grand list." Meserve v. Folsom, 20 Atl. 926, 927, 62 Vt. 504.

For land to be "assessed" within the act of 1889 for dissolution of a drainage district (Hurd's Rev. St. 1909, c. 42, § 191), authorizing dissolution on petition of the owners of a certain proportion of the "assessed" land of the district, it is not necessary that the costs and benefits shall have been apportioned under Farm Drainage Act, § 26 (Hurd's Rev. St. 1909, c. 42, § 100); but it being clear, from sections 21, 22, and 59 of said act (sections 95, 96, 134), in connection with the remainder thereof, that it was intended that the classification of the lands should be treated as the special assessment thereof, all land classified above zero, as to which no appeal has been taken, is "assessed" land. Cosby v. Barnes, 96 N. E. 282, 283, 251 Ill. 460.

The term "assessed" means the amount to be imposed on the property and collected. To assess is to rate or to fix the proportion which every person has to pay of any particular tax; the determination by the taxing body of the tax to be paid by each individual, and adjustment of the shares of a contribution by several toward a common beneficial object according to the benefit received; to set, fix, or charge a certain sum upon, by way of tax, as to assess each individual in due proportion—the tax being regarded as assessed when it is apportioned. Risley v. City of Utica, 168 Fed. 737, 751.

While ordinarily the terms "assess" and "assessment" apply only to ad valorem taxation, when used in respect of tax laws, as used in an act providing that the clerk of the county court shall collect all privilege taxes, declaring that any property or properties included in the act shall be back-assessed or reassessed for the period provided by law, when the same have been omitted from or escaped taxation, or when the owner or his agent fails or refuses to list the property to the assessor, as required by law, and requiring the assessor to make and return to the clerk of the county court the name of each person engaged in any business liable to a privilege tax, the word "assess" means simply the listing of names of persons exercising privileges subject to taxation, and the clerk of the county court is entitled to back-assess or reassess privilege taxes that have escaped listing and collection. Foppiano v. Speed, 82 S. W. 222, 223, 113 Tenn. 167.

As fixing value

In Const. art. 13, § 5, vesting in municipal corporations power to assess and collect taxes, the term "assess" includes the valuation of property, as well as the levying of the rate of taxation. State v. Eldredge, 76 Pac. 337, 340, 27 Utah, 477.

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To "assess property" is to place a value on it for taxation. While an action against the Louisiana state board of appraisers to reduce an assessment must be brought at Baton Rouge, the domicile of that body, still an action to have an assessment made by it, declared a nullity, may be brought in the parish where the property sought to be exempted is situated. New Orleans Great Northern R. Co v. Thomas, 55 South. 737, 738, 129 La. 128.

When valued by the assessor, personal property is "assessed," within the meaning of Sess. Laws 1903, p. 74, c. 59, § 3, providing that personal property taxes shall be a lien upon all real estate and personal property from the date the assessment is made. City of Puyallup v. Lakin, 88 Pac. 578, 579, 45 Wash. 368.

As levy

In Const. art. 13, § 5, authorizing the vesting in municipal corporations power to "assess" and collect taxes for all the purposes of the corporation, the term "assess" has a comprehensive meaning and includes the levying of the rate of taxation. State v. Eldredge, 76 Pac. 337, 340, 27 Utah, 477.

The word "assessed," as used in a franchise granted by a municipality to a company to construct and operate a waterworks system within the municipality, which provides that the municipality shall pay in municipal taxes which may be assessed against the company for the first ten years of the franchise, is used in the sense of a levy of taxes, rather than the mere determination to raise money by taxation—the proceedings requisite to charge property or the owners thereof with the payment of taxes, not the assessment of property for taxation. The term "assess taxes" is commonly used as synonymous with the levying of taxes, as descriptive of the steps in their entirety necessary to charge specific property with taxes, or the owner with the payment thereof. There is no such thing as the assessment of a tax in the mere sense of assessment of property for taxation. Town of Washburn v. Washburn Waterworks Co., 98 N. W. 539, 541, 120 Wis. 575 (citing Chicago & N. W. R. Co. v. Forest County, 70 N. W. 77, 95 Wis. 80).

Levy distinguished

To "assess" a tax is to adjudge and determine what proportion of his property the taxpayer shall contribute to the public. To "levy" a tax is to make a record of this determination, and to extend the assessment against the taxpayer's property. Chicago, B. & Q. R. Co. v. Klein, 71 N. W. 1069, 1071, 52 Neb. 258.

As used in Code Civ. Proc. § 325, requiring an adverse occupant to pay all the taxes which have been levied and assessed upon the land, the word "levied" refers to the act of the board of supervisors in making the levy, and the word "assessed" refers to the act of the assessor in making the assessment. The statute does not require the payment of taxes assessed before the occupancy, and levied afterwards, but only such taxes as were both levied and assessed during the occupancy. Allen v. McKay, 52 Pac. 828, 829, 831, 120 Cal. 332.

List distinguished

"The words 'list' and 'assess' are used in the chapter relating to taxation in a somewhat different sense, but always as a part of the same process of getting the property upon the tax roll. * * * The title of the act says 'to list and collect taxes thereon,' and surely this phrase includes an assessment." Beresheim v. Arnd, 90 N. W. 506, 508, 117 Iowa, 83.

Tax synonymous

The words "assessed" and "taxed," in Sess. Laws 1903, c. 73, § 29, were used interchangeably by the Legislature, and were intended to express the same meaning. State v. Fleming, 97 N. W. 1063, 1070, 70 Neb. 529.

ASSESSED VALUE

The term "assessed value," in a city charter, providing that no improvement shall be made when the estimated cost thereof shall exceed 50 per cent. of the assessed value of the property, refers to the value of the property as assessed for general taxation at the time next prior to that when the improvement is ordered. Ferry v. City of Tacoma, 76 Pac. 277, 279, 34 Wash. 652.

The words "debt" and "liability," as used in Const. art. 8, § 1, forbidding the Legislature to create any debt or liability, singly or in the aggregate, exceeding 1½ per cent. of the assessed value of taxable property in the state, are not employed in a technical sense, but have special reference to the basic legislative authority on which a state contract must rest, and in which alone a state debt must find its sanction. Such constitutional provision limits the Legislature to the assessed valuation at the time of the passage of any measure creating a debt, and does not refer to the date at and after which a legislative act authorizes a sale of state bonds. Under such constitutional provision, the Legislature, in creating a debt, must be governed by the assessed value as the same has been ascertained and then exists, and cannot anticipate the future and leave the ascertainment of the assessed valuation to the future acts of ministerial and executive officers. Lewis v. Brady, 104 Pac. 900, 902, 17 Idaho, 251, 28 L. R. A. (N. S.) 149.

ASSESSMENT

As charges on benefit certificate

"While it must be conceded that the mere designation of payments made upon a policy of insurance or a benefit certificate bearing all the marks of regular or old time

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insurance, as 'assessments,' does not make them assessments," there is a distinction between policies upon which fixed premiums are paid and benefit certificates in fraternal beneficiary associations in which insurance is dependent on the payment of monthly assets and dues; and Rev. St. § 7897, providing that no policies issued by any life insurance company shall be forfeited for nonpayment of premiums after the payment of three annual premiums, and section 7898, providing for the issuance of paid-up policies, are not applicable to fraternal beneficiary associations doing business on the assessment plan and under the laws of which assessments and the liability of the association are not permanently established. Westerman v. Supreme Lodge, Knights of Pythias, 94 S. W. 470, 485, 196 Mo. 670, 5 L. R. A. (N. S.) 1114.

Where a mutual benefit insurance policy provided that the rate of "assessment" should be fixed by the board of directors of the company, the fact that the executive committee took part with such board in fixing assessments did not render the same illegal. Barrows v. Mutual Reserve Life Ins. Co., 151 Fed. 461, 463, 81 C. C. A. 71.

As calls on corporate stock

As suit, see Suit.

The word "assessment" and the words "call" or "installments" are used interchangeably in the statute; yet, strictly speaking, the word "assessment" means a demand upon stockholders for payments above the par value of their stock to meet the money demands of creditors of the corporation, while the word "call" or "installments" means the action of the board of directors of the corporation demanding the payment of all or a portion of unpaid subscriptions. The word "assessments" as used in Rev. Codes, § 2769, granting power to a corporation to admit stockholders or members, and to sell the stock or shares for the payment of assessments or installments, is distinguished from "calls" or "installments," and means assessments upon full-paid stock, as distinguished from calls or installments for portions of unpaid subscriptions. Wall v. Basin Mining Co., 101 Pac. 733, 736, 16 Idaho, 313, 22 L. R. A. (N. S.) 1013.

The word "assessment," in Const. art. 6, § 4, conferring appellate jurisdiction on the Supreme Court in cases at law in which the demand amounts to $2,000 or more, or which involve the legality "of any tax, impost, assessment, toll, or municipal fine," and giving appellate jurisdiction to the District Court of Appeal of cases where the demand amounts to $300, and does not amount to $2,000, when considered in connection with section 5, conferring original jurisdiction on the superior court of cases involving the legality of any "tax, impost, assessment, toll, or municipal fine," refers to assessments for public taxation or for the raising of funds for local public improvements, and does not include assessments by a private corporation to compel stockholders to contribute to its treasury additional sums in proportion to their ownership of paid-up stock; and the Supreme Court does not have appellate jurisdiction of an action by a private corporation for $350 for an assessment by it on paid-up stock held by a stockholder, but the appeal lies to the District Court of Appeal. Bottle Min. & Mill. Co. v. Kern, 97 Pac. 25, 154 Cal. 96.

ASSESSMENT (In Taxation)

See Double Assessment; Illegal Assessment; Last Assessment; Local Assessments; New Assessment; Raise Money by Taxes or Assessment; Reassessment; Special Assessment; Subsequent Assessment; Supplemental Assessment; Time of Assessment; Uniform Assessment.

Before assessment, see Before.

Substantial statement of assessment, see Substantial Statement.

"Assessment in a general sense denotes the process of ascertaining and adjusting the shares respectively to be contributed by the several persons toward a common beneficial object according to the benefit received. Assessment, in taxation: The listing and valuation of property for the purpose of apportioning a tax upon it, either according to value alone or in proportion to benefit received. Also, determining the share of a tax to be paid by each of many persons, or apportioning the entire tax to be levied among the different taxable persons, establishing the proportion due from each." When a tax levying officer, levying a tax for the construction of a drainage ditch, knows the proportionate benefit to each tract and the amount of money necessary to be raised, and when he has determined the number of payments in which it shall be paid and the time of payment of the same, and has ordered his determination placed upon the tax list for collection by the proper officers, he has made an assessment. Morris v. Washington County, 100 N. W. 144, 148, 72 Neb. 174 (quoting Black, Law Dict.).

The word "assessment," as used in tax statutes, does not mean merely the valuation of the property for taxation, but includes the whole statutory mode of imposing the tax, embracing all of the proceedings for raising money by the exercise of the power of taxation from their inception to their conclusion. Jackson Lumber Co. v. McCrimmon, 164 Fed. 759, 763, 764 (citing 1 Words and Phrases, pp. 551, 552).

"'Assessment' is, from its legal requirement, and the necessity of preserving its evidence, a written entry, and must depend upon the records of the commissioners' office, and not upon parol testimony, or the private duplicate of the assessor. * * * It is the 'assessment' which confers the power to sell,

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in the same manner as a judgment on which an execution is issued. It is the 'assessment,' therefore, which must contain the means of identification of the ownership in order that the proprietor may pay his tax, or redeem if he fails to pay in time." Norris v. Delaware, L. & W. R. Co., 66 Atl. 1122, 1125, 218 Pa. 88 (quoting and adopting the definition in Philadelphia v. Miller, 49 Pa. 440).

The word "assessment" in tax laws has a double significance. It may mean the appraisement of property for the purpose of taxation, or it may mean the apportioning of the tax to the taxable property. First Nat. Bank v. City of Binghamton, 76 N. Y. Supp. 526, 527, 72 App. Div. 354.

The word "assessment" as used in a contract for the purchase of real property, which provided that the purchaser should pay all taxes and assessments imposed on the premises after the date of the contract, means "local assessment." Clizer v. Krauss, 106 Pac. 145, 146, 57 Wash. 26.

"The word 'assessment' is equivocal and may mean either the act of apportioning the burden to be borne by the persons or property chargeable, or the particular burden assigned to each." The agreement by property owners to pay counsel 15 per cent. of the amount of any assessment on their property which may be set aside by the courts, or 15 per cent. of any reduction if not entirely set aside, used the word "assessment" in the sense last stated, and the attorney's right to compensation would not accrue until it was determined that there should be no charge on the property or the assessment should be reduced. Milton v. Stell, 62 Atl. 1133, 1134, 73 N. J. Law, 261.

Every system of taxation consists of two parts, one relating to "assessment" or the designation of the persons or things which shall be the subject of taxation and the apportionment of taxation among such persons or things in the ratio prescribed by law, the other to the collection of taxes by the enforced payment thereof. The constitutional provision relative to uniformity of taxation relates only to the assessment, and in that respect concerns only such equalization of the burden of taxation as would result from the designation of the property which shall be the subject of taxation and the apportionment of the taxes under general laws and by uniform rules according to its true value. The mere machinery by which taxes shall be assessed or collected is left in legislative discretion. Central R. Co. v. State Board of Assessors, 67 Atl. 672, 682, 75 N. J. Law, 120 (citing State Board of Assessors v. Central R. Co., 4 Atl. 578, 48 N. J. Law, 146.

As incumbrance

See Incumber—Incumbrance.

As levy

Under Sess. Laws 1903, p. 74, c. 59, § 8, providing that personal property taxes shall be a lien upon all real estate and personal property from the date the "assessment" is made, the word "assessment" means the valuation of property for taxation by the assessor, and not the levy of taxes by the commissioners. City of Puyallup v. Lakin, 88 Pac. 578, 579, 45 Wash. 368.

The term "assess taxes," as commonly used, is synonymous with the levying of taxes, as descriptive of the steps in their entirety necessary to charge specific property with taxes or the owners with the payment thereof. There is no such thing as the assessment of a tax in the mere sense of the assessment of property for taxation. In a contract between a municipal corporation and a waterworks company by which the municipality promised to pay a specific rental together with any town or municipal tax "which may be assessed" against the company as compensation for the use of certain hydrants, the word "assessed" was used in the sense of a levy of taxes rather than the mere determination to raise money by taxation and included the proceedings requisite to charge property or the owners thereof with the payment of taxes and not the assessment of property for taxation. It plainly referred to the actual creation of an obligation upon the owner of the waterworks property to pay taxes and the actual extension upon the tax roll of the tax apportioned its property. Town of Washburn v. Washburn Waterworks Co., 98 N. W. 539, 541, 120 Wis. 575.

As listing and valuation

The word "assessment" as used in the Kansas Constitution means valuation of property by the proper officers for the purposes of taxation; in other words, it is the official listing of property for the purpose of constituting a basis upon which taxes are to be levied. Western Union Telegraph Co. v. Howe, 180 Fed. 44, 52, 103 C. C. A. 398.

The word "assessment," used in its restricted sense, means an official listing of persons and property with an estimate of the value of the property of each for the purpose of taxation. The word, used in its general and more extended sense, implies the completed tax list; that is to say, the names and lists of the persons to be taxed, with the valuations of their property and the taxes set down under their several headings, and properly extended and carried out. There being no statute providing that a simple listing of real estate for taxation gives the county a lien for taxes to be subsequently levied thereon, a county from which lands are taken to form a new county can have no lien for taxes on such lands unless levy was made thereon before the formation of the new county. Wason v. Major, 50 Pac. 741, 743, 10 Colo. App. 181.

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Though the word "assessments," as applied to taxation, ordinarily implies an official listing of the persons and property to be taxed, and a valuation of the property of each person as a basis of apportionment, usually performed by officials specially appointed for the purpose, in the case of taxes laid on solvent securities, the nominal or face value of which is identical with the actual value, the assessment may be made by the Legislature without the intervention of the assessing officer. State v. Clement Nat. Bank, 78 Atl. 944, 950, 84 Vt. 167, Ann. Cas. 1912D, 22.

The word "assessment," as used in Laws 1903, p. 73, c. 59, § 3, declaring that taxes assessed on personal property shall be a lien on the property of the person assessed from and after the date of such assessment, means the listing of the property for taxation by the county assessor, so that a lien for taxes assessed on personal property attaches immediately on the listing and valuing of the property by the county assessor. Klickitat Warehouse Co. v. Klickitat County, 84 Pac. 860, 861, 42 Wash. 299.

An assessment of property for taxation includes a list of the property to be taxed in some form and an estimate of the sums which are to guide in apportioning the tax. Sullivan v. Bitter, 113 S. W. 193, 195, 51 Tex. Civ. App. 604.

While the words "assessment" and "valuation" may be properly used to designate certain acts of the assessor, they are as properly and more frequently used to designate the official estimate of the value of property subject to taxation. While the assessor makes such official estimate, it is not conclusive, but is subject to revision by the board of equalization, which body frequently substitutes its own estimate of the value of a particular portion of the property for that of the assessor. State ex rel. Mellor v. Grow, 105 N. W. 898, 899, 74 Neb. 850.

An "assessment" means the listing or valuation of a man's property for the purpose of levying a tax; an official listing of persons and property with an estimate of the value of the property of each for the purpose of taxation. Whedon v. Lancaster County, 107 N. W. 1092, 1093, 76 Neb. 761 (quoting and adopting definition of Chief Justice Holcomb in Hacker v. Howe, 101 N. W. 255, 72 Neb. 385).

The two essentials to a valid "assessment" are a listing of the property to be taxed in some form, and an estimate of the sums which are to guide in the apportionment of the tax, and the fact that an assessment made by the treasurer of discovered property does not specifically conform to the exactions of one made by an assessor will not invalidate it. In re Seaman, 113 N. W. 354, 356, 135 Iowa, 543.

"An 'assessment' is simply a valuation, or a valuation and listing, of property for purposes of taxation." Under Code Pub. Gen. Laws, art. 81, § 89, providing that the city register of Baltimore shall on each 1st day of May, July, and September make out and deliver to the appeal tax court of the city a full and accurate list of the holders of the city's stock loans, the interest of which is payable on such dates, and section 90, requiring such court to carefully examine and correct the list, by striking off the holders who are exempt from taxation on said stock, and to annually deliver, on or before the 1st day of September, to the city register one copy and to the State Comptroller another copy of the corrected list, "setting forth distinctly in said copy the assessed values of the stock mentioned therein," there is a valid provision for assessment of the stock. State v. City of Baltimore, 65 Atl. 369, 372, 105 Md. 1 (citing 3 Cyc. p. 1111; Bouv. Law Dict. vol. 1, p. 177).

Rev. St. 1892, § 1542, provides a proceeding to have an "assessment" declared not lawfully made. "Keeping in mind, then, the narrow scope of the statute, we are called upon to define the word 'assessment' therein used. 'Valuation,' as an incident to the term, has been eliminated by our decisions, and it seems to us there is nothing left but the clerical act of extending in the assessment rolls the name of the party assessed, the description of the property, the value as fixed by the proper tribunal, the millage for various purposes, and the total amount of the tax. For mistakes in these clerical duties the circuit judge is made a reviewing officer, with power merely to 'declare the assessment not lawfully made.'" Louisville & N. R. Co. v. Board of Public Instruction for Jackson County, 39 South. 480, 481, 50 Fla. 222.

An "assessment" for taxation is "an official estimate of the sums which are to constitute the basis of an apportionment of a tax between individual subjects of taxation within the district. As the word is more commonly employed, an 'assessment' consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them." Consolidated Gas Co. of Baltimore v. City of Baltimore, 61 Atl. 532, 538, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584 (citing Cooley on Taxation, 258; New York v. Weaver, 100 U. S. 539, 25 L. Ed. 705; 3 Cyc. 1111).

While an action against the State Board of Assessors to reduce an assessment must be brought at the capital, the domicile of that body, an action to have an assessment made by it declared a nullity may be brought in the parish where the property sought to be exempted is situated, the whole duty of such board being confined to the assessment of property, which is to place a value upon it,

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while claim that property is exempt presents an issue not within its jurisdiction. New Orleans Great Northern R. Co. v. Thomas, 55 South. 737, 739, 129 La. 128.

Local improvement assessment

The term "assessment," as used in Gen. St. 1906, §§ 950–960, is a tax specially levied against the property benefited. Roesch v. State ex rel. Wyman, 56 South. 562, 564, 565, 62 Fla. 263, 270.

The word "assessment" as used in Acts 1901, c. 231, authorizing local improvements, means a local or special imposition placed on property to pay for a public improvement on the theory that such property thereby derives special benefit. Brownell Improvement Co. v. Nixon, 92 N. E. 693, 695, 48 Ind. App. 195.

The word "assessment," as used in the title of Act March 24, 1892 (P. L. p. 255), which reads, "An act concerning assessments for local improvements in the cities of the first class," providing for the appointment of boards of commissioners to make all such assessments, defining the duties of such commissioners, and affixing their compensation, cannot be construed to mean the ascertainment of benefits only, so that it would not be broad enough to support the enactment authorizing the assessment of damages as well as benefits, since there is no reason why such purely arbitrary distinction should be made for the purpose of frustrating the plain object of the act. Morris v. City of Newark, 62 Atl. 1005, 73 N. J. Law, 268.

No better name than "assessment" can be found for an imposition on lands adjoining a public street in which is laid a pipe for the distribution of water for the use of a city and its inhabitants of a fixed definite sum per front foot for the expense of such pipe. Doughten v. City of Camden, 63 Atl. 170, 72 N. J. Law, 451, 3 L. R. A. (N. S.) 817, 111 Am. St. Rep. 680, 5 Ann. Cas. 902.

The constitutional provisions against the release and commutation of taxes do not apply to special "assessments" to pay for local improvements; and municipal authorities have power to compromise suits involving the validity of such assessments notwithstanding those provisions. An "assessment" to reimburse a municipality for benefits conferred by improvements is not an exercise of the power to tax in the generally accepted meaning of the term. Farnham v. Lincoln, 106 N. W. 666, 668, 75 Neb. 502.

In proceedings to acquire property to widen a street, an assessment of benefits upon abutting property and award of damages in excess of benefits were an "assessment for local improvements," under the city's power of taxation, within Laws 1879, p. 397, c. 310, § 1, exempting lands actually used for cemetery purposes from assessment for local improvements, though the proceeding was instituted under its power of eminent domain to acquire the land. In re Jerome Ave., 85 N. E. 755, 757, 192 N. Y. 459.

St. 1911, p. 1686, amending the charter of the city and county of San Francisco, adds to article 6 a chapter numbered 8, which by section 1 empowers the board of supervisors to order the construction of a tunnel and levy the expenses thereof upon private property "in the manner and under and subject to the proceedings, powers, * * * and limitations of chapter 2, of this article, providing for street work and street improvements." Chapter 2 of the charter, by section 5 (St. 1899, p. 295), authorized the board of supervisors to define the districts benefited by a proposed improvement and to be assessed to pay its expense, and St. 1911, p. 1691, added to chapter 2, art 6, of the charter, a section numbered 33, which provides the methods of procedure for constructing tunnels and "for the assessment of expenses thereof * * * on private property." Held, that the charter provisions authorized the assessment of the cost of construction of a tunnel upon a special district; the word "assessment," as here involved, meaning a burden imposed upon property to pay the cost of the improvement made with reference to the supposed benefit. Mardis v. McCarthy, 121 Pac. 389, 392, 162 Cal. 94.

As special tax

See Special Tax.

Taxes distinguished

See Tax—Taxation.

ASSESSMENT DISTRICT

As used in Code, § 1313, providing that if personal property not consisting of moneys, credits, corporation or other shares of stock or bonds has been kept in another assessment district the greater part of the year preceding the first of January or portion of that period which it was owned by the person subjected to taxation therefor, it shall be taxed where it has been so kept, it is doubtful, to say, the least, whether by "assessment districts" is meant any subdivision less than those having an assessor and a local board of review. Indeed, it would seem that within the township personal property might well be assessed to the owner in the school district where he resides, as such district must have the burden of furnishing school facilities for the members of his family of school age. Independent School Dist. of McCowen v. Local Board of Review, 108 N. W. 220, 221, 131 Iowa, 195.

ASSESSMENT POLICY

A policy, which provides for the payment of fixed sums at fixed intervals, and which authorizes an assessment on persons holding similar policies, if necessary, is an assessment policy within Rev. St. 1909, § 6950, defining a contract of insurance on the

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"assessment plan." Moran v. Franklin Life Ins. Co., 140 S. W. 955, 958, 160 Mo. App. 407.

Where a policy provided that the price of the insurance was calculated on the American Tables of Mortality, and that a certain sum should be laid aside from the premiums for the first two years to make an emergency fund required by Rev. St. 1899, § 7905, and that if the death rate should exceed that estimated in the American Tables an assessment might be made to meet the emergency, it was an old line life insurance policy, and not an "assessment policy," defined by section 7901 as one where the amount is dependent on the collection of an assessment on persons holding similar contracts, and hence the policy in question was within section 7890, declaring that no misrepresentation should avoid a policy unless the matter represented should have actually contributed to the contingency or event on which the policy was to become payable. Williams v. St. Louis Life Ins. Co., 8 S. W. 499, 503, 189 Mo. 70.

A contract of life insurance which does not unalterably fix the payments to be made by the insured, and which makes the benefit to be paid dependent upon the collection of such assessments as may be necessary, is an assessment policy, an old line policy being one in which the premiums and the liability incurred by the insurer are fixed and unalterable. Knott v. Security Mut. Life Ins. Co., 144 S. W. 178, 183, 161 Mo. App. 579.

ASSESSMENT PROCEEDING

As proceeding, see Proceeding.

ASSESSMENT ROLL

The term "assessment roll," as used in Gen. St. 1901, § 3796, requiring the original jury list to be selected from the "assessment roll," does not refer exclusively to the personal property roll, but includes the real estate roll as well. State v. Gereke, 86 Pac. 160, 161, 74 Kan. 196 (citing State v. Reed, 37 Pac. 174, 53 Kan. 767, 42 Am. St. Rep. 322).

Where assessment lists originally made by the assessor and his assistant were sworn to by the assessor, and his oath was attached thereto as required by Code, § 1365, such lists, and not the books or lists thereafter required to be made up for other purposes, are the "assessment roll" required by section 1366 to be laid before the local board of review for correction. Reed v. City of Cedar Rapids, 116 N. W. 140, 141, 138 Iowa, 366.

Rev. St. 1895, art. 617c, provides that at an election relating to the abolition of the corporate existence of a town all persons may vote who are legally qualified voters of the state and county in which such election is ordered, and resident property taxpayers in the city or town where such election is held, as shown by the last assessment roll. Rev. St. 1895, arts. 5120, 5127, provide that the commissioners' court shall make up an assessment roll from the list rendered by assessors, and return the list to the assessors for making up the general rolls. The town assessors made up a tax roll, compiled from the county assessor's rolls, which was adopted by the council, and thereafter they made assessments, shown by assessment lists, against residents who had rendered property for taxation, but whose names were not on the tax roll. Held, that the assessment list was not an "assessment roll," within the meaning of the statute; and hence that such residents were not qualified voters, and their votes were properly refused. Warrener v. Lambrecht (Tex.) 146 S. W. 633, 634.

ASSESSMENT WORK

Rev. St. U. S. § 2324, provides that, on the failure of any one of several co-owners to contribute his proportion of the expenditure for assessment work on a mining claim for any year, the co-owners who have performed the labor or made the improvements at the expiration of the year may give the delinquents personal notice in writing that, if the delinquent fails or refuses to contribute his proportion required within ninety days after the notice, his interest will become the property of his co-owners who have made the required expenditures. Held, that where notice to contribute for annual assessment work was addressed personally to the individuals supposed to be the co-owners in default and was personally served on them, and was delivered immediately to their grantee under a prior unrecorded deed, it was sufficient to forfeit the rights of their grantee; the co-owners serving the notice having neither actual nor constructive notice of the conveyance. Work done on a mining claim to withdraw water from the mine so that it could be examined by a prospective purchaser, not operating to develop or improve the mine, or to enable the co-owners performing the work to work the mine, was not assessment work required by Rev. St. U. S. § 2324, to preserve the co-owners' right to the claim. Evalina Gold Mining Co. v. Yosemite Gold Min. & Mill. Co., 115 Pac. 946, 949, 15 Cal. App. 714.

Under the statute requiring $100 worth of assessment work to be done annually on a mining claim each year, "the question is not what it cost to do the assessment work, but was it worth $100? The work may all have been contributed gratuitously and still it would constitute assessment work under the law. Anderson v. Caughey, 84 Pac. 223-225, 3 Cal. App. 22.

Independent of the statute, work done outside of a mining claim, if done for furthering the development thereof, is as available as assessment work as if done within

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the boundaries of the claim itself, and, where there is no organized mining district, the building of a road to be used in the general development of the mining property is a doing of assessment work within the meaning of the law. Sexton v. Washington Mining & Milling Co., 104 Pac. 614, 616, 55 Wash. 380.

ASSESSOR

As judicial officer, see Judicial Officer.
As ministerial officer, see Ministerial Office—Officer.

ASSESSOR'S BOOKS

See Appear On Assessor's Books.

ASSETS

See Administered Assets; Corporate Assets; Equitable Assets; Further Assets; Marshaling Assets; Net Assets; New Assets; Quick Assets; Remaining Assets.

Of bankrupt or insolvent

"The word 'assets' is derived from the French 'assez,' meaning sufficient, and originally signified a sufficiency of property to pay the decedent's debts. Its meaning has been enlarged, and it now signifies any property available for the payment of debts, as the 'assets' of a partnership, of a corporation, of a decedent, or of a bankrupt. The word represents something over which a man has dominion, and can transfer with or without consideration, and may be reached by execution process. It has been held that a general power of appointment is not an interest in property which can be transferred to another or sold on execution or devised by will, or a chose in action, and hence does not constitute 'assets' of a bankrupt which passes to an assignee." The husband's power of election, under the statute providing that any surviving husband may against his wife's will elect to take such interest in her property as she could have elected to take against his will or otherwise take only her real estate as tenant by the curtesy, is not an "asset" for the discharge of his debts. In re Fleming's Estate, 66 Atl. 874, 875, 217 Pa. 610, 11 L. R. A. (N. S.) 379, 10 Ann. Cas. 826.

A bank is insolvent or in failing circumstances, within Acts 25th Leg. c. 100, punishing any officer of any bank who receives any deposit with knowledge that the bank is insolvent or in failing circumstances, when the bank does not have sufficient "assets," consisting of real or personal property, bills receivable, notes, obligations to the bank of every character, considering the solvency of the makers, indorsers, guarantors, thereof, and the value of the securities thereon, if any, and stocks and bonds held by the bank as its property, to pay its debts. Fleming v. State, 139 S. W. 598, 606, 607, 62 Tex. Cr. R. 653.

Of corporation

The word "funds," as used in Rev. St. §§ 3821—85, relating to embezzlement by bank officers, means permanent investment for income, stock of convertible use, or, perhaps in its broadest sense, it is merely synonymous with "assets," but a certificate of stock is not an asset when the real thing of which the certificate is only evidence of title is within complete control of the creditor company. State v. Davis, 96 N. E. 1022, 1025, 85 Ohio St. 43.

Of decedent's estate

The term "assets," as applied to decedents' estates, means property, real or personal, tangible or intangible, legal or equitable, which can be made available for, or may be appropriated to, payment of debts. Mutual Life Ins. Co. of New York v. Farmers' & Mechanics' Nat. Bank of Cadiz, Ohio, 173 Fed. 390, 397.

Under Rev. Code 1892, § 1881, providing that the goods and chattels of decedent and the rent of lands accruing during the year of his death, whether he died testate or intestate, shall be "assets"; and section 1882, providing that the court may, on the application of the personal representative, decree the sale of the crop growing at the time of decedent's death; and section 1892, authorizing the personal representative to sell the cotton raised on the farm of deceased, or any other commodity raised for market, and to account for the proceeds as "assets"—rents accruing during the year of testator's death, and crops remaining on the lands at the date of his death, whether gathered or still in the field, matured or unmatured, are "assets" of decedent, whether testate or intestate, and as such pass into the hands of his personal representative for the payment of his debts and expenses of administration. Gordon v. James, 39 South. 18, 22, 86 Miss. 719, 1 L. R. A. (N. S.) 461.

A husband and wife executed a trust deed, authorizing the trustee to pay over the income to the wife for life, and after death to pay the income to the husband for his life, and after his death the principal to be paid to their children in such sum as the husband by his last will should appoint, and in default of any appointment to be divided equally. The wife died before the husband. Held that, except as to creditors existing at the time of the settlement or those in immediate contemplation, the principal was free from the attack of creditors, but the income payable to the husband was "assets for the payment of his debts." Egbert v. De Solms, 67 Atl. 212, 213, 218 Pa. 207 (citing Mackason's Appeal, 42 Pa. 330, 82 Am. Dec. 517).

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Where a mutual benefit certificate was payable to the member's "legal heirs," the beneficiaries took by virtue of the contract, and not by succession; and hence the certificate was not an "asset of the estate" of the member and a bequest of the proceeds of the certificate to the member's wife was ineffectual to entitle her to the entire proceeds of the certificate, notwithstanding the by-laws of the society authorized a change of beneficiaries where it did not permit of a change by the member's will. Burke v. Modern Woodmen of America, 84 Pac. 275, 276, 2 Cal. App. 611.

Same—Right of action for decedent's death

A claim against a railroad company for negligent death is not an "asset," or "debt," within Code 1858, § 2203, authorizing letters of administration upon the estate of a nonresident in a county where he had assets or where any debtor resides, etc. Louisville & N. R. Co. v. Herb (Tenn.) 143 S. W. 1138, 1139, 1140.

A cause of action for decedent's negligent death constitutes "assets," within Revisal 1905, § 16, providing for administration in the county where decedent left assets. Fann v. North Carolina R. Co., 71 S. E. 81, 82, 155 N. C. 136.

Ky. St. 1909, § 6, authorizing the maintenance of an action against a corporation for death of a servant due to negligence, provides that the action shall be prosecuted by the decedent's personal representative, and that the amount recovered, less funeral expenses and the cost of administration and such cost above the recovery including attorney's fees as are not included in the recovery from defendant, shall be for the benefit of and go to the kindred of deceased in a specified order. Held that, under such act, a claim for wrongful death constituted assets of the decedent's estate sufficient to confer jurisdiction on the probate court to appoint an administrator to enforce such liability, and this without reference to the fact that decedent was an alien. Southern Pac. Co. v. De Valle Da Costa, 190 Fed. 689, 693, 111 C. C. A. 417.

Of school district

Under B. & C. Comp. St. § 3365, amended by Laws 1903, p. 125, relating to formation of new school districts and division of assets, and providing that assets shall include all school property and moneys belonging to the district at the time of division, the proceeds of a special tax for building and repairing collected before the division is included in the assets to be divided, and it is immaterial whether the amount due the new district is paid from the proceeds of the tax or from other funds. School Dist. No. 61, Polk County, v. School Dist. No. 32, Polk County, 98 Pac. 523, 524, 53 Or. 33.

ASSIGN

See Day Assigned; Duly Assigned; Transferred and Assigned.
Grant distinguished, see Grant.

The words "sell, transfer or assign," as used in section 88, added to chapter 54 of the Code of 1899, by chapter 35, p. 93, Acts 1901, authorizing a corporation to sell, transfer, or assign corporate property, do not authorize the corporation to trade or barter away for anything other than money. The word "sell" usually applies to tangible property. It is a technical term applicable to the alienation of that kind of property and especially to personal property. "Transfer or assign" are applicable to choses in action, rights and privileges, rather than tangible property, and are almost, if not quite, identical in meaning. None of these terms, except the word "sell," indicates what the nature of the consideration shall be. Neither "assign" nor "transfer" is broad enough to cover the consideration. They in no sense define the contract under which they pass title, but simply define the nature of the act by which the title passes. They are more limited than the word "sell," which necessarily involves a price or consideration, but they stop short of indicating whether the property may be disposed of by sale or barter, and hence do not confer a power to trade. Germer v. Triple-State Natural Gas & Oil Co., 54 S. E. 509, 519, 60 W. Va. 143.

ASSIGNABILITY

Where a right of action is so entirely personal that the party in whom it exists cannot by contract place it beyond his control, it will not survive, and hence as a general rule "assignability" and "survivability" of causes of actions are convertible terms. Selden v. Illinois Trust & Savings Bank, 87 N. E. 860, 863, 239 Ill. 67, 130 Am. St. Rep. 180.

ASSIGNED

In an allegation that the claims upon which liens were asserted were assigned, the word "assigned" included everything necessary to a valid assignment. Hence, since such assignments are valid only when in writing, it was in effect an allegation that the assignment was in writing. Small v. Foley, 47 Pac. 64, 68, 8 Colo. App. 435.

Rev. St. 1899, § 2933, provides that dower in a leasehold estate for a term of 20 years or more shall be granted and assigned as in real estate, and for a less term than 20 years shall be granted and assigned as in personal property. Held, that the words "granted" and "assigned," as so used, were synonymous, and mean only that the widow shall have the same dower in a leasehold estate of 20 years or more that she is entitled to in real estate, and that if the lease is for less than 20 years she has dower in it as she

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has in other personal property; the term of such leasehold being determined by the term named in the lease, and not by the portion of the term remaining at the husband's death. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S. W. 486, 497, 225 Mo. 414, 20 Ann. Cas. 1072.

ASSIGNEE

See Voluntary Assignee.
See, also, Assigns.

An "assignee" is one to whom an assignment has been made, so that a second mortgagee is an "assignee" of the mortgagor within the meaning of the statute providing for redemption of mortgage property. Brown v. Smith, 102 N. W. 171, 173, 13 N. D. 580 (citing Bouv. Law Dict. [Rawle's Revision] p. 834).

"Assignees" are of two classes, depending upon the manner of their creation: First, assignees who are created by act of the parties; and, second, assignees created by operation of law. Whether an assignee belongs to the first or second class depends upon the purpose for which he was created, the object to be attained by his creation, and the language of the statute or other instrument from which he derives his powers. A "voluntary assignee is ordinarily invested with all the rights which his assignor possessed with respect to the property, while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned." Hoffeld v. United States, 22 Sup. Ct. 927, 928, 186 U. S. 273, 46 L. Ed. 1160.

The word "assignee," as used in Rev. St. § 4919, which provides that damages for the infringement of any patent may be recovered by action on the case in the name of the party interested, either as patentee, assignee, or grantee, is used in a limited sense, as meaning an assignee of patent rights, and does not cover a mere assignee of a claim for infringement. Webb v. Goldsmith, 127 Fed. 572 (citing Waterman v. MacKenzie, 11 Sup. Ct. 334, 138 U. S. 255, 34 L. Ed. 923; Moore v. Marsh, 74 U. S. [7 Wall.] 515, 19 L. Ed. 37; Gayler v. Wilder, 51 U. S. [10 How.] 477, 13 L. Ed. 504; Hayward v. Andrews, 12 Fed. 786; 3 Robinson, Patents, § 937).

One to whom the purchaser from a broker assigns his contract is an "assignee," within Rev. Laws 1902, c. 173, § 4, making the rights of an assignee subject to all defenses to which defendant would have been entitled, had the action been brought in the name of the assignor. Kurinsky v. Lynch, 87 N. E. 70, 71, 201 Mass. 28.

Where a note payable to order was indorsed to plaintiff, he was the "assignee" thereof within a power of attorney contained in the note authorizing any attorney to appear for the maker and confess judgment in favor of the payee or assigns. Halfhill v. Malick, 129 N. W. 1086, 1091, 145 Wis. 200.

Rev. Laws 1905, § 4460, provides that a notice of sale to foreclose a mortgage shall specify the name of the mortgagor, mortgagee, and the assignee of the mortgage, if any. Held that, in view of section 5513, subd. 2, providing that in the construction of statutes words purporting the singular number may extend and be applied to several persons or things, and in view of the rule that the construction must be favorable to persons seeking to redeem, the word "assignee" will be taken as if in the plural, necessitating that the name of each assignee be specified in the notice. Moore v. Carlson, 128 N. W. 578, 579, 112 Minn. 433.

An "assignee" of a painting within Rev. St. § 4952, as amended by Act March 3, 1891, c. 565, 26 Stat. 1107, providing that the author, inventor, designer, or proprietor of any book, map, chart, painting, etc., and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same, contemplates one who receives a transfer not necessarily of the painting but of the right to multiply copies of it, which right does not depend alone upon the statute, but which is rather derived from the painter and secured by the statute to the assignee of such painter's right. Bong v. Alfred S. Campbell Art Co., 29 Sup. Ct. 628, 630, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.

A substituted beneficiary in a life policy is not an assignee of decedent, the insured, within Code, § 4604, prohibiting a party testifying to a personal transaction or communication with deceased against his assignee. Crowell v. Northwestern Nat. Life Ins. Co. of Minneapolis, 118 N. W. 412, 413, 140 Iowa, 258.

An assignment of a patent to two persons named "and to their legal representatives," to be held and enjoyed by them for their own use and behoof, "and for the use and behoof of their legal representatives," is not a mere personal license to the two persons named, but they were authorized to assign their right, and the words "legal representatives" must be held to mean "assignees" as well as "executors and administrators." Hamilton v. Kingsburg, 11 Fed. Cas. 346, 347, 15 Blatchf. 69.

A corporation which constructs a railroad, in consideration of receiving from the railroad company certain lands, to which it is entitled by a grant from the state of Florida and a contract with the trustees of the Florida internal improvement fund, is an "assignee of a chose in action," within the meaning of the judiciary acts (Rev. St. § 629, and Act March 3, 1887), and cannot maintain in

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a federal court a suit to compel a conveyance to it by such trustees, unless the railroad company itself could have maintained the action in such court. Plant Investment Co. v. Jacksonville, T. & K. R. Co., 14 Sup. Ct. 483, 485, 152 U. S. 71, 38 L. Ed. 358.

A suit by a corporation to rescind a contract for the building of a steamship by defendant, made between defendant and complainant's promoters acting as trustees for complainant, and assumed by complainant on its organization, on the ground that the contract was fraudulent and procured by defendant by paying a secret commission to the promoters, is not one in which complainant sues as "assignee" within the meaning of Judiciary Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, which provides that no federal court shall have cognizance of any suit to recover the contents of any chose in action "in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made," for in such case complainant is asserting no right derived from its promoters or which they could have asserted. Commonwealth S. S. Co. v. American Shipbuilding Co., 197 Fed. 780, 785.

As creditor

See Creditor.

Donee

A donee is an "assignee," within the meaning of Code, § 4604, providing that no party to any action shall be examined as a witness in regard to any personal transaction or communication between such witness and a decedent, against an assignee of decedent, and hence, in an action to recover a sum of money alleged to have been delivered by decedent to defendant for plaintiff, defendant was disqualified to testify as to the transaction with decedent. McAleer v. McNamara, (Iowa) 112 N. W. 85.

In an action to quiet title, by one alleging that he had conveyed land by absolute deed to his wife to secure a debt, which he paid off; that she had destroyed the deed, supposing that the act reinvested plaintiff with title, and had subsequently made to him a conveyance in the form of a deed of bargain and sale, but without an order of court approving it; that afterwards she had conveyed the land to her daughter by deed of gift, which last deed was sought to be canceled—the grantee in the deed of gift was an assignee or transferee of the title, within Civ. Code 1910, § 5858, par. 1, providing that, where a suit is defended by an indorsee or transferee of a decedent, the opposite party shall not be admitted to testify in his own favor against such decedent as to transactions with decedent, plaintiff's wife being deceased, and plaintiff could not testify as to the transaction between him and his wife. Turner v. Woodward, 71 S. E. 418, 419, 136 Ga. 275.

As legal representative

See Legal Representatives.

As real party in interest

See Real Party in Interest.

Receiver

A receiver appointed in an action to foreclose, on allegation that the property is insufficient to satisfy the debt, as expressly authorized by Burns' Ann. St. 1901, § 1236, subd. 4, is neither an "assignee" nor "receiver," within section 7051, providing that where a property owner's business shall be put into the hands of any assignee, receiver, or trustee, the debts owing to laborers or employés by the property owner shall be treated as preferred debts; nor is such receiver an "assignee" or "receiver" within section 7058, providing that all debts due any person for manual or mechanical labor shall be preferred claims in all cases where property shall pass into the hands of an "assignee" or "receiver," and shall be first paid in full. McDaniel v. Osborn (Ind.) 72 N. E. 601, 603.

ASSIGNEE FOR BENEFIT OF CREDITORS

An assignee under the act of this state concerning "voluntary assignments for benefit of creditors" is, in effect, a statutory receiver; that is, he receives and holds in trust the property of the assignor under the conditions, with the powers and duties possessed under the common law by receivers, modified and controlled by the provisions of such act. Danforth v. Stone, 128 Ill. App. 57, 60.

As officer of the court

See Court Officer.

ASSIGNEE IN FACT

An "assignee in fact" is one to whom an assignment has been made in fact by the party having the right. Blakemore v. Cooper, 106 N. W. 566, 567, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574 (citing Bouv. Law Dict.).

ASSIGNEE IN LAW

An "assignee in law" is one in whom the law vests the right as an executor or administrator. Blakemore v. Cooper, 106 N. W. 566, 567, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574 (citing Bouv. Law Dict.).

ASSIGNMENT

See Colorable Assignment; Common-Law Assignment; Equitable Assignment; General Assignment; Preferential Assignment.

Assignment or otherwise, see Otherwise.

Interested in assignment, see Interest.

An "assignment" is a transfer or making over to another of the whole of any property,

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real or personal, in possession or in action, or of any estate or right therein. Brown v. Smith, 102 N. W. 171, 173, 13 N. D. 580 (citing Bouv. Law Dict. [Rawle's Revision] p. 834).

An "assignment" is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the act of transfer, but also the instrument effecting it. Noble v. Ft. Smith Wholesale Grocery Co., 127 Pac. 14, 18, 34 Okl. 662.

"An 'assignment' is substantially a transfer, actual or constructive, with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred." No particular form of words is essential to effect an assignment of a policy of insurance. Ormond v. Connecticut Mut. Life Ins. Co., 58 S. E. 997, 998, 145 N. C. 140 (citing May, Ins. §§ 388, 390).

The word "assignment" has several meanings. In a broad sense it signifies the act by which one person transfers to another the entire right or property which he has in any realty or personalty in possession or in action or some share or interest therein, and is more particularly applied to a written transfer as distinguished by a transfer by mere delivery. Johnson v. Brewer, 68 S. E. 590, 591, 134 Ga. 828, 31 L. R. A. (N. S.) 332.

To constitute a valid assignment, there must be a perfect transaction between the parties intended to vest in the assignee a present right in the thing assigned, and an agreement to pay a certain sum out of a fund one is entitled to receive, when received, does not operate as a legal or equitable assignment. Holmes v. Bell, 124 N. Y. Supp. 301, 306, 139 App. Div. 455.

An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not an "assignment," within Rev. St. § 4898. National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114, 116, 63 C. C. A. 616.

To constitute a valid "assignment," there must be a perfected transaction between the parties, intended to vest in the assignee a present right in the thing assigned. An agreement to pay a certain sum out of, or that one is entitled to receive the same from, a designated fund when received, does not operate as a legal or equitable assignment, since the assignor in either case retains control over the subject-matter. Donovan v. Middlebrook, 88 N. Y. Supp. 607, 608, 95 App. Div. 365.

An instrument denominated an "assignment," and which referred to the property assigned as household furniture, wearing apparel, etc., "in and about the residence at number ———," and which did not contain allegations in aid of the instrument tending to show in what house or in what place the property was to be found, and which purported to sell and assign all the salary and wages of some person that were due and to become due from some unnamed person, was not an "assignment." State v. Cordray, 98 S. W. 1, 2, 200 Mo. 29, 9 Ann. Cas. 1110.

An agreement by a beneficiary in a benefit certificate, reciting that she was the beneficiary and was desirous of seeing certain children of her deceased husband, the insured, receive a portion of the insurance money, and that she agreed to divide the proceeds of the certificate when received, etc., among such children, was not an "assignment," either legal or equitable, but merely an executory contract to assign. Banholzer v. Grand Lodge A. O. U. W., 95 S. W. 953, 954, 119 Mo. App. 177.

Where the mortgagee of lands in the state died out of the state and his foreign executors, who had not qualified in the state, executed a deed for the premises, their deed amounted to no more than an "assignment" of the debt and mortgage, and did not deprive the executors of the right to sell under the power of sale in the mortgage. Scott v. Blades Lumber Co., 56 S. E. 548, 549, 144 N. C. 44.

The part of an indictment alleging falsity of testimony given is technically called the "assignment," and must be direct and specific, not uncertain in meaning or by way of implication. Fudge v. State, 49 South. 128, 129, 57 Fla. 7, 17 Ann. Cas. 919.

A patent secures the exclusive right to make, the exclusive right to use, and the exclusive right to vend the invention it protects. A grant of all these exclusive rights throughout the United States, a grant of an undivided part of all these exclusive rights, or a grant of all these exclusive rights throughout a specified part of the United States, is an "assignment of an interest in the patent," by whatever name it is designated. Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 596, 64 C. C. A. 162.

Draft as assignment

Where a creditor drew a draft on his debtor, and, after attaching a statement of account thereto, procured a bank to discount the draft, such transaction operated as an "assignment" of the claim to the bank independent of any unexpressed intention of the assignor. Provident Nat. Bank v. C. D. Hartnett & Co., 100 S. W. 1024, 1025, 45 Tex. Civ. App. 273.

Indorsement distinguished

The writing on the back of a negotiable note signed by the payee: "I hereby assign my interest in this note to G."—is not a legal indorsement, necessary to enable G. to bring action thereon in his own name, but is merely an "assignment," within Comp. Laws, §

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10,054, providing that the assignee of a chose in action "not negotiable under existing laws" may sue thereon in his own name; which changes, merely as to nonnegotiable instruments, the common-law rule that the assignee of a chose in action may not sue thereon in his own name. Gale v. Mayhew, 125 N. W. 781, 784, 161 Mich. 96, 29 L. R. A. (N. S.) 648.

Lease or sublease distinguished

Whenever a lessee grants or transfers the whole term for which the premises are leased to him, leaving no reversionary interest in himself, it amounts to an assignment and is not a sublease. Cameron Tobin Baking Co. v. Tobin, 116 N. W. 838, 839, 104 Minn. 333.

A covenant in a contract of sale of land against assigning will be strictly construed and will not be held to embrace a subletting. James J. Stevinson v. Joy, 128 Pac. 751, 754, 164 Cal. 279.

An instrument whereby a lessee for a fixed term "sublets, assigns and transfers" the premises to a third person, subject to a contingent reversionary interest in the estate, on the failure of the third person to pay rent, and whereby the lessee reserves the right to pay the rent to the lessor, thereby reserving the right to forestall the lessor, on the failure of the third person to pay rent, from exercising the right to re-enter, is a subletting and not an "assignment"; an assignment being properly a transfer or making over to another of the right one has in any estate. Davis v. Vidal (Tex.) 151 S. W. 290, 292, 42 L. R. A. (N. S.) 1084.

License distinguished

A conveyance by a patentee to another of the sole and exclusive right and license to use and to build for use within territory described the machines of the patent, with certain express exceptions, and also reserving to the patentee the right to build machines in said territory for use outside thereof, is a mere "license," and not an "assignment." Bowers v. Atlantic G. & P. Co., 162 Fed. 895, 902.

A patent secures the exclusive right to make, the exclusive right to use, and the exclusive right to vend the invention it protects. A grant of all these exclusive rights throughout the United States, a grant of undivided part of all these exclusive rights, or a grant of all these exclusive rights throughout a specified part of the United States, is an "assignment of an interest in the patent," by whatever name it is designated. A grant of any interest in or right under a patent less than these is a "license." Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 596, 64 C. C. A. 162.

Lien

See Lien.

Subrogation distinguished

If one person, not a mere interloper, but having an interest in the matter, pay the note and satify the mortgage of another, the question whether he becomes an assignee of the note and mortgage is one of fact and intention of the parties. If, however, overriding equities so require, one who satisfies an incumbrance upon his land may be subrogated to the rights of the lienholder, or may be entitled to an equitable assignment of such rights. Subrogation and equitable assignment are acts of the law as distinguished from assignment by acts of parties. We must be careful to distinguish between an assignment of the mortgage debt and a mere right of subrogation to the lien of the mortgage creditor. "Assignment" is the act of the parties, and depends generally upon intention. Where the nature of the transaction is such as imports a payment of the debt and a consequent discharge of the mortgage, there can, of course, be no assignment, for the lien of the mortgage is extinguished by the payment. A mortgage creditor cannot be compelled to assign the debt and mortgage upon receiving payment. All that he can be required to do is to give an acquittance and release. The exception to this rule, if it can be so termed, is found in those cases where the party making the payment occupies the position of surety of the debt, or is in some way personally bound for its payment. Such a person may, in equity, require an assignment or transfer, not only of the mortgage itself, but of all the securities held by the creditor, for his protection and indemnity, and, although no such assignment or transfer is actually made, a court of equity will treat it as having been done. But, if the party making the payment does not occupy the position of surety for the debt, as a general rule he cannot claim to be entitled as assignee unless by agreement with the creditor. "Subrogation" is, however, a very different thing from an "assignment." It is the act of the law, and the creature of a court of equity, depending not upon contract, but upon the principles of equity and justice. It pre-supposes an actual payment and satisfaction of the debt secured by the mortgage. But, although the debt is paid and satisfied, a court of equity will keep alive the lien for the benefit of the party who made the payment, provided he as security for the debt has such an interest in the land as entitles him to the benefit of the security given for its payment. Lynds v. Van Valkenburgh, 93 Pac. 615, 620, 77 Kan. 24 (citing Binford v. Adams, 3 N. E. 753, 104 Ind. 41; Gatewood v. Gatewood, 75 Va. 407, 410).

Working contract distinguished

A covenant in a coal lease against assigning or subleasing without the consent of the lessor, when relied on as a ground of forfeiture, will be given a strict construction

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in equity, and a contract between such a lessee and a mining company, by which the latter was given possession of the lessee's plant and equipment and agreed to mine the property and load the coal in cars for the lessee, which retained the ownership and paid for the work, was merely a working contract, and not an "assignment" or sublease" within the meaning of such a covenant. St Louis Union Trust Co. v. Galloway Coal Co., 193 Fed. 106, 115.

By lessee

An "assignment by a lessee" is that whereby he transfers his entire interest without retaining any reversionary interest, and the mere fact that he is to receive a surrender of the premises on the last day of the term precludes the transfer from being an assignment. Where a lessee executed an instrument which reserved rent at a different rate and time of payment from the original lease, and a right of re-entry on nonpayment and on breach of other conditions, and which provided for the surrender of the premises to him on the expiration of the term, there was no assignment of the original lease. Murdock v. Fishel, 121 N. Y. Supp. 624, 626, 67 Misc. Rep. 122.

Of mortgage

As deed, see Deed.

As transfer

See Transfer.

Of policy

A provision in a mortgage given by a corporation to secure bonds requiring the mortgagor to keep the property insured for the benefit of the mortgagee, and that "this section shall be construed and taken to be an assignment of the said first party's interest in and to any and all insurance policies thereon for the use and benefit of the holders of said bonds in case of loss," is not an assignment of a policy of insurance on the property, in contravention of a provision therein that any assignment thereof before a loss shall work a forfeiture. Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co., 185 Fed. 54, 60, 107 C. C. A. 274.

ASSIGNMENT FOR BENEFIT OF CREDITORS

An "assignment for the benefit of creditors" is an assignment whereby a debtor, generally insolvent, transfers his property to another in trust to pay his debts or apply the property on their payment. Johnson v. Brewer, 68 S. E. 590, 591, 134 Ga. 828, 31 L. R. A. (N. S.) 332.

The word "assignment," in a statute providing that an assignment for the benefit of certain creditors by a person in contemplation of insolvency shall be void, does not contemplate only cases where the entire assets of the debtor are assigned, but also where a part is assigned, and the effect is to prefer any creditor to others, or secure or pay to any creditor a greater proportion of his debt or demand than to all the creditors; the object of the statute being to prevent any such preference, though it does not mean that a failing debtor may not honestly prefer a bona fide creditor by giving a bond or by making a bona fide sale. Brown v. Wilmington & Brandywine Leather Co. (Del.) 74 Atl. 1105, 1111.

"When it is said of a merchant that he has 'made an assignment,' it is understood, not that he has made a transfer of some specific article or portion of property to this or that particular creditor in payment or as security, but that he has made a general disposition of his property, and suspended his whole business in consequence." Maloney & Co. v. Gonhue, 116 N. W. 436, 438, 152 Mich. 325 (quoting United States v. Clark, 1 Paine, 629, 640, 25 Fed. Cas. 447).

Deed of trust or mortgage distinguished

An "assignment for benefit of creditors" is more than a security for the payment of debts; it is an absolute appropriation of property to their payment. It does not create a lien in favor of creditors upon property which in equity is still regarded as the property of the assignor, but it passes both the legal and equitable title beyond the control of the assignor, and there remains in him no equity of redemption, and the trust which results to the assignor in the unemployed balance does not indicate such an equity. The assignment is voluntary on the part of the debtor, and no authority can exact it, and it therefore, partakes of the nature of a private contract. Miller v. Swhier, 79 N. E. 1092, 1093, 40 Ind. App. 465 (citing Burrill, Assign. § 6, distinguishing O'Neil v. Beck, 69 Ind. 239; Robinson v. Hughes, 20 N. E. 220, 117 Ind. 293, 3 L. R. A. 383, 10 Am. St. Rep. 45; Graves v. Hinkle, 21 N. E. 328, 120 Ind. 157).

"If the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property, and but a portion of his debts are secured by it." Civ. Code, §§ 3449–3473, provide that an "assignment for the benefit of creditors" is void against any creditor of the assignor not assenting thereto, in case it gives a preference of one debt or class of debts over another, and that the assignment must be made to the sheriff of the county where the property is situated. A debtor executed a deed of a portion of her property to a trustee, who was to pay certain creditors from the profits, but it was provided that the surplus of profits should inure to the use of the grantor during her life, and that, after payment of the debts

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and the grantor's death, the property should be transferred to her children. Any surplus from the proceeds of any sale or mortgage by the trustee was to be invested by him, and he was empowered to exchange the property for other property to be held subject to the trust. Held, that the deed was not intended as an absolute disposition of the property, or as an "assignment for the benefit of creditors" within the meaning of the statute, and hence was not invalid for failure to comply therewith. Heath v. Wilson, 73 Pac. 182, 185, 139 Cal. 362 (quoting and adopting definition in Cadwell's Bank v. Crittenden, 23 N. W. 646, 66 Iowa, 240).

A mortgage or deed of trust in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment or performance. A "mortgage" does not invest the mortgagee with an absolute and indefeasible title. The equitable title, called the "equity of redemption," remains in the mortgagor. The mortgage is a security for the debt, and creates a lien upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust executed to secure a debt, where the power of sale is placed in a third person. Both are securities for a debt. Both create specific liens on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust. "An assignment for the benefit of creditors" is well defined to be "a transfer by a debtor of some or all of his property to an assignee in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor." The owner of a sawmill property, including the mill, machinery, and logs and lumber, the personalty being subject to a chattel mortgage, entered into a contract with the chattel mortgagee by which he purported to convey and transfer to said mortgagee all of the property, both personal and real, with authority to take possession and to operate the mill and to sell any and all of the property, the owner agreeing to execute conveyances of the same as required by him. In consideration of such contract, the grantee agreed to pay certain indebtedness of the owner, including his own, and to apply to that purpose all sums received from the operation of the mill or sales of the property, after deducting expenses; the surplus, if any, to be paid over to the grantor. Held, that such contract was not a mortgage, but a trust agreement or deed, which vested the absolute title to the property in the grantee, and that it avoided a policy of insurance previously issued to the grantor on the property containing a provision that it should be void if his interest in the property should be or become other than unconditional and sole ownership. Brecht v. Law Union & Crown Ins. Co., 153 Fed. 452, 455 (quoting and adopting definitions in Ladd v. Johnson, 49 Pac. 756, 32 Or. 195, 200; Bartlett v. Teah, 1 Fed. 768; Burrill, Assign. § 2, and citing Appolos v. Brady, 49 Fed. 401, 1 C. C. A. 299; Richmond v. Mississippi Mills, 11 S. W. 960, 52 Ark. 30, 4 L. R. A. 413; Robson v. Tomlinson, 15 S. W. 456, 54 Ark. 229; Holliday v. Benoist, 37 Mo. 501; Cadwell's Bank v. Crittenden, 23 N. W. 646, 648, 66 Iowa, 240, 241; Sabichi v. Chase, 41 Pac. 29, 108 Cal. 81; Monteith v. Hogg, 20 Pac. 327, 17 Or. 270).

As proceeding

See Proceeding.

As sale

As sale, see Sale.

ASSIGNMENT IN FRAUD OF CREDITORS

A transfer by an insolvent husband to his wife of a policy of insurance on the life of the husband is not an assignment of property in fraud of creditors within Rev. St. §§ 3628, 3629, 6343, permitting a transfer to a wife of a policy of insurance then in force on the life of the husband. Lytle v. Baldinger, 95 N. E. 389, 391, 84 Ohio St. 1, Ann. Cas. 1912B, 894.

ASSIGNMENT OF DOWER

"Assignment of dower" is ascertaining a widow's right of dower by laying out or marking off one-third of her deceased husband's lands and setting off the same for her use during life. " 'Dower' is one thing, and the 'assignment of dower' is essentially a different thing. One is an estate, the other smacks of the remedy for segregating the estate. When the statute therefore says that no dower shall be assigned, it falls far short of saying that the widow's right of dower is lost or drowned in a greater estate. In our opinion all the statute means is this: Given a homestead greater in extent than common-law dower, then the courts shall remain passive, and refuse to assign, that is, admeasure and mark off the dower interest while the homestead exists in the widow. To mark out dower in the homestead in such case would be a vain and useless thing. Albeit, the dower right is left latent merely—covered up, as it were—and its assignment cannot be enforced in the homestead while the widow's homestead exists. But if we may be allowed a trope, as the stars come out when the sun goes down, so, when such homestead right disappears, the right to assignment of dower reappears—suspended during widowhood, it revives again on remarriage, at the precise time assignment of dower would have any meaning or vitality in the case in hand." Chrisman v. Linderman,

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100 S. W. 1090, 1095, 202 Mo. 605, 10 L. R. A. (N. S.) 1205, 119 Am. St. Rep. 822.

ASSIGNMENT OF ERROR

An "assignment of errors," in a strict common-law sense, amounts to the complaint or declaration of the plaintiff in error, and resembles in every material respect the initial pleading in a court of original jurisdiction. Scott v. Great Western Coal & Coke Co., 79 N. E. 53, 54, 223 Ill. 271.

"An 'assignment of errors' is in the nature of a pleading, and, in the court of last resort, it performs the same office as a declaration or complaint in a court of original jurisdiction. The object of an assignment of error is to point out the specific errors claimed to have been committed by the court below, in order to enable the reviewing court and opposing counsel to see on what points plaintiff's counsel intends to ask a reversal of the judgment or decree, and to limit discussion to those points." First Nat. Bank of Richmond v. Wm. R. Trigg Co., 56 S. E. 158, 163, 106 Va. 327, 7 L. R. A. (N. S.) 744.

An assignment of errors, made on a separate piece of paper attached at the upper edge to a page of the transcript, is not an assignment of errors on the record, and cannot be considered. Pugh v. Hardman, 44 South. 389, 390, 151 Ala. 248.

An assignment of errors differs from exceptions taken at the trial, and includes all the points duly taken as exceptions, which the appellant thus notifies the appellee and the appellate court that he intends to rely upon, embracing the exceptions taken during the trial, the exceptions to the charge of the court, and also exceptions to the court's jurisdiction and to the sufficiency of the complaint. Jones v. Atlantic Coast Line R. Co., 69 S. E. 427, 428, 153 N. C. 419.

There can be no such thing as cross-assigning to affirm a decree or judgment, and it therefore results that the right of appellees, after dismissal of the appeal, to invoke the review on appeal of asserted erroneous rulings in the reception or rejection of evidence, cannot be determined by the fact that such rulings are not assigned as error by them. Freeman v. Blount, 55 South. 293, 295, 172 Ala. 655 (citing 1 Words and Phrases, p. 577).

ASSIGNOR

The federal courts will accept as controlling the decision of the Land Department that the use of the word "assignors" in the amendment of Act March 3, 1891, c. 561, § 2, 26 Stat. 1096, to Desert Land Act March 3, 1877, c. 107, 19 Stat. 377, evidenced the intention of Congress to remove the restrictions of the earlier act upon the assignment of a desert land entry, and was not merely in recognition of the right that every entryman has under the public land laws of the United States to make an assignment after he has acquired the equitable title to the land embraced within his entry. United States v. Hammers, 31 Sup. Ct. 593, 595, 596, 221 U. S. 220, 55 L. Ed. 710.

ASSIGNS

See Heirs and Assigns.

Successors and assigns, see Successor.

"An 'assign' or assignee is one to whom an assignment has been made. Assignees are either assignees in fact or assignees in law." Blakemore v. Cooper, 106 N. W. 566, 567, 15 N. D. 5, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574.

The word "assigns," as used in Rev. St. § 4952, as amended by Act March 3, 1891, c. 565, 26 Stat. 1106, authorizing the copyrighting of a painting by the author or proprietor, or by the "assigns" of any such person, is not confined to a person to whom the thing copyrighted has been transferred, excluding a person to whom the copyright itself has been transferred, and the assignee of the copyright of a painting is within the term and may obtain a statutory copyright, although not the owner of the painting itself. Werckmeister v. American Lithographic Co., 142 Fed. 827, 831.

A contract executed by property owners on a street imposing restrictions upon the lots for building purposes which recited that, "in consideration of the mutual covenants herein contained, we do hereby agree to and with each other and for our and each of our heirs, executors, administrators, and assigns," bound the successors in title of the signers as well as themselves personally, so that the covenant may be enforced by or against the grantee of an original signer, the word "assigns" including all who take immediately or remotely from the assignor, whether by conveyance, devise, or descent. Erichsen v. Tapert, 138 N. W. 330, 332, 172 Mich. 457.

The federal courts will accept as controlling the decision of the Land Department that the use of the work "assigns" in the amendment of Act March 3, 1891, c. 561, § 2, 26 Stat. 1096, to Desert Land Act March 3, 1877, c. 107, 19 Stat. 377, evidenced the intention of Congress to remove the restrictions of the earlier act upon the assignment of a desert land entry, and was not merely in recognition of the right that every entryman has under the public land laws of the United States to make an assignment after he has acquired the equitable title to the land embraced within his entry. United States v. Hammers, 31 Sup. Ct. 593, 595, 596, 221 U. S. 220, 55 L. Ed. 710.

A written contract between T., in whose name all the capital stock of an irrigation company stood, and a new company, provided that T. should cause the old to convey all its property to the new company on the express condition that the new company should con-

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vey to T. for the stockholders of the old company certain water rights, such rights to be free from all assessments until such rights should be used by T. or his assigns, or should be sold by him. Held that, while the ordinary meaning of "assigns" is any person to whom property is transferred by any title, oral evidence that the word as used was intended to be restricted to a certain investment company, the real owner of the stock, and that the contract was made for the benefit of such investment company, which was the real party in interest, was admissible. Farmers' Pawnee Canal Co. v. Henderson, 102 Pac. 1063, 1065, 46 Colo. 37.

A stipulation in a contract of sale of real estate that no assignment thereof shall be valid without the written consent of the vendor, following a provision that, on the purchaser or his assigns performing his part of the agreement, the vendor shall execute to the purchaser or assigns a warranty deed, is valid, and an assignee under an assignment without the vendor's consent cannot compel specific performance after tendering the amount due in the manner prescribed by the contract on the theory that the stipulation is designed only to insure payment of the price; the word "assigns" meaning such assignees as the vendor accepts. Lockerby v. Amon, 116 Pac. 463, 64 Wash. 24, 35 L. R. A. (N. S.) 1064, Ann. Cas. 1913A, 228.

The word "assigns," in a will reciting, "I give, devise and bequeath unto my daughter A., and to her heirs, lawfully from her body begotten, and assigns forever, all my whole estate, both real and personal," was not sufficient to control the previous words of limitation; and under the will she took an estate tail in the premises. Den ex dem. Doremus v. Zabriski, 15 N. J. Law, 404, 409.

The word "assigns," as used in Rev. St. § 4952, as amended by Act March 3, 1901, 26 Stat. 1107, providing that the author, inventor, or proprietor of any painting or the assigns of such person shall have the sole liberty of reprinting the same, does not relate to any estate which the author may acquire, but refers to one who receives the transfer of the right to multiply copies of the work. Bong v. Alfred S. Campbell Art Co., 29 Sup. Ct. 628, 630, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.

Real Property Law (Laws 1896, c. 547) § 193, provides that the assignee of the lessor has the same remedies for the nonperformance of any agreement in the assigned lease as the lessor would have had. Code Civ. Proc. § 2235, includes the assignee of a lease as well as the landlord within those by whom summary proceedings may be instituted. The language of the last section is substantially taken from 2 Rev. St. (1st Ed.) pt. 3, c. 8, tit. 10, § 29, which provided that the landlord, as well as his "assigns," might make and present the oath, under which it was always held that a new lessee was not an "assign," and could not maintain summary proceedings against the former lessee to recover the premises. Held, that one whose lease begins at the termination of a prior lease cannot, when the prior lessee holds over maintain summary proceedings to recover the leased premises, since the substantial adoption of a former term of description in a statute on its recodification indicates the intention of the Legislature to adopt its settled judicial construction. Eells v. Morse, 121 N. Y. Supp. 617, 618, 67 Misc. Rep. 125.

As affecting alienability

The use of the word "assigns" in the granting clause and habendum of a deed imports an intention to give the grantees the power to sell and dispose of the property. Teague v. Sowder, 114 S. W. 484, 491, 121 Tenn. 132.

A contract for personal services is not assignable because it recites that it is made between the parties and "assigns." Swarts v. Narragansett Electric Lighting Co., 59 Atl. 111, 112, 26 R. I. 436 (citing Arkansas Valley Smelting Co. v. Belden, 8 Sup. Ct. 1308, 127 U. S. 379, 32 L. Ed. 246).

The fact that a will uses the phrase "to assign" to his daughter, her heirs and assigns forever, is not indicative of an intent that the absolute title should be vendible by her, as the word "assigns" is generally used where the fee is determinable as well as it is intended to be absolute. Chrystie v. Phyfe, 19 N. Y. 344, 352.

A will, reciting that the testator devises all his property to his wife, "for her sole use and comfort during her natural life and to her heirs and assigns forever," gives her a fee in the property. The words "heirs and assigns" are the usual technical words in a deed to signify a fee, and, although unnecessary for that purpose in a will, are commonly used in wills with the same meaning. The use of the word "assigns" implies power of disposal. Kendall v. Clapp, 39 N. E. 773, 774, 163 Mass. 69.

Between man and man the only office that can be assigned to the word "assigns" in a will whereby testator devised lands to his two sons and to their heirs and "assigns" forever, and providing that the same should not be sold before the younger of the two should become of age, and that, should either of them die without issue, the survivor, his heirs and "assigns," should take the part bequeathed to the son so dying, and that, in the event both should die without issue, the land should pass to testator's surviving heirs, is that testator contemplated that the devised land might be transferred, and testator granted his acquiescence in such a transfer. The language used bears the further construction that not only did the testator contemplate that the land might be sold, but he contemplated that it might be

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sold by his two sons. Gannon v. Pauk, 98 S. W. 471, 475, 200 Mo. 75.

Where property was bequeathed to have and to hold to him, his heirs and assigns forever, the word "assigns" implies, ex vi termini, the right to sell, give away, or dispose in any other manner of the estate given to him. It is defined by Bouvier to mean those to whom the right has been transferred by particular title, such as sale, gift, legacy, transfer, or cession. McRee v. Means, 34 Ala. 349, 356.

The term "assigns" is not necessary in a deed, either as a word of limitation denoting the quantity of the estate granted or to give the grantee authority to dispose of the same. Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co., 33 Fed. 146, 155.

Administrators

An administrator is an "assign" of his intestate by act of law, if such a construction comports with the character and intent of the instrument, and a sale of land under foreclosure is not invalid because the administrator of the mortgagee signed the notice of sale, "C., Assignee of the Mortgagee," and did not state in the notice that he was such assignee by virtue of his office as administrator. Thurber v. Carpenter, 31 Atl. 5, 18 R. I. 782.

Covenants running with land

The use of "assigns" as a technical word has never been essential to the running of a covenant with the land at common law. Sexauer v. Wilson, 113 N. W. 941, 942, 136 Iowa, 357, 14 L. R. A. (N. S.) 185, 15 Ann. Cas. 54.

Under the rule that a covenant binding the assigns will be considered as running with the land, the word "assigns" is not used in a technical sense, and as the only word appropriate for the purpose, but that equivalent words or any clear manifestation of intent will suffice to make the covenant one running with the land. Masury v. Southworth, 9 Ohio St. 341, 351.

Grantees and purchasers of land

The grantee of the grantee in a tax deed is his "assign" within Laws 1859, c. 22, § 35, giving a right of action to such grantee, "his heirs, executors or assigns." Finney v. Ford, 22 Wis. 173, 175.

The term "assigns" is a more equivocal word than "grantees," and indicates rather the successor in title to real property than the assignee to a personal right. Bouvier's Dictionary states that it is now seldom used except in the phrase in deeds "heirs, executors and assigns." Southworth v. Perring, 82 Pac. 785, 71 Kan. 755, 2 L. R. A. (N. S.) 87, 114 Am. St. Rep. 527.

The word "assigns," in Pol. Code, § 3477, authorizing repayment to original purchasers or their "assigns" all money expended in reclaiming swamp lands, refers only to those to whom the indebtedness may have been assigned or transferred by the owner and not to a purchaser of the land. Carpenter v. San Francisco Sav. Union, 61 Pac. 92, 94, 128 Cal. 516.

The term "assigns," in the statute providing that "any person, his heirs, or assigns, having at any time obtained a grant from the state for any swamp lands, which have been surveyed or taken possession of by the state board of education or their agents, and shall not have regularly listed the same for taxation and paid the taxes due thereon to the persons entitled to receive same, such grantee and his heirs and assigns shall forfeit all right, title," etc., does not mean purchasers of the land from the grantee or his heirs after the grant had issued, but persons to whom the grantee had assigned his right to have the grant before the same issued and to whom it was issued by virtue of such assignment. Under the provisions of the statute that such of those lands which have been surveyed by or for the state board of education or of which they have taken possession shall, upon such default, revert to the state, a survey made in 1887 cannot adversely affect those claiming under a purchase from the heirs of the original grantee without notice of the unperfected forfeiture and who for 14 years have paid all taxes against the land. Eastern Land, Lumber & Mfg. Co. v. State Board of Education, 7 S. E. 573, 578, 101 N. C. 35.

Rev. Codes 1905, §§ 7494, 7495, provide how executory contracts for sale of land may be declared forfeited, and require that written notice be given "to the vendee or purchaser, or his assigns." Held, that such written notice should be served on all persons known by the vendor to have acquired, by purchase or otherwise, the purchaser's interest in the property; the word "assigns" being used in its broad meaning and not restricted to mere assignees of the written contract. Williams v. Corey, 131 N. W. 457, 460, 21 N. D. 509, Ann. Cas. 1913B, 731.

The corporate grantee in a quitclaim deed to public coal land, executed by a person who, having then no interest therein, afterwards made an entry avowedly for his sole use and benefit, but actually at the instance of the corporation, with its money and for its benefit, is his "assign" within the meaning of the act of June 16, 1880, § 2, providing for the repayment of the purchase price in case of subsequent cancellation of the entry "to the person who made such entry, or to his heirs or assigns." United States v. Colorado Anthracite Co., 32 Sup. Ct. 617, 619, 225 U. S. 219, 56 L. Ed. 1063.

Holder of negotiable note

The word "assigns," as used in Rev. Codes 1899, § 3265, providing that every con-

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tract made by or on behalf of any corporation doing business in the state without first having complied with the law shall be wholly void on behalf of such corporation and its assigns, does not include the indorsee of negotiable paper, who takes the same before maturity, for value and without notice of defenses thereto. National Bank of Commerce v. Pick, 99 N. W. 63, 65, 13 N. D. 74.

Legal representatives

Where a testator devised all of his estate of which he died seised to his son to have and to hold the same to him, his heirs and assigns, executors and administrators, the son took an estate in fee; the expression "assigns" being equivalent to "legal representatives" and not cutting down the estate from a fee-simple to a life estate. Smith v. Rice, 66 N. E. 806, 183 Mass. 251 (citing Briggs v. Shaw, 91 Mass. [9 Allen] 516, 518).

An assignment of a patent to two persons named, "and to their legal representatives," to be held and enjoyed by them for their own use and behoof, "and for the use and behoof of their legal representatives," is not a mere personal license to the persons named, but the words "legal representatives" mean "assigns," as well as "executors and administrators." Hamilton v. Kingsbury, 11 Fed. Cas. 346, 347, 15 Blatchf. 69.

Mortgagees

The word "assigns," as used in Act Cong. June 16, 1880, c. 244, § 2, 21 Stat. 287, providing for the repayment of the purchase price to a person making an entry of public land, or to his heirs or assigns, in case of the cancellation of such entry for conflict, means one who derives from the original entryman by the voluntary act of the latter, and a mortgagee who has foreclosed his mortgage and purchased the mortgaged property at sheriff's sale under a decree of the court is an assign. United States v. Commonwealth Title Ins. & Trust Co., 24 Sup. Ct. 546, 547, 193 U. S. 651, 48 L. Ed. 830.

"The term 'assigns' is of sufficiently broad signification to include a second mortgagee and has been deemed to comprehend all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law." Brown v. Smith, 102 N. W. 171, 173, 13 N. D. 580 (quoting and adopting definition in Brown v. Crookston Agricultural Ass'n, 26 N. W. 907, 34 Minn. 545).

ASSIGNATION HOUSE

A "bawdyhouse" is a house kept for the purpose of prostitution; that is, for men and women to have unlawful, illicit sexual intercourse together therein. The statute uses the words "bawdyhouse or brothel, or house of assignation." A "bawdyhouse" is a house of ill fame. An "assignation house" is a house resorted to for purposes of prostitution, and is synonymous with "bawdyhouse" or "brothel." State v. Keithley, 127 S. W. 406, 408, 142 Mo. App. 417.

ASSIST

The word "abet" is not synonymous with "aid" and "assist." It may import presence with instigation or encouragement towards the commission of the criminal offense but without aid or assistance therein. The furnishing by the defendant of a machine that happened afterwards, without his privity, to be used for gambling, does not constitute either the aiding, abetting, or assisting in the keeping of a gambling resort. State v. Flynn, 72 Atl. 296, 297, 76 N. J. Law, 473.

ASSISTANCE

See Writ of Assistance.

The word "assistance," as used in Ky. St. 1903, § 114, authorizing employment of special assistance to the Attorney General in collecting claims due the commonwealth, means "assistants." Ray v. James (Ky.) 112 S. W. 641, 642.

ASSISTANT

See First Assistant.

The word "assistance," as used in the statute authorizing employment of special assistance to the Attorney General in collecting claims due the commonwealth, means "assistants." Ray v. James (Ky.) 112 S. W. 641, 642.

As a deputy

The designation deputy county attorney, while not accurate, will be sufficient designation of an "assistant county attorney," so that notwithstanding Acts 22d Leg. c. 72, authorizing a county attorney to appoint not more than three assistant county attorneys, the fact that one, if so appointed as an assistant, signed an information as deputy county attorney, would be no ground for quashing the information. Murrey v. State, 87 S. W. 349, 48 Tex. Cr. R. 219.

"Assistant deputy sheriffs" are not "deputies" within Civil Service Law New York (Laws 1899, c. 370) § 12, exempting certain positions, including in subdivision 1, the "deputies of principal executive officers authorized by law to act generally for and in place of their principals." People ex rel. Scanlon v. Milliken, 111 N. Y. Supp. 551, 552, 127 App. Div. 468.

The word "deputy" does not mean the same as "assistant," and hence under White's Ann. Code, art. 125, denouncing the bribing of an officer, which term, under article 127, includes all city officials, there can be no conviction of bribing an "assistant city attorney" of a city, the charter of which makes no provision for such an officer, but by Loc. & Sp. Laws 30th Leg. c. 5. § 26, only authorizes the city attorney to appoint a

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"deputy." Naill v. State, 129 S. W. 630, 631, 59 Tex. Cr. R. 484, Ann. Cas. 1912A, 1268.

ASSISTANT ATTORNEY GENERAL

As state officer, see State Officer.

ASSISTANT AUDITOR

Ky. St. 1903, § 4258, authorizes the auditor of public accounts to appoint revenue agents, whose term of office shall be four years. Section 4259 requires revenue agents to take the oath required of other officers, and to execute a bond to the commonwealth. The duties of such agents are prescribed by law, and in many matters they may act independently of the auditor, as in assessing omitted property under section 4241. Held, that a revenue agent, though an appointee of the auditor, is an officer of the commonwealth, holding for a fixed term, and is not subject to removal by the auditor under section 140 of the statutes, authorizing the auditor to remove the "assistant auditor" and "auditor's clerk." Hager v. Lucas, 86 S. W. 552, 553, 120 Ky. 307.

ASSISTANT CASHIER

As clerk, see Clerk.

ASSISTANT DISTRICT ATTORNEY

As court officer, see Court Officer.

As officer of United States, see United States Officer.

ASSISTANT SOLICITOR

Private counsel, who aid in prosecution of a case as the solicitor may permit, are not "assistant solicitors," within Gen. St. 1906, § 3880. Clinton v. State, 50 South. 580, 58 Fla. 23.

ASSISTANT SURGEON

A passed assistant surgeon in the navy, with the rank of lieutenant, is entitled to the pay of a captain in the army, mounted, in view of the respective provisions of Rev. St. U. S. § 1466, assimilating in rank lieutenants in the navy with captains in the army, of Navy Personnel Act March 3, 1899, c. 413, § 13, 30 Stat. 1007, entitling commissioned officers of the line of the navy to the same pay and allowance as officers of corresponding rank in the army, and of Act June 7, 1900, c. 859, 31 Stat. 697, declaring that assistant surgeons shall rank with assistant surgeons in the army, who are mounted, since Congress must have used the words "assistant surgeons" as descriptive of the whole class of assistant surgeons, passed as well as those not passed. United States v. Farenholt, 27 Sup. Ct. 629, 631, 206 U. S. 226, 51 L. Ed. 1036.

ASSOCIATE

Under a franchise to one "and such persons as he may associate with him" to construct and maintain a turnpike and toll road with a grant of a right of way, and the requirement that the road should be constructed within two years, the grantee named had an implied right to transfer or assign certain interests in the franchise, since he could not otherwise associate persons with him; the term "and such persons as he may associate with him" not meaning persons employed to assist in the construction and maintenance of the road but persons in whom he might vest an interest and franchise. People ex rel. Spiers v. Lawley, 119 Pac. 1089, 1093, 17 Cal. App. 331.

The word "associated," as used in Act March 2, 1893, c. 196, §§ 1, 2, 8, 27 Stat. 531, 532, as amended by Act March 2, 1903, c. 976, 32 Stat. 943, § 2, providing that "whenever * * * any train is provided with power air brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer; * * * and all power braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated," means the cars immediately connected with the 50 per cent. equipped with power brakes and operated from the engine; and those associated cars are also required to be operated from the engine. Lyon v. Charleston & W. C. Ry., 58 S. E. 12–16, 77 S. C. 328.

ASSOCIATION

See Beneficial Association; Fraternal Association; Habitual Association; Homestead Loan Association; Joint-Stock Companies and Associations; Mixed Association; Mutual Relief Association; Scientific Association.

Insurance association, see Insurance Company.

See, also, Club.

The term "association" is generic, and may comprehand the whole body of men, like the stockholders, who unite in forming the body politic of a banking institution. An averment in an indictment under Rev. St. § 5209, charging that defendants, as director and cashier of a national bank, by means of a draft, drawn by them or by other stated means, misapplied the moneys, funds, and credits "of said association without the knowledge and consent thereof" is not equivalent to an averment that the act was done without the knowledge and consent of the directors as required by the statute and is insufficient. United States v. Martindale, 146 Fed. 280–284.

Cr. Code, § 82, provides that in a prosecution for embezzlement of the property of any person, bank, incorporated company, or copartnership by an agent, servant, etc., it shall be sufficient to allege, generally, an embezzlement of the funds of the person, incorporated company, etc., to a certain amount, without specifying the particulars of the embezzlement. The indictment charged accused, as agent in the employ of "A. Express Company,

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an association," with embezzlement of the money of said company. Held, that the indictment was bad for not alleging ownership of the money in any person, or any corporation, joint-stock company, or other entity which could legally own property, the term "association" meaning a body of persons acting together without incorporation for a particular object, and being applied to partnerships and unincorporated companies as well as to corporations not recognized for profit; and the statute did not make the averment of ownership sufficient, its primary purpose being to obviate the necessity of specifying the particular manner in which the funds were held by an agent, etc. People v. Brander, 91 N. E. 59, 60, 244 Ill. 26, 135 Am. St. Rep. 301, 18 Ann. Cas. 341.

An "unincorporated, voluntary association" is not a partnership or a corporation, although it has some of the elements of both. By becoming a member of it one takes an interst in the property owned by it, but by leaving it he leaves this interest behind him in those who continue as members of the organization. Richardson v. Harsha, 98 Pac. 897, 903, 22 Okl. 405.

An unincorporated association of farmers organized to provide themselves with a telephone line, each member to pay his proportionate share of the expense of construction and operation, which is not a partnership, nor a joint-stock company, is a voluntary association, since an "association" is a body of persons acting together without a charter, but on the methods and forms used by incorporated bodies and in the prosecution of some common enterprise. Branagan v. Buckman, 122 N. Y. Supp. 610, 613, 67 Misc. Rep. 242.

Code, § 1820, provides that no stipulation or condition in any policy of insurance, issued by any company or association referred to in the chapter, limiting the time to less than a year after knowledge by the beneficiary within which notice or proofs of death must be given, shall be valid. Section 1784 of the chapter provides that corporations, organized upon the stipulated premium plan or assessment plan to insure lives or furnish benefits to widows, etc., of deceased members, shall be styled "associations," and corporations doing business under the chapter which provides for payment of policy claims, accumulation of a reserve or emergency fund, and the expense of management and prosecution of the business by payment of stipulated premiums, assessments, or periodical calls, and wherein the insured's liability to contribute to the payment of policy claims is not limited to a fixed amount, shall be deemed to be upon the stipulated premium plan or assessment plan, and shall be subject to the provisions of the chapter. Section 1798 provides that the chapter shall not apply to any association organized solely for benevolent purposes, and composed wholly of members of any one occupation, guild, etc., but that such an association may, by complying with the provisions of the chapter, become entitled to its privileges, and be amenable to its provisions so far as applicable. The business of an association was to collect from its members, a fixed membership fee, annual dues, and an assessment upon the death of a member in good standing. The amount in the treasury was not to be reduced below a certain amount, and an assessment might be made when necessary to carry out the business of the association. The money, after meeting expenses, was paid to members in case of disability or to their beneficiaries in event of death. Held, that the association was not organized solely for benevolent purposes, but was a mutual assessment association, and an association, within sections 1784, 1820, and hence a provision in its by-laws that written notice of a member's death should be given within 15 days after its occurrence was void. Connell v. Iowa State Traveling Men's Ass'n, 116 N. W. 820, 821, 139 Iowa, 444.

Board of health

Medical Practice Act, §§ 9, 10, providing for the recovery of a penalty for the use of the state board of health against persons practicing medicine without a license, are not in violation of Const. art. 4, § 22, prohibiting the General Assembly by local or special law from granting to any "corporation," "association," or "individual" any special or exclusive privilege, immunity, or franchise, for, as the state board of health is a branch of the state executive department and its members officers of the state, the board is neither a corporation, association, nor individual within such constitutional provision. People v. Dunn, 99 N. E. 577, 578, 255 Ill. 289.

As company

See Company.

Corporation

A "corporation" has a definite legal meaning differing essentially from an "association," which may or may not be incorporated. In re Graves' Estate, 63 N. E. 787, 789, 171 N. Y. 40.

St. 1898, § 1038, subd. 3, exempting personal property owned by any religious, scientific, literary, or benevolent "association" from taxation, includes corporations. St. John's Military Academy v. Edwards, 128 N. W. 113, 114, 143 Wis. 551, 139 Am. St. Rep. 1123.

A "corporation" is an "association of persons" within the meaning of the coal land laws, confining every association of persons to the entry of not exceeding 640 acres. United States v. Munday, 32 Sup. Ct. 53, 56, 222 U. S. 175, 181, 56 L. Ed. 149 (citing United States v. Trinidad Coal & Coking Co., 11 Sup. Ct. 57, 137 U. S. 160, 169, 34 L. Ed. 640).

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By Code, § 1620, fraud in deceiving the public or individuals as to a corporation's condition is a misdemeanor, and section 1621 makes the diversion of corporate funds, if any person is injured, and payment of dividends leaving insufficient funds, a fraud within the preceding section. Section 1622 provides that the intentional violation of the two preceding sections shall work a forfeiture of the corporate privileges. Section 1640 empowers courts of equity to close up the business of any corporation on good cause shown and to appoint a receiver therefor. Acts 30th Gen. Assem. 1904, pp. 57, 58, c. 66, § 1, provides that the term "association" as used in the act shall mean any corporation, etc., which issues stock on the installment plan, and the term "stock" shall mean contracts, etc., of any kind upon the installment plan. Section 2 prohibits such an association from issuing stock unless it has procured from the state auditor a certificate and requires it to file with him a statement to procure the certificate, which statement shall be laid before the excutive council, which body, by section 3, may direct the issuance of the certificate. Section 4 requires compliance with the act within 60 days after it takes effect. Section 6 requires such association, before doing business, to deposit a bond or securities for performance of contracts, and at the end of the year to deposit with him securities equal to the amount of its liabilities. Section 7 makes any member of such association guilty of a misdemeanor who transacts business without complying with the act. Defendant corporation issued a large number of installment land contracts without complying with chapter 66, and also published false and misleading statements as to its capital and assets, and falsely advertised that it had deposited securities with the state auditor. The money received under the contracts was not invested according to its advertised plan, and its expenses were very largely out of proportion to its revenue. Defendant had no substantial business other than the land contract business, and, while it bought and sold some land, it did not have enough funds to pay its outstanding land contracts, and it did not appear that creditors and stockholders could not be protected upon the dissolution of the corporation. Held, that chapter 66 contemplated the dissolution of an association not complying with its provisions, and, in view of the violations of Code, §§ 1620, 1621 shown, and its failure to comply with chapter 66, the business of the association should be wound up in a suit for that purpose by the state. State ex rel. Mullan v. Syndicate Land Co., 120 N. W. 327, 329, 142 Iowa, 22.

As partnership

See Partnership.

As person

As person, see Person.

ASSOCIATION FOR PECUNIARY PROFIT

An association organized for pecuniary profit is one organized to carry on some business in which a profit is looked for, in which case the members become in fact copartners, and the liability of the individual members rests on rules governing the liability of partners and the liability of principals for the acts of the agent. Ranken v. Probey, 115 N. Y. Supp. 832, 835, 131 App. Div. 328.

ASSOCIATION THEORY

The "association theory," that a master will not be excused from liability for injury to one servant by the negligence of a fellow servant unless the servants are so engaged and situated as that each by carefulness and attention in the performance of his duties may protect himself from injury caused by the negligence of a person with whom he is working, obtains in Kentucky. Louisville R. Co. v. Hibbitt, 129 S. W. 319, 321, 139 Ky. 43, 139 Am. St. Rep. 464.

ASSUME

The word "assume," in Rev. Laws, c. 102, § 1, providing that whoever assumes to be a common victualer, without being licensed as such, shall forfeit a specified sum, is synonymous with the word "presume," as used in Gen. St. 1860, c. 88, § 1, and Pub. St. 1882, c. 102, § 1, which are the same as Rev. Laws, c. 102, § 1, with the exception that the word "presume" is used instead of "assume." Commonwealth v. Lavery, 73 N. E. 884, 188 Mass. 13.

Defendant obtained permission from the government to alter the course of a river and promised to "assume all responsibility for damages" by reason of the alteration of the current in the river, but the court held that this was an indemnifying contract purely between the parties, and not an undertaking by defendant to pay to outsiders damages for which otherwise they would have no cause of action. Defendant's obligation was to pay or fight all claims for damages on account of the current, and save the federal government harmless. Corrigan Transit Co. v. Sanitary Dist. of Chicago, 137 Fed. 851, 855, 70 C. C. A. 381.

A lease by a railway company of a part of its right of way stipulated that the lessee covenanted to "assume all the risks" of loss of any building, improvements, or property on or near the premises, occasioned by fire from locomotives, etc., and that the lessee released and discharged the company from any claim on account thereof. The lease provided that if, on termination of the lease, the lessee or owner of any of the buildings on the ground should fail to remove any buildings or other property from the leased premises, the company might remove the same at the cost of the lessee. Held, that the lessee assumed

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only risk of loss of its own buildings and property, the words "assumes all the risks" applying, in common acceptance, to an employé entering the service of the master, who "assumes all the risks" of injury to himself incident to his employment, and the words "release and discharge" not being used in ordinary parlance in relation to insurance, guaranty, or indemnity, but applying to a claim owned or controlled by the party undertaking to release and discharge another from such claim. W. A. Morgan & Bros. v. Missouri, K. & T. R. Co. of Texas, 110 S. W. 978, 983, 50 Tex. Civ. App. 420.

As agree to pay

An allegation that grantees of mortgaged premises "assumed" the mortgage debt meant only that they promised to pay it. Southern Indiana Loan & Savings Inst. v. Roberts, 86 N. E. 490, 492, 42 Ind. App. 653.

A finding that "defendant 'assumed the mortgage'" is to be construed as meaning that defendant assumed payment of the mortgage debt. Kastner v. Fashion Livery Co., 85 Pac. 120, 121, 10 Ariz. 23.

Where a deed to land provides that the grantee "assumes" all incumbrances then of record, the effect of the word "assumes" is equivalent to "assumes and agrees to pay" and imposes a personal liability on the grantee to pay the incumbrance which may be enforced against her estate. Thomas v. Home Mut. Bldg. Loan Ass'n, 90 N. E. 1081, 1084, 243 Ill. 550.

Where a person agreed to "assume" certain incumbrances, this meant that he was to pay them when due, and it was immaterial whether one of them was a lien on more than one of the properties involved. Olsen v. Sortedahl, 121 N. W. 559, 562, 143 Iowa, 166.

The limitation on municipal indebtedness prescribed by Act April 29, 1902 (95 Ohio Laws, p. 321), being "that no municipal corporation shall hereafter create or assume an aggregate indebtedness of outstanding and unpaid bonds under the authority of this act in excess of 8 per cent. of the total value of all the property in it as listed and assessed for taxation," has only a prospective operation, and indebtedness created or "assumed" prior to the passage of the act may not be considered in ascertaining whether the prescribed limit of indebtedness has been reached. City of Tiffin v. Griffith, 77 N. E. 1075, 1076, 74 Ohio St. 219.

Where defendants were deeded certain property on which plaintiff held a vendor's lien, evidenced by notes, and asked for an extension of time, for which they executed a trust deed, which contained the recital that the defendants "are justly indebted to the plaintiff, as evidenced by certain notes assumed" by the defendants, an indebtedness was created on the part of the defendants, although the ordinary office of a trust deed is to furnish security for a debt already created; the expression "notes assumed" meaning that payment was assumed. Peterson v. Kerbey (Tex.) 151 S. W. 321, 323 (citing 1 Words and Phrases, pp. 586, 587).

ASSUMED RISK

See Assumption of Risk.

ASSUMPSIT

See General Assumpsit; Special Assumpsit.

"Assumpsit" is but another word for an undertaking or a promise. It does not lie except there be an express or implied promise. A claim for the conversion by plaintiff of corn in which defendant had a valid landlord's lien gives rise to an implied assumpsit in defendant's favor, irrespective of whether or not plaintiff sold the corn and received the proceeds. Crane v. Murray, 80 S. W. 280, 281, 106 Mo. App. 697.

The distinction between "assumpsit" and "case" is that the one is a breach of a contract, and the other a breach of a duty growing out of a contract express or implied. Alabama Great Southern R. Co. v. Norris, 52 South. 891, 892, 167 Ala. 311.

A promise express or implied is the basis of every cause of action enforceable in "assumpsit"; and every promise to amount to a cause of action, must be supported by a valuable consideration. Ivy Coal & Coke Co. v. Long, 36 South. 722, 724, 139 Ala. 535.

By common-law procedure, the appropriate form of an action at law to recover an amount due upon a judgment is an action of debt. Such an action lies for the recovery of a fixed and definite sum due upon a contract, whether it be a contract of record like a judgment, or a contract by specialty, or a simple contract. In such a form of action, therefore, the plaintiff must declare on a contract and must claim the amount alleged to be due on the contract. It differs from an action of "assumpsit" in that the latter is for recovery of damages for the nonperformance of a parol or simple contract. Du Bois v. Seymour, 152 Fed. 600, 602, 81 C. C. A. 590, 11 Ann. Cas. 656.

The word "assumpsit" is derived from the Latin "assumere," meaning to assume or undertake. In the law of contracts, it is understood as an undertaking, either express or implied, to perform a parol agreement. At common law, it was divided into express and implied assumpsit; the former being an undertaking, made orally, by writing not under seal, or matter of record, to perform an act or to pay a sum of money to another; while an implied assumpsit was an undertaking presumed in law to have been made by a party from his conduct, although he had not made an express promise. The action of as-

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sumpsit was also divided into special assumpsit, or an action brought on an express promise, and general assumpsit or an action brought on an implied contract. Board of Highway Com'rs, Bloomington Tp., v. City of Bloomington, 97 N. E. 280, 283, 284, 253 Ill. 164, Ann. Cas. 1913A, 471.

The form of the action of "assumpsit" known as general or indebitatus assumpsit is founded on what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay the plaintiff. Assumpsit is the proper remedy against one who acquiesces in and implicitly sanctions an act of another, which act, if done by himself, would amount to an undertaking in law. Meager v. Linder Lumber Co., 57 S. E. 1004, 1005, 1 Ga. App. 426 (citing 1 Wait, Act. & Def. 382; Miller v. Creyon, 2 Brev. [S. C.] 108).

" 'Assumpsit' is nomen generalissimum, under which a great variety of special cases are embraced. It includes every case by simple contract, whether in the nature of a warranty, a promise to pay money, or an undertaking to do or perform any act, from whence a promise, either express or implied, can arise. The damages to be recovered must always depend upon the nature of the action and the circumstances of the case. The difference of opinion which seems to exist on the subject, I apprehend, has arisen from confounding the distinctions between the different forms of assumpsit. In an action for money had and received, the actual amount of money received (with interest in some cases) should be the measure of damages. In an action for goods or any specific chattel sold and delivered, the value of the thing sold; and so on in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud, and other cases merely sounding in damages, the jury may give a verdict to the whole amount of the injury sustained or imaginary damages. * * * In Bacon it is said: 'If there are any circumstances of hardship, fraud, or deceit, the jury may consider of them, and proportion and mitigate the damages as they please.' 2 Bacon, tit. 'Damages.' And Lord Mansfield says 'that fraud alone may be ground for an assumpsit where there is no express undertaking, as where a person sells property as sound, knowing it to be otherwise.' Stewart v. Wilkins, Doug. 18." Welborn v. Dixon, 49 S. E. 232, 235, 70 S. C. 108, 3 Ann. Cas. 407 (quoting and adopting the definition in Rose & Rodgers v. Beatie [S. C.] 2 Nott & McC. 538).

ASSUMPSIT FOR MONEY HAD AND RECEIVED

"Assumpsit for money had and received" is of an equitable character and lies, in general, whenever the defendant has received money which in equity and good conscience he ought to pay to plaintiff. Henderson v. Koenig, 91 S. W. 88, 91, 192 Mo. 690.

ASSUMPTION

See, also, Assume.

ASSUMPTION OF FACTS

A fact is not "assumed" by the charge when it is left to the jury to be found or believed by the evidence. In an action against a railroad for injuries to a switchman caused by a handhold on a box car giving way while plaintiff was descending from the car, a charge that plaintiff had a right to presume that defendant had exercised ordinary care to furnish a reasonably safe handhold for his use, and was not required to inspect such handhold before using it, but if the fact that the handhold was insecurely fastened was open and obvious to plaintiff, or if he knew of the same or must necessarily have discovered the same while engaged in the discharge of his duties, he would assume the resulting risk, was not subject to the objection of assuming that the handhold was insecurely fastened. Missouri, K. & T. Ry. Co. of Texas v. Box (Tex.) 93 S. W. 134, 137.

ASSUMPTION OF RISK

See Imputed Appreciation of Risk.

"Assumption of risk" is a form of contributory negligence, or want of ordinary care. Anderson v. Chicago Brass Co., 106 N. W. 1077, 1080, 127 Wis. 273.

"Assumption of risk" in its true sense is the assumption of the risks arising out of the negligence of the master when such negligence is known to the servant, and the danger therefrom is appreciated by him. Duffey v. Consolidated Block Coal Co., 124 N. W. 609, 610, 147 Iowa, 225, 30 L. R. A. (N. S.) 1067.

By the common expression that the servant "assumes" certain risks is meant the statement that the law casts them on him and the master is not responsible. Bria v. Westinghouse, Church, Kerr & Co., 117 N. Y. Supp. 195, 196, 133 App. Div. 346.

An employé may not take chances, and, in case of ill results following the risks thereby assumed, charge them to the master. Such conduct, resulting in injury, constitutes the "assumption of risk" that prevents recovery. McConnell v. Alpha Portland Cement Co., 67 Atl. 346, 347, 74 N. J. Law, 727 (citing Gill v. National Storage Co., 56 Atl. 146, 70 N. J. Law, 53; Dwojakowski v. Central R. Co., 55 Atl. 100, 69 N. J. Law, 601; Schwanewede v. North Hudson County Ry. Co., 51 Atl. 696, 67 N. J. Law, 449).

The term "assumption of risk," as used in the books, is applied to two very different

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conditions or states of fact. One has reference to the risks naturally incident to work which the servant undertakes to do, and the other has reference to risks or dangers arising from the employer's negligence, the peril of which the servant assumes when he remains in the employment after he knows, or as a reasonably prudent person ought to know, the dangers to which he is thus exposed. Vohs v. A. E. Shorthill & Co., 107 N. W. 417, 419, 130 Iowa, 538.

"The doctrine of 'assumption of risk' is of comparatively recent origin, and when first introduced the decisions of the courts were far from uniform, and in some cases illogical. With fuller discussion and clearer analysis, the doctrine has been repudiated that mere knowledge on the part of the servant of defective appliances, when taking employment or afterwards, is an 'assumption of risk' which relieves the employer of the duty of furnishing reasonably safe appliances and a reasonably safe place in which to work. That rule ignored the fact that the employé was not on equal terms with the employer. It ignored the duty of the state to protect the welfare of a deserving and meritorious class of its citizens, who should not be exposed to unnecessary risks in the search for bread, and cynically made the necessities of the laborer condone and pardon the neglect of duty on the part of the employer." Pressly v. Dover Yarn Mills, 51 S. E. 69, 73, 138 N. C. 410.

Application of doctrine

"The doctrine of 'assumption of risk' is only applicable to cases arising between master and servant." Conrad v. Springfield Consol. R. Co., 88 N. E. 180, 182, 240 Ill. 12, 130 Am. St. Rep. 251 (citing Schoninger Co. v. Mann, 76 N. E. 354, 219 Ill. 242, 3 L. R. A. [N. S.] 1097).

The doctrine of "assumed risk" in its application to carrier and passenger involves the doctrine of contributory negligence, since, unless the position voluntarily taken by the passenger exposes him to obvious and patent dangers or such as he is required to anticipate, he cannot in case of injury be charged with negligence or to have assumed the risk. United Rys. & Electric Co. v. Riley, 71 Atl. 970, 974, 109 Md. 327.

"The doctrine of 'assumption of risk' generally pertains to controversies between masters and servants, although litigation, attended by circumstances which make the defense available, may arise between parties not sustaining that relation. Arise where it may, the defense is one which must rest on contract; or, if not exclusively on contract, then on an act done so spontaneously by the party against whom the defense is invoked that he was a volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his adversary. The word 'assumption' imports a contract, or some kindred act of an unconstrained will. Whenever a man does anything dangerous, he faces risk, but it by no means follows that, legally speaking, he assumes the risk." It has no application to the case of a passenger injured while attempting to alight from an electric car at a dangerous place selected by the carmen, though she made no demands to have the car returned to a safe place for alighting. Fillingham v. St. Louis Transit Co., 77 S. W. 314, 316, 102 Mo. App. 573.

As a general rule, the doctrine of "assumption of risk" pertains to controversies between masters and servants, though circumstances may arise between parties other than masters and servants when the doctrine may apply; but such defense is never available unless it rest upon contract, or, if not exclusively on contract, then on an act done so spontaneously by the party against whom the defense is invoked that he was a volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his adversary. The word "assumption" imports a contract, or some kindred act of an unconstrained will. Whenever a man does anything dangerous, he encounters the risk; but it by no means follows that, legally speaking, he assumes the risk. One employed by the foreman of a bridge crew of a railroad company to cook for the men in cars furnished by the company for the purpose and paid by the men for the services rendered does not assume the risk of an injury while the cars are hauled by the company from one place to another. Tinkle v. St. Louis & S. F. R. Co., 110 S. W. 1086, 1093, 212 Mo. 445 (citing Fillingham v. St. Louis Transit Co., 77 S. W. 314, 102 Mo. App. 573).

Agreement or consent

"'Assumption of risks' rests on contract; 'negligence' rests in tort." George v. St. Louis & S. F. R. Co., 125 S. W. 196, 209, 225 Mo. 364 (quoting and adopting the rule in Charlton v. St. Louis & S. F. R. Co., 98 S. W. 529, 535, 200 Mo. 413, 433, citing Dale v. Hill-O'Meara Construction Co., 82 S. W. 1092, 108 Mo. App. 97).

"Assumption of risk" involves an implied agreement by the employé to assume the risks ordinarily incident to his employment or a waiver, after full knowledge of extraordinary risk, of his right to hold the employer for a breach of duty in that regard. Hall v. Northwestern R. Co., 81 S. E. 848, 850, 81 S. C. 522 (quoting and adopting definition in Bodie v. Charlestown & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 468); James v. Fountain Inn Mfg. Co., 61 S. E. 391, 393, 80 S. C. 232 (citing Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 468).

"Assumption of risk" is a contractual incident implied by law from the very nature of the contract itself. Brown v. Boyle Ma-

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chine & Foundry Co., 62 S. E. 720, 724, 5 Ga. App. 142.

"Assumption of risk" is based, not upon the contract, but on the maxim "Volenti non fit injuria." Rase v. Minneapolis, St. P. & S. S. M. R. Co., 120 N. W. 360, 363, 107 Minn. 260, 21 L. R. A. (N. S.) 138.

"Assumption of risk" is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. It rests in contract. In an action for injuries to a servant, the defense of "assumption of risk" must be pleaded. Missouri, K. & T. R. Co. v. Wilhoit, 98 S. W. 341, 343, 6 Ind. T. 534.

"Assumption of risk" is a term of the contract of employment, express or implied, by which the servant agrees that dangers of injury obviously incident to the discharge of his duty shall be at his risk. Sans Bois Coal Co. v. Janeway, 99 Pac. 153, 156, 22 Okl. 425.

In an action by an employé for injuries, the term "assumption of risk" usually refers to those risks arising from the contract, either express or implied, but may include risks voluntarily assumed by the employé in attempting to do something unnecessary. King v. Woodward Iron Co. (Ala.) 59 South. 264, 269 (citing 1 Words and Phrases, p. 589).

"Assumption of risk" by an employé is contractual, and becomes immaterial when the negligence of the employer is the producing cause of the injury. Mack v. Chicago, R. I. & P. Ry. Co., 101 S. W. 142, 144, 123 Mo. App. 531.

"Assumption of risk" is a matter of contract. If a servant is defeated by the rule of assumed risk, it must be because he agreed, long before the accident happened, that he would assume the very risk from which his injury arose. Diamond Block Coal Co. v. Cuthbertson, 76 N. E. 1060, 1067, 166 Ind. 290 (citing D. H. Davis Coal Co. v. Polland, 62 N. E. 492, 158 Ind. 607, 92 Am. St. Rep. 319).

"Assumption of risk" is a matter of contract. A servant assumes such a risk as a part of his contract of service. He agrees to the risk in order to be employed and paid. In an action for personal injuries to a laborer in a factory, due to defendant's neglect to properly guard machinery, where there was no contract relation between the parties, it was proper to refuse to submit to the jury the question of the "assumption of the risk" by plaintiff. Poole v. American Linseed Co., 103 N. Y. Supp. 1047, 1048, 119 App. Div. 136.

"Assumption of risk" rests on agreement of the servant with the master, express or implied, from the circumstances of the employment, that the master shall not be liable for any injury incident to the service, resulting from a known or obvious danger arising in the performance of the service. Buena Vista Extract Co. v. Hickman, 62 S. E. 804, 806, 108 Va. 665.

The "assumption of risk" by a servant is based on the notion that one who consents to the doing of an act cannot maintain an action in respect of the damage which results from that act. The consent may be either express or implied. Huggard v. Glucose Sugar Refining Co., 109 N. W. 475, 481, 132 Iowa, 724.

"Assumed risk" involves no act of negligence of the injured party, but arises out of the contractual relations between the master and servant, and involves an injury from some danger incident to the servant's employment, or of which he had knowledge, actual or constructive, when he entered on the performance of the things he was doing when the injury occurred, the risk of which he is presumed to have agreed to assume. Columbia Creasoting Co. v. Beard, 89 N. E. 321, 324, 44 Ind. App. 310.

"Assumption of risk" rests on contract. The servant, when he enters his master's employ, impliedly agrees with him, for the compensation named, to assume the risk of usual dangers incident to the work. But the servant does not assume the risk of the master's negligence. In the assumption of risks by a servant, it must be considered that the master impliedly contracts with the servant that he will exercise ordinary care to protect such servant from injury by providing a reasonably safe place for him to work. The risks assumed by the servant are those risks alone which remain after the master has exercised ordinary care. Charlton v. St. Louis & S. F. R. Co., 98 S. W. 529, 535, 200 Mo. 413.

A servant by his contract of hire "assumes the risks" of injury which are the ordinary dangers of the employment. He assumes all of the ordinary risks pertaining to the business, and if the employer should be negligent in supplying him imperfect machinery, and the employé becomes aware of the defect, or by ordinary care may know of it, it is his duty either to inform the employer or quit work, and if he continues in the employment he assumes the risks that may result therefrom. Atoka Coal & Mining Co. v. Miller, 104 S. W. 555, 561, 7 Ind. T. 104.

"Assumption of risk" is a waiver of defects and dangers by an employé, and a consent under an express or implied contract to assume them, whether he is careful or negligent in his conduct; the doctrine being based on the maxim, "Volenti non fit injuria." Miller v. White Bronze Monument Co., 118 N. W. 518, 523, 141 Iowa, 701, 18 Ann. Cas. [illegible]

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"Assumption of risk" rests for its support upon the expressed or implied agreement of the employé that, knowing the danger to which he is exposed, he agrees to assume all responsibility for resulting injury. The protection vouchsafed to employés by statute against the negligence of their employers cannot be contracted away, and in an action by an employé for injury caused by the employer's failure to comply with the factory act, requiring manufacturers to safely guard their machinery, assumption of risk is not available as a defense. Western Furniture & Mfg. Co. v. Bloom, 90 Pac. 821, 822, 76 Kan. 127, 11 L. R. A. (N. S.) 225, 123 Am. St. Rep. 123.

"'Assumption of risk' is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume." The defense of assumption of risk is not based on contract, but is based on the doctrine of volenti non fit injuria (one who, knowing and appreciating a danger, voluntarily assumes the risk of it), and is recognized by Rev. Codes, § 6183, declaring "he who consents to an act is not wronged by it"; and hence the doctrine of assumed risk was not abrogated by Const. art. 15, § 16, and Rev. Codes, §§ 5052, 5053, declaring that a contract releasing an employer from liability for his negligence is void. Osterholm v. Boston & Montana Consol. Copper & Silver Min. Co., 107 Pac. 499, 504, 40 Mont. 508.

An early, if not the earliest, application of the phrase "assumption of risk," was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. The defense of "assumed risk" is said to rest on contract, which is generally implied by the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. Johnson v. Mammoth Vein Coal Co., 114 S. W. 722, 725, 88 Ark. 243, 19 L. R. A. (N. S.) 646 (citing Schlemmer v. Buffalo, R. & P. Ry. Co., 27 Sup. Ct. 407, 205 U. S. 1, 51 L. Ed. 681; Choctaw, O. & G. R. Co. v. Jones, 92 S. W. 244, 77 Ark. 367, 4 L. R. A. [N. S.] 837, 7 Ann. Cas. 430).

"Assumption of risk" does not arise from the contract of employment, but is based on the ground that the employment creates a status or relationship to which the law attaches certain reciprocal duties, obligations, and disabilities which are not matters of agreement between the parties. Denver & R. G. R. Co. v. Gannon, 90 Pac. 853, 859, 40 Colo. 195.

The law regarding "assumption of risk" is the law governing the relation of master and servant and is independent of the will of either. It is not a term of the contract of employment. It is a principle of the common law. It is over and above the contract and depends in no manner for its existence upon the agreement of the parties. It is founded upon public policy, the status assumed by master and servant, and upon the maxim, "Volenti non fit injuria." Laws Colo. 1897, p. 258, c. 69, requiring all railroad companies to securely block all frogs and switch rails, does not deprive a railroad company, when sued for injury to an employé resulting from its failure to observe such law, of the right to defend on the ground of "assumption of risk." Denver & R. G. R. Co. v. Norgate, 141 Fed. 247, 253, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448.

Where the use of the terms "risk" and "acceptance of risk" is involved, the question is whether, in incurring the particular danger, an employé accepted the risk in the sense that, by continuing at his work, he agreed to relieve defendant from the possible results; and hence the employé not only must be shown to have known the risk, but by implication from his conduct must be found to have voluntarily assumed it. Jellow v. Fore River Shipbuilding Co., 87 N. E. 906, 908, 201 Mass. 464.

"The doctrine of the 'assumption of the risks' of his employment by an employé has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer it leads up to the broader principle expressed by the maxim, 'volenti non fit injuria;' one who, knowing and appreciating a danger, and voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger." Drake v. Auburn City Ry. Co., 66 N. E. 121, 123, 173 N. Y. 466 (quoting and

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adopting definition in O'Maley v. South Boston Gaslight Co., 32 N. E. 1119, 158 Mass. 135, 47 L. R. A. 161).

The doctrine of "incurred risk" or "taking the risk" or "running the risk," as applied to master and servant, may be said to rest upon, or be, in its nature, effect, and import, the equivalent at least of the principle expressed by the maxim volenti non fit injuria, and is not founded on the theory of an implied agreement or contract, as is usually asserted in suits by a servant against the master. Indiana Natural Gas & Oil Co. v. O'Brien, 65 N. E. 918, 920, 160 Ind. 266.

Contributory negligence distinguished

"Assumption of risk" and "contributory negligence" are not synonymous. Parks v. St. Louis & S. R. Co., 77 S. W. 70, 73, 178 Mo. 108, 101 Am. St. Rep. 425.

The defenses of "assumed risk" and "contributory negligence" are separate and independent; the former arising out of contract relations, and the latter not. St. Louis, I. M. & S. R. Co. v. Brogan (Ark.) 151 S. W. 699, 704.

"Assumption of risk" is a form of contributory negligence, but is not the equivalent of contributory negligence where other forms, phases, or species of contributory negligence are shown. Campshure v. Standard Mfg. Co., 118 N. W. 633, 634, 137 Wis. 155.

"'Assumption of risk' and 'contributory negligence' are separate and distinct defenses: The one is based on contract, the other on tort; the former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain, or remote and improbable." Choctaw, O. & G. R. Co. v. O'Nesky, 90 S. W. 300, 302, 6 Ind. T. 180 (quoting and adopting St. Louis Cordage Co. v. Miller, 126 Fed. 495, 508, 61 C. C. A. 477, 63 L. R. A. 551).

The distinction between "assumed risk" and "contributory negligence," as defenses, is that, if assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal to the plaintiff's case, while, if contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal or may not be, dependent upon whether a person of ordinary prudence under the circumstances would have done what the injured person did. Galveston, H. & S. A. Ry. Co. v. Hanson (Tex.) 125 S. W. 63, 68 (citing St. Louis & S. F. R. Co. v. Mathis, 107 S. W. 530, 101 Tex. 342; Southern Pac. Co. v. Allen, 106 S. W. 441, 48 Tex. Civ. App. 66; St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 Fed. 495, 63 L. R. A. 551; Davis Coal Co. v. Polland, 62 N. E. 492, 158 Ind. 607, 92 Am. St. Rep. 319; Rase v. Minneapolis, St. P. & S. S. M. Ry. Co., 120 N. W. 360, 107 Minn. 260, 21 L. R. A. [N. S.] 138).

"Assumed risk" and "contributory negligence" are distinct doctrines of law. The distinction, briefly and generally stated, is, where negligence or want of proper care on the part of a person brings about injury which he suffers, then "contributory negligence" could be applied to his act; where a servant is injured from one of the mere known dangers ordinarily incident to his service, without negligence on his part, then his injury is ascribed to one of the ordinary risks of employment which he assumed in entering upon the service. Louisiana & Texas Lumber Co. v. Brown, 109 S. W. 950, 954, 50 Tex. Civ. App. 482.

"The two defenses of 'assumption of risk' and 'contributory negligence' are unlike because of the different states of mind in which they are rooted. Negligence is the result of inattention or oversight, whereas consent to a risk implies knowledge of the danger of the act to be performed, and the performance of the act understandingly and without constraint." Lee v. St. Louis, M. & S. E. R. Co., 87 S. W. 12, 15, 112 Mo. App. 372 (quoting and adopting language of Dean v. St. Louis Woodenware Works, 80 S. W. 292, 106 Mo. App. 167, citing Adolff v. Columbia Pretzel & Baking Co., 73 S. W. 323, 100 Mo. App. 206).

"Assumption of risk" and "contributory negligence" are entirely distinct. One has to do with contract and the other rests in tort. "Assumption of risk" is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor, while "contributory negligence" is the casual action or omission of the servant without ordinary care of the consequences, or the omission to use those precautions which ordinary prudence requires. Chicago & E. R. Co. v. Ponn, 191 Fed. 682, 687, 688, 112 C. C. A. 228.

"The doctrine of 'assumption of risk' by the employé is distinct from the doctrine of contributory negligence, although there may arise a certain condition of facts capable of supporting either inference. This has given rise to a great deal of confusion of statement when dealing with these defenses. 'Assumption of risk' rests in the law of contract and involves an implied agreement by the employé to assume the risks ordinarily incident to his employment, or a waiver, after full knowledge of extraordinary risk, of his right to hold the employer for a breach of duty in this regard. The law as to waiver applies because the relation between the employer and employé is contractual and waiver is the voluntary relinquishment of a known right. When, therefore, a case arises in which it is shown upon proper pleading that the employé has assumed the risk from

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which the injury arose, or, what is in effect the same thing, has waived his right to hold the employer responsible for risk, his action is defeated because of his agreement and not because of his negligence." Montgomery v. Seaboard Air Line Ry., 53 S. E. 987, 988, 73 S. C. 503 (quoting and adopting definition in Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 718, 61 S. C. 468, 478).

Many cases seem to confuse an agreement to "assume the risk" of an employment, as it is known to be to the servant, and his "contributory negligence." That under certain circumstances the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employés worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. "Assumption of risk" is in such cases the acquiescence of any ordinarily prudent man in a known danger, the risk of which he assumes by contract. "Contributory negligence" in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been organized by the Supreme Court of the United States. Swick v. Ætna Portland Cement Co., 111 N. W. 110, 115, 116, 147 Mich. 454.

The defenses of "assumption of risk" and "contributory negligence" must be regarded as distinct, and an injured servant who has not been guilty of contributory negligence may be precluded as a matter of law from recovery of damages from his master because he had assumed the risk. "Voluntary assumption negatives the idea of even prima facie liabilities. Contributory negligence displaces liability prima facie established. The former is mere passive subjection by the servant to risk of injury in known defective conditions. The latter is an act or omission on complainant's own part tending to add new danger to the situation not necessarily incident to conditions, and bringing upon himself a harm caused not solely by them, but created in part, at least, by his own misconduct. Contributory negligence is a breach of legal duty to take due care, imposed by law upon the servant, however unwilling or protesting he may be. Assumption of risk is not a duty, but is purely voluntarily upon the part of the servant. The doctrine of assumption of risk rests on intelligent acquiescence with knowledge of danger and appreciation of the risks. The distinction varies from being clear and vital at one extreme to being vague and insignificant at the other." Assumption of risk is based, not upon the contract, but on the principle expressed by the maxim, "Volenti non fit injuria." Rase v. Minneapolis, St. P. & S. S. M. R. Co., 120 N. W. 360, 363, 107 Minn. 260, 21 L. R. A. (N. S.) 138.

"There is a vast difference between the doctrines of 'assumption of risk' and 'contributory negligence'; the first rests in contract, and the second arises out of the negligence of the servant. The result to the person injured is the same in both cases, but the underlying principles are different and should be carefully borne in mind in every case. The maxim, 'volenti non fit injuria' cuts off a recovery where the injury is caused by one of the risks incident to the business which the servant assumes when he enters the employment. The right of recovery is cut off in the second case under the rule of law which prohibits a recovery where the negligence of the person injured contributes thereto." Obermeyer v. F. H. Logeman Chair Mfg. Co., 96 S. W. 673, 677, 120 Mo. App. 59 (quoting and adopting the distinction laid down by Judge Marshall in Blundell v. William A. Miller Elevator Mfg. Co., 88 S. W. 103, 105, 189 Mo. 552, 560).

"The doctrine of 'assumption of risks' by the employé is distinct from the doctrine of 'contributory negligence,' although there may arise a certain condition of facts capable of supporting either inference. This has given rise to a great deal of confusion of statement when dealing with these defenses. 'Assumption of risk' rests in the law of contract, and involves an implied agreement by the employé to assume the risk ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for breach of duty in this regard. Hooper v. Columbia & G. R. Co., 21 S. C. 547, 53 Am. Rep. 691. The law as to waiver applies because the relation between the employer and employé is contractual, and waiver is the voluntary relinquishment of a known right. By the contract, the employé and employer each assume certain risks; but, as in all contracts, either party may waive his right to insist upon strict performance of the other's contractual duty. When therefore a case arises in which it is shown (upon proper pleading) that the employé has assumed the risks from which the injury arose, or, what is the same thing in effect, has waived his right to hold the employer responsible for the risk, the employé's action is defeated because of his agreement, and not because of negligence. 'Contributory negligence,' on the other hand, rests in the law of torts as applied to negligence, and when such defense is established the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury." Wood v. Victor Mfg. Co., 45 S. E. 81, 82, 66 S. C. 482 (quoting and adopting Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 478.

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See, also, Chase v. Spartanburg Ry., Gas & Electric Co., 41 S. E. 899, 64 S. C. 212).

The rules of "assumed risk" and "contributory negligence" are dependent on widely separated tests and principles. Entering the employment of one who is known to furnish defective appliances might be assuming the risk arising therefrom, but it is not contributory negligence. The latter is the doing of some act or omission amounting to want of ordinary care, as, concurring with some negligent act of the defendant, is the proximate cause of the injury for which redress is sought. There must be some positive act of commission or omission that caused the injury or contributed thereto. To illustrate, if the explosion had been caused by allowing the water to get too low in the boiler, and it had been the duty of appellee to keep the water up to the safety mark, he might have been guilty of contributory negligence in failing to perform his duty, or if he had been working with the water glass at the time, and thereby caused the explosion, such act might have been contributory negligence. "Assumed risk" refers to a general course of action in connection with the master's way of doing business and the appliances furnished. "Contributory negligence" refers to the question as to whether the servant acted prudently in connection with a certain matter that arose for his consideration at a certain time and place. The first is an intelligent choice; the latter is carelessness. El Paso & S. W. R. Co. v. Foth, 100 S. W. 171, 173, 45 Tex. Civ. App. 275.

Assumption of risk and absence of contributory negligence may coexist; the former relating to assumption by an employé of a risk already in existence when assumed, and the latter to conduct on his part increasing an existing risk or creating or contributing proximately to a new one. Van Dinter v. Worden-Allen Co. 138 N. W. 1016, 1018, 153 Wis. 533.

While the doctrine of assumption of risk sometimes shades into that of contributory negligence, there is a clear distinction between the doctrines, an employé being held to assume the risk of ordinary dangers of his occupation, and also those risks which are known to him or are so clearly observable that he may be presumed to know of them, while contributory negligence constitutes omission of an employé to use those precautions for his own safety which ordinary prudence requires. Wright v. Yazoo & M. V. R. Co., 197 Fed. 94, 96.

The conscious negligence of a servant in doing or omitting an act is not "assumed risk," as used in the rule of law exempting a master in such a case from liability for injury to a servant, as such words relate to the risk of injuries resulting from dangers necessarily incident to the work, or due to conditions within the servant's knowledge, or of which he must have known had he exercised ordinary care. Houston, E. & W. T. Ry. Co. v. McHale, 105 S. W. 1149, 1154, 47 Tex. Civ. App. 360.

"Assumption of risk" is an element distinct from contributory negligence and is not affected by Burns' Ann. St. 1908, § 362, providing that want of contributory negligence need not be alleged but shall be a matter of defense. "Assumption of risk" is a matter of contract, while contributory negligence is a matter of conduct. Cleveland, C., C. & St. L. R. Co. v. Bossert, 87 N. E. 158, 159, 44 Ind. App. 245 (citing Cleveland, C., C. & St. L. R. Co. v. Scott, 64 N. E. 896, 29 Ind. App. 519-531; Bowles v. Indiana Ry. Co., 62 N. E. 94, 27 Ind. App. 672, 87 Am. St. Rep. 279; Baltimore & O. S. W. R. Co. v. Hunsucker, 70 N. E. 556, 33 Ind. App. 27; Indianapolis & G. Rapid Transit Co. v. Foreman, 69 N. E. 669, 162 Ind. 85, 94, 102 Am. St. Rep. 185).

The "assumption of risk" and contributory negligence are regarded and treated as distinct defenses in this state. The servant may be guilty of contributory negligence in using a machine which he knows to be defective and dangerous, notwithstanding he has protested against such use, and received the master's promise to repair. Such protest and promise relieves him in continuing in the service with such knowledge of the imputation by law of such negligence. But, if the danger to the servant arising from the use of the defective appliance is so great that an ordinarily prudent person, under the circumstances, would not have incurred it, or the servant by his own negligence in performing his work increased the risk, and thereby contributes to his injury, a recovery will be denied. St. Louis Southwesterly Ry. Co. of Texas v. Kern (Tex.) 100 S. W. 971, 973.

Assumption of risk and contributory negligence are distinct and separate defenses. Assumption of risk rests in contract. It is not conditioned or limited to the existence of contributory negligence, and the latter is not an element or attribute of it. Assumption of risk is alike available, whether the risk assumed is great or small, whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger. St. Louis Cordage Co. v. Miller, 126 Fed. 495, 499, 501, 61 C. C. A. 477, 63 L. R. A. 551.

"Contributory negligence" rests in the law of torts, as applied to negligence, and, when such defense is established, the plaintiff's action is defeated, not because of any agreement express or implied, but because his own misconduct was a proximate cause of the injury, and is distinguished from "assumption of risk," as it rests in the law of contract, and involves an implied agreement

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by the employé to assume the risks ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for a breach of duty in this regard. Hall v. Northwestern R. Co., 62 S. E. 848, 850, 81 S. C. 522 (citing and quoting Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 468).

Dangers incident to employment

A servant assumes all risk ordinarily incident to his work. Kenny v. Marquette Cement Mfg. Co., 90 N. E. 724, 726, 243 Ill. 396; Roberts v. Virginia-Carolina Chemical Co., 66 S. E. 298, 300, 84 S. C. 283; Alamo Dressed Beef Co. v. Yeargan (Tex.) 123 S. W. 721, 723; Goddard v. Interstate Telephone Co., Limited, 106 Pac. 188, 189, 56 Wash. 536.

"Assumption of risk" means the ordinary risks incident to the employment. Duffey v. Consolidated Block Coal Co., 124 N. W. 609, 610, 147 Iowa, 225, 30 L. R. A. (N. S.) 1067.

As a rule, a servant "assumes all risks" ordinarily incident to the business. A risk which is extraordinary in that it is unusual may be in incident to the employment; and, if it is, and is known to the servant, he assumes it. Roberts v. Virginia-Carolina Chemical Co., 66 S. E. 298, 300, 84 S. C. 283.

"An employé 'assumes all the risks' naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge equal to his employer, of any defect in the appliances or the machinery used, and without objection or promise on the part of the employer to remedy the defect, the employé assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby." Monarch Mining & Developing Co. v. De Voe, 85 Pac. 633, 36 Colo. 270 (quoting and adopting the definition in Denver Tramway Co. v. Nesbit, 45 Pac. 405, 406, 22 Colo. 408, 411, and citing Hough v. Texas & P. R. Co., 100 U. S. 224, 25 L. Ed. 612; Indianapolis & St. L. Ry. Co. v. Watson, 14 N. E. 721, 725, 114 Ind. 20, 27, 5 Am. St. Rep. 578).

"It has been the law all of the time that the servant, upon entering into a contract of employment, 'assumes' the hazards which result from such risks as are ordinarily incident to the employment in which he engages. * * * This proposition is bottomed upon and grows out of the contract of employment, in which it is necessarily implied that the servant, having undertaken the services for a consideration, must also, and has for the same compensation undertaken and agreed to, assume such hazards as are ordinarily incident to such employment. * * * In addition to the risks assumed above mentioned, the servant, either by entering or continuing in the service, and using, without complaint, defective appliances and machinery, assumes the hazards, * * * providing he knew of both the defects and dangers liable to result therefrom. It is not enough for him to know the defects alone; he must also know, understand, and appreciate the dangers thereof. * * * The law will not charge the servant with knowledge nor will it presume him to have known of the defects, ordinarily, which could have been ascertained by the exercise of ordinary care and diligence on his part, for the law does not require him to search for latent defects in machinery." Only in case of patent and obvious dangers will it be presumed that he knew such dangers as were obvious from a given defect, and which were necessarily sequent therefrom. The proposition involving patent defects and obvious dangers results not alone upon a contract of hire, but upon the maxim volenti non fit injuria, which is defined by Black as, "He who consents cannot receive an injury," which, like the contract itself, involves the idea of assent on the part of the servant; that is, the free and open activity of the senses, the understanding of the situation, and the untrammeled consent to cope therewith. Lee v. St. Louis, M. & S. E. R. Co., 87 S. W. 12, 18, 112 Mo. App. 372.

A servant assumes the ordinary hazards incident to his employment and the hazards of which he has knowledge, either actual or constructive, arising after his employment, where, with a comprehension of the risk and without any promise that the unsafe conditions shall be removed, or other inducements from the master, he voluntarily continues his employment, and a servant employed to repair a defective and unsafe appliance assumes the risks incident thereto. Arnold v. Connecticut Co., 75 Atl. 78, 79, 83 Conn. 97.

A servant "assumes" the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight, and when he engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them. Where a miner stood in the main slope of a mine while turning a room off from it, the portion of the slope occupied by him was his working place, in the sense that he was required to keep it safe from falling rock, loosened by

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his own efforts in turning the room, and the master was not liable for injury from such cause. Rolla v. McAlester Coal Co., 98 S. W. 141, 142, 6 Ind. T. 404.

The doctrine of "assumption of risk" is that the servant on entering the service of the master impliedly assumes by his contract of hire, for the same compensation, the hazards which result from such risks as are ordinarily incident to the employment in which he engages, and, in addition to these risks, ordinarily incident, etc., he also either by entering or continuing in the service and using, without complaint, defective machinery or appliances, or without complaint continuing to labor in an unsafe or dangerous place, assumes the risk of such defective machinery or appliances or unsafe or dangerous place, provided he knew not only that the machinery or appliances were defective or the place unsafe, but also knew and understood and appreciated the dangers which were liable to result therefrom, and that he understood and appreciated the dangers must be made to appear, first by either positive evidence to that effect, or else, second, the danger as well as the defect must have been obvious. Rigsby v. Oil Well Supply Co., 91 S. W. 460, 462, 115 Mo. App. 297 (citing Lee v. St. Louis, M. & S. E. Ry. Co., 87 S. W. 12–18, 112 Mo. App. 372; Zeigenmeyer v. Charles Goetz Lime & Cement Co., 88 S. W. 139, 142, 113 Mo. App. 330; Epperson v. Postal Tel. Cable Co., 50 S. W. 795, 155 Mo. 346; Id., 55 S. W. 1050, 155 Mo. 346.

"The very expression 'risks naturally incident or inherent in the employment' exclude ex vi termini the idea of 'negligence,' while 'negligence' as applied to the master conveys with equal certainty the idea of a risk not incident but arising from the failure of the master to exercise the degree of care that the law requires of him for the safety of the servant. Now, generally speaking, the law never holds the servant to take upon himself the risk of injury from such failure on the master's part; but to this proposition there is a well-recognized exception. While the servant in entering upon and exercising the employment may rightfully take it for granted that the master's duty with reference to his safety has been and will continue to be performed, yet if he knows that the master is in fact negligent in any respect, or if such negligence is so patent or obvious that as a person of ordinary capacity he ought to know it, and to appreciate the danger therefrom, and with such knowledge he continues in the service without any promise on the part of the master to remedy or remove the defect, then he is said to have 'assumed the risk' of the master's negligence and cannot recover for injury resulting to himself therefrom." Martin v. Des Moines Edison Light Co., 106 N. W. 359, 363, 131 Iowa, 724.

Switchmen or brakemen whose duty requires them to be on or about the cars are fully advised as to, and assume, the risks ordinarily incident to their employment, such as arise from the more or less jerking or bumping of freight trains, and, if injury or death results therefrom, no recovery is allowed. Louisville & N. R. Co. v. Greenwell's Adm'r (Ky.) 125 S. W. 1054, 1056.

An instruction that "plaintiff in becoming an employé of the defendant as a laborer assumed the ordinary risks, hazards, and dangers incident to the work in which he was engaged, and, if you believe from the evidence that the plaintiff was injured by reason of the caving in of the earth in a ditch in which he was working, and that the risks, hazard, or danger of such caving in was an ordinary one, incident to the work, then plaintiff cannot recover, and the jury must find the defendant * * * not guilty," correctly states the law as to assumed risk. Kennedy v. City of Chicago, 144 Ill. App. 25, 28.

Assumption of risk is not properly applicable to "ordinary risk," since it can mean no more than that the risk inhered in the contract of service, and, as applied to an extraordinary risk, assumption of risk means that the servant has by his own act waived the effect of the employer's negligence. Belevicze v. Platt Bros. & Co., 81 Atl. 339, 342, 84 Conn. 632.

It is the well-settled rule that a servant "assumes" all the ordinary risks which are naturally and reasonably incidental to his employment. This rule is based on the presumption that a person who enters a certain service appreciates the dangers normally incident thereto, and by accepting such employment impliedly relieves his employer from responsibility for such injuries as may result from such risks; the consideration for such implied agreement being the wages he receives. No risks, however, are the ordinary incidents of an employment which are caused by the negligent act or omission upon the part of the master, and the servant assumes the risk of injury only as to those matters which arise after the exercise of care and diligence on the part of the master. The servant does not assume risks arising from the negligence of the master. Ray v. Pecos & N. T. Ry. Co., 88 S. W. 466, 469, 40 Tex. Civ. App. 99.

Duty imposed by statute

A servant, who remained at work about an elevator shaft which was not guarded by barriers as required by law, assumed the risk of injury. Sabatino v. Roebling Const. Co., 120 N. Y. Supp. 956, 957, 136 App. Div. 217.

That a coal miner continued in his work, with knowledge that the operator has failed to furnish props to secure the roof of the mine, as required by statute, does not prevent a recovery for a personal injury suffered

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by the miner by reason of such breach, as the risks which a servant assumes are those only which occur after the master has discharged his statutory duty. Burns' Ann. St. 1908, § 8580, requiring a coal mine operator to furnish props with which to secure the roof of the working place, is designed to protect miners from dangers apparent and remote, and, in the absence of notice to a miner of imminent danger, he need not quit work because the operator fails to comply with the statute, and where, while in the employment, he is injured because of the failure, it is no defense that the operator failed to perform its duty, and that the miner knew it. Miami Coal Co. v. Kane, 90 N. E. 13–15, 45 Ind. App. 391.

Knowledge of danger—Necessity and effect

A servant does not assume a danger of which he has no knowledge or means of knowledge. Malloy v. Kelly-Atkinson Const. Co., 144 Ill. App. 226, 229; Kaukola v. Oliver Iron Mining Co., 124 N. W. 591, 596, 597, 159 Mich. 689; Kenny v. Marquette Cement Mfg. Co., 90 N. E. 724, 727, 243 Ill. 396; Hamilton v. Chicago, B. & Q. R. Co., 124 N. W. 363, 364, 145 Iowa, 431; Missouri, K. & T. Ry. Co. of Texas v. Poole (Tex.) 123 S. W. 1176, 1179; El Paso & S. W. R. Co. v. Welter (Tex.) 125 S. W. 45, 47; Jones v. Tennessee Coal, Iron & R. Co., 50 South. 1017, 1018, 163 Ala. 266; Duluth Elevator Co. v. Wallin, 174 Fed. 955, 958, 99 C. C. A. 459.

A servant knowing of a danger is chargeable with knowledge of the injurious results naturally and proximately flowing from such danger. Nordstrom v. Spokane & Inland Empire R. Co., 104 Pac. 809, 812, 813, 55 Wash. 521, 25 L. R. A. (N. S.) 364.

Where a servant knows, or by ordinary care should have known, the risks to which he is exposed, he will as a rule be held to have assumed them, but where he does not know, or, knowing, does not appreciate such risks, and his ignorance or nonappreciation is not due to negligence, there is no assumption of risk. Galveston, H. & S. A. Ry. Co. v. Hanson (Tex.) 125 S. W. 63, 65.

A servant is not entitled to recover for injuries sustained while in the service of his master unless he has established that he did not know of the defects which caused his injury, and did not have equal opportunities with his master of knowing thereof at the time he was so injured. Bettis v. Chicago Coated Board Co., 145 Ill. App. 390, 393.

Where it was an employé's duty to put his hand under the die of a leather stamping machine and remove the leather after the ram plate had descended, and it would not have been hurt except for a secret danger, he was not guilty of contributory negligence where he neither knew, nor ought in the exercise of ordinary care to have known, of the danger. Berger v. Abel & Bach Co., 124 N. W. 410, 411, 141 Wis. 321.

"The doctrine of the law of master and servant that one who, knowing and appreciating a danger, voluntarily 'assumes' the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that regard, and leaves each to take such chances as exist in the situation without a right to claim anything from the other." Hall v. West & Slade Mill Co., 81 Pac. 915, 925, 39 Wash. 447, 4 Ann. Cas. 587 (quoting and adopting O'Maley v. South Boston Gas Light Co., 32 N. E. 1119, 158 Mass. 135, 47 L. R. A. 161).

"Assumption" implies knowledge, and where a complaint by an injured employé averred that he had not at any time "notice, knowledge, or information" that the defendant had failed and neglected to have a watchman or a set of signals at said junction, but, on the contrary, believed during the entire time of his employment that defendant had taken the precaution to avoid collisions by having such watchman or signals, it sufficiently appeared from the complaint that plaintiff did not assume the risk. Coal Bluff Mining Co. v. Akers, 80 N. E. 545, 546, 39 Ind. App. 617.

A servant assumes the ordinary hazards incident to his employment and the hazards of which he has knowledge, either actual or constructive, arising after his employment, where, with a comprehension of the risk and without any promise that the unsafe conditions shall be removed, or other inducements from the master, he voluntarily continues his employment, and a servant employed to repair a defective and unsafe appliance assumes the risks incident thereto. Arnold v. Connecticut Co., 75 Atl. 78, 79, 83 Conn. 97.

Same—Appreciation of risk

Before an employé will be held to have assumed a risk, it must appear that he appreciated the danger, and voluntarily assumed it. Miller v. Camp Bird, 105 Pac. 1105, 1107, 46 Colo. 569; Barrett v. New England Telephone & Telegraph Co., 87 N. E. 565, 566, 201 Mass. 117; El Paso & S. W. Ry. Co. v. Vizard, 88 S. W. 457, 461, 39 Tex. Civ. App. 534; Pigeon v. W. P. Fuller & Co., 105 Pac. 976, 978, 156 Cal. 691.

Where a servant fully appreciating the nature and extent of perils from an unguarded machine at which he is required to labor, and continues in the service after learning of its unguarded condition, he waives performance of the employer's obligation to provide suitable guards, and assumes the risk of the employment. Wiley v. Batchelder, 75 Atl. 47, 48, 105 Me. 536.

A servant, though knowing of defects in appliances operated by him, may recover for

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injuries resulting therefrom, where he did not know of the danger in the use of the appliances. Muse v. Abeel (Tex.) 124 S. W. 430.

Ordinarily, if one of mature years knows of the dangers of a machine, he may be assumed to appreciate them. Kirchoff v. Hohnsbehn Creamery Supply Co., 123 N. W. 210, 212, 148 Iowa, 508.

"Assumption of risk" is not predicable from mere knowledge of conditions alone, but the circumstances must be such that no other inference than that the servant appreciated the danger is fairly deducible therefrom. Galvin v. Brown & McCabe, 101 Pac. 671, 677, 53 Or. 598.

"Assumption of risk" in its true sense is the assumption of the risks arising out of the negligence of the master when such negligence is known to the servant, and the danger therefrom is appreciated by him. Duffey v. Consolidated Block Coal Co., 124 N. W. 609, 610, 147 Iowa, 225, 30 L. R. A. (N. S.) 1067.

The doctrine of "assumption of risk" is wholly dependent on the servant's knowledge, actual or constructive, of the danger incident to his employment, and where he knows, or should reasonably know, the risks to which he is exposed, he will as a rule be held to assume them, but where he does not know, or knowing, does not appreciate, such risks, and his ignorance or nonappreciation is not due to want of care on his part, he does not assume the risk. Millen v. Pacific Bridge Co., 95 Pac. 196, 198, 51 Or. 538.

An experienced operator of a circular saw in a lumber mill assumed the risk of being fatally injured by a piece of lumber being thrown back by the saw, due to want of a guard and to the fact that a device designed to prevent "pinching" of pieces being sawed was insufficient, especially where he is shown to have realized the danger through having made complaint about the defective condition before the accident occurred. Fullerton v. Henry Wrape Co. (Ark.) 151 S. W. 1005, 1006.

Same—Dangerous animal

Where a master negligently furnishes his servant with a mule of such a vicious nature that the servant is liable to be injured because of its viciousness, and the servant knew that the animal was dangerous, but continued to use it he assumes the risk. Arkansas Smokeless Coal Co. v. Pippins, 122 S. W. 113, 114, 92 Ark. 138, 19 Ann. Cas. 861.

Same—Dangerous mines

A servant, by entering or continuing in the employment of a master without complaint, "assumes the risks" and dangers of the employment which he knows and appreciates, and those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation. An employé in a mine, who had knowledge of the defective condition of the roof of an entry for two or three weeks, and who always walked faster and watched the rock while passing the place, but who continued to work without objection, "assumed the risk" of injury by falling of the rock. Choctaw, O. & G. R. Co. v. O'Nesky, 90 S. W. 300, 302, 6 Ind. T. 180.

Same—Dangerous operations

A switchman on entering the service of defendant railroad company did not thereby assume to understand the established customs and usages of the company concerning the switching of locomotives and cars in the yard in which he was employed. Texas & N. O. R. Co. v. Walker (Tex.) 125 S. W. 99, 104.

Where the foreman of a switching crew knew that the engine used was operated without a proper headlight, and he continued to work without any complaint, and without any promise to repair the same, and was killed by a collision between his engine and cars to which it was attached, and another switch engine and cars, he assumed the risk by continuing at work. Ross v. Chicago, R. I. & P. Ry. Co., 90 N. E. 701, 703, 704, 243 Ill. 440.

A brakeman whose duties did not limit his activities to any part of the right of way was not bound to know that the company had not provided a derailing or other safety device at a particularly dangerous point where a storage track connected with the main line on a descending grade to prevent a collision between trains on the main track and cars set out on the storage track which might run down the grade onto the main track because the defective brakes with which they were equipped were insufficient to hold them, and hence a brakeman in a train on the main track did not assume the risk of injuries sustained in such collision. St. Louis, I. M. & S. Ry. Co. v. Corman, 122 S. W. 116, 118, 92 Ark. 102.

A party working on a tower erected on a flat car in putting up trolley wire, who was familiar with the work and knew all the dangers incident thereto, that the trolley wire often slipped and was liable to do so any time, and that he would be injured by grasping a live wire, cannot recover for injury due to the trolley wire slipping, and causing him to lose his balance, so that he involuntarily grasped a live wire, since he assumed the risk of such injury. Shore v. Spokane & I. E. R. Co., 106 Pac. 753, 754, 57 Wash. 212.

A brakeman, thrown from a freight car and injured by the pulling out of a defective handhold, was not charged with notice of its condition, unless he either had actual knowledge thereof, or must have necessarily obtained such knowledge in the ordinary discharge of his duties. The rule that a serv-

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ant is negligent in voluntarily choosing a dangerous way when a safe way is open to him, precluding a recovery for injuries sustained, applies only when the way chosen is obviously unsafe, or the danger known to the servant. Missouri, K. & T. Ry. Co. of Texas v. Hawley (Tex.) 123 S. W. 726, 731.

Same—Dangerous or defective machinery, tools or appliances

Where a servant, with knowledge of the dangers arising from defects in a machine he is operating, continues in the service in consideration of an increase of wages, he assumes the risk from resulting from the defects. Southern Cotton Oil Co. v. Walker, 51 South. 169, 175, 164 Ala. 33.

Where an employé lawfully in the vicinity of dangerous and unguarded machinery slips and falls into the machine and is injured, the fact that he knew the conditions does not of itself establish as a matter of law that he assumed the risk. Snyder v. Waldorf Box Board Co., 124 N. W. 450, 451, 110 Minn. 40.

"The doctrine of 'assumption of risk' has no application to a case where the injured person is not shown and cannot be presumed to have possessed the knowledge necessary to enable him to detect or realize the danger." An engineer and fireman did not assume the risk arising from corrosion of the boiler due to the corrosive action of chlorides contained in the water used in the boiler. Nelson v. City of New York, 91 N. Y. Supp. 763, 765, 101 App. Div. 18.

"Assumption of risk" is an element of a contract of employment. A servant assumes only those hazards as are natural incidents of the employment. Tools which are dangerously defective are not the natural incidents of any employment. It is the master's absolute and unassignable duty to supply safe ones. If defective tools are furnished, the servant may assume the risk attending their use, but he can be held to have done so only when he has knowledge, or the equivalent of knowledge, of the facts and of the danger. The flying of chips of metal from the casting the plaintiff was dressing was a natural incident of his work. He was bound to know that such a result would follow from the pounding of his chisel by the helper's sledge and was required to take all necessary precautions to protect himself from injury from that source. But he was not bound to take any steps to protect himself from a slivering sledge when he could assume that the master had given the helper a sound one. A skilled machinist, engaged in the work of chipping a casting, who held a handled chisel while the helper struck it with a plainly defective sledge hammer supplied by the employer so that a sliver of steel broke from the sledge and destroyed his eye, did not assume the risk of injury from the sledge. Missouri, K. & T. R. Co. v. Quinlan, 93 Pac. 632, 636, 77 Kan. 126 (citing and adopting Kansas City, M. & O. R. Co. v. Loosely, 90 Pac. 990, 76 Kan. 103).

In an action for injuries to an employé operating a sausage machine, in consequence of his fingers being caught by the revolving worm, the evidence showed that he had been advised as to how to operate such a machine, and had been cautioned to be careful of his fingers, and not to put them into the machine. He knew that, if he got his fingers into the machine, they would be cut off. Held, that he was guilty of contributory negligence as a matter of law. Fortune v. Hall, 106 N. Y. Supp. 787, 789, 122 App. Div. 250.

Though a servant incurs the risks of place or machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose that they may be safely used with great skill and care, the mere knowledge of the defects on the servant's part will not defeat a recovery for injuries. George v. St. Louis & S. F. R. Co., 125 S. W. 196, 208, 225 Mo. 364.

A servant assumes the risk of a danger of which he has actual knowledge and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would use in the particular employment. Where a brakeman, injured by the defective construction of a coupling lever on a caboose, had been in the company's employ for a year and had used the same coupling lever frequently in the same condition it was in when the injury occurred, he assumed the risk incident to the operation of the coupler, and could not recover. Trinity & B. V. R. Co. v. Perdue, 101 S. W. 485, 487, 45 Tex. Civ. App. 659.

Same—Duty to inspect and discover defects

Where an experienced lineman working for a telephone company, whose rules required linemen to inspect poles before climbing them, knew that here had been no inspection of a pole on which he had a right to rely, he assumed the risk of injury from its falling when he had climbed it. De Frates v. Central Union Telephone Co., 90 N. E. 719, 721, 243 Ill. 356.

An experienced and properly instructed employé of an electric light and power company, employed to discover and repair defects in the system, and furnished with proper appliances for doing the work, assumes the risk of injury while repairing the defect and replacing a lamp burnt out. White v. Thomasville Light & Power Co., 66 S. E. 210, 211, 212, 151 N. C. 356.

Same—Experience of servant

Where a fireman of six months' experience and average intelligence knew that about one-third of the engines were equipped with screens on the lubricator feed glasses,

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which were immediately in front of him on the boiler, and there was no defect or anything inherently dangerous in the glass, except that it might occasionally break, as any other implement or tool might, he assumed the risk of injury from the breaking of the glass. St. Louis, I. M. & S. R. Co. v. Wells, 124 S. W. 524, 525, 93 Ark. 153.

Plaintiff, a man of ordinary intelligence and experience, 60 years of age, had worked in defendant's mill for many years, and from May, 1905, to October 17th following, the day of his injury, had operated a mixing woolen picker. By the removal of a lever it became necessary, when the machine clogged, for plaintiff to stop it and reach through the discharge spout and past a fan, and remove the clogged material. While doing this on the occasion of his injury, the machine suddenly started, and he was injured. Held, that plaintiff was charged with knowledge of the danger incident to putting his hand into the machine in that manner and assumed the risk as a matter of law. Lillis v. Beaver Dam Woolen Mills, 124 N. W. 1011, 1014, 142 Wis. 128.

A servant of ordinary intelligence and of experience in sawmills and steel roller mills, and of six years' experience as a lineman on electric current wires, is chargeable with knowledge that sawing iron lugs creates iron dust, which will fly with the wind, or which will be thrown by the movement of the saw, and that such flying dust will enter the eyes when sufficiently near, and that such dust, entering the eyes, may result in serious injury, and he assumes the risk of any injury to the eyes caused by such dust flying into them when sawing the lugs on insulators carrying a trolley wire. A lineman employed in constructing a trolley wire was engaged with a fellow servant in sawing lugs on insulators. In doing the work the linemen worked in pairs, standing on tower cars and using a hack saw. Owing to the unevenness of the track, the car would be at different heights, so that the eyes of the linemen would sometimes be above, sometimes on a level with, and sometimes below, the lug. The lineman knew the facts, and made no complaint, but continued to use the car. Held, that he assumed the risk of injury resulting from iron dust flying into his eyes. Nordstrom v. Spokane & Inland Empire R. R. Co., 104 Pac. 809, 812, 813, 55 Wash. 521, 25 L. R. A. (N. S.) 364.

Same—Failure to complain or require safeguards

A section hand, who, long before the time when he lost his balance on a hand car from its lurching because of a wheel on one of the axles being loose and the axle having too much play, knew of such condition of the car and had not complained of it, will be held to have "assumed the risk" incident thereto. Foster v. Chicago, R. I. & P. R. Co., 102 N. W. 422, 423, 127 Iowa, 84, 4 Ann. Cas. 150.

If a servant does not require further safeguards to machinery, or so conducts himself as to assure the master that he is content with the machinery as it is, and will take the chance of injury, he cannot recover for an injury therefrom. A servant injured by a laundry mangle had worked at the master's laundry at different times for more than a year, and for about four weeks before the accident had constantly operated the mangle. Prior to the month of steady work, she had occasionally operated it with the assistance of another person, and during her entire service in connection with the mangle no guard rails had been used upon it. She fully appreciated the extent of the danger of operating it without a guard rail. Held, that she assumed the risk. Wiley v. Batchelder, 75 Atl. 47, 48, 105 Me. 536.

Where the foreman, of a switching crew knew that the engine used was operated without a proper headlight, and he continued to work without any complaint, and without any promise to repair the same, and was killed by a collision between his engine and cars to which it was attached, and another switch engine and cars, he assumed the risk by continuing at work. Ross v. Chicago, R. I. & P. Ry. Co., 90 N. E. 701, 703, 243 Ill. 440.

Negligence of fellow servant

"An early, if not the earliest, application of the phrase 'assumption of risk,' was the establishment of the exception to the liability of a master for the negligence of his servant, when the person injured was a fellow servant of the negligent man." Lyon v. Charleston & W. C. Ry., 58 S. E. 12, 19, 77 S. C. 328 (quoting, with approval, from Schlemmer v. Buffalo, R. & P. R. Co., 27 Sup. Ct. 407, 205 U. S. 1, 51 L. Ed. 681).

A servant does not, by his contract, assume the risk of his superintendent's negligence, unless, after the danger becomes obvious, he knows of the conditions creating it and appreciates the degree of danger resulting therefrom. Silvia v. New York, N. H. & H. R. Co., 89 N. E. 1061, 1062, 203 Mass. 519.

Negligence of master

"Assumption of risk," is the risk which is ordinarily incident to the service in which a servant is engaged, not arising out of the negligence of the master, unless the danger is obvious or known to the servant or would be known to him by the exercise of ordinary care, and under Act 1905, c. 163, a servant engaged in railway service does not assume the risk of a defect and danger arising out of the negligence of the railroad though known to him, where a person of ordinary care would continue in the service with knowledge thereof. International & G. N. R. Co. v. Schubert (Tex.) 130 S. W. 708, 709.

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A servant does not assume the risk of his master's negligence, unless he knows or is charged with knowledge thereof, and of the danger arising therefrom. Where the place where a servant was injured did not become dangerous during the progress of the work he was doing, but was dangerous when his master put him there to work, and the servant did not know of the danger, he did not assume the risk. Buchanan & Gilder v. Murayda (Tex.) 124 S. W. 973, 975.

Where a servant enters into the employ of another, he "assumes the risks" ordinarily incident to the business, but the willful violation by an employer of his obligation to furnish appliances which are safe (particularly those with which he will have necessarily to come in contact) and the results to flow from such violation are not risk ordinarily incident to the business, which the employé assumes. Roff v. Summit Lumber Co., 44 South. 302, 306, 119 La. 571.

A servant does not assume the risk of the master's negligence, but, where there are no hidden agencies or unknown conditions, it is not negligence to put a servant to perform work on the master's plan, known to him. Saversnick v. Schwarzschild & Sulzberger, 125 S. W. 1192, 1193, 141 Mo. App. 509.

A servant assumes the risk of a danger incident to his employment, but he never assumes the risk of his master's negligence. If the master furnishes unsafe implements, and the servant uses them, knowing them to be unsafe, a question of contributory negligence arises, but not of assumption of risk. Cole v. St. Louis Transit Co., 81 S. W. 1138, 1142, 183 Mo. 81.

An employé does not assume such risks as arise from the negligence of the employer in failing to furnish him a reasonably safe place in which to work and reasonably safe instrumentalities and materials with which to work. Brents v. Louisville & N. R. Co. (Ky.) 104 S. W. 961, 962.

Obvious dangers

The rule that an employé "assumes the obvious risks" of his employment does not rest wholly on his implied agreement, but on an independent act of waiver, evidenced by his continuing in the employment with knowledge of the facts. An owner of a building in process of construction requested an independent contractor, having nothing to do with the keeping of fires in stoves to prevent the plaster from freezing, to put on one of his men to do the work and the owner would pay therefor. Pursuant to the arrangement, the independent contractor directed one of his employés to do the work. His entire time was occupied in doing it, and the owner paid for it. Held, that the relations between the owner and the employé were such that the owner was entitled to invoke the doctrine of the "assumption of risk" by the employé. Rooney v. Brogan Const. Co., 99 N. Y. Supp. 939, 940, 113 App. Div. 813 (citing Drake v. Auburn City Ry. Co., 66 N. E. 121, 173 N. Y. 466).

In an action for injuries to a servant, an instruction that if he knew, or by the exercise of ordinary care could have known, at the time of the injury, that the machine which he was repairing was not provided with a belt shifter, and that the belt was therefore liable to slip from the loose to the tight pulley, and plaintiff's act in attempting to repair the machine was so obviously dangerous that he knew he was taking an extra risk, then he "assumed" such risk, was proper. Pressly v. Dover Yarn Mills, 51 S. E. 69, 73, 138 N. C. 410.

The standard of care which the law requires of the servant is that which a reasonably cautious and intelligent person would exercise under the same circumstances, and the hazards and risks attendant upon his employment which he "assumes" are those which are open and obvious, of which he ought to have known by using reasonable care. Bryant v. Great Northern Paper Co., 68 Atl. 379, 380, 103 Me. 32.

An employé assumes obvious danger inherent in the nature of the work he is employed to do, as in the case of slippery floors in a department of a meat-packing house, which cannot be otherwise considering the nature of the work and the manner of operation. Saversnick v. Schwarzschild & Sulzberger, 125 S. W. 1192, 1193, 141 Mo. App. 509.

The doctrine of "assumed risk" must be limited to risks which are obvious and can be understood by a servant of ordinary intelligence, or at most to those dangers which should be anticipated by the servant, as a result of obvious conditions, or may reasonably be expected to be known by him. Dettering v. Levy, 79 Atl. 476, 481, 114 Md. 273.

The instruction, in an action for injury to a servant, that he assumed all the open, apparent, and obvious risks incident to his work, and if his injury resulted from such risks there would be no recovery, correctly states the law. Anustasakas v. International Contract Co., 107 Pac. 342, 344, 345, 57 Wash. 453.

Where an employé injured by the fall of a scaffold on which he was at work chose to enter into and continue in the service with full knowledge of the mode of carrying on the work he was doing, and with co-employés was intrusted with the placing of the brackets, and the construction of the scaffold, and was at full liberty and had ample opportunity, not only to exercise his judgment as to the safety or the sufficiency of the mode of hanging the brackets adopted, but also to brace up the bracket which gave way by

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such additional contrivances as common sense would suggest, including if necessary a scantling from the floor to the outside thereof, he assumed the risk, even if his employer neglected its duty as to the appliances. An employé who enters and continues in the service of an employer, knowing that the latter had laid out a particular mode of doing his work, assumes the ordinary risk of such service arising from such mode which he knows by ordinary observation. When an employé knowing that his employer has furnished particular appliances for doing his work enters and continues in the service of his employer, he assumes the risks arising from such appliances, which are simple in their construction, and not worn out, broken, or defective. Ladwig v. Jefferson Ice Co., 124 N. W. 407, 410, 141 Wis. 191.

A fireman who knows that the engine is running backward over a new and rough track does not assume the risk of injury therefrom, unless the danger is known or apparent to him. Missouri, K. & T. Ry. Co. of Texas v. Poole (Tex.) 123 S. W. 1176, 1180.

A complaint for injuries to an employé while oiling a rock crusher, which alleges that the employé's coat sleeve was caught in uncovered gearing over which it was necessary for him to reach in working as oiler, that the employer negligently failed to warn the employé, who was inexperienced, as to the danger, and negligently set the employé to work in a place of danger, but which does not intimate that the exposed gearing was not obvious, shows, as a matter of law, that the employé assumed the risk, within the rule recognized by Civ. Code, § 1970, that an employé, understanding the dangers incident to the defective condition of machinery, assumes the risk, where he continues in the use thereof. Bresette v. E. B. & A. L. Stone Co., 121 Pac. 312, 314, 162 Cal. 74.

A grain elevator owned by defendant when filled with grain settled and sagged over, causing a belt conveyor which extended from the ground through the center to tear loose some of the boards and shingles from the roof. Plaintiff, with others, was employed to load a car with grain on the south side of the building while a strong wind was blowing from the north, and was struck and injured by a board which fell upon him. There was evidence tending to show that, when the men went to work, there was a loose board on the roof flapping in the wind, and it was seen by defendant's superintendent. Held, that plaintiff did not assume the risk; it not appearing that he saw or knew of the loose board, or that it was plainly observable. Duluth Elevator Co. v. Wallin, 174 Fed. 955, 958, 99 C. C. A. 459.

"'Assumption of risk' does not mean that in all cases where the plaintiff has knowledge of the defects of dangerous machinery and goes on with the work that he assumes the risk; but the law is that, where the defendant fails to perform its duty and furnish the plaintiff with safe and suitable methods of doing the work, the plaintiff will not be held to assume the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probability of the injury is greater than those of safety, or unless it is a danger ordinarily incident to the employment, or unless obvious, or one which the servant may discover by the exercise of ordinary care." Jones v. American Warehouse Co., 51 S. E. 106, 108, 138 N. C. 546.

"Assumption of risk" means that one entering a dangerous employment assumes the ordinary and usual risks incident thereto, not only those known, but those which he might have discerned in the exercise of reasonable care; but it does not cover the risk of latent defects, notwithstanding that his opportunity of discovering them is the same as that of his employer, nor risks arising from his employer's negligence which are not incidental to the business, when he has no actual knowledge of the same. Puget Sound Electric R. Co. v. Harrigan, 176 Fed. 488, 491, 100 C. C. A. 104.

Where a servant suing for injury by slipping on a greasy spot on an iron plate forming a part of the floor of a factory showed that for several years, during three of which he had been a servant in the factory, the machines threw out the lubricating oil on the iron plates placed back of the machines; that the oil had been permitted to accumulate; that the floor had not been cleaned; that various servants had at various times slipped on the oily surface; that he passed over the iron plates every day and knew all about the machines throwing out the oil—the testimony showed, as a matter of law, that he assumed the risk, though he stated that he had not seen any oil on the plate on which he slipped while he passed there before the accident. A servant who has had every opportunity to see and know what his fellow servants have seen and known, and who has been under such conditions for at least a year, may not give probative evidence that he has not seen the condition, especially where he shows that he was familiar with the details of the place. Welch v. Waterbury & Co., 120 N. Y. Supp. 1059, 1061, 136 App. Div. 315.

Promise to repair

An employer's promise to repair a defective appliance need not be in express words, but may be implied from the words spoken or the employer's subsequent conduct. An employer's promise to repair defective appliances is in effect an agreement to temporarily assume responsibility for any accident occurring by reason thereof, and the servant does not assume the risk of injury

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from such defect until the lapse of such time as precludes reasonable expectation that the promise will be performed. Alkire v. Myers Lumber Co., 106 Pac. 915, 917, 918, 57 Wash. 300.

A servant who has been induced to continue work by his master's promise to remedy dangerous conditions is not guilty of contributory negligence so long as he may reasonably expect the master's promise to be kept, unless the danger is so obvious that a reasonably prudent person would not continue the work. Benak v. Paxton & Vierling Iron Works, 124 N. W. 461, 462, 85 Neb. 836.

A master is not liable under his promise to repair if the danger of injury from the defective appliance is so great or imminent that a reasonably prudent person would not assume the risk. Comer v. Meyer, 74 Atl. 497, 498, 78 N. J. Law, 464, 29 L. R. A. (N. S.) 597.

A servant does not assume the risk of injury from a defective machine where he has continued at work not beyond a reasonable time under a promise of his master to repair. The servant has a right to rely upon such a promise when made with respect to a simple device if the machine as a whole was so dangerous that he would not have been justified in himself undertaking to make the repairs. Suchomel v. Maxwell, 144 Ill. App. 543, 547.

Where a master had promised to repair a dangerous place of work or machinery, the servant, using extra precaution commensurate with the enhanced hazard, although having knowledge of the conditions, may continue to work without assuming the risk from the defects until after a reasonable time has transpired for making the promised repairs. Price & Lucas Cider & Vinegar Co. v. Haley, 125 S. W. 720, 137 Ky. 305.

Where slight ruts existed in the floor of a warehouse made by wheels of trucks in hauling hogsheads of tobacco over it, and the roof leaked so that, when it rained, the floor was always wet at a certain place, assurance of the master that the floor and roof would be repaired gave an employé injured thereafter by slipping on the floor during a rain while pulling a truck stalled at the ruts no right of recovery; the place not having been intrinsically dangerous to work, danger to employés from such conditions not being anticipated when the request for and promise of repairs were made, the employé not having continued at his work because of such assurance, and the assurance that the defects would be repaired when there was nothing else to do having been given two weeks before the accident, and the employés having had idle days after the assurance and before the accident. American Tobacco Co. v. Adams, 125 S. W. 1067, 1070, 137 Ky. 414.

Where a servant, knowing and appreciating the danger and risk, voluntarily elects to encounter them and is injured, he assumes the risk and cannot recover for the injury; but where the master undertakes expressly or impliedly to remove the danger within a reasonable time, his assurance is an "assumption" by the master "of the risk" incident to the duties of the employment during such reasonable time, and where the servant is injured in the meantime by reason of the danger the master is responsible therefor. Southern Cotton Oil Co. v. Walker, 51 South. 169, 174, 164 Ala. 33.

Plaintiff, a head stone mason in charge of a stone gang, was injured by the fall of a stone by the breaking of a defective derrick chain. When chains needed repairs, or new ones were required, they were obtained from the blacksmith, frequently under plaintiff's direction, and at other times on motion of members of the crew. Plaintiff, on the day before the accident, in the absence of the general foreman, complained to H., in charge of ordinary supplies, of the defective character of the chain, and was told to go on with the work, and that H. would see that it was fixed. H. had no authority as to tools and appliances used. Both H. and plaintiff had authority to employ men. Held, that H. was not the vice principal, and that his promise to repair did not excuse plaintiff on assuming the risk of using the chain. Wolk v. Smith, 105 Pac. 138, 140, 56 Wash. 33.

The foreman not being the fellow servant of a switching crew in the performance of duties peculiar to his position, but the representative of the master, his promise to a member of a crew that a defective foot board on an engine would be repaired is binding on the company. Berglund v. Illinois Cent. R. Co., 123 N. W. 928, 929, 109 Minn. 317.

Reliance on care of master

A servant may assume that the master has performed his duty to provide and maintain a reasonably safe place in which to work and is not required to exercise care to ascertain such fact, but assumes the risk from an unsafe place only where he knows it to be unsafe, or its dangerous condition is obvious. Central Coal & Coke Co. v. Williams, 173 Fed. 337, 338, 97 C. C. A. 597.

A person entering the service of a corporation has a right to assume that it, as the master, has and will continue to discharge its obligations as master. The master is not called on to warrant the safety of the employé, who "assumes all risks" incident to the employment. The greater the danger of the employment, the greater the risk undertaken by the employé; but the risk of hazard so undertaken exists only so far as it is incident to the employment undertaken, and the employé does not "assume risks" of the negligence of the master. McCabe & Steen Const. Co. v. Wilson, 87 Pac. 320, 323, 17 Okl. 355.

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"The employé is said to 'assume' all the ordinary risks incident to the employment, but it is as well established that dangers attributable to the negligence of the master, when material to be considered, are usually classed under the head of extraordinary risks, and these the employé does not assume. This last principle applies in full force where the conditions of increased hazard, attributable to the master's negligence, are not known to the employé, or could not be discovered in the exercise of reasonable care. The employé ordinarily has a right to assume that the employer has done his duty. This assumption is not absolute, however, nor held to obtain in the face of real and established facts, and where the defects and dangers attributable to the master's negligence have become known to the employé, and the risks appreciated under certain circumstances, these conditions may be classed with the ordinary risks which the employé does assume." Hicks v. Naomi Falls Mfg. Co., 50 S. E. 703, 706, 138 N. C. 319.

A master cannot plead assumed risk where the ground of the plea is knowledge, or means of knowledge, of the defect complained of, where the master has knowledge of the defect, or the superior of the employé, intrusted with the duty of repairing the defects, knows thereof, and the servant is not under duty to report the defect. International & G. N. R. Co. v. Clark (Tex.) 125 S. W. 959, 960.

An employé working on an upper floor assisting in hoisting materials by a rope and pulley, who knows that the guard rail about the shaft is fastened at one end only by being dropped into a slot, assumes the risk of a bundle, when hoisted, lifting the guard rail out of the slot, and precipitating him into the shaft. Kock v. Clinton Chair Co., 123 N. W. 172, 144 Iowa, 548.

Superior knowledge or equal means of knowledge

If the servant is skilled in the work required, and equally or better qualified than the master to know the danger and the danger is so obvious that he must have known it, but nevertheless undertakes it, he cannot complain if injured. Nicholas v. E. H. Abadie Co. (Ky.) 124 S. W. 325, 327.

"A servant 'assumes' the ordinary risks of his employment in cases where its dangers are open to common observation and are as fully known to him as to his employer, and where he is as capable of knowing and measuring the dangers of such employment, and is not induced to continue in the work by any promise of betterment or indemnity from his employer. In such a case the servant cannot recover from his employer damages for any injury that may come to him in the course of his employment." Missouri Pac. R. Co. v. Click, 96 Pac. 796–798, 78 Kan. 419 (quoting and adopting definition in Walker v. Scott, 64 Pac. 615, 67 Kan. 814).

Where the injury was caused by a defective condition which plaintiff in the line of his duty was seeking to remedy and about which he knew as much as his employer, he assumed the risk. Archer v. Eldredge, 90 N. E. 525, 526, 204 Mass. 323.

A servant is not entitled to recover for injuries sustained while in the service of his master unless he has established that he did not know of the defects which caused his injury, and did not have equal opportunities with his master of knowing thereof at the time he was so injured. Bettis v. Chicago Coated Board Co., 145 Ill. App. 390, 393.

A master cannot plead assumed risk where the ground of the plea is knowledge, or means of knowledge, of the defect complained of, where the master has knowledge of the defect, or the superior of the employé, intrusted with the duty of repairing the defects, knows thereof, and the servant is not under duty to report the defect. International & G. N. R. Co. v. Clark (Tex.) 125 S. W. 959, 960.

Work tending to create danger

Where the work which the servant is doing tended to create the dangers from which he suffered his injury, the servant is held to assume the risk of such dangers. Gunszfsky v. People's Gaslight & Coke Co., 145 Ill. App. 255, 260, 261.

Where the work is of a character to render the place in which it is performed unsafe, or the place is rendered unsafe by the work in which the servant is engaged, the servant, when charged with knowledge of the peril, assumes the risk. Streicher v. Davenport Brick & Tile Co. (Iowa) 124 N. W. 327, 329.

ASSUMPTION OF SKILL

The proprietor of a business is conclusively presumed to know of the nature of the constituents and general characteristics of the substances used in his business, so that he can give directions for the conduct thereof with ordinary safety to his servants performing it with ordinary care, and such rule known as the doctrine of assumption of skill frequently makes the knowledge implied against the master superior to that implied against the servant as to things used in connection with the master's business. Beard v. Georgian Mfg. Co., 70 S. E. 57, 58, 8 Ga. App. 618.

ASSURANCE

The word "assurance" refers to the instrument itself, rather than to what it accomplishes. It is defined to be any instrument which confirms the title to real estate. It was anciently used to evidence and assure title to the grantor in a transfer of real es-

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tate previously made. A real estate mortgage is not a "conveyance or assurance," within the meaning of Gen. St. 1901, § 2092, providing that every person executing with intent to defraud a writing for a conveyance or assurance of lands or chattels which he had previously sold or assured to any other person shall on conviction be adjudged guilty of a misdemeanor. State v. Rhodes, 93 Pac. 610, 612, 77 Kan. 202 (citing 1 Words and Phrases, p. 591).

ASSURANCE OF TITLE

A deed purporting to convey the grantor's right, title, and interest to a specified tract, aided by proof of a deed purporting to convey title to the grantor, is "assurance of title" within Shannon's Code, § 4456. A tax deed, void on the ground that the taxes, to collect which the sale was had, were assessed against a deceased owner, is an "assurance of title" within Shannon's Code, § 4456. Under Shannon's Code, § 6301, providing that a decree may vest the title to realty out of any of the parties and vest it in the others, in which case it has the effect of a conveyance, a decree which merely declares that complainant is the owner in fee of the land in controversy, and that his title is superior to that claimed by defendant, but which does not purport to devest and vest title, is not an assurance of title within section 4456, vesting title in one who has had seven years' possession holding under an assurance of title. Southern Iron & Coal Co. v. Schwoon, 135 S. W. 785, 792, 124 Tenn. 176.

ASSURED

The words, "assured" and "insured" are so nearly synonymous that they are frequently used interchangeably. Certain policies provided that, after two annual premiums had been paid, the policy became nonforfeitable for an amount equal to one-tenth of the insurance for each and any premium so paid, and that if the amount of any annual premium or interest due on any note taken in part payment of a former annual premium was not fully paid as provided, then the policy should be forfeited, except as to annual payments for prior years which shall have been fully made, and that, if any note given in payment of any premium should not be paid according to its terms, the policy should become immediately void, except as respects prior payments. The policy called decedent the "insured," and the beneficiary the "assured," and declared that defendant might set off any demand against the "assured" arising in connection with the insurance against any claim for which it should be liable. Decedent gave notes in part payment for the first and subsequent premiums, until five premiums had accrued on one policy and four on another; none of such premiums ever having been paid. The clause relating to set-off did not limit the company's right to claims against the beneficiary only. Hoar v. Union Mut. Life Ins. Co., 103 N. Y. Supp. 1059, 1062, 118 App. Div. 416.

The word "assured" is sometimes applied to the beneficiary, but, generally speaking, it is synonymous with "insured." Where a third party procures a policy on another's life, he is spoken of as the "assured," because the contract is with him; but, where a persons procures a policy on his own life, he is both the insured and the assured, although he makes a third person the beneficiary. Chandler v. Traub, 49 South. 240, 241, 159 Ala. 519 (citing 1 Words and Phrases, pp. 591, 592; Hogle v. Guardian Life Ins. Co., 29 N. Y. Super. Ct. 567, 569; Ferdon v. Canfield, 10 N. E. 146, 104 N. Y. 143, 145).

"The 'beneficiary' of an insurance policy may be defined as the party to whom the proceeds are made payable by the terms of the contract, and 'beneficiary' and 'assured' are synonymous terms, though the former is the more commonly used." Union Fraternal League v. Walter, 34 S. E. 317, 322, 109 Ga. 1, 46 L. R. A. 424, 77 Am. St. Rep. 350.

A towing company, owner of a tug and barges, procured an open policy of insurance "for the account of whom it may concern" on all lawful goods on board barges owned by it "against any and all risks and perils of fire and inland navigation and transportation, property of the assured or held by them in trust or custody as freighter, forwarder, bailee or common carrier." In accordance with the provisions of the policy, the company procured a certificate thereunder covering the cargo of one of its barges, "loss if any payable only to the order of" the owner of such cargo. Under an agreement between them, it paid the premium on the certificate, and added the amount to the freight. The certificate also contained the following: "It is agreed that upon the payment of any loss or damage the insurers are to be subrogated to all the rights of the assured under their bills of lading or transportation receipts to the extent of such payments." While in tow of the company's tug the barge was sunk in a collision, and the cargo was a total loss; the tug and the second vessel both being held in fault for the collision. The insurer paid the loss to the cargo owner. Held, that within the meaning and intent of the certificate the cargo owner, which paid the premium, was the "assured," and that the insurer was entitled to be subrogated to its right of recovery as against both vessels. Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosway Towing & Transp. Co., 191 Fed. 769, 773, 113 C. C. A. 427.

A fire policy provided that it should be void if "the insured" should have or procure any other contract of insurance on the property covered. Plaintiff, having sold the

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property on time, assigned the policy with the insurer's consent, a rider being added providing that any loss ascertained and proven to be due "assured" under the policy should be payable to plaintiff as her interest might appear. Following the provision in the policy against additional insurance was a provision that if with the consent of the insurer an interest under the policy shall exist in favor of a mortgagee, or any other person, or corporation having an interest in the subject of the insurance other than the interest of the insured, the conditions "hereinbefore contained shall apply in the manner expressed in such provisions, and conditions of insurance relating to such interest as shall be written upon, attached, or appended to the policy." Held, that the conditions referred to in such provision were not those contained in the rider, but those contained in the policy, and the grantee of the property, and not the grantor, being the "assured" within the rider, plaintiff could only recover in case of loss such an amount as could be recovered by the grantee, and was therefore subject to the defense that the policy was void because of the grantee procuring additional insurance without the insurer's consent. Dumphy v. Commercial Union Assurance Co., Limited, of London (Tex.) 142 S. W. 116, 117.

ASTROLOGY

As fortune telling, see Fortune Telling.

ASYLUM

See Orphan Asylum.

An "asylum" is "an institution for the protection or relief of the unfortunate." The word is so used in Const. art. 5, § 3, which disables persons kept at any asylum at public expense from acquiring a residence there for voting purposes, and includes a state soldiers' home. Lawrence v. Leidigh, 50 Pac. 600, 601, 58 Kan. 594, 62 Am. St. Rep. 631 (quoting and adopting the definition in Webster's Dictionary as quoted in Wolcott v. Holcomb, 56 N. W. 838, 97 Mich. 363, 364, 23 L. R. A. 215).

An asylum is defined by Webster to be an institution for the protection and relief of the unfortunate. A soldier's home is included in the term "asylum," used in Const. art. 2, § 3, providing that no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while kept in any almshouse or other asylum or institution wholly or partly supported at public expense. In re Smith, 89 N. Y. Supp. 1006, 1010, 44 Misc. Rep. 384.

The words "poor house or other asylum," as used in Const. art. 8, § 8, providing that "no person while kept at any 'poor house or other asylum' at public expense, nor while confined in any public prison, shall be entitled to vote at an election under the laws of this state," will not be held to include soldiers' homes, and therefore Rev. St. 1899, § 6994, providing that no person, while kept in any "poor house or other asylum" at public expense, "except at soldiers' homes," shall be entitled to vote, will not be held unconstitutional as excepting soldiers' homes from its operation. Hale v. Stimson, 95 S. W. 885, 890, 198 Mo. 134.

As charity

See Charity.

AT

As on, see On—Upon.

In boundaries

In a conveyance the words "to," "on," "by," "at," "along," a nontidal stream presumptively carry title as far into the stream as the grantor possesses. Leary v. Jersey City, 189 Fed. 419, 428.

A deed conveyed a strip of land on either side of the center line of a railroad commencing at a specified point and running in an easterly direction to a point where the G. cut-off line diverges from the old railroad, running thence easterly along the center line of both lines of railroad to their intersection with the easterly line of the Rancho San Pascuals, and also all the land lying between the two lines of railway from their junction at Garvanza depot to Pasadena avenue, where such avenue lies between such railway lines. There were two junctions of the cut-off and the main line; the easterly one being at the intersection of the easterly line of the Rancho San Pascuals, and the other being a considerable distance west of the depot mentioned, but much nearer to it than the easterly junction, and situated in the territory known as Garvanza, while the easterly junction was situated in another territory. Held, that in view of the fact that the westerly junction was in the same territory as the Garvanza depot and nearer to it, and that the easterly junction was referred to, in the deed immediately previous to the reference to the junction as "Garvanza depot," as the "intersection near the easterly line of the Rancho San Pascuals," and the fact that the word "at," when applied to a place, is not definitely locative, but primarily expresses the relation of presence, nearness in place, or time or direction toward, the description of the land lying between the two lines of railway from their junction at "Garvanza depot," etc., will be deemed to refer to the westerly junction of the railway line and to convey the land bounded by the triangle formed by the two lines of railway west of Pasadena avenue. Los Angeles County v. Hannon, 112 Pac. 878, 881, 159 Cal. 37, Ann. Cas. 1912B, 1065.

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As in neighborhood of

"At" means in the neighborhood of. Where a petition in an action against a telegraph company for negligently delivering a message announcing the increased illness of the recipient's mother alleges that plaintiff was at the home of her sister at H., a small village, there is no variance between such allegation and evidence that plaintiff's sister's house was two miles from the village. Western Union Telegraph Co. v. Roberts, 78 S. W. 522, 524, 34 Tex. Civ. App. 76.

As in or within

A note payable "at" a designated bank in the state is negotiable within Burns' Ann. St. 1908, § 9076, declaring that a note payable in a bank in the state shall be negotiable; the word "at" meaning "in." Halstead v. Woods, 95 N. E. 429, 431, 48 Ind. App. 127.

The preposition "at" has a great relativity of meaning conforming readily to the nature of the thing which constitutes its grammatical object and to the principal notion in the mind of the person using it. It generally includes in its meaning all that "in" would, but not quite as much as "in and near" would. Jenkins alias Jinks v. State, 62 S. E. 574, 576, 4 Ga. App. 859 (citing 1 Words and Phrases, p. 595; 8 Words and Phrases, p. 7585).

"Witnesses in testifying that no divine service was held 'at' the church upon the occasion named must evidently be understood as meaning that no such service was then held 'in' the church or its immediate proximity. The word 'at' is somewhat indefinite. It may mean 'in' or 'within,' or it may mean 'near.' Its primary idea is nearness, and it is less definite than 'in' or 'on.' At the house may mean in or near the house. * * * The word 'at' is used 'to denote near approach, nearness or proximity.' * * * It is a relative term, and its signification depends largely upon the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects. * * * 'At' and 'near' may be considered synonymous." An indictment charging that accused disturbed a congregation of persons lawfully assembled for divine worship "at" a named church is sustained by proof that he disturbed a congregation so assembled at a bush arbor about 170 or 200 yards from such church. Minter v. State, 30 S. E. 989, 992, 104 Ga. 753 (quoting and adopting Rich. Eng. Dict., and citing and adopting Webster's Dict.; Williams v. Ft. Worth & N. O. Ry. Co., 18 S. W. 206, 82 Tex. 553; Frey v. Ft. Worth & R. G. Ry. Co., 24 S. W. 950, 6 Tex. Civ. App. 29; Fall River Iron Works Co. v. Old Colony & F. R. R. Co., 87 Mass. [5 Allen] 221; Bartlett v. Jenkins, 22 N. H. 53).

Where a statute provided for the location of a high school, on petition requesting that the school be established in the county "at a place" in said petition named, a petition, requesting the location of a school "in or near" a certain city, sufficiently designated the place in which it was desired to locate the school. No metaphysical distinction between the significance of the words "at" and "in" could have been in the minds of the legislators in the enactment of the law; but in using the expression "at a place," in said petition named, the Legislature purposely used an indefinite expression in order to leave a wide discretion in the high school board as to the final location of the building. Territory ex rel. McGuire v. Board of Trustees for High School of Logan County, 76 Pac. 165, 168, 13 Okl. 605.

Same—In criminal law

An indictment charging that the offense was committed "at," instead of "in," the county is sufficiently definite after verdict. Augustine v. State, 20 Tex. 450, 452.

One who, while inside of an occupied dwelling, shoots a pistol at a floor thereof, is guilty of shooting "at" or "into" such dwelling, within the meaning of the act approved August 13, 1910 (Acts 1910, p. 137). English v. State, 74 S. E. 286, 10 Ga. App. 791 (citing 1 Words and Phrases, p. 596; Blackwell v. State, 30 Tex. App. 416, 17 S. W. 1061).

As near as to place

The word "at" expresses the idea of nearness of place, and is less definite than "in" or "on." Lovin v. Hicks, 133 N. W. 575, 576, 116 Minn. 179.

The word "at," when used to designate a place, may, and often must, mean "near to." It is less definite than "in" or "on"; "at" the house may be "in" or "near" the house. The language of Acts 1903, c. 375, § 15, providing that a township board shall "begin road improvements at the courthouse on the four main roads in said township," may be sustained and given effect by beginning work on the roads at the boundary of the corporation leading to the courthouse where they merge into streets. Waynesville v. Satterthwait, 48 S. E. 661, 665, 136 N. C. 226, (citing Webster's International Dict. 95; Cent. Dict. vol. 1).

A complaint against a street railway company alleged that a passenger was injured while alighting "at" C., which appears to have been a shed station, and not a town or city. The evidence showed that the accident occurred about two car lengths from the station. Held, that there was no variance. Birmingham Ry., Light & Power Co. v. McGinty, 48 South. 491, 492, 158 Ala. 410.

"At the town of L.," in said county, where an act located the county seat, is equivalent to near or in proximity to that place; so that location of the courthouse 1,000 feet

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outside the limits of the original town plat is authorized. Murdoch v. Klamath County Court, 126 Pac. 6-8, 62 Or. 483 (citing 1 Words and Phrases, pp. 595, 598).

The preposition "at," when used to denote local position, may mean "in," "on," "near," "by," etc., according to the context; denoting usually a place conceived of as a mere point. A contract between a railroad and a person for whom it agreed to lay a side track to his mill, releasing the railroad from all liability for injury to stock killed on the tracks of the railroad "at" the spur track or upon the same, has no application to stock killed on the main line near the spur. St. Louis S. W. Ry. Co. v. Stringer, 86 S. W. 280, 281, 74 Ark. 425 (quoting and adopting the definition in Rogers v. Galloway Female College, 44 S. W. 454, 64 Ark. 627, 39 L. R. A. 636; and citing Stewart v. Patrick, 68 N. Y. 450; Proctor v. Andover, 42 N. H. 348, 362; Davis' Adm'r v. Chesapeake & O. Ry. Co., 75 S. W. 275, 116 Ky. 144; 1 Words and Phrases, p. 593 et seq.).

The word "at" is a word of somewhat indefinite meaning, whose significance is generally controlled by the context and attending circumstances, denoting the precise sense in which it is used. Used in reference to place, it often means "in" or "within"; but its primary sense is "nearness" or "proximity," and it is commonly used as the equivalent of "in" or "about." The word denotes, primarily, nearness, presence, or direction towards. The word as used in a covenant not to engage in a certain business within ten miles of a certain town, so long as the other party to the agreement should operate such business "at" that place, prevents the party making the covenant, from engaging in the business, though the business operated by the other party was outside of the corporate limits of the town. Harris v. Theus, 43 South. 131, 134, 149 Ala. 133, 10 L. R. A. (N. S.) 204, 123 Am. St. Rep. 17 (citing 4 Cyc. p. 365; Rogers v. Galloway Female College, 44 S. W. 454, 64 Ark. 627, 39 L. R. A. 636, 639; Williams v. Ft. Worth & N. O. R. Co., 18 S. W. 206, 208, 82 Tex. 553; O'Conner v. Nadel, 23 South. 532, 117 Ala. 595, 598; Ray v. State, 50 Ala. 172, 173).

The proprietor of a produce business at R., a small unincorporated town, sold the business, the main part of which was with people around and outside of the town, by a contract providing that he would not engage in the produce business "at R." for five years. Within that time he purchased a store at H., an unincorporated town about 1½ miles from R., and engaged in the produce business and shipped through the railroad station at R., and lived and received his mail there, and bought produce from his old trade, delivered at H., and gained the business of persons who used to do business wth him at R., and who had done business with the purchaser. Held, that the seller was in open competition with the buyer of the business, construing the words "at R." to mean near and about that town, and would be enjoined. Counts v. Medley, 146 S. W. 465, 468, 163 Mo. App. 546.

In construing an instruction, in an action against a railroad company for loss of wheat by fire while in storage in a warehouse, that if there was a heavy grade "at the point" where the alleged fire occurred, and the train passing said point just prior to the discovery of the fire was so heavily loaded as to require the engines to be worked hard and to cause them to emit an unusual quantity of sparks, these are circumstances which the jury have a right to consider in determining whether or not the engines attached to said train were skillfully and carefully managed. It would be quite technical to construe the words "at the point" to means at the very or exact point, especially when the grade was in such proximity that the train had begun its ascent before it had cleared the warehouse. Anderson v. Oregon R. Co., 77 Pac. 119, 123, 45 Or. 211.

Same—In criminal law

"At a private residence," in the statute permitting crap games when played at a private residence, means "near by, in proximity to," so that the statute was not violated by persons playing a game within ten feet of the front door of a private residence. Young v. State (Tex.) 97 S. W. 90 (quoting Hipp v. State [Tex.] 75 S. W. 28, 62 L. R. A. 973, and citing Borders v. State, 6 S. W. 532, 24 Tex. App. 333).

AT NOV. 15TH

A memorandum of sale provided that the goods should be delivered at specified dates thereafter designated as "June 15/30," "May 15/30," "July 1/15," and "at Nov. 15th." It was conceded that the phrase "at June 15/30" meant between June 15th and June 30th. Held, that, since "at," when used both as to time and place, often means "near," or "about," the phrase "at Nov. 15th" was ambiguous, and did not necessarily mean on Nov. 15th, and hence parol evidence was admissible to explain the same. Lorraine Mfg. Co. v. Oshinsky, 182 Fed. 407, 408.

AT OR AFTER

Civ. Code Prac. § 203, provides that, if property attached be stock in a corporation, the corporation may be summoned as garnishee, and section 223 declares that, in proceedings on such attachment, the garnishee may pay the debt owing to, or deliver the property held for, his debtor, to the sheriff, and to that extent be discharged from liability to the debtor, but section 224 declares that each garnishee summoned must appear, though he may have delivered the property or fund to the sheriff, and that, in case of a corporation, any shares of stock held there-

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in by or for the benefit of the defendant "at or after the service of the order of attachment" shall be subject to the writ. Held, that the words "at or after" in section 224 related only to corporate stock, and that the writ did not cover other indebtedness which accrued after service. Boswell v. Citizens' Sav. Bank, 96 S. W. 797, 800, 123 Ky. 485.

AT OR BEFORE

The words "at or before the close of the evidence," in Revisal 1905, § 536, requiring that a request to put the instructions in writing shall be made "at or before the close of the evidence," if inserted in section 538, providing that counsel shall reduce their prayers for special instructions to writing, would mean that requested instructions could be made at some time not later than the beginning of the argument of counsel to the jury, and the refusal of requested charges because made too late, when made before the commencement of argument, is erroneous. Craddock v. Barnes, 54 S. E. 1003, 1005, 142 N. C. 89.

AT OR NEAR

The words "at or near," used in a railroad charter as the designation of the railroad's terminus, "are indefinite and must receive a reasonable construction." Collier v. Union R. Co., 83 S. W. 155, 158, 113 Tenn. 96 (citing Lewis, Em. Dom. § 257; Redf. Railways, vol. 1, p. 413; Fall River Iron Works v. Old Colony & F. R. R. Co., 87 Mass. [5 Allen] 221; Boston & P. R. Corporation v. Midland R. Co., 67 Mass. [1 Gray] 340, 367; Purifoy v. Richmond & D. R. Co., 12 S. E. 741, 108 N. C. 100).

The words "at or near," used in the proof with reference to the place of posting notices of a chattel mortgage foreclosure sale, are indefinite as to the place. Powell v. Hardy, 94 N. W. 683, 89 Minn. 229.

AT ANY STAGE

The words "at any stage of utero-gestation," as used in Cr. Code, § 6, punishing abortion, mean at any stage of pregnancy. Edwards v. State, 112 N. W. 611, 612, 79 Neb. 251.

AT ANY TIME

The phrase "at any time" means after a certain time, or after the fulfillment of a certain condition. Murray v. Barnhart, 42 South. 489, 491, 117 La. 1023.

The right given in an oil and gas lease to remove fixtures "at any time" was not unlimited, but the removal must be within a reasonable time after expiration of the lease. Perry v. Acme Oil Co., 88 N. E. 859, 861, 44 Ind. App. 207.

The words "at any time," in a deed by a corporation reciting that the conveyance is subject to the restrictions in the act of incorporation, and that the grantee, his heirs, and assigns agree not to violate any of the provisions in the act of incorporation, "by-laws, rules or regulations made by the said" grantor "at any time," refer to the date of the violation, and not to the date of the adoption of the by-laws, rules, or regulations. Newbery v. Barkalow, 71 Atl. 752, 754, 75 N. J. Eq. 128.

The power given a Court of Chancery by General Corporation Act, § 43, to appoint a receiver for a dissolved corporation "at any time," is not limited to the three years from expiration or dissolution, for which section 40 provides its corporate existence shall be continued for winding up its affairs. Slaughter v. Moore (Del.) 82 Atl. 963, 966; Harned v. Beacon Hill Real Estate Co. (Del.) 80 Atl. 805, 808.

A timber deed conveyed all timber standing and fallen, with the right to cut and remove it "at any time." Held, that the words "at any time" did not give the grantee the right to remove the timber at its own convenience, without regard to lapse of time, but meant a reasonable time without unnecessary delay, the same as if no time at all were specified. Fletcher v. Lyon, 123 S. W. 801, 803, 93 Ark. 5.

Bankr. Act July 1, 1898, c. 541, § 59, cl. "f," 30 Stat. 562, provides that creditors, other than original petitioners, may "at any time" enter their appearance and join in the petition. Clause "d" declares that creditors, notified of the pendency of the petition as there provided, must join in it prior to or during the hearing. Held, that clause "d" deals only with cases in which the issue is whether the alleged bankrupt's creditors number less than twelve, and hence a creditor may intervene and join the original petitioners "at any time" prior to the dismissal of the petition. In re Lewis F. Perry & Whitney Co., 172 Fed. 744, 745.

A covenant by the grantee in a deed that the grantor "shall at any time have the right of pre-emption of the premises" at a stated price does not give the grantor a right to repurchase except when the grantee wishes to sell. Garcia v. Callender, 5 N. Y. Supp. 934, 935, 53 Hun, 12.

The words "at any time within twenty days," as used in Comp. Laws 1897, § 896, providing that the party appealing shall prepare and present the intended bill of exceptions to the trial judge "at any time within twenty days" before the first day of the Supreme Court in which the said cause shall be docketed, are to be construed as meaning at any time in not less than 20 days, so as to require presentation of the bill of exceptions to the trial judge at least 20 days before the first day of the term of this court to which the case is returnable. United States v. Sena, 106 Pac. 383, 385, 15 N. M. 187.

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Rev. St. 1908, § 518, preserves the lien of a chattel mortgage for 30 days after maturity without possession taken, and section 520, subsequently enacted, provides that the lien of any recorded chattel mortgage to secure any indebtedness may "at any time within 30 days after the maturity of the last installment of the indebtedness secured thereby" be extended as to the unpaid portion thereof by filing a sworn statement of the total payments on the debt and the amount remaining unpaid, that it is "still due" the mortgagee or his assignee, and that the mortgagee consents to an extension. Held, in view of section 518, that the word "due" was used in the sense that the debt was subsisting or outstanding, that the words "still due" referred to a time subsequent to a time when the debt was known or taken to be due, and that the expression "at any time within 30 days after the maturity of the last installment of the indebtedness secured thereby" required that such sworn statement be filed within 30 days after the maturity of the indebtedness, and that a statement on the date of maturity was premature and did not extend the lien as against a purchaser after the expiration of the 30 days. Ferris v. Chambers, 117 Pac. 994, 995, 51 Colo. 368.

AT BANK

See Payable at Bank.

AT DEATH

Where a deed provided that the grantee should hold the property during her natural life, and at her death the property should belong to her daughter, her heirs and assigns, but, in the event of the daughter's dying without issue, then "at her death" all of the property should be divided between her two brothers, the quoted phrase refers to the death of the daughter, and not to the death of the mother. Sterling v. Huntley, 76 S. E. 375, 377, 139 Ga. 21.

Where testator devised to his son certain real estate during his natural life, and "at his death to his children," the word "at" designated the time of enjoyment merely, and not the time of the vesting of the estate; and hence the grandchildren acquired vested interests immediately on their birth, which they could alienate by mortgage or otherwise. Manhattan Real Estate & Bldg. Ass'n v. Cudlipp, 80 N. Y. Supp. 993, 995, 80 App. Div. 532.

Testator devised real estate to his son on condition that he pay testator's widow a specified annuity, "at his death to be divided among his living children as follows: $500 to M., a daughter of the son, the remainder to be equally divided among the other children." The son at the date of the will had five children. Another child was born before the death of testator, and two were born afterwards. Held, that the words "at his death" fixed the death of the son as the time for division, and that the words "living children" and "other children" were descriptive of the persons entitled to take, and, until the time for division was reached, such persons could not be ascertained. Day v. Thompson, 82 Atl. 935, 233 Pa. 550.

A devise to M. for life, "and at the decease of M. the premises shall vest in her heirs," gave to her an estate of inheritance by virtue of the rule in Shelley's Case; the use of the words "at the decease," instead of "after the decease," being immaterial. Pierce v. Pierce, 14 R. I. 514, 516.

AT HIS OWN SALE

Purchase by administrator at his own sale, see Purchaser.

AT HOME

In a wedding card announcement that the newly married couple would be "at home" at a certain place after a certain time, the phrase "at home" meant simply that at that time and place they would be ready to see and receive visits from their friends, and did not necessarily refer to a domicile. It had the same signification, no more and no less, as the society phrase put in the mouth of the servant who opens the door to the casual visitor and declares to that visitor that the lady of the house is not "at home," and which is understood by everybody to mean no more than that she is not ready to receive visitors. Duke v. Duke, 62 Atl. 466, 468, 70 N. J. Eq. 135.

AT ITS OWN COST

A policy, insuring against loss resulting from the injury or death of an employé of the assured through its negligence, limited the liability of the company for loss through the injury or death of one person to $5,000, but further provided that, "if any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company and the company will defend against such proceeding in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for." An action was brought against the assured, resulting in a judgment against it for $5,000, which was affirmed on appeal, and then paid by the assured. Held, that the phrase "at its own cost," as used in such provision of the policy, meant the same as "at its own expense," and was not limited to the taxable court costs of the action, but included whatever expenditure was necessary in defending the suit, such as court costs, attorneys' and stenographers' fees, and the like, which the company was required by such provision to pay, although it might be in addition to the $5,000, limited in case it elected not to defend or settle; that as so construed the company was liable for the amount of the judg-

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ment, increased by whatever of such expense was paid by the assured, with interest thereon from the time of such payment, but was not liable for interest on the judgment pending the appeal, during which time the assured had the use of the money. Maryland Casualty Co. of Baltimore, Md., v. Omaha Electric Light & Power Co., 157 Fed. 514, 518, 85 C. C. A. 106.

AT LARGE

See Insane Person at Large.

To "suffer a ram to go 'at large,'" within the meaning of the statute imposing a penalty upon the owner therefor, implies consent or willingness of mind. Selleck v. Selleck, 19 Conn. 501, 504.

In a prosecution against a nonresident for herding, grazing, and permitting his cattle to "run at large" in this state, an instruction that if defendant's cattle were being herded or grazed or permitted to "run at large" in this state, and he, while in this state, participated in or assented to the same, the jury should convict him, was proper. Beattie v. State, 95 S. W. 163, 164, 77 Ark. 247.

As animals not under control of owner

"Running at large" means strolling without restraint, or confinement, as rambling, roving, or wandering at will, unrestrained; that is, without any one to hinder or direct them. Donley v. Fowler, 110 N. W. 1097, 1101, 147 Mich. 288.

"Going at large," as used in the statute prohibiting animals from running at large without a keeper (Pub. St. c. 36, §§ 20–40), means the unrestrained use of a highway by animals in the absence of a keeper or person to look after them. Leonard v. Doherty, 55 N. E. 461, 462, 174 Mass. 565.

Allowing a vicious horse to eat in the street unattended and unhitched while attached to a wagon was not a negligent permitting of the animal to run "at large." Corcoran v. Kelly, 113 N. Y. Supp. 686, 61 Misc. Rep. 323.

Under an ordinance prohibiting the running at large of animals in the city, or permitting them to graze or feed in the streets, except in such part of such streets as are in front of or adjoining lands owned by the owner of the animal, an animal who is unattended or untethered in the street is as much "at large" when in front of its master's premises as in any other part of the street. In order to be within the exception, the animal must not only be in front of its master's premises, but must be attended or securely tethered and not running "at large." Decker v. McSorley, 86 N. W. 554, 555, 111 Wis. 91.

A horse running through the streets of a city, returning to its stable, unattended, is "running at large," within the meaning of an ordinance making it unlawful for horses to run at large, notwithstanding that the horse has been accustomed and trained to return to the stable after being turned loose. Allen v. Hazzard, 77 S. W. 268, 269, 33 Tex. Civ. App. 523.

A horse trained to go straight home when turned loose at any distant part is not "running at large," within Gen. St. c. 100, § 29, while on its way home. Russell v. Cone, 46 Vt. 600, 604.

Section 24 of the act approved April 14, 1903 (P. L. p. 526), as such section was amended by the act approved April 5, 1904 (P. L. p. 406), not only provides that it shall be unlawful for any owner of any dog to permit such dog to run at large in woods or fields inhabited by rabbits or game birds, except only between the 1st day of October and the 1st day of February following, but it also provides a penalty therefor. The term "running at large," as used in the statutes imposing a penalty on one who suffers animals to run at large in public places, is used in the sense of strolling without restraint or confinement; wandering; roving; or rambling at will; unrestrained. Conner v. Fogg, 67 Atl. 338, 339, 75 N. J. Law, 245.

Under Kirby's Dig. § 1898, which provides that a person taking certain animals running at large in the range of woods, and which are not designated by brands or earmarks, shall not be guilty of larceny, but simply liable to the owner for the value of such animals, a cow, though not under the physical restraint of a halter or inclosure, which was, upon being turned out in the woods during the day to feed, accustomed to return to its home at night, did not run at large and, though unmarked, it was a subject of larceny; "range" meaning a sparsely populated and uninclosed tract of land over which stock and cattle are permitted to roam and feed without restraint, "in the woods" referring to uninclosed and unpopulated woodland, and "running at large" being applicable to animals which roam and feed at will, and which are not under the control and direction of any one. Jefferies v. State (Ark.) 144 S. W. 514, 515; Jordan v. Same, Id. 1197.

Under Kirby's Dig. §§ 5450, 5451, animals are "running at large" if they are within the corporate limits of the city without being within the control of any one, regardless of whether or not the owner was at fault in permitting their escape or in not making diligent search for them. McKenzie v. Newton, 117 S. W. 553, 554, 89 Ark. 564 (citing Clarendon v. Walker, 80 S. W. 883, 72 Ark. 8; Benton v. Willis, 88 S. W. 1000, 76 Ark. 443).

Where an incorporated town has declared by ordinance the "running at large" of hogs in the town to be a nuisance and prohibited the same and directed that hogs and pigs found running at large should be taken

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up by the police constable and impounded, it was held that the hogs of a party who resided near the town limits, and who suffered them to go at large, were subject to be impounded under the ordinance, if they were found at large within the town. Friday v. Floyd, 63 Ill. 50, 51.

A nonresident's horse, which is turned loose by the owner and strays into a city, is "running at large with the owner's permission," within the meaning of an ordinance prohibiting the same. Moore v. Crenshaw (Tex.) 1 White & W. Civ. Cas. Ct. App. § 264.

As animals within control of owner

An animal tied to a stake in a public street and permitted to graze is at large within an ordinance authorizing the removal of obstructions from the public streets and requiring the marshal to take up live stock running at large. Williams v. Sewell, 49 S. E. 732, 121 Ga. 665.

Where, in an action for injuries received by plaintiff's child by being hooked by a vicious cow, alleged to belong to the defendant and permitted by it to "run at large" on the public road in violation of an ordinance of the police jury, it was shown that the public road ran through defendant's plantation and at the time of the injury the cow was on the public road, but under charge of a keeper who was transferring it, with others, from a cow lot on one side of the road to a pasture on the other side belonging to defendant, the cow was not "running at large" on the public road. Stevens v. Mrs. E. D. Burguieres Planting Co., 45 South. 601, 603, 120 La. 767.

A dog is not "running at large," within the meaning of the statute, when he is within calling distance and sight of the owner's family and under their control. Brown v. Graham, 114 N. W. 153, 154, 80 Neb. 281.

Animals escaping from control of owner

An ordinance of a town of Collinsville, prohibiting the "running at large" of certain animals within the corporate limits of the town, provides that any person being the owner of, or having the care of, any such animals, who shall suffer the same to "run at large," etc., shall be subject to a certain penalty therein specified. In an action to recover the penalty for a violation of this ordinance, the proof disclosed these facts: That the defendant resided on his farm outside the limits of the town; that he had allowed the animals to run in a piece of woods near by; but that he watched and cared for them daily, and would have prevented them from straying into the town, in the present instance, had it not been that he was suddenly called away to the bedside of a dying brother. Held, that this evidence clearly exonerated the defendant from the charge of suffering his animals to "run at large" within the corporate limits of the town. Town of Collinsville v. Scanland, 58 Ill. 221, 222.

Whether cattle killed on a railroad were "running at large" so as to make the company liable under Code, § 2055, is a question for the jury; there being evidence that after being driven over the railroad, while going along a highway, they got through a defective wing fence, and ran some distance down the track, and the owner pursued them and got them partway back, when they were killed. Morris v. Chicago G. W. R. Co., 110 N. W. 154, 155, 133 Iowa, 28.

An ordinance provided that "no horse shall be permitted to run at large in the city," and that any person "who shall permit the same" to so run at large shall be punished. Held, that negligence in not securing the horse from escape did not constitute a violation of the ordinance, but the horse must be at large with the knowledge and assent or permission of the owner. Decker v. McSorley, 93 N. W. 808, 809, 116 Wis. 643.

Animals escaping from inclosures

"The meaning of the words 'running at large' is different in different statutes, and should always be determined largely from the object and purposes sought to be accomplished by the particular statute wherein they are used." Within the meaning of the provisions, article 2, c. 2, St. Okl. 1893, animals trespassing on the premises of another than their owners, and not under the immediate control of their owner, are "running at large." Gilbert v. Stephens, 55 Pac. 1070, 1072, 6 Okl. 673.

An animal is "running at large," within the meaning of a city ordinance requiring the city officers to impound animals running at large and providing for their sale after reasonable notice, though it has escaped from the inclosure in which it was kept by the owner without his knowledge or fault. City of Paris v. Hale, 35 S. W. 333, 334, 13 Tex. Civ. App. 386.

Where a bull escaped from the owner's premises and broke into the pasture of an adjacent owner, and the owner of the pasture and of the bull agreed that the bull should remain in the pasture over night, during which time it killed the mare of a third person kept in the pasture for hire, the bull was running "at large" in the nighttime, within Comp St. 1893, c. 2, art. 3, § 14, prohibiting animals running at large during the nighttime, and making the owner liable in an action for damages done during such nighttime, and the owner of the mare could recover from the owner of the bull for the damages sustained. Duggan v. Hansen, 61 N. W. 622, 43 Neb. 277.

Under McLain's Code, § 2250, permitting any person to take possession of any bull found "at large," defendant had the right

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to take up a bull running "at large," though it escaped by breaking an insufficient division fence which it was the duty of the person taking up the animal to keep in repair. If the owner turned the bull out in a pasture improperly fenced and that would not restrain him, and he escaped into an adjoining field, he was running "at large." Conway v. Jordan, 81 N. W. 703, 704, 110 Iowa, 462.

Where the owner of domestic animals in a county where the herd law of 1872 was in force kept the same confined on his own farm, in a pasture inclosed with a good and lawful fence, and the animals, without fault of the owner, escaped from the pasture, in the nighttime, into a public highway, and wandered upon uninclosed land through which a railway runs, adjoining the farm of their owner, and are run over and killed by an engine at a place on the railway where it is wholly unfenced, and their escape from the pasture was not, and could not by the use of ordinary care have been, discovered by the owner until after they were killed, held, that such animals cannot be said to be allowed to "run at large." Missouri Pac. Ry. Co. v. Johnston, 10 Pac. 103, 105, 35 Kan. 58.

Rev. St. 1898, § 1482, as amended by Laws 1903, p. 18, c. 14, provides that if the owner of any bull shall suffer such animal to "run at large" he shall be liable for all damages done by the animal while at large, although he escapes without the fault of the owner. Held, that diligence to prevent escape is not a defense, but diligence to recapture the animal after its escape is a defense, and, as so construed, the statute is not invalid as unreasonable because beyond the limits of the police power. Hadtke v. Grazyll, 110 N. W. 225, 226, 130 Wis. 275.

It has been held that where the owner of land adjoining a railroad turns stock into a pasture surrounded by a legal fence on all sides excepting along the right of way, which the company, in violation of its duty, leaves open, the animals are not deemed to be "running at large"; but under similar circumstances it was held that the owner had failed to "confine" his stock, a distinction being made between the two expressions, and it has been said that the words "confined" in one act, and "prohibited from running at large" in another act, mean substantially the same thing, but the difference has since been noted and acted upon. But decisions defining the phrase "running at large," made in railroad cases, necessarily apply whenever the statute is invoked in behalf of one whose injury has been occasioned by a failure in the performance of his own duty. Consequently, where a bull escapes from the land of the owner to that of a neighbor by reason of the failure of the latter to keep up a portion of the division fence in accordance with an agreement between them, no action for the resulting damages can be maintained under the statute (Gen. St. 1901, § 7380) forbidding owners of animals to permit them to run at large. McAfee v. Walker, 107 Pac. 637, 638, 82 Kan. 182, 27 L. R. A. (N. S.) 226 (citing Gooding v. Atchison, T. & S. F. R. Co., 4 Pac. 136, 32 Kan. 150; Kansas Pac. Ry. Co. v. Landis, 24 Kan. 406; St. Louis & S. F. Ry. Co. v. Mossman, 2 Pac. 146, 150, 30 Kan. 336; Atchison, T. & S. F. R. Co. v. Riggs, 3 Pac. 305, 31 Kan. 622, 630; Railroad Co. v. Jackson, 79 Pac. 662, 70 Kan. 791; Missouri Pac. Ry. Co. v. Shumaker, 27 Pac. 126, 128, 46 Kan. 769, 772).

Hogs escaping from the owner's field onto the land of an adjoining owner through a defective partition fence, which it was the duty of the adjoining owner to keep in repair, were not "running at large," within Acts 1903, p. 315, c. 151, making it unlawful to allow live stock to run at large. Brown v. Sams, 109 S. W. 513, 514, 119 Tenn. 677.

Mules which broke loose during the night after they had been tied up by the owner after ceasing work for the day, and which escaped and went on a railroad right of way and were killed, were not running at large within the law prohibiting animals from running at large. International & G. N. R. Co. v. Seiders, 110 S. W. 997, 999, 50 Tex. Civ. App. 568.

Animals on owner's land

Cattle on the owner's premises between which and a railroad there is no sufficient fence are not running "at large" within the meaning of the herd law. So in Kansas where, under the railroad stock law of 1874 (Laws 1874, c. 94), railroad companies are required to inclose their roads with a good and lawful fence to prevent animals from going upon their roads, and in a county where the herd law of 1872 is in force (Laws 1872, c. 193) cattle are not allowed to run at large, where an owner of cattle in a county where both of these laws are in force kept and pastured them on his own land, through which a railroad was constructed and operated, which railroad was not inclosed by any fence separating it from the owner's land, and the cattle strayed on the railroad, where one of them was killed by the railroad company in the operation of its road, he may recover of the railroad company such injury. Atchison, T. & S. F. R. Co. v. Riggs, 3 Pac. 305, 312, 31 Kan. 622.

AT LAW AND IN EQUITY

Laws 1880, p. 349, c. 292, confers power to appoint commissioners in condemnation proceedings upon the circuit court or the judge thereof. Laws 1905, p. 446, c. 295, confers on the superior court for Lincoln county jurisdiction equal to and concurrent with the circuit court of that county in "all civil actions and proceedings at law and in equity," with an immaterial exception and confers express authority to issue all com-

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missions provided by law, and provides that, whenever a statute shall mention the circuit judge, the words shall be deemed to apply to the judge of the superior court for Lincoln county. St. 1898, § 2594, divides remedies in courts of justice into "actions" and "special proceedings"; the latter embracing all remedies other than actions, under the direct provisions of section 2596. Held, that inasmuch as the words "at law and in equity" embrace all exercise of judicial or quasi judicial power of courts, whether conferred by statute, common law, or equitable rules, the expression "all civil actions and proceedings at law and in equity" is extensive and general, rather than restrictive and particular, and confers on the superior court or the judge thereof the same power to appoint commissioners in condemnation proceedings as is possessed by circuit courts or judges. Wisconsin River Imp. Co. v. Pier, 118 N. W. 857, 859, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

AT LEAST

"The meaning of the words 'at least' is in the smallest or lowest degree; at the lowest estimate or at the smallest concession or claim; at the smallest number." In re Gregg's Estate, 62 Atl. 856, 857, 213 Pa. 260.

The words "at least," as used in an instruction that if defendant shot decedent after an assault already ended, and when he was in no possible danger, defendant "would at least be guilty of the offense of voluntary manslaughter," did not amount to an intimation of opinion on the part of the judge as to the guilt of the accused. Lee v. State, 58 S. E. 676, 677, 2 Ga. App. 481.

An extension of "at least 60 days" is an extension for an indefinite time not less than 60 days, and gives a reasonable time after the 60 days expire. City of St. Charles v. Stookey, 154 Fed. 772, 782, 85 C. C. A. 494 (citing Roberts v. Wilcock [Pa.] 8 Watts & S. 464, 470; Stewart v. Griswold, 134 Mass. 391).

A certificate of incorporation, which fixes the term of existence of a corporation at "not to exceed the term of 40 years," is sufficiently definite, and means that the term during which the corporation shall exist will be "at least" 40 years—the limit prescribed by the statute. Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316, 324.

Article 281 of the Civil Code, correctly interpretated, means that "family meetings in all cases * * * shall be composed of, at least five (persons), relations, or in default of relations, friends," etc. The words "at least" apply to all family meetings, and cannot be held to mean "neither more nor less than five." Succession of Carbajal, 36 South. 41, 48, 111 La. 944.

"When so many 'clear days' or so many days 'at least' are given to do an act or 'not less than' so many days must intervene, both the terminal days are excluded; and under a statute invalidating charitable bequests unless made at least one calendar month before death, such a bequest in a will, made on October 8th between 3 and 5 p. m., is invalid where testator died on November 8th between 7 and 8 p. m." In re Gregg's Estate, 62 Atl. 856, 857, 213 Pa. 260 (quoting and adopting the language of Endlich, Interpretation of Statutes, § 391).

As indicating successive days' notice

The provision of the Code which requires "at least 60 days' notice of any application for the passage of an ordinance in at least two of the daily newspapers in the said city" does not require a daily publication for 60 days in two newspapers, nor any number of times for the publication, but it requires that the notice shall be published in two of the daily newspapers of the city, and that 60 days shall elapse after the publication of the notice before any such ordinance shall be passed. Mayor, etc., of Baltimore v. Little Sisters of the Poor, 56 Md. 400, 405.

AT ONCE

The term "at once" means immediately, or to-day. Patterson v. Missouri Pac. Ry. Co., 94 Pac. 138, 140, 77 Kan. 236, 15 L. R. A. (N. S.) 733.

The term "at once," like the words "forthwith" and "immediately," does not mean instantaneously, but a reasonable time. Where defendant, who was engaged in the business of lending money on chattel mortgages and pledges and selling jewelry and merchandise on installment contracts, sold the business to plaintiff, under a written contract guaranteeing the title to all pledges and the collection of all mortgages but requiring plaintiff to signify her dissatisfaction with any mortgage or the title to any property within three months from the date of the contract, and, if dissatisfied with any such title, to foreclose the mortgage "at once," the contract did not require plaintiff to foreclose a mortgage within three months from the date of the contract. Cohen v. Silverman, 40 N. Y. Supp. 8, 10, 4 App. Div. 503 (citing Bennett v. Lycoming County Mut. Life Ins. Co., 67 N. Y. 274; Bamforth v. Raddin, 96 Mass. [14 Allen] 66; Roberts v. Brett, 11 H. L. Cas. 337; Oldershaw v. King, 2 Hurl & N. 399, 517).

Insured was injured January 31, 1903. He stopped work because of the injury for 15 minutes, and then continued to work until March 25, 1903, and died April 6th following from the injury. An accident policy provided for a specified payment if insured should receive personal injury "at once resulting in continuous" total inability to engage in any business, etc., necessarily resulting independently of all other causes in certain results including illness, loss of members and loss of life. Held, that while the disability occurred

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"at once," to wit, at the time the accident happened, there was no continuous total inability to engage in business from the time of the injury to insured's death, and that the insurer was therefore not liable. Continental Casualty Co. v. Wade, 105 S. W. 35, 101 Tex. 102.

In a contract to indemnify a person, in case of accident, for injury sustained by violent means which shall, "independently of all other causes, immediately, wholly, and continuously prevent him from the prosecution of any and every kind of business pertaining to his occupation," the word "immediately" is not synonymous with "instantly," "at once," and "without delay." A disability is immediate, within the meaning of such contracts, when it follows directly from an accidental hurt, within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation. Order of United Commercial Travelers v. Barnes, 80 Pac. 1020, 1023, 1024, 72 Kan. 293, 7 Ann. Cas. 809.

Under Rev. Laws 1905, § 3395, providing that, where a person acquires an interest in land pending proceedings to register the title thereof and prior to the entry of decree, he must appear and answer in such proceedings "at once," persons who delayed more than six months after actual notice of proceedings to register the title to certain land before making application for permission to answer in such proceedings, in order to assert interests alleged to have been acquired pendente lite, were not entitled to answer as a matter of right; Rev. Laws 1905, § 3396, having no application to such a case. In re Brown, 138 N. W. 941, 942, 119 Minn. 491.

Reasonable time

The words "at once" will not be construed strictly according to their literal meaning, but will be held to mean within a reasonable time in view of the circumstances of each case. Peterson v. Hansen, 107 N. W. 528, 530, 15 N. D. 198.

Like "forthwith" and "immediately," "at once" does not mean instantaneously, but requires action to be taken within a reasonable time. It is sometimes synonymous with "as soon as possible," and is usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing. Lucas v. Western Union Telegraph Co., 109 N. W. 191, 193, 131 Iowa, 669, 6 L. R. A. (N. S.) 1016.

A stipulation in a contract of sale to deliver certain described machinery "at once" binds the seller to deliver without unreasonable delay. Georgia Agr. Works v. Price, 74 S. E. 718, 720, 11 Ga. App. 80.

Where a wrecking contract provided that plaintiff was to remove a certain building "at once," and others at specified times, the words "at once" meant within such time as was reasonable under the attending circumstances. Wetter v. Kleinert, 123 N. Y. Supp. 755, 756, 139 App. Div. 220.

An order for a gasoline tank to be shipped "at once" denoted a prompt or immediate shipment of a tank then on hand, the reasonable time ordinarily allowed a seller for shipment, not being sufficient, and the failure of the seller to ship within 10 days after receiving the order warranted the buyer in rescinding the contract. Bowser v. Atkinson, 143 S. W. 75, 76, 161 Mo. App. 450.

A contract for 300 signs, to be used by the buyer's salesmen for distribution among the trade, 150 to be delivered "at once," and 150 in three months from the date of the order, calls for a prompt delivery of 150, and an offer to deliver six weeks after the making of the contract comes too late; the words "at once" contemplating the making of a delivery with greater celerity than is ordinarily comprehended by a reasonable time. Binger Co. v. Blumberg, 134 N. Y. Supp. 1115, 76 Misc. Rep. 432.

Where an accident policy only insured against bodily injuries caused through external, violent, and purely accidental means, causing "at once," and continuously after the accident, total inability to engage in any and every labor or occupation, etc., the term "at once" or "immediately" should be construed as adverbs of time and not causation, and were not intended to mean "reasonable time," but rather "presently," or without any substantial interval between the accident and disability. Continental Casualty Co. v. Ogburn (Ala.) 57 South. 852, 853.

Where, pending suit on a claim, a compromise was entered into whereby defendant agreed to pay $42 in settlement of $63, and $21 of the $42 was paid down, and a note given for the balance, payable "at once," the words "at once" will be construed to mean in a reasonable time, and not to mean a cash payment, especially where the parties themselves have so construed it. Rivers v. Campbell, 111 S. W. 190, 193, 51 Tex. Civ. App. 103.

AT OWNER'S RISK

Where apples were stored with a public warehouseman for hire, the recital in a receipt given therefore that they were "at owner's risk" did not relieve the warehouseman from liability for injuries arising from his negligence in failing to protect them from unusually cold weather. Denver Public Warehouse Co. v. Munger, 77 Pac. 5, 6, 20 Colo. App. 56.

AT PLEASURE

In Rev. Laws, c. 102, § 172, authorizing municipal officers to license theatrical exhibitions and to revoke the same "at their pleasure," the quoted words mean from time to time in the exercise of a wise discretion, hav-

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ing in view the purposes of the statute, to prevent theatrical performances contrary to good morals. Commonwealth v. McGann, 100 N. E. 355, 356, 213 Mass. 213.

The phrase "dividend payable at the pleasure of the company," in a certificate reciting that one is entitled to a specified amount of script dividend, and declaring that this dividend is payable at the pleasure of the company, etc., means reasonable time, and, where script dividends representing the undivided earnings of a corporation were evidenced by a certificate reciting that it was payable at the pleasure of the company, it was payable within a reasonable time, and, some having been paid, all were payable. Billingham v. E. P. Gleason Mfg. Co., 91 N. Y. Supp. 1046, 1048, 101 App. Div. 476.

Under Springfield City Charter, § 8, providing that the administration of police shall be vested in the mayor and aldermen, who shall have exclusive power to appoint police officers "and the same to remove 'at pleasure,'" the mayor and aldermen had the absolute power to remove the city marshal and his assistants, without notice or hearing. Stebbins v. Police Com'rs of City of Springfield, 82 N. E. 42, 43, 196 Mass. 365.

Ky. St. 1903, § 3619, provides: "The marshal, assessor, treasurer, clerk and city attorney shall be appointed for a term of two years by the city council, but may be 'removed at the pleasure' of the city council." The language of the statute is that the officers named may be "removed at the pleasure" of the city council. These words have a well-defined legal meaning. The right to "remove at pleasure" is an entirely different thing from the right to remove for cause. To hold that the statute only authorizes the council to remove for cause would be to deny the words used by the Legislature their ordinary meaning. Its meaning is that the officers named shall hold at the pleasure of the city council, but not longer than for a term of two years. The council is elected itself for two years, and for this reason their power of appointment is also limited to two years. But their appointees during the term hold at their pleasure. In other words, their appointments are subject to the pleasure of the council, but expire in any event after two years. London v. City of Franklin, 80 S. W. 514, 515, 118 Ky. 105.

The right to remove at pleasure is entirely different from the right to remove for cause. Ky. St. 1903, § 3404, provides that the council of a city of the third class shall elect a city assessor, who shall hold his office until his successor is elected and qualified. By section 3249 all officers or employés elected, appointed, or employed by the council may be removed by it at pleasure; and section 3254 provides that, except as otherwise provided, any officer, whether elected or appointed, may be impeached and removed by the council for incompetency, inefficiency, neglect, or misconduct. Held, that the council of a city of the third class may remove the city assessor at pleasure. Rogers v. Congleton (Ky.) 84 S. W. 521, 522 (citing London v. City of Franklin, 80 S. W. 514, 118 Ky. 105).

AT PRIVATE ENTRY

Acts 1861, p. 12, relating to the sale and disposition of swamp and overflowed lands by the state, did not require that they be sold only to actual settlers; the phrase "at private entry," used therein, only contemplating a sale thereof to citizens generally. Jordan v. McClure Lumber Co., 54 South. 415, 423, 170 Ala. 289.

AT SAID TIME

In a suit by two children of a decedent to set aside decedent's deed of real estate to a third child, to the exclusion of one of the plaintiffs, the master found that the defendant and one of the plaintiffs "connived together to induce their mother to make a will in their favor to the exclusion of Thomas [her son] and her grandson, and that she was unduly influenced by them, and that, although she of her own volition and with the idea of preventing trouble, which might be occasioned if she left another will, suggested a deed instead, was nevertheless affected at said time by said undue influence." Held, in view of the fact that decedent made no will, at that time or later, that the finding that the mother was "unduly influenced" had no meaning except by reference to the deed, that the words "at said time" meant when the deed was executed, and that the word "affected" signified acted upon, moved, or changed. Lyons v. Elston, 98 N. E. 93, 94, 211 Mass. 478.

AT SETTLEMENT

The words "at settlement," as used in a provision in the by-law of a building association that, where its loan contracts are governed by laws that limit the aggregate amount of premium and interest that can be taken on them, only so much of the premium collected shall be taken as profits by it as will, with the interest collected, equal and conform to the highest contractual rate of interest in such state, the balance of the premium being used "at settlement" in reduction of the debt, mean that the borrower is entitled to the benefit thereof only on final settlement, after maturity of the stock. Georgia State Bldg. & Loan Ass'n v. Grant, 34 South. 84, 86, 82 Miss. 424.

AT SUCH TIME

Wilson's Rev. & Ann. St. 1903, § 3578, providing for the filing of a chattel mortgage where the property is "at such time" situated, refers to the time of execution of the mortgage, and requires it to be filed where the property is then situated, and not where it is subsequently taken and located at the

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time the mortgage is filed. Hales v. Zander, 103 Pac. 669, 24 Okl. 246, 138 Am. St. Rep. 879.

AT THE BASE

The phrase "at the base" in a deed conveying timber above a certain size at the base, when cut, to be cut at any time within 15 years meant at the ground, though it was customary in that vicinity to cut timber two feet above the ground. Banks v. Blades Lumber Co., 54 S. E. 844, 845, 142 N. C. 49.

AT THE COURTHOUSE

A tax sale "at the door of the courthouse" is a sale "at the courthouse," within the requirement of Sess. Laws 1897, c. 28, § 116 (Pol. Code, § 2195), that such a sale be at the courthouse. Hobart v. Scott, 125 N. W. 124, 25 S. D. 20.

AT THE END

The words "at the end," in 2 Hill's Ann. St. & Codes, §§ 462, 463, providing that the lien of a judgment remaining unsatisfied at the end of five years after the rendition may be revived, mean "after the expiration" of five years. Tacoma Nat. Bank v. Sprague, 74 Pac. 393, 394, 33 Wash. 285.

AT THE EXPENSE OF THE MUNICIPAL TREASURY

Acts 1900, p. 153, c. 119, § 6, requires all persons therein designated to work on the public roads or pay a commutation tax, and prescribes in addition an ad valorem tax on all property in the county, and provides that the commutation tax shall be paid to the treasurer of the municipality from which the same was collected, but that the ad valorem tax shall be treated as a general road fund for use anywhere in the county, except the taxes so collected on property within a municipality the streets of which are worked "at the expense of the municipal treasury," which shall be equally divided between the county road fund and the municipal street fund. Section 7, p. 155, declares that the provisions of that act relating to commutation tax shall not apply to municipalities which work their streets "at the expense of the municipal treasury." Held, that a municipality working its streets "at the expense of the municipal treasury" is not limited to a municipality working its streets with money raised by an ad valorem tax alone, but that any municipality assuming the burden of working its streets with money out of its own treasury, whether raised by an ad valorem tax or a commutation tax, is working its streets "at the expense of the municipal treasury," within sections 6 and 7. McComb City v. Pike County, 45 South. 871, 872, 91 Miss. 736.

AT THE EXPIRATION

Under a lease giving the lessee an option to renew "at the expiration" of the term, he was bound to elect at a point of time at or before the expiration of the old lease, after it had expired being too late. This was held against the contention that the request could not be made before such expiration and that "at the expiration" was just as much the day following as the day preceding the actual expiration. I. X. L. Furniture & Carpet Installment House v. Berets, 91 Pac. 279, 282, 32 Utah, 454.

The phrase "at the expiration of one year" in a lease for five years, with the privilege to either party to terminate the lease "at the expiration of one year" on 60 days' notice in writing, defines the limit of time and marks the close of a period and not its beginning, and the lease can be terminated only by notice within 60 days of expiration of the first year thereof, and not at any time thereafter. M. Fine Realty Co. v. City of New York, 103 N. Y. Supp. 115, 116, 53 Misc. Rep. 246.

AT THE HANDS OF JUSTICE

Though the killing by the husband of the paramour of the wife be under such circumstances that the law would class the act as justifiable homicide, such killing is not "at the hands of justice," either punitive or preventive, within the provision of a policy of life insurance, that if death was caused or superinduced "at the hands of justice," the full amount of the policy could not be recovered, and Civ. Code 1895, § 2118, declaring that death "at the hands of justice, either punitive or preventive," releases the insurer. Supreme Lodge Knights of Pythias v. Crenshaw, 58 S. E. 628, 629, 129 Ga. 195, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

AT THE OPTION OF EITHER PARTY

A dealer in electric lamps agreed with a manufacturer to carry a specified number of the manufacturer's lamps in stock at all times, the dealer to give a note, which he was to be allowed to settle "by return of lamps * * * at any time at the option of either party, and by a 60-day notice by either party." Held, that the manufacturer did not have the right to elect to take lamps in payment of the indebtedness, such election being the right of the dealer, the words "at the option of either party" relating to the time of payment, giving either party the option of determining when the note should be paid. Union Trust Co. v. Michigan Electric Co., 103 N. W. 556, 557, 140 Mich. 131.

AT THE RATE OF

See Payable at the Rate of.

Carter's Alaska Code, pt. 5, c. 27, § 255, provides that the rate of interest in the district shall be 8 per cent. per annum, and no more, on all moneys after the same becomes due, but on contracts interest "at the rate of twelve per centum" may be charged by express agreement of the parties. Held,

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that there can be no reasonable doubt that the intention of Congress in using the words "at the rate of 12 per centum" was to designate an annual rate of interest. Such words will not be deprived of that meaning from the fact alone that they are found in a penal statute. Hemple v. Raymond, 144 Fed. 796, 798, 75 C. C. A. 526.

AT THE STUMP

The expression "at the stump," in the agreement, means the point at which the trees would be cut, and the custom in the vicinity, known to the parties, being to cut pulp wood 20 to 24 inches above the ground, that was the point meant by the phrase, which did not apply to a point 3 feet above the ground, as provided in Laws 1897, c. 220, § 7, under which the state acquired the land under the deed, providing that the owner of land to be taken under the article might, at his option, within the limitations thereinafter prescribed, reserve the spruce timber thereon 10 inches or more in diameter at a height of 3 feet from the ground. Turner v. Bissell, 126 N. Y. Supp. 234, 237, 69 Misc. Rep. 167.

AT THE TIME

The words "at the time," in Act Cong. May 2, 1890, c. 182, § 20, 26 Stat. 91, providing that no person who shall "at the time" be seised in fee simple of 160 acres of land in any state or territory shall be entitled to enter land in the territory, mean the time an application is made to enter the land. Gourley v. Countryman, 90 Pac. 427, 430, 18 Okl. 220.

The phrase "at the time," as used in an instruction in an action for personal injuries from being struck by a train at a crossing, referred to the entire transaction or series of circumstances from the time he reached the tracks to the time when he was injured. Lake Shore & M. S. Ry. Co. v. Johnson, 26 N. E. 510, 512, 135 Ill. 641.

An instruction, conditioning the right of recovery upon the fact that the injured person was "at the time" of the injury exercising due care, refers to the whole transaction, and is not objectionable as requiring due care only at the very moment of the injury. Lake Shore & M. S. Ry. Co. v. Ouska, 37 N. E. 897, 898, 151 Ill. 232.

Under Rem. & Bal. Code, § 1133, providing that a materialman must deliver or mail a duplicate statement of such material to the owner "at the time" the material is delivered to the contractor, the acts of delivery of the materials and the giving of the notice must be coincident. Seattle Lumber Co. v. Richardson & Elmer Co., 120 Pac. 517, 518, 66 Wash. 671.

Rem. & Bal. Code, § 1133, provides that a materialman, to be entitled to a lien for materials furnished, at the time the material is delivered, shall deliver or mail to the owner a duplicate statement thereof, etc. Petitioner contracted to furnish materials for a dwelling, and commenced delivering the material September 14, 1909, and continued until March 31, 1910; the deliveries being made from day to day. On the date of the first delivery, petitioner mailed to the owner a duplicate statement of all the material covered by the contract, and no other duplicate statement was given or mailed. Held, not to constitute a substantial performance of the statute, and that petitioner was therefore not entitled to a lien for the material. Heim v. Elliott, 119 Pac. 826, 827, 66 Wash. 361.

Under the Colorado statute of frauds (Mills' Ann. St. 1891, § 2025), which provides that every contract for the sale of any goods, chattels, or things in action for the price of $50 or more "shall be void, * * * third, unless the buyer shall, at the time, pay some part of the purchase money," a verbal contract to deliver stock of a corporation in part payment for services "thereafter to be rendered" is not taken out of the statute by the subsequent rendition of the services which is not a payment "at the time" within the exception of the statute nor a part performance which can validate the contract at law. Franklin v. Matoa Gold Min. Co., 158 Fed. 941, 943, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302.

Rev. Codes 1899, § 5894, relating to the redemption of personal property sold under mortgage, provides that the mortgagor or his assignee desiring to redeem such property shall "at the time of sale" give written notice to the person making the sale of his desire to make such redemption, otherwise he shall be deemed to have waived his right to do so. Held, that a notice of intention to redeem, made 33 minutes after the sale, is sufficient, and that the phrase "at the time of the sale," taken in connection with the context and the intent of the law, should be construed to convey the same meaning as the word "forthwith" or "immediately" would convey if used in the same connection. Brown v. Smith, 102 N. W. 171, 173, 13 N. D. 580.

AT THEIR DISCRETION

Under a will providing that dividends of certain stock shall be paid to testator's children by the executors "at their discretion," the executors have no right to determine capriciously and without ground whether or not the income should be paid, but the words, "at their discretion" refer to the times and manner of payment. Lembeck v. Lembeck, 68 Atl. 337, 340, 73 N. J. Eq. 427.

AT THEIR (Or His) PLACE OF BUSINESS

The phrase "at their place of business," appearing in the prohibition statute of 1907 (Acts 1907, p. 81, § 1), includes the immediate room or place in which the business is con-

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ducted, also any nearby room or place used by the proprietor in connection with the business, or in such a relation to it as to indicate that it is a convenient place which the proprietor would probably use for keeping such liquors as he might desire to furnish others for the purpose of inducing trade or for unlawful sale. Jenkins v. State, 62 S. E. 574, 576, 4 Ga. App. 859.

This court reaffirms the ruling in Jenkins v. State, 62 S. E. 574, 4 Ga. App. 859, that "the phrase 'at their place of business,' appearing in the general prohibition statute of 1907 (Acts 1907, p. 81, § 1), includes in its meaning the immediate room or place in which the business in question is conducted, also any nearby room or place used by the proprietor in connection with the business or in such a relation to the actual 'place of business' as to indicate that the nearby room, compartment, etc., is a convenient place which the proprietor would probably use for keeping therein such liquors as he might desire to furnish to others for the purpose of inducing trade, or for keeping therein liquors intended for unlawful sale under cover of the business carried on in the main place." It was not error to instruct the jury in the language above quoted. Smith v. State, 74 S. E. 711, 11 Ga. App. 89.

From the room in which defendant kept a restaurant a door led into a closed hall, and opening into this was a door leading into other rooms, with a storage room downstairs from the hall and another upstairs. In the downstairs room was found whisky, and in the upstairs room several cases of whisky, and in the adjoining storage room several unopened cases of different sorts of liquor. Held to justify a finding that the rooms in which defendant kept the liquors were "at his place of business," within the general prohibition statute of 1907 (Acts 1907, p. 81). Bashinski v. State, 62 S. E. 577, 578, 5 Ga. App. 3.

AT THEIR VALUE

Under B. & C. Comp. §§ 3042, 3058, declaring that shares of stock in banks shall be assessed "at their value," and that personal property shall be assessed at its true value in cash, the cash value of shares in national bank stock, for the purpose of taxation, is their market value, and not their pecuniary value as computed by adding to the par value of the paid-up stock the undivided earnings or profits of the bank. Ankeny v. Blakley, 74 Pac. 485, 488, 44 Or. 78.

AT WILL

See Hiring at Will; Lease at Will; Tenant at Will.

AT YOUR HOUSE

Defendant gave a firm a guaranty to pay all bills which might be contracted "at your house" by W. At the time of sale to W. the firm had been formed into a corporation having the same parties. Held, that defendant was not liable, on the theory that by the use of the words "at your house" the guaranty was to the proprietors of the store, whoever they were. Jordan-Marsh Co. v. Beals, 87 N. E. 471, 201 Mass. 163.

ATLANTIC SEABOARD

The words "Atlantic seaboard" as used in a contract by which a seller of a fishing trade agreed as a condition of the sale that he would not become engaged or interested in the business of catching or manufacturing the products from certain classes of fish along the Atlantic seaboard, in competition with the business of the purchaser, for a specified term, would seem to be broad enough to include such indentations in the coast as Delaware, New York, or Massachusetts Bay, and, at least, a location of a plant on Chesapeake Bay, about 70 miles from the Atlantic Ocean. Fisheries Co. v. Lennen, 130 Fed. 533, 535, 65 C. C. A. 79.

ATROCITY

See Extreme Atrocity or Cruelty.

ATTACH

A fire policy insured $1,000 on plaintiff's machinery, tools, etc., and all building material while contained in one story frame metal roof building, and its "additions thereto attached," and while stacked on yard within 100 feet of the above described mill, situated, etc. Held, that a brick boiler house located 27 feet from the mill and connected with it by steam and sawdust and shavings pipes constituted an "addition" within the terms of the policy, and that lumber and shingles piled within 100 feet of the boiler house, though not within that distance of the mill building, was covered by the policy. Georgia Home Ins. Co. v. Mayfield Planing Mills (Ky.) 119 S. W. 1190.

As to buildings

The word "attached" in a fire policy on a two-story building, and "additions attached thereto," used as a stable, having the meaning of "connected with," or "joined to," the policy covers an extension of the main floor, by means of an excavation, partly of unoccupied higher ground; the same then being planked over and partly under another building on higher ground. Montana Stables v. Union Assur. Soc. of London, 101 Pac. 882, 883, 53 Wash. 274.

Within the law that lands are excepted from a grant if any homestead claim is "attached" thereto, the word "attached" did not merely mean settlement, residence, or cultivation, but a proceeding in the proper land office. It meant that by such a proceeding the right of homestead had fastened to

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that land which could ripen into a proved title by a future residence and cultivation. Whitney v. Taylor, 15 Sup. Ct. 796, 798, 158 U. S. 85, 89, 39 L. Ed. 906 (citing Natoma Water & Mining Co. v. Bugbey, 96 U. S. 165, 24 L. Ed. 621).

Under the Lien Law as amended by Laws 1904, c. 698, incorporated in Personal Property Law (Laws 1909, c. 45) art. 4, providing that contracts of conditional sale, accompanied by delivery of the thing sold, shall be void as against subsequent purchasers in good faith unless filed as directed, and that, where chattels are so sold to be attached to a building, the conditions of the contract shall be void against bona fide purchasers of the premises, unless before delivery of the chattels at such building the contract shall have been duly filed, electric generators which were conditionally sold to a purchaser for use in the plant of an amusement company, and were delivered some months after the date of the contract by the seller to the amusement company at the request of the buyer, and were permanently affixed to the foundation and connected with an engine, making them part of the plant of the amusement company, were "attached to the building" within the statutes, and, the contract not having been filed, the sale was absolute as to subsequent bona fide purchasers of the premises. Crocker-Wheeler Co. v. Genesee Recreation Co., 125 N. Y. Supp. 721, 724, 140 App. Div. 726.

As to counties

Because two or more counties compose one judicial district they are not "attached" for judicial purposes within the meaning of Act Nov. 28, 1861 (Comp. Laws, par. 2967), providing that "the sheriff in any county in any judicial district in this state, to which any other county or counties in such district may be 'attached' for judicial purposes shall have power and authority to serve all process, writs, orders or other papers, issued or directed to him by the district court, or the clerk thereof, within any county or counties the same as if the said county or counties were not separate or district counties." Sadler v. Tatti, 30 Pac. 1082, 1083, 17 Nev. 429.

As to pre-emption rights

Notwithstanding its subsequent cancellation, on the filing of a declaratory statement a pre-emption claim "attached" to land within Act Cong. July 1, 1862 (12 Stat. 489), granting land, in aid of a railroad "to which a pre-emption or homestead claim may not have attached." Whitney v. Taylor, 45 Fed. 616, 617 (citing Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 734, 23 L. Ed. 634; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Kansas Pac. R. Co. v. Dunmeyer, 5 Sup. Ct. 112, 113 U. S. 629, 28 L. Ed. 1122; Hastings & D. R. Co. v. Whitney, 10 Sup. Ct. 112, 132 U. S. 357, 33 L. Ed. 363; Burlington & M. R. R. Co. v. Abink, 15 N. W. 317, 14 Neb. 95).

The word "attached," as used in Act Cong. March 3, 1855 (10 Stat. 683), granting land to Minnesota to aid in constructing certain railroads and reserving from the grant lands, to which rights of pre-emption had "attached," did not mean mere settlement, residence, or cultivation of the land, but a proceeding in the proper land office by which the inchoate right to the land was initiated, and a right of pre-emption "attached" at least as early as the time of filing the application. Weeks v. Bridgman, 43 N. W. 81, 83, 41 Minn. 352 (quoting and adopting the definition in Kansas P. R. Co. v. Dunmeyer, 5 Sup. Ct. 566, 573, 112 U. S. 414, 28 L. Ed. 794).

The word "attached," within the rule that no pre-emption or homestead claim attaches to a tract until an entry in the local land office, does not mean mere settlement or residence or cultivation of the land, but means the proceeding in the proper land office by which the inchoate right to the land was initiated. It means that by such a proceeding the homestead right had fastened to the land which could ripen into a perfect title by future residence and cultivation. The word "attached" was probably the best word that could have been used. Northern P. R. Co. v. Colburn, 17 Sup. Ct. 98, 99, 164 U. S. 383, 41 L. Ed. 479 (citing Kansas P. R. Co. v. Dunmeyer, 5 Sup. Ct. 566, 573, 113 U. S. 629, 644, 28 L. Ed. 1122).

ATTACHED BUILDING

As dwelling, see Dwelling—Dwelling House.

ATTACHÉ

The word "attaché," as employed in a constitutional provision authorizing municipal charters to provide for the appointment and compensation of the "attachés" of the judges, is to be taken in its general and enlarged sense as applying to any one recognized as a necessary adjunct to a court, tribunal, or office, and, by virtue of the necessity existing at practically all preliminary examinations for the appointment of a stenographer, he should be treated as coming within the term. Elder v. McDougald, 79 Pac. 429, 432, 145 Cal. 740.

ATTACHMENT

See Foreign Attachment; Malicious Attachment; Taking (In Attachment); Warrant of Attachment.

Discharge of attachment, see Discharge.

See, also, Garnishment.

An "attachment" is merely a possessory process. Lowenthal v. Hodge, 105 N. Y. Supp. 120, 124, 120 App. Div. 304.

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An "attachment" is merely a proceeding ancillary to the action by which a party may acquire a lien for the security of his demand, and is a provisional, independent proceeding, initiated by affidavit forming the basis for the writ, and can only be made available through a judgment, which neither changes the nature nor determines the validity of the attachment. Nail v. Superior Court in and for the County of Los Angeles, 103 Pac. 902, 903, 11 Cal. App. 27.

As civil action

See Civil Action—Case—Suit—etc.

Execution distinguished

"Attachments" may be a species of executions but "executions" is a broader term, and the lesser does not include the greater. The levy of execution on the property of a judgment debtor is not an "attachment" of such property, within Kirby's Dig. § 4055, authorizing the receiver to have all attachments of the insolvent debtor's property dissolved. J. M. McGuire & Co. v. Barnhill, 115 S. W. 1144, 1145, 89 Ark. 209.

The word "attachment," as ordinarily understood in American law, has reference to a writ the object of which is to hold property to abide the order of the court for the payment of a judgment in the event the debt shall be established. An attachment has but few of the attributes of an execution; the execution contemplated by statute being the judicial process for obtaining the debt or damages recovered by judgment, and final in its character, while attachment is but mesne process, liable at any time to be dissolved, and the judgment upon which may or may not affect the property seized. Neither the words "attachment" or "arrestment," as used in Rev. St. U. S. § 4536, providing that no wages due or accruing to a seaman shall be subject to attachment or arrestment from any court, and declaring that payment of wages to seamen shall be valid notwithstanding any previous sale, or assignment, attachment, incumbrance, or arrestment, etc., when considered literally has reference to execution or proceedings in aid of execution to subject property to the payment of judgment, but refers to process of holding property to abide the judgment, but, when liberally construed in the light of other provisions of the statute to effect the protection intended to be secured to seamen, will include proceedings in aid of execution. Wilder v. Inter-Island Steam Nav. Co., 29 Sup. Ct. 58, 61, 211 U. S. 239, 53 L. Ed. 164, 15 Ann. Cas. 127.

As instrument

See Instrument.

As legal proceeding

See Legal Proceedings.

As a lien

See Lien.

As process

See Process.

As special proceeding

See Special Proceeding.

Of person

"An 'attachment' is merely process requiring one to be arrested and produced before the court and does not of itself import that when produced the party is to be punished." In re Doland, 64 Atl. 1091, 1093, 69 N. J. Eq. 802.

ATTACHMENT OF A CHIP

The return of an "attachment of a chip" is a legal fiction; it represents a nominal and not an actual attachment of property. Martin v. Bryant, 80 Atl. 702, 108 Me. 253.

ATTACK

See Collateral Attack; Direct Attack.
Impeach equivalent, see Impeach—Impeachment.

Where the evidence was that defendant shot deceased upon his throwing his hand to his hip pocket, an instruction as to defendant's right of self-defense, if the deceased had made an attack was insufficient, since, though the act of deceased may have been an attack in law, as ordinarily understood the word "attack" means more than a threatening gesture, and the law should have been applied to the evidence and the jury instructed that, if by the act of deceased it reasonably appeared to the defendant that his life was in danger, he had a right to shoot. Johnson v. State, 138 S. W. 1021, 1024, 63 Tex. Cr. R. 50.

An unlawful attack warranting one in killing his assailant is such an attack as puts him, as a reasonable person, in fear of being killed or of receiving great bodily harm, and one cannot deliberately proceed in the immediate exercise of a mere technical right when he has reason to know that by so doing he will be placed under the necessity of killing another in self-defense. People v. Webster, 109 Pac. 637, 639, 13 Cal. App. 348.

ATTAINDER—ATTAINT

See Bill of Attainder.
Conviction distinguished, see Convicted—Conviction.

Attainder signifies an extinction of civil and political rights and capacities, and includes a bill of pains and penalties, and hence Act Oct. 14, 1879, authorizing the removal of a railroad commissioner by a majority vote of each house of the General Assembly after suspension by the Governor, is not violative of Const. art. 1, § 3, par. 2, providing that no bill of attainder shall be passed, the action of the Legislature in removing such a commissioner not amounting to a conviction of crime nor of the infliction of any punishment, but simply depriving him of the

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right to hold the particular office at the time. Gray v. McLendon, 67 S. E. 859, 872, 134 Ga. 224 (citing 1 Words and Phrases, pp. 620, 621, 779, 780).

ATTEMPT

See Criminal Attempt.

The word "attempt" is defined thus: To make an effort to effect some object; to make a trial or experiment; to use exertion for some purpose; to perform an act toward accomplishing a purpose. It can only be made by an actual deed done in pursuance and furthermore of a design. Radebaugh v. Scanlan, 82 N. E. 544, 547, 41 Ind. App. 109 (citing Anderson's Law Dict.; Prince v. State, 35 Ala. 367).

The word "attempt," in an instruction that the attempt of accused to prove an alibi does not shift the burden of proof, did not mean to discredit the evidence of defendant on the question of alibi; but it evidently meant that the fact that defendant had offered evidence for the purpose of proving an alibi did not shift the burden of proof. People v. Lang, 76 Pac. 232, 234, 142 Cal. 482.

Under an Ohio statute making it unlawful for an employer to coerce or "attempt" to coerce an employé from belonging to any lawful labor organization, the court said: "Was there an attempt to coerce? In order to constitute an 'attempt' to do anything, the means employed must have some adaptation to accomplish the intended result. 1 Bish. Cr. Law, § 749. If the employer threatens to discharge his employé because of his connection with a labor organization, then there may be some reason for saying that the threat is calculated to accomplish his withdrawal, and therefore that, by threatening to discharge, the employer attempts to coerce. But how is an actual discharge adapted to accomplish his withdrawal? It could not have been in the contemplation of the defendant that in consequence of discharging the employé he would withdraw from the organization. The discharge was not such an act as could have the effect to coerce him or compel him against his will to withdraw. Notwithstanding the discharge, he was at liberty to leave the organization or remain in it as he chose. His withdrawal would not restore him to the service. If therefore it is assumed that an attempt to coerce is the act which the statute prohibits and declares to be a misdemeanor, it is a serious question whether the indictment in this case states an offense." State v. Bateman, 10 Ohio S. & C. P. Dec. 68, 70.

As respects an attempt or offer to cast a ballot and vote, the terms "offer" and "attempt" are practically the same in meaning. One of the definitions given by Mr. Webster of the word "offer" is "attempt." State v. Fielder, 109 S. W. 580, 583, 210 Mo. 188.

ATTEMPT AT SUBORNATION

An "attempt at subornation" of perjury is an effort to induce a witness to swear falsely in a particular case, so that the act, if successful, would be perjury; a mere general attempt to induce another to swear falsely being insufficient. State v. Johnson (Del.) 84 Atl. 1040, 1041.

ATTEMPT TO COMMENCE ACTION

"An 'attempt' to commence an action shall be deemed equivalent to the commencement thereof * * * when the party diligently endeavors to procure a service; but such an 'attempt' must be followed by service within sixty days." Rev. St. Wyo., § 3462; Caldwell v. State, 74 Pac. 496, 497, 12 Wyo. 206; Clause v. Columbia Savings & Loan Ass'n, 95 Pac. 54, 59, 16 Wyo. 450.

If Code Civ. Proc. (Gen. St. 1901, § 4448), providing that an action shall be deemed commenced at the time of the first publication, applies to a case where plaintiff without causing a summons to be issued has filed his petition and affidavit for publication and caused a suitable notice to be delivered to the publishers of the only newspaper printed in the county, with directions for its insertion in the next issue thereof, such proceeding by plaintiff must be regarded as constituting an "attempt" to begin the action, within the meaning of the further provision of the same section that an "attempt to commence an action" shall be deemed equivalent to the commencement thereof, when the party faithfully, properly, and diligently endeavors to procure a service. Canaday v. Davis, 101 Pac. 626, 627, 79 Kan. 816.

An "attempt to commence an action," under Rev. St. § 4988, declaring that an attempt to commence an action shall be deemed equivalent to the commencement thereof, when the party diligently endeavors to procure a service, but such attempt must be followed by service within 60 days, and section 4991, providing that where, in an action commenced or attempted to be commenced in due time, a judgment be reversed, or if plaintiff fail otherwise than on the merits, and the time limited for the commencement of such action has at the date of such reversal or failure expired, plaintiff may commence a new action within one year after such date, an action brought within the proper time in the federal court, which dismisses the cause for want of jurisdiction over the parties or subject-matter, is the commencement of the action, and plaintiff failing otherwise than on the merits is entitled to commence a new action within one year from the date of dismissal. Pittsburgh, C., C. & St. L. Ry. Co. v. Bemis, 59 N. E. 745, 64 Ohio St. 26.

ATTEMPT TO COMMIT CRIME

An attempt to commit a crime is an act done in part execution of a criminal design with the intent to commit, but which falls

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short of actual consummation. Nider v. Commonwealth, 131 S. W. 1024, 1026, 140 Ky. 684; State v. Doran, 59 Atl. 440, 441, 99 Me. 329, 105 Am. St. Rep. 278 (quoting 1 Bish. Cr. Law, § 728); People v. Du Veau, 94 N. Y. Supp. 225, 226, 105 App. Div. 381 (citing Pen. Code, § 34).

An attempt to commit a crime contains three elements—the intent, the performance of some act toward its commission, and failure of consummation. State v. Thompson, 101 Pac. 557, 559, 31 Nev. 209.

An intention to commit a felony, and the doing of some act towards its commission, without actually committing it, is an "attempt." Cates v. Commonwealth, 69 S. E. 520, 521, 111 Va. 837.

An "attempt" is defined as "an intended, apparent, unfinished crime. * * * It must be apparent, since if it be obviously not likely to effect the result at which it aims (e. g., where a popgun is leveled at a ship or a witch is employed to use enchantments), it is not indictable. * * * It must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." Dahlberg v. People, 80 N. E. 310, 311, 225 Ill. 485.

Under Pen. Code, § 34, providing that an act done with intent to commit a crime, and tending, but failing, to effect its commission, is an "attempt" to commit that crime, there could be no attempt to suborn perjury, where the false testimony sought to be procured would not have constituted perjury if given as intended, as there would have been no subornation of perjury in such case. People v. Teal, 89 N. E. 1086, 1087, 196 N. Y. 372, 25 L. R. A. (N. S.) 120, 17 Ann. Cas. 1175.

Where defendant attempted to procure R. to kill a third party, and in furtherance of the purpose took a gun, loaded it, and started with R. to the point where the killing was to occur, but was arrested, the act was an act done tending to effect the commission of the crime, and was an "attempt," within the meaning of Code 1906, § 1049, providing that every person who shall design and endeavor to commit an offense, and shall do any overt act towards the commission thereof, but shall fail therein, or shall be prevented from committing the same, shall, etc., even though the third party did not go to the place of the proposed killing. Stokes v. State, 46 South. 627, 628, 92 Miss. 415, 21 L. R. A. (N. S.) 898.

Under Sess. Laws 1848, c. 11, § 12, making it an offense to attempt to burn a barn, an "attempt" can only be made by an actual but ineffectual deed done in pursuance of and in furtherance of the design to commit the offense. Uhl v. Com., 6 Grat. (47 Va.) 706, 709.

"'Attempts' is a term peculiarly indefinite. It has no prescribed legal meaning. It relates from its nature to an unconsummated offense. It covers acts some of which are indictable and some of which are not. * * * In an indictment for an attempt to commit a crime, it is essential to aver that the defendant did some act which, directed by a particular intent, to be averred, would have apparently resulted, in the ordinary and likely course of things, in a particular crime." Hogan v. State, 39 South. 464, 465, 50 Fla. 86, 7 Ann. Cas. 139 (quoting and adopting definition in 1 Whart. Cr. Law [10th Ed.] 190, 192).

Intent distinguished

"The word 'attempt' is more comprehensive than the word 'intent,' implying both the purpose and an actual effort to carry that purpose into execution. In crimes which require force as an element in their commission, there is no substantial difference between an assault with intent, and an assault with attempt, to perpetrate the offense." Smith v. State, 55 S. E. 475, 126 Ga. 544 (quoting and adopting definition in Johnson v. State, 14 Ga. 55; 2 Bish. New Cr. Proc. [4th Ed.] § 80).

The only distinction between an "intent" and an "attempt" to do a thing is that the former implies purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution; and, since the word "attempt" embraces the full meaning of "intent" with something more, it is not impossible that the courts may hold it to be an admissible substitute in an indictment. Smith v. State, 100 N. W. 806, 807, 72 Neb. 345 (citing 2 Bish. Cr. Proc. § 80; Atkinson v. State, 30 S. W. 1064, 34 Tex. Cr. App. 424; Runnells v. State, 30 S. W. 1065, 34 Tex. Cr. App. 431).

Intent required

The word "attempt," in a verdict finding defendant guilty of assault with "attempt" to murder in the second degree, carries with it the idea that there was "intent" to commit the crime, and the verdict is not fatally defective. Bunch v. State, 50 South. 534, 535, 58 Fla. 9, 138 Am. St. Rep. 91.

An "attempt" is an act in part execution of a crime which exceeds a mere design, but falls short of complete execution, and implies an intent as well as an endeavor to commit the crime. Flower v. Continental Casualty Co., 118 N. W. 761, 762, 140 Iowa, 510.

"'Attempt' involves an intent to do a particular thing which the law declares to be a crime." An attempt to commit suicide is not an indictable offense in the state of Maine. May v. Pennell, 64 Atl. 885, 887, 101 Me. 516, 7 L. R. A. (N. S.) 286, 115 Am. St. Rep. 334, 8 Ann. Cas. 351.

One cannot be convicted of an "attempt" to commit mayhem by destroying an eye with red pepper, there being no other evidence of intent than the throwing of the pepper, and

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the evidence showing that an eye cannot be destroyed by red pepper, unless it is allowed to stay in the eye longer that it would take to remove it in the ordinary course of events. Dahlberg v. People, 80 N. E. 310, 311, 225 Ill. 485 (quoting and adopting the definition in 1 Wharton on Criminal Law [10th Ed.] § 173).

Under Pen. Code, § 113, making it a felony to give or offer to a witness, or one about to be called as a witness, any bribe upon any understanding or agreement that his testimony shall be thereby influenced, or to attempt by any other means fraudulently to induce any witness to give false testimony, the essence of the crime is the understanding under which the money was given to a prospective witness and not the giving of the money; the words "upon any understanding or agreement," and "attempts fraudulently to induce," being equivalent to "with the intent." People v. Kathan, 120 N. Y. Supp. 1096, 1099, 136 App. Div. 303.

Offer synonymous

A verdict finding defendant guilty of an "attempt" to bribe sufficiently showed a violation of a statute prohibiting the offer of a bribe; the words "offer" and "attempt" as so used being synonymous. Johnson v. State, 92 S. W. 257, 49 Tex. Cr. R. 250.

As sufficient charge of intent

The word "attempt" itself implies an intent formed, and also an attack or endeavor to commit the offense, and, employed with the language of the statute defining the substantive offense, advises the court and the accused of the nature of the accusation made. State v. Evans, 73 Pac. 1047, 1048, 27 Utah, 12.

Comp. Laws Nev. § 4208, provides that an indictment is sufficient if it can be understood therefrom that it is entitled in a proper court; that it was found by a grand jury of the proper district; that defendant is named or described; that the offense was committed at some place within the court's jurisdiction, and at some time prior to the time of finding the indictment; that the offense charged is clearly set forth in ordinary and concise language and stated with such certainty as to enable the court to pronounce judgment upon a conviction. Section 4840 provides that every person lawfully confined in a county jail who shall escape or attempt to escape shall be punished. Accused was indicted for "the crime of attempting to escape from a county jail," in that, while accused was lawfully confined in the jail of said county under an indictment for burglary, he "did willfully, unlawfully, and feloniously attempt to break out of said county jail and in pursuance of said attempt did willfully, unlawfully, and feloniously break out of a cell in said county jail" in which he was confined, and assaulted and overpowered a jailer of said jail, contrary to the statute, etc. Held, that the indictment sufficiently alleged that the acts complained of were done with intent to escape, as the word "feloniously" means "done with intent to commit a crime," and with a design on the part of the accused to commit the felony with which he is charged, and the word "attempt" implies both an intent and an endeavor to accomplish it, and that the indictment complies with requirements of section 4208. State v. Clark, 104 Pac. 593, 595, 32 Nev. 145, Ann. Cas. 1912C, 754.

Overt act

"An act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit that crime." Pen. Code, § 34. "Felonious intent alone is not enough, but there must be an overt act shown, in order to establish even an attempt. An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause." Defendant formed a plot to obtain possession of certain indictments, for the purpose of destroying them, by bribing the assistant district attorney having them in his charge to deliver them to him for a certain consideration. A third party, pretending to act for the district attorney, delivered them to him, and he took possession of them and walked away, whereon he was arrested and the indictments recovered. Defendant was properly convicted, under Pen. Code, § 94, of an attempt to unlawfully remove documents from a public officer, and, under section 531, of an attempt to commit grand larceny in the second degree. People v. Mills, 70 N. E. 786, 789, 178 N. Y. 274, 67 L. R. A. 131.

To constitute an "attempt" there must be something more than mere intention or preparation; there must be some act moving directly toward the commission of the offense after the preparations are made. State v. Doran, 59 Atl. 440, 441, 99 Me. 329, 105 Am. St. Rep. 278 (citing People v. Youngs, 81 N. W. 114, 122 Mich. 292, 47 L. R. A. 108); Ex parte Turner, 104 Pac. 1071, 1073, 3 Okl. Cr. 168.

To constitute a crime at common law, some act must be done in execution of the criminal design. Mere preparation is not sufficient. The distinction between the preparation and the "attempt" itself is not abrogated by the statute. State v. Wood, 103 N. W. 25, 19 S. D. 260.

An "attempt" to commit the crime of larceny is an overt act or acts done with intent to deprive the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, and tending to effect the commission of the crime, but failing to accomplish it. State v. Miller, 114 N. W. 88, 103 Minn. 24 (citing 1 Words and Phrases, p. 622).

"An 'attempt' to commit a crime is an act done with intent to commit that crime and forming a part of a series of acts which

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would constitute its actual commission if it were not interrupted." The mere fact that a prisoner procured tools adapted to jail breaking did not constitute an attempt to break jail. State v. Hurley, 64 Atl. 78, 79, 79 Vt. 28, 6 L. R. A. (N. S.) 804, 118 Am. St. Rep. 934.

An "attempt" to commit a crime implies both intention to do the act committed and an actual offer to consummate such attempt; hence an allegation that accused did attempt to murder another is good, though the indictment did not charge that the act constituting the attempt was done with intent to murder. State v. Hager, 40 S. E. 393, 394, 50 W. Va. 370 (citing 1 McClain, Cr. Law, § 228; 1 Bish. Cr. Law, 729).

To constitute an "attempt to commit crime," the act done with an intent to commit the crime must go beyond mere preparation, and there must be an overt act, amounting to a step towards the execution of the criminal purpose. Johnson v. State, 55 South. 321, 323, 1 Ala. App. 102.

An "attempt" is an endeavor to accomplish a crime, carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. It is an intent to do any particular thing combined with an act which falls short of the thing intended; an act immediately and directly tending to the commission of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution, including solicitations of another. Mere intention to commit a specific crime does not amount to an attempt; but there must, in addition to the mens rea, be some act done toward the accomplishment of the proposed crime. People v. Paluma, 122 Pac. 431, 18 Cal. App. 131.

"An indictable 'attempt' * * * consists of two important elements: First, an intent to commit the crime; and, second, a direct, ineffectual act done towards its commission. To constitute an attempt, there must be something more than a mere intention to commit the offense, and preparation for its commission is not sufficient. Some overt act must be done toward its commission, but which falls short of the completed crime. It need not be the last proximate act before the consummation of the offense, but it must be some act directed toward the commission of the offense after the preparations are made. It is often difficult to determine the difference between preparation for the commission of a crime and an act towards its commission. There is a class of acts which may be done in pursuance of an intention to commit a crime, but not, in legal sense, a part of it, and do not constitute an indictable attempt; such as the purchase of a gun with the design of committing murder, or the procuring of poison with the same intent. These and like acts are considered in the nature of mere preliminary preparation, and not as acts towards the consummation of the crime." "One may commit a crime by his own hand or that of another employed, aided, or encouraged by him. If he endeavors or attempts to commit it himself, and is interrupted or frustrated, he would clearly be guilty of an indictable attempt, and if he uses another person to accomplish the same purpose, and the other fails to carry out his design, whether purposely or otherwise, the result is the same." State v. Taylor, 84 Pac. 82–84, 47 Or. 455, 4 L. R. A. (N. S.) 417, 8 Ann. Cas. 627.

To constitute the crime of "attempting" to poison a white person by a slave, there must be actual attempt to poison by the administering of some poisonous drug or substance calculated to destroy human life; the offense consists in the attempt to do an action which if consummated would have caused death. An unexecuted determination to poison, though preparation was made for that purpose or the actual administering of a substance not poisonous or calculated to cause death, though believed to be so by the person administering it, is not an "attempt to poison." State v. Clarrissa, 11 Ala. 57, 60.

Preparation alone insufficient

An "attempt" in criminal law is an effort to accomplish a crime amounting to more than mere preparation and planning for it, and which, if not prevented, will result in the consummation of the act attempted. State v. Hewett, 74 S. E. 356, 357, 158 N. C. 627.

An attempt to commit a crime is an endeavor carried beyond mere preparation, but falling short of execution of the ultimate design. It is an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he had the power of carrying his intention into execution, and would have done so but for some intervening cause. Ex parte Floyd, 95 Pac. 175, 7 Cal. App. 588.

Solicitation to commit

The weight of authority is that a solicitation to commit a crime is not an "attempt" to commit it. The very definition of "attempt" precludes the possibility of its including a mere solicitation. To constitute an "attempt" the act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation and must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or more subsequent step in a direct movement towards the commission of the offense after the prepara-

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tions are made. State v. Bowles, 79 Pac. 726, 730, 70 Kan. 821, 69 L. R. A. 176.

ATTEMPT TO COMMIT RAPE

The words "attempt to rape" implies an assault. State v. Sullivan, 84 S. W. 105, 109, 110 Mo. App. 75.

An attempt to commit rape embraces every element of the crime except its accomplishment, and if the assault is made under such circumstances that the act of sexual intercourse, if it had been actually accomplished, would be rape, it would be an "attempt to commit rape." While to constitute an "attempt to commit rape" there must be, in addition to the intent, some overt act in pursuance of such intent, the overt act need not amount to a technical trespass. Payne v. Commonwealth (Ky.) 110 S. W. 311, 312.

An indictment, alleging that accused made an assault on a female under the age of 15 years and attempted to ravish her, charges an assault with intent to rape, in violation of Pen. Code 1895, art. 608, providing that, where any person shall assault a woman with intent to commit rape, he shall be punished; the word "attempt" in the indictment being equivalent to the word "intent." Fowler v. State (Tex.) 148 S. W. 576, 577.

Under Pen. Code 1895, art. 640, providing that if it appears, on a trial for rape, that the offense, though not committed, was attempted by the use of any of the means stated in articles 634, 635, and 636, but not so as to make it an assault to commit rape, the jury may find accused guilty of an attempt to commit rape, and article 634, making the definition of "force" in assault and battery applicable to the crime of rape, in which case it must be sufficient to overcome resistance, considering the relative strength of the parties, etc., in order to constitute an "attempt to commit rape," there must have been an intent to use such force as would constitute rape or an assault to commit rape, but the attempt to apply the force must have failed, so that it did not amount to rape or an assault to commit rape. Holloway v. State, 113 S. W. 928, 933, 54 Tex. Cr. R. 465.

ATTEMPT TO ENTER

The term is used in treaties in regard to blockaded ports. Persisting in an intention to enter a blockaded port after warning is not "attempting to enter" it. The intention must be accompanied by some overt act. Fitzsimmons v. Newport Ins. Co., 8 U. S. (4 Cranch) 185, 199, 2 L. Ed. 591; Calhoun v. Insurance Co. of Pennsylvania (Pa.) 1 Bin. 293, 308.

An importer swore to a false invoice value before an American consul, but on importation presented at the custom house an invoice to which was added sufficient to make the true value. Held, that the case was not within Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135, relating to any "attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." The illegal intent was abandoned before any "attempt" was made to enter the goods. United States v. One Trunk, 171 Fed. 772, 774.

Where an importer took out a fraudulent invoice, but concluded not to use it in making entry of the goods covered by the invoice, but used instead a corrected invoice, the goods were not forfeitable on the ground of a fraudulent "attempt to enter" imported merchandise, under Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135. Inasmuch as articles for sale which accompany a person arriving in the United States are not required to be declared at the same time as the passenger's personal baggage, an intentional misstatement of the value of such articles does not make the articles forfeitable, because the importer was under no obligation to enter them or declare their value at that time, under section 2799 Rev. St. relating to "baggage." United States v. One Trunk, 175 Fed. 1012, 1015.

ATTEMPT TO PURCHASE

A attempt to get an option is not an "attempt to purchase" within Comp. Laws, § 6234, subd. 8, empowering a railroad company, if unable to purchase real estate required for its purposes, to acquire it by condemnation. Michigan Cent. R. Co. v. Ferguson, 127 N. W. 320, 321, 162 Mich. 220.

ATTEMPT TO USE

Accused purchased a street car transfer and paid for the same and passed along a street on which the cars ran on which his transfer would be good, and the cars on that line were convenient for him to take for the purpose of going to his work, but he was arrested before he could take one of the cars. Held, that his conduct did not constitute an "attempt to use" such transfer within the meaning of a city ordinance making it unlawful for any person to purchase a transfer from any one not an agent of the street car company and "attempt to use" the same. City of Chicago v. Taub, 150 Ill. App. 611, 613.

ATTEND

ATTENDANCE

See Medical Attendance.

Under Code 1896, §§ 4580, 4581, entitling regular jurors to $2 for each day's service and special jurors to the same compensation for their "attendance," a special juror, who attended court upon summons for one day, and was then discharged, without being sworn as a juror, was entitled to compensation for his attendance. Chitty v. Tisdale, 45 South. 587, 154 Ala. 246.

Under a statute providing that jurors shall receive a certain sum per diem for "at-

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tendance" upon court, a juror is not entitled to fees for the time during which he is dismissed from attendance on the court before his final discharge. Jacobs v. Elliott, 37 Pac. 942, 104 Cal. 318.

One summoned to testify before a police court upon a complaint charging another with illegally selling intoxicants, who, upon accused being required to furnish bail for his appearance at the next term of court, was ordered to give sureties for his appearance as a witness at the same term, but, being a stranger in the town, was unable to furnish sureties, whereupon he was detained in jail 80 days until the next term, when he testified before the grand jury which did not indict, was "in attendance" upon court within the statute for the period detained in jail without his own fault, so as to be entitled to witness' fees therefor. Kirke v. Strafford County, 80 Atl. 1046, 1047, 76 N. H. 181, Ann. Cas. 1912C, 807.

ATTENTION

Where an order for goods is taken by a traveling salesman and transmitted to his employer, who thereupon writes to the proposed buyer acknowledging the receipt of the order, thanking him for it, and saying that it will receive prompt and careful "attention," such communication either is in itself an absolute acceptance of the order, or is such an expression as may, in connection with an otherwise unexplained omission for a long time to make any further response, be deemed some evidence from which an acceptance may be inferred; if not conclusively an "acceptance," it may be given that effect if the subsequent conduct of the parties indicates that they have each so treated it. Bauman v. McManus, 89 Pac. 15, 17, 75 Kan. 106, 10 L. R. A. (N. S.) 1138.

ATTEST—ATTESTATION

The word "attest" has several variations of meaning subordinate to the general sense, among which the Oxford Dictionary gives: (a) To bear witness to, to testify, to certify; (b) formally by signature. In re Paxson's Estate, 70 Atl. 280, 285, 221 Pac. 98.

A test to decide whether the will of a person who has the use of all his faculties is "attested" in his presence is to inquire whether he understood what they were doing when they affixed their signatures and could, if he had been so disposed, readily have seen them do it. Healey v. Bartlett, 59 Atl. 617, 618, 73 N. H. 110, 6 Ann. Cas. 413.

Where a witness "attests" the signature of one maker of a promissory note, and another maker afterwards signs it, it seems that it is not an "attested" note, as to the latter, within the provision of the statute of limitations. Walker v. Warfield, 47 Mass. (6 Metc.) 466, 470.

"In the case of Drury v. Connell, 177 Ill. 43, 52 N. E. 368, it was said that the attestation of a will consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature of the testator was affixed or the will acknowledged in their presence." Calkins v. Calkins, 75 N. E. 182, 183, 216 Ill. 458, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233.

As certify or verify

Since the town recorder is the official custodian of the town records, his certificate to the correctness of a copy of a resolution is sufficient, in view of Code, §§ 4630, 4635, relating to the effect of documents as evidence which are duly authenticated and certified by public officers, and section 4643, raising a presumption of genuineness of the signature of such officers, and the copy of the resolution filed was sufficiently certified by the town recorder; to "certify" a document being to affirm or assert in writing its correctness or identity, and to "attest" being to affirm to be true or genuine. Sawyer v. Lorenzen & Weise, 127 N. W. 1091, 1093, 149 Iowa, 87, Ann. Cas. 1912C, 940 (citing 2 Words and Phrases, p. 1033).

A certificate reading: "A copy. Attest" —implies that the document authenticated is a "true copy." Commonwealth v. Quigley, 48 N. E. 782, 783, 170 Mass. 14.

Subscribe distinguished

"'Attestation' is the act of witnessing the execution of an instrument and subscribing the name of the witness in testimony of fact. The dictionary definitions, without exception, show conclusively that the notion associated with the word 'attested' both in its technical and nontechnical use is that of observation and subscription. The word 'attested,' as used in Mills' Ann. St. Rev. Supp. § 4664, providing that all wills by which any property is devised or bequeathed shall be attested in the testator's presence by two or more witnesses, contemplates not only the mental act of observing, but also the certification of the thing noted by the manual act of subscription, the word being derived from the Latin words 'ad' and 'testari,' meaning to witness or to bear witness and being in fact synonymous with 'witnessed' when used in connection with wills, which word implies the act of subscribing as well as of observing; and hence where two persons saw a testator execute a purported codicil and heard him declare it to be such, but one of them subscribed it in his presence, it was insufficiently attested." International Trust Co. v. Anthony, 101 Pac. 781, 783, 785, 45 Colo. 474, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087 (quoting Calkins v. Calkins, 75 N. E. 182, 216 Ill. 548, 1 L. R. A. [N. S.] 393, 108 Am. St. Rep. 233; citing 4 Cyc. p. 888).

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To "subscribe," within Code Pub. Gen. Laws 1904, art. 93, § 317, providing that wills shall be in writing signed by the testator and attested and subscribed in his presence by two or more credible witnesses, means that the witnesses shall sign their names to the same paper for the purpose of identification and implies that attestation has been performed. Brengle v. Tucker, 80 Atl. 224, 226, 114 Md. 597.

Witness synonymous

See Witness.

ATTESTED ORDER

Under Code Pub. Gen. Laws 1904, art. 23, § 210, providing that a benefit shall not be assignable except to the beneficiaries and then only by the consent of the association, but the member may surrender his certificate and have a new one issue to any one or more of the beneficiaries as provided by the by-laws of the society, and the by-laws of a fraternal society providing that the benefit, on the death of a member, shall be paid to his widow, orphans or parents or "attested order," a will of a member disposing of his death benefit is not an "attested order," and the beneficiary under the will is not entitled to the benefit due under the certificate. Mineola Tribe No. 114, Improved Order of Red Men, v. Lizer, 83 Atl. 149, 150, 117 Md. 136, 42 L. R. A. (N. S.) 1170.

ATTESTING WITNESS

"An 'attesting witness' is a subscribing witness." Historical Society of Dauphin County v. Kelker, 74 Atl. 619, 226 Pa. 16, 134 Am. St. Rep. 1010.

Under Act April 26, 1855 (P. L. 328), providing that no property shall be bequeathed to any person in trust for religious or charitable uses except by deed or will, attested by two credible witnesses, at least one calendar month before the decease of the testator, an attesting witness must be a subscribing witness. In re Paxson's Estate, 70 Atl. 280, 281, 221 Pa. 98.

ATTORN

See Attornment.

One of the meanings of the verb "attorn" is to transfer or turn over to another. Eichelberger v. Sifford, 27 Md. 320, 330.

ATTORNEY

The name of the drawee in a check was followed by the abbreviation "Atty.," and there was a marginal note, "in full for A. J. K. mortgage." Held, that the abbreviation did not give notice to the bank in which the check was deposited that it was impressed with a trust, for "attorney" may mean "assignee," "agent," or "attorney at law," and the marginal memorandum did not broaden that meaning; for banks are not required to notice marginal memoranda. First Denton Nat. Bank v. Kenney, 81 Atl. 227, 231, 116 Md. 24, Ann. Cas. 1913B, 1337.

Administrator as attorney

An administrator was held to be neither an "attorney," agent, factor, trustee, nor debtor, for purposes of foreign attachment. Conway v. Armington, 11 R. I. 116, 117.

As attorney at law

On an issue as to the sufficiency of a notice to vacate certain railroad depot grounds, signed in the name of the railroad company by F. and A., "its attorneys," the word "attorneys" should be construed to mean attorneys at law. Nolan v. St. Louis & S. F. R. Co., 91 Pac. 1128, 1129, 19 Okl. 51.

Defendant's affidavit of merits for change of place of trial, averring that he has fully and fairly stated all the facts to his "attorney," C., is sufficient without further stating that C. is his counsel in the case; "attorney," "counselor, and "attorney at law" being used synonymously by Code Civ. Proc. §§ 275–299. Pittman v. Carstenbrook, 104 Pac. 699, 702, 11 Cal. App. 224.

The word "attorney" following the name of a person, when not qualified, is ordinarily understood to mean a member of the legal profession, and one who, as an attorney at law, is legally authorized to appear for and represent clients who are parties to causes in courts of record. People ex rel. Colorado Bar Ass'n v. Erbaugh, 94 Pac. 349, 351, 42 Colo. 480.

The word "attorney," when used in connection with the proceedings of courts and the authority to conduct business in them, as well as when employed in a general sense as to the transaction of business usually and almost necessarily confided to members of the legal profession, has a fixed and universal signification, and has reference to a class of persons who are by license made officers of the courts, and empowered to appear, prosecute, and defend, and upon whom peculiar duties, responsibilities, and liabilities are devolved by law in consequence. Danforth v. Egan, 119 N. W. 1021, 1024, 23 S. D. 43, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

ATTORNEY AT LAW

See City Attorney; County Attorney; District Attorney; Prosecuting Attorney.

Attorney's fees as costs, see Costs.

Misconduct of attorney, see Misconduct.

Practice of law as business, see Business.

Student in office of attorney, see Student.

See, also, Malpractice; Practice of Law.

An "attorney" is a man set apart by the law to expound to all persons who seek him the laws of the land relating to high interests of property, liberty, and life. To

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this end he is licensed and permitted to charge for his services. The relation he bears to his client implies the highest trust and confidence. An attorney may be disbarred, if he has been guilty of an act of immorality or impropriety inconsistent with the character or incompatible with the faithful discharge of the duties of his profession or any other good cause. Under Shannon's Code, § 5781, providing that the courts must strike from their rolls any attorney guilty of such misdemeanor or acts of immorality or impropriety as are inconsistent with the faithful discharge of the duties of his profession, where a firm of attorneys procured a number of cases by personal solicitation by their representative, they are not entitled to compensation for their services from a coal company on its procuring a settlement with the clients, though the contract of employment of the attorneys was free from fraud or misrepresentation and no infidelity to the interests of their clients was imputed to them. Ingersoll v. Coal Creek Coal Co., 98 S. W. 178, 189, 117 Tenn. 263, 9 L. R. A. (N. S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829.

Code Civ. Proc. § 417, requires a summons to be subscribed by plaintiff's "attorney," who must add to his signature his office address; and section 418 prescribes, as part of the form of a summons, the words, "You are hereby summoned * * * to serve a copy of your answer on the plaintiff's 'attorney.'" Held, that the use of the singular form of the word "attorney" does not indicate that there can be no more than one "attorney" for plaintiff; the use of the word being no more significant than the use of the singular form of the word "plaintiff's." In either case the singular is used as the simple and natural mode of the expression without any intent to exclude the plural but to embrace it. Jones v. Conlin, 95 N. Y. Supp. 255, 256, 48 Misc. Rep. 172.

Where plaintiff was admitted to the bar in 1893, but never filed the certificate required by Laws 1899, p. 406, c. 225, with the clerk of the Court of Appeals, or practiced law, except for about a year after admission, he is not an attorney, within Code Civ. Proc. § 73, prohibiting an attorney from buying a chose in action with intent to sue thereon. Thompson v. Stiles, 89 N. Y. Supp. 876, 877, 44 Misc. Rep. 334.

Where a notice of appeal was signed by certain persons, "attorneys for plaintiffs," these words clearly meant to convey the information that the signatures were attached in a representative capacity and were not merely descriptive. Igo v. Bradford, 85 S. W. 618, 620, 110 Mo. App. 670.

As agent

See Agent.

As attorney

See Attorney.

As civil officer

See Civil Officer.

As counselor or solicitor

Defendant's affidavit of merits for change of place of trial, averring that he has fully and fairly stated all the facts to his "attorney," C., is sufficient without further stating that C. is his counsel in the case; "attorney," "counselor,' and "attorney at law" being used synonymously by Code Civ. Proc. §§ 275–299. Pittman v. Carstenbrook, 104 Pac. 699, 702, 11 Cal. App. 224.

In England the legal practitioners are divided into two classes, denominated solicitors or attorneys, and "barristers," and their respective duties and functions are well defined. It is only "barristers" and not "attorneys" that at common law could not recover for professional services, and it is not and never has been the common law in England or in this state that an attorney could not recover. In this case the plaintiff described himself as an attorney and counselor at law, indicating that in Missouri, as in this state, the distinction between an "attorney" and "counselor" at law no longer obtains. Spencer v. Busch, 98 N. Y. Supp. 690, 692, 50 Misc. Rep. 284.

As creditor

See Creditor.

As employé

See Employé.

As executive officer

See Executive Officer.

As judicial officer

See Judicial Officer.

As laborer

See Laborer.

Lawyer distinguished

See Lawyer.

As learned in the law

See Learned in the Law

As member of learned profession

See Learned Profession.

As ministerial officer

See Ministerial Office—Officer.

As officer in general

See Officer.

As officer of court

An "attorney" is an officer of the courts generally. State v. Babin, 50 South. 825, 826, 124 La. 1005, 18 Ann. Cas. 837.

An "attorney at law" is a sworn officer of the court. In re Holland's Estate, 97 N. Y. Supp. 202, 203, 110 App. Div. 799.

An "attorney at law" is an officer of court, exercising a privilege or franchise to the enjoyment of which he has been admitted, not as a matter of right, but upon proof of fitness, through evidence of his possessior

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of satisfactory legal attainments and fair private character. In re Durant, 67 Atl. 497, 500, 80 Conn. 140, 10 Ann. Cas. 539 (citing Fairfield County Bar v. Taylor, 22 Atl. 441, 60 Conn. 11, 15, 13 L. R. A. 767; Ex parte Garland, 4 Wall. 333, 378, 18 L. Ed. 366; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 4 Sup. Ct. 652, 111 U. S. 746, 763, 28 L. Ed. 585).

An "attorney at law" is an officer of the court, and it is as much incumbent on him to attend the sittings of the court when a case in which he is of counsel is on trial, and which trial cannot proceed in his absence, as it is for the sheriff or the clerk of the court to be present. The absence of an attorney from the court in which he has business, and when he should be there to attend to it, and when his absence necessarily impedes or delays the court's business, is contempt of court. In re Clark, 103 S. W. 1105, 1108, 126 Mo. App. 391.

An "attorney at law" is an "officer of the court," authorized to appear therein, and as such present to the court for its consideration the interests of his client, as well as to appear generally for his client with reference to the transaction of business usually confided to members of the legal profession, and are, before being authorized to appear in court or to do business as an attorney at law, required to prove their qualification and to take an oath that in the transaction of business as attorneys they will do no falsehood or consent that any be done in court, and will not knowingly promote, sue, or procure to be sued any false or unlawful suit. These requirements of the law have given to attorneys, admitted to the practice of the law, a status before the courts, and with reference to business they assume control of, different from that of other agents. A presumption follows their act, when acting for another, that they are authorized by such other to act for him touching the particular subject-matter. Attorneys admitted to the practice in Oklahoma obtain such right through and by reason of the authority of the Supreme Court, and the courts of the territory may therefore properly take notice of the right of an individual to act as an attorney at law, and to presume that in so acting they are not prosecuting any false or unlawful suit. Nolan v. St. Louis & S. F. R. Co., 91 Pac. 1128, 1129, 19 Okl. 51.

Code, § 1166, declares that all process authorized by the Code to be issued by any court or officer thereof shall run in the name of the state of Oregon, and be signed by the officer issuing the same, and, if issued by the clerk of the court, he shall affix thereto his seal of office. While an "attorney" was in one sense an officer of the court, he was not such an officer as was meant or referred to by that term as used in the statute, so as to authorize an attorney for a party to issue process of the court. Bailey v. Williams, 6 Or. 71, 73.

An "attorney at law" is an officer of the court, and, if his authority is denied, the burden of proving that he is unauthorized rests on the party making the denial. Schlitz v. Meyer, 21 N. W. 243, 244, 61 Wis. 418.

An attorney at law is an "officer of the court" and as such is under special obligation to be considerate and respectful in his conduct and communications to the court or judge. He is also as such officer entitled to such treatment from the trial judge that the interest of his client will not be prejudiced. Dallas Consol. Electric St. Ry. Co. v. McAllister, 90 S. W. 933, 936, 41 Tex. Civ. App. 131.

An "attorney and counselor at law" is an officer of the court, and when he retains his client's money, claiming a lien thereon for his services, the Supreme Court clearly has jurisdiction to determine the whole question summarily on application to compel the payment of the moneys retained. In re Klein, 101 N. Y. Supp. 663, 664.

As party

See Party.

As workingman

See Workingman.

ATTORNEY GENERAL

Assistant as state officer, see State Officer.

"Under the laws of this state the 'Attorney General' is as much the representative of the state of Florida in the Supreme Court, as the king's Attorney General is his representative in the Court of King's Bench; indeed, more so, as in the Court of King's Bench there are for certain causes representatives of the king other than the Attorney General, while here it is his sole duty to 'appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in any wise interested, in the Supreme Court of this state.' Acts 1845, c. 2. The office of 'attorney general' is in many respects judicial in its character and he is clothed with a considerable discretion." State ex rel. Moodie v. Bryan, 39 South. 929, 947, 50 Fla. 293.

ATTORNEY IN FACT

An "attorney in fact" is defined as a private or special attorney, appointed for some particular or definite purpose not connected with a proceeding at law; hence the very definition excludes the idea that he is authorized to represent his principal in proceedings in court. Harkins v. Murphy & Bolanz, 112 S. W. 136, 137, 51 Tex. Civ. App. 568.

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ATTORNEY'S FEES

See Reasonable Attorney's Fee.
As damages, see Damage—Damages.
As necessaries, see Necessaries.
As part of recovery, see Recover—Recovery.
As support, see Support (Of Person).
Enforcement of as special proceeding, see Special Proceeding.
See, also, Counsel Fee.

Costs are awarded by each court in the proceeding before it, and are legal fees allowed by law computable from the record, whereas attorney's fees are extrinsic to the record, not to be found from it, but dependent on facts dehors the record. State ex rel. Citizens Nat. Bank v. Graham, 69 S. E. 301, 303, 68 W. Va. 1.

ATTORNEY'S LIEN

An "attorney's lien" is simply the right to hold or retain in the attorney's possession the money or property of the client until his proper charges have been adjusted and paid. It requires no equitable proceeding for its establishment. Sweeley v. Seiman, 98 N. W. 571, 123 Iowa, 183 (citing Foss v. Cobler, 75 N. W. 516, 105 Iowa, 728; In re Wilson, 12 Fed. 235).

"Attorney's liens" are divided into two classes, "possessory" and "charging." The first exists at common law, and extends to all property in the possession of the attorney with respect to which he renders services to the owner. The lien is divested, as in other cases of similar liens, upon the surrender of possession of the property to the owner. The other class, the "charging" lien, is a statutory creation, and was unknown to the common law. It extends to all money or property of the client, including judgments, with reference to which the attorney's services were rendered, and is perfected when notice thereof is given the debtor. Prior to the adoption of the Revised Law of 1905, this lien did not extend to the cause of action, but only to judgments recovered or money paid, or agreed to be paid, as a result of the attorney's services. Northup v. Hayward, 113 N. W. 701, 702, 102 Minn. 307, 12 Ann. Cas. 341.

An attorney has a "lien" for compensation of professional services and for disbursements upon the property received by him on his client's behalf in the course of his employment. In re Bender's Will, 97 N. Y. Supp. 171, 176, 111 App. Div. 23.

A claim of an attorney founded on a contract providing that, if he would give information to defendant on which defendant could successfully prosecute a suit, defendant would pay a specified percentage of the recovery, and based on the fact that defendant, through another attorney, successfully prosecuted a suit on the information given, is not an "attorney's lien" within Judiciary Law (Consol. Laws, c. 30) § 475, giving the attorney, appearing for a party, a lien on his client's cause of action, but the claim is on a contract of sale of information. Holmes v. Bell, 124 N. Y. Supp. 301, 306, 139 App. Div. 455.

ATTORNEY TO THE BOARD

A resolution of a board of chosen freeholders appointing a lawyer as "attorney to the board" does not place him in an office or position which is within the protection of the veteran acts. Rowe v. Board of Chosen Freeholders of Hudson County, 88 Atl. 818, 61 N. J. Law, 120.

ATTORNMENT

See, also, Attorn.

An agreement between a purchaser of land, who had no right of possession under the contract, and a truant, that the latter should continue in possession as his tenant upon terms arranged between them, without evidence of the consent of the vendor to deliver possession, does not constitute an "attornment." Kurtz v. Cummings, 24 Pa. 35, 37.

"Attornment," at common law, was the acknowledgment by a tenant of a new landlord on the alienation of land and an agreement to become the tenant of the purchaser. It could take place only when the land was alienated after the execution of the lease, so that prior to St. 32 Hen. VIII, c. 34, the assignee of the reversion could not sue on a covenant in the lease, though the covenant ran with the land, unless the tenant had attorned to the assignee. Attornment, however, is not necessary to enable a grantee of the mortgaged premises to maintain actions against tenants in New York under Real Property Law, § 223, authorizing the grantee of leased real property, or of a reversion, or of any rent thereof, etc., to enforce the same remedies as are allowed to his grantor or lessor. Commonwealth Mortgage Co. v. De Waltoff, 119 N. Y. Supp. 781, 782, 135 App. Div. 33.

ATTRACTIVE APPLIANCE

A wagon constructed with the bed below the axles, for the purpose of carrying stone, was not an "appliance" peculiarly "attractive" to children, so as to require the owner to exercise greater care with reference to the use thereof than placing it in charge of a careful driver. Foster-Herbert Cut Stone Co. v. Pugh, 91 S. W. 199, 202, 115 Tenn. 688, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881.

ATTRACTIVE NUISANCE

An "attractive nuisance" is one which has an especial attraction for children by reason of their childish instincts. Franks v. Southern Cotton Oil Co., 58 S. E. 960, 961, 78 S. C. 10, 12 L. R. A. (N. S.) 468.

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To render the owner of a dangerous article attractive to children liable for injuries to children caused by his failure to guard it, the article must be so located as to attract children from a street or public place where they may be expected to be, and if the children can only find it by trespassing on his premises, he is not liable. McDermott v. Burke, 100 N. E. 168, 170, 256 Ill. 401.

The term "attractive nuisance" has been applied to anything which may naturally be expected to allure young children upon private premises. It is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation but merely by sufferance. Wheeling & L. E. R. Co. v. Harvey, 83 N. E. 66, 71, 77 Ohio St. 235, 19 L. R. A. (N. S.) 1136, 122 Am. St. Rep. 503, 11 Ann. Cas. 981.

A pond remote from any street or highway upon which a minor had a right to be or travel upon is not an attractive nuisance within the doctrine of allurement. Hanna v. Iowa Cent. Ry. Co., 129 Ill. App. 134, 137.

"Assuming that she was a trespasser, and that the timber pile was rightfully in its position, the contention is that there can be no liability except upon the extreme theory of the doctrine of 'attractive nuisances' as laid down in the line of cases generally known as 'Turntable Cases.' These cases are referred to in the case of Klix v. Nieman, 68 Wis. 271, 32 N. W. 223, 60 Am. Rep. 854, as 'a class of cases which hold the proprietor liable for injuries resulting to children from dangerous machinery left unguarded and so exposed as to be calculated to attract their interference with it;' but they are not expressly approved or disapproved in that case, and, in fact, the question has never been directly considered and passed upon by this court, though the reasoning of the case cited would seem rather opposed to the doctrine than otherwise. The doctrine in these cases seems to be that by creating or leaving on one's premises a dangerous machine or thing which is especially calculated to attract children to play therewith one impliedly invites children on his premises, and is guilty of negligence, if he does not take precaution to protect such children from injury. Thompson, Neg. §§ 945–1024. This doctrine has been debated in many cases and in many courts with the result that there are many authorities supporting the doctrine in its broadest application, while many repudiate it entirely, and others give it qualified recognition, and practically limit it to railroad turntables." Busse v. Rogers, 98 N. W. 219, 221, 120 Wis. 443, 64 L. R. A. 183.

AUCTION

A sale of mortgaged chattels at auction is a sale to the highest bidder, its object a fair price, and its means competition; and any agreement to stifle competition is a fraud, and the act of the mortgagor in trying to induce persons not to bid, stating that it was a sham sale, is improper. Henderson-Snyder Co. v. Polk, 62 S. E. 904, 905, 149 N. C. 104.

"A 'sale at auction,' is a sale to the highest bidder, its object a fair price, its means competition. Any agreement to stifle competition is a fraud upon the principles upon which the sale is founded." Davis v. Keen, 55 S. E. 359, 362, 142 N. C. 496 (citing Smith v. Greenlee, 13 N. C. 126, 18 Am. Dec. 564).

Though an auction is defined as a sale by consecutive bidding intended to reach the highest price of the article by exciting competition for it, property may be sold at public auction to the highest bidder and for the maximum possible amount, though a like public auction under other conditions and at other times might bring many times more, and consequently a much higher maximum possible amount. Pike v. State Board of Land Com'rs, 113 Pac. 447, 454, 19 Idaho, 268, Ann. Cas. 1912B, 1344; State v. Hoover, 113 Pac. 455, 19 Idaho, 299 (quoting 1 Words and Phrases, p. 637).

AUDIT

See False Auditing and Paying of Claims; Power to Audit, Adjust and Settle.

"To 'audit' is to hear, to examine an account, and in its broader sense it includes its adjustment or allowance, disallowance or rejection." People ex rel. McCabe v. Matthies 72 N. E. 103, 104, 179 N. Y. 242 (quoting and adopting definition in People ex rel. Myers v. Barnes, 114 N. Y. 317, 323, 2 N. E. 609, 610; People v. Board of Apportionment and Audit, 52 N. Y. 224, 227). For the same or substantially similar definitions, see People ex rel. Andrus v. Board of Sup'rs of Saratoga County, 94 N. Y. Supp. 1012, 1013, 106 App. Div. 381; People ex rel. Ramsdale v. Board of Sup'rs of Orleans County, 38 N. Y. Supp. 890, 16 Misc. Rep. 213, 214.

To "audit" is to hear and examine an account and includes its adjustment, allowance or disallowance at some definite sum. A report of auditors that they have allowed a certain claim at a sum not to exceed a specified amount is not sufficient to constitute an "audit." Stemmler v. Mayor, etc., of City of New York, 72 N. E. 581, 583, 179 N. Y. 473.

To "audit," as used in Code, § 4,600, authorizing the county board to audit the claims of justices of the peace and constables, for fees, means to hear or examine the account or claim, and implies the power to adjust or allow or reject, or otherwise decide, according to the nature of the claim. McGuire v. Iowa County, 111 N. W. 34, 36, 133 Iowa, 636.

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While the word "audit" is sometimes restricted to a mere mathematical process, it generally includes investigation, the weighing of evidence, and deciding whether items should or should not be included in the account. Travelers' Ins. Co. v. Pierce Engine Co., 123 N. W. 643, 644, 141 Wis. 103.

Hearing imported

"To 'audit' is to examine and adjust, as to audit and adjust accounts. Primarily it means a hearing; but not necessarily so." T. M. Sinclair & Co. v. National Surety Co., 107 N. W. 184, 188, 132 Iowa, 549.

The statute provides that the account of the county superintendent of health "shall be audited by the county board of health and by it certified to the board of county commissioners." The word "audit," as here used, has a technical meaning, which is to examine, to pass upon, and to adjust. To audit implies a hearing, and upon the hearing to adjust, or to allow or to reject, or otherwise decide according to the nature of the claim. From this definition of the word "audit," it would appear from the language of the statute that it was the duty of the county board of health to pass upon and allow or reject, or modify and adjust, this claim, and afterwards to certify it to the board of county commissioners for payment as other claims against the county are paid. Cooke v. Board of Com'rs of Custer County, 73 Pac. 270, 272, 13 Okl. 11 (citing Territory v. Grant, 21 Pac. 693, 3 Wyo. 241).

Judicial discretion implied

The meaning of the phrase "to audit," when applied to claims against towns, cities, or counties, means to hear, to examine an account, and, in its broader sense, includes its adjustment or allowance, disallowance, or rejection; and the verb, "audit," as so used, means simply to examine, to adjust, and clearly implies the exercise of judicial discretion. Where a city officer presents his accounts to a board having power to audit them, and fails to charge himself with moneys received, of which failure the board has no knowledge, its audit of his account is not binding upon the city in favor of such officer or his sureties as to the amounts not accounted for by him. City of Syracuse v. Roscoe, 123 N. Y. Supp. 403, 408, 66 Misc. Rep. 317.

AUDITA QUERELA

The common-law writ is one by which a proceeding may be had by a judgment defendant in the court wherein the record lies to review the judgment on account of some matter occurring after judgment discharging its obligation. Smith v. Young, 117 S. W. 628, 634, 136 Mo. App. 65.

"The 'writ of audita querela' does not lie, where the party complaining has had a legal opportunity of defense, and has neglected it. This writ is a regular suit in equity, to which the parties may plead and take issue on the merits, and cannot, therefore, be sued against the United States." United States v. One Trunk containing Fourteen Pieces of Embroidery, 155 Fed. 651, 652 (citing Avery v. United States, 79 U. S. [12 Wall.] 304, 20 L. Ed. 405).

AUDITOR

See Assistant Auditor.

An "auditor" appointed by a court is not the "court," but an officer of the court. An auditor is improperly appointed in a proceeding under a statute requiring that "all hearings shall be in open court." McArthur Bros. Co. v. Commonwealth, 83 N. E. 334, 335, 197 Mass. 137.

The word "auditor" does not ex vi termini import one clothed with judicial power or function. It fairly implies that the officer is one who mainly exercises or performs a ministerial duty. Sloan v. State, 8 N. W. 393, 398, 51 Wis. 623, 636 (dissenting opinion).

An auditor is an officer of the court, whose duty is to present to the court in intelligent form the various contentions of parties and his rulings and conclusions thereon. Hale v. Owensby, 66 S. E. 781, 782, 133 Ga. 631.

Const. art. 4, § 1, creates the office of State Auditor, and declares that he shall perform such duties as are prescribed by the Constitution or by law. Article 10, § 15, makes him a member of the State Board of Equalization, prescribing certain duties of the board, and Rev. St. 1908, §§ 6203, 6204, prescribe duties to be performed by him; the latter section requiring that he shall also perform all such other duties as may be prescribed by law. Held, that the use of the word "Auditor" in the Constitution did not limit the duties that could be imposed on him by legislative act to such as are generally performed by such an officer, and that the Legislature had power by Laws 1902, p. 73, imposing a corporation license tax, to require that such tax be paid to the Auditor, and that he pay the same into the state treasury within 30 days after receipt thereof. American Bonding Co. of Baltimore v. People, 127 Pac. 941, 942, 53 Colo. 512.

Controller synonymous

Under the constitutional provision that "county officers shall consist of * * * auditors or controllers," the duties and powers of "auditors" and "controllers" are substantially the same, and under an act requiring county auditors to approve the compensation of the county treasurer as fixed by the county commissioner, where a controller is substituted for the county auditor the compensation should be approved by him. Scranton v. Lackawanna County, 63 Atl. 968, 969, 214

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Pa. 509 (citing Taggert v. Commonwealth ex rel. Attorney General, 102 Pa. 854).

As court

See Court (Of Justice).

AUDITOR'S CLERK

Ky. St. 1903, § 4258, authorizes the auditor of public accounts to appoint revenue agents, whose term of office shall be four years. Section 4259 requires revenue agents to take the oath required of other officers, and to execute a bond to the commonwealth. The duties of such agents are prescribed by law, and in many matters they may act independently of the auditor, as in assessing omitted property under section 4241. Held, that a revenue agent, though an appointee of the auditor, is an officer of the commonwealth, holding for a fixed term, and is not subject to removal by the auditor under section 140 of the statutes, authorizing the auditor to remove the "auditor's clerk." Hager v. Lucas, 86 S. W. 552, 553, 120 Ky. 307.

AUDITORIUM

An "auditorium" is "a hall of audience. In a church, theater, public hall or the like, the space allotted to the hearers or audience." If the primary object of a building is to provide a place for public meeting, the building itself may properly be designated an "auditorium" although other portions of it are devoted to other uses than that of an auditorium in the strict sense of that term. City and County of Denver v. Hallett, 83 Pac. 1066, 1071, 34 Colo. 393 (quoting and adopting definition in Cent. Dict.).

AUG

In passing on an indictment alleging the date of an offense as a certain day in "Aug." in a certain year, the court said: "It occurred in 1884. Therefore we hold that the abbreviation Aug. for August is so well understood that it would not authorize the quashal of the indictment." Purdy v. State, 97 S. W. 480, 50 Tex. Cr. R. 318.

AUGMENT—AUGMENTATION

The term "increase" is the synonym of "augment." Mathew v. Wabash R. Co., 78 S. W. 271, 272, 115 Mo. App. 468.

In construing an early act giving land bounties to colonists, the court said: "The words of the article are, 'It appertains to the government to augment the quantity indicated, etc., according to the family, industry, and activity of the colonists.' Now, what are we to understand by 'augmentation'? Is it an original concession of some certain quantity, or an increase allowed in addition to a quantity already given? Lexicographers define augment to mean 'an enlargement by addition; to enlarge in size; to swell.' Webster. And so I understand it." Harlan v. Haynie, 9 Tex. 459 (quoted in Groesbeck v. Golden [Tex.] 7 S. W. 362, 364).

AUTHENTIC

AUTHENTIC ACT

A deed of gift under private signature, attested by two witnesses and acknowledged by the donor before a notary public in another state, is not such an authentic act as will evidence a donation of immovables; Civ. Code, art. 2234, providing that such an act must show on its face that it was passed before a notary or other officer authorized to execute such functions and two competent witnesses. Baker v. Baker, 52 South. 115, 117, 125 La. 969.

AUTHENTICATE—AUTHENTICATION

According to Webster's Dictionary, to "authenticate" means to "render authentic; to give authority to, by the proof, attestation, or formalities required by law, or sufficient to entitle to credit." Under Kirby's Dig. §§ 1194–1199, requiring appeals granted by the lower court to be perfected within 90 days by filing an authenticated copy of the record in the Supreme Court, and permitting appeals to be granted by the clerk of the Supreme Court at any time within one year after the rendition of the judgment sought to be reviewed, the clerk of the Supreme Court can only grant an appeal when an authenticated copy of the record is presented to him within the year. Damon v. Hammonds, 84 S. W. 796, 73 Ark. 608.

A statute provided that it should be unlawful to sell any patent right until a duly "authenticated copy" of the patent had been filed. It was held that by "authenticated copy" was meant such official attestation as would render the copy admissible in evidence. Mayfield v. Prosser, 32 N. E. 1129, 133 Ind. 699.

The authentication of the evidence in a bill of exceptions in a criminal case is the signature of the judge; the certificate of the official stenographer being merely for the information of the parties and the judge in settling the bill. Richardson v. State, 89 Pac. 1027, 1034, 15 Wyo. 465, 12 Ann. Cas. 1048.

A copy of a judicial record of another state, not authenticated as required by the federal statute, or by Code Civ. Proc. Kan. § 371, which relates in terms to the proceedings of the courts of foreign countries, is not rendered admissible in evidence by being certified to in accordance with the requirements of section 372, Code Civ. Proc., which provides for the admission in evidence of copies of records required by law to be kept in any public office; such section having reference only to records kept under authority of the laws of this state or of the

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United States. Ayres v. Wm. Deering & Co., 90 Pac. 794, 795, 76 Kan. 149.

AUTHORITY—AUTHORIZE

See Affirmatively Authorized; Apparent Authority; Appointment or Authority; Color of Authority; Express Authority; Implied Authority; Lawful Authority; Lawfully Authorized; Legislative Authority; Ostensible Authority; Proper and Lawful Authority, Scope of Authority; Special Authority; Without Authority of Law.

Other governing authority, see Other.

"Authorized" means empowered. Bacon v. Davis, 98 Pac. 71, 76, 9 Cal. App. 83.

The primary meaning of the word "authorize" is to empower, to give a right to act. State v. Board of Com'rs of Franklin County, 114 Pac. 247, 248, 84 Kan. 404.

To "authorize" is to "clothe with authority" (Webster, Dict.); "to give legal power to" (Cent. Dict.). The word "authorized" in a state statute authorizing a corporation to construct, maintain, and operate a street railroad in a city as the common council thereof has authorized the corporation or shall authorize the corporation so to do, etc., means an additional grant of the right and power which the Legislature requires a corporation to obtain as a condition precedent to its use and occupation of the streets. This power of the city, in the absence of language in the statute excluding the authority and reserving its exercise to the state, necessarily includes the right to fix a time for which the streets may be used. Blair v. City of Chicago, 26 Sup. Ct. 427, 439, 201 U. S. 400, 50 L. Ed. 801.

Const. art. 1, § 22, provides that the operation of the laws shall never be suspended, except by authority of the legislative assembly. Held, that the word "authority," while meaning power to act, whether original or delegated, is usually used to express a derivative power, and the clause permits the operation of laws to be suspended by an officer or tribunal of the state; and hence Act Feb. 18, 1907 (Laws 1907, p. 77) § 26, requiring railroads to furnish cars on demand by shippers, and authorizing the railroad commission to suspend the operation of the act, is constitutional. Martin v. Oregon R. & Nav. Co., 113 Pac. 16, 19, 58 Or. 198.

The term "authorize to be operated," as used in Laws 1875, c. 300, § 7, and Laws 1882, c. 410, § 1980, relating to the powers of the trustees of the New York and Brooklyn Bridge, providing that they should have power to operate and "authorize to be operated" a railroad or railroads over said bridge, is sufficient to imply and comprehend a contract to operate. Schinzel v. Best, 92 N. Y. Supp. 754, 758, 48 Misc. Rep. 224.

Laws 1893, p. 20, c. 11, § 1, provides that action to recover land of which any person is possessed by actual, open, and notorious possession for seven years, having a connected title from any person authorized to sell land under an order or decree in any court of record, shall be brought within seven years. Plaintiffs, heirs of a mortgagor, sued to recover land sold to defendant on a mortgage foreclosure; plaintiffs not having been made parties thereto so as to affect their interests. Held, that a sale was "authorized" under the statute when it was directed by an order or decree valid on its face, and an order valid both against collateral and direct attack was not required to give color of title to an adverse possessor, and hence defendant's title, accompanied by the requisite possession, was sufficient. Schlarb v. Castaing, 97 Pac. 289, 290, 50 Wash. 331.

A sale of land described in a mortgage properly executed is not void because the assignee of the mortgage did not take possession before selling under a power in the mortgage which authorized, but did not require him to take possession; the word "authorized," as used in the term "authorized to foreclose or take possession and sell" not meaning that he must do both. Cromartie v. Weaver, 73 S. E. 504, 505, 137 Ga. 452.

Laws 1901, c. 411, authorizes county boards to place the clerk of the circuit court on a salary basis by resolution, and provides that such salary shall be full compensation for all services by the clerk as such, and requires him to pay to the county treasurer all fees, and other emoluments received by him. Naturalization Act, 59th Congress, June 29, 1906, c. 3592, § 13, 34 Stat. 600, authorizes clerks of circuit courts to charge certain fees in naturalization proceedings, one-half of which they are authorized by the act to retain, and the balance they are required to pay over to the Bureau of Immigration and Naturalization. Held, that the words "authorized" and "permitted," as used in the Act of Congress, referred solely to the adjustment between the clerks and the Bureau of Immigration, and did not entitle clerks on a salary basis to hold any part of such fees as against the counties, but that such fees were earned in official capacity, and must be accounted for to the county treasurer. Barron County v. Beckwith, 124 N. W. 1030, 1032, 142 Wis. 519, 30 L. R. A. (N. S.) 810, 135 Am. St. Rep. 1079.

Laws 1907, pp. 411, 412, c. 576, § 1753–3, provides that a public service corporation shall not do any of the things conditionally prohibited, except on the authority of the railroad commission first obtained; the word "authority" not being used as suggestive of a delegation of power to determine what the corporation may do within its corporate powers, but of authority to determine whether the thing proposed to be done is within such powers. State ex rel. Minneapolis, St. P.

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& S. S. M. R. Co. v. Railroad Commission, 117 N. W. 846, 848, 849, 137 Wis. 80.

Act Cong. March 3, 1899, c. 425, § 10, 30 Stat. 1151, provides that the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of the waters of the United States is prohibited, except on plans recommended by the chief of engineers and authorized by the Secretary of War. Held, that the word "authorize" was used in such section in the sense or to approve of and formally sanction, and did not confer on the Secretary of War authority to grant original authorization for the construction of any work constituting an obstruction of the navigable waters of the United States. Hubbard v. Fort, 188 Fed. 987, 994.

"The word 'authorized,' as used in an instruction in regard to punitive damages, is criticised as being equivalent nearly to the word 'entitled,' which, it has been held, was error to use. Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 303. While it is not believed to be the best word to use, yet its use has never been condemned so far as we are aware. It was used in the case of Hodgson v. Millward (Pa.) 3 Grant Cas. 406, with apparent approval. See Sedgwick, Measure of Damages (6th Ed.) notes to p. 569." Mansur-Tebbetts Implement Co. v. Smith, 65 Ill. App. 319, 324.

Greater New York Charter (Laws 1901, c. 466) § 516, provides that all persons acting under authority of the city of New York shall have the right to use the ground under any street within the state for the introducing of water into the city. Held, that a private water company contracting with the city to deliver a certain amount of water at a stated place in the city where a part of the water conveyed to the main was used to fulfill its franchise duties to others was not acting under authority of the city within the meaning of the charter. Richards v. Citizens' Water Supply Co. of Newtown, 125 N. Y. Supp. 116, 127, 140 App. Div. 206.

Rev. St. c. 23, § 68, relating to ways, provides that when a way is changed in grade by a road commissioner or "person authorized," to the injury of an abutting owner, he may apply in writing to the municipal officers for an assessment of damages occasioned thereby to be paid by the town. Chapter 53, § 19, relating to street railroads, provides that such road shall be constructed and maintained in such manner and upon such grades as the municipal officers of the towns where they are located may direct, and when, in the judgment of such corporation, it shall be necessary to alter the grade of any road the alteration shall be made at the expense of the corporation in accordance with the directions of the municipal officers. Held, that the two sections should be construed together, and under Rev. St. c. 1, § 2, rules 2 and 14, by which the word "person" may include a corporation and singular words include plural, where a grade was established by municipal officers at the request of a railroad company, it must be deemed to have been done by a "person authorized" within the meaning of section 68, and though section 68 provides that the damages shall be assessed by the municipal officers to be paid by the town, and section 19, that the alterations shall be at the expense of the corporation, yet the word "expense" in section 19 will include the damages to landowners, which, if paid by the town, are a part of the expense of the alteration, and are recoverable by the town from the railroad corporation. Hurley v. Inhabitants of South Thomaston, 74 Atl. 734, 736, 105 Me. 301.

A lessor may, by posting or giving notice, as required by section 3509, Rev. Laws 1905, prevent mechanics' liens from attaching to his interest, although in the lease he has given the tenant permission to make the alterations for which the lien is claimed; the tenant having agreed to pay for the alterations and to restore the building to its former condition at the end of the term, the word "authorized" in such section meaning authorized by contract with or at the instance of the owner. Wallinder v. Weiss, 138 N. W. 417, 418, 119 Minn. 412.

As mandatory

The words "authorized and empowered" are usually words of permission merely, and generally have that sense when used in contracts and private affairs, but when used in statutes they are frequently mandatory and imperative. People ex rel. Hilliker v. Pierce, 119 N. Y. Supp. 21, 26, 64 Misc. Rep. 627 (quoting and adopting People v. Board of Supervisors of Otsego County, 51 N. Y. 401, 406).

Under the law of Maryland, as settled by decision, a legislative delegation of "power and authority" to a municipal corporation, to be exercised for the public benefit or protection, is not permissive merely, but imperative, and imposes a duty and obligation on the municipality for the nonexercise or negligent exercise of which, resulting in private injury, it is liable in damages. State of Maryland v. Miller, 194 Fed. 775, 781, 114 C. C. A. 495.

Where an order merely "authorizes" a commissioner of public streets to order the removal of produce and goods from the wharves and levees forty-eight hours after their discharge thereon, it has been held that the performance of that duty cannot be compelled by mandamus. State ex rel. Louisiana Const. Improvement Co. v. Fitzpatrick, 47 La. Ann. 1329, 1331, 17 South. 828.

The words "authorize and empower," in ordinary acceptation and in private transactions, are usually permissive; but, when these words are used in statutes, they are frequently imperative, and where the stat-

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ute is concerning public interests, or promotive of justice, or to secure and maintain the individual rights of others, such words are well-nigh uniformly construed to be mandatory. As used in Laws 1903, c. 289, authorizing and empowering the commissioners of the county to issue certain bonds for the purpose of funding the floating indebtedness and refunding certain previous bonds, such words are imperative. Jones v. Madison County Com'rs, 50 S. E. 291, 295, 137 N. C. 579.

The words "authorize" or "may," as used in a statute, are sometimes construed as mandatory in effect, though permissive in form, as where a statute provides for the doing of some act required by justice or public duty; but, where they confer or recognize a discretionary power, a mandatory construction will not be given to them. Whitley v. State, 68 S. E. 716, 723, 134 Ga. 758.

Under an act providing that the commissioners of Lehigh county are hereby "authorized" to erect foot sidewalks, etc., the word "authorize" did not mean required. Lehigh County v. Hoffort, 9 Atl. 177, 179. 116 Pa. 119, 2 Am. St. Rep. 587.

On the trial of an action for personal injuries against a railway company, it was held that a charge that "failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should be reasonably apprehended would not preclude a recovery, but would 'authorize' a jury to diminish the damages in proportion to the fault of the person injured," did not properly present to the jury the imperative requirement of Civ. Code, 1895, § 2322, in reference to the diminution of the plaintiff's damages in such a case. Atlanta, K. & N. R. Co. v. Gardner, 49 S. E. 818, 821, 122 Ga. 82.

The word "authorized" in a will whereby testator devised the use of real estate to his son and wife during their lives to be sold at their death, and the proceeds divided among the son's children, and whereby the testator provided that, in case the son and his wife elected not to reside on the property or refused to pay taxes or make repairs thereon, the executor was "authorized" to sell the same and invest the proceeds for the benefit of the son and his wife for life, and after their death to divide the same among the son's children, did not vest in the executors any discretion as to whether or not a sale should be made, but the will contained a mandatory direction to the executor to sell the property on the refusal of the son and his wife to pay taxes and make repairs thereon. Ayers v. Courvoisier, 91 N. Y. Supp. 549, 550, 101 App. Div. 97.

The word "authorized," as used in an instruction directing the jury that, if they believe from the evidence that a witness has willfully testified falsely as to any material fact in the trial, they are "authorized" to disregard the whole of his testimony, is equivocal, and should not be used in such connection, because it may imply to the jury that they are required to do only what they are at liberty to do. State v. Dwire, 25 Mo. 553, 554.

Under Rev. St. § 2984, whereby "the Secretary of the Treasury is 'hereby authorized' * * * to abate or refund the amount of impost duties paid or accruing" upon imported merchandise damaged or destroyed accidentally "while in custody of the officers of the customs," the secretary may not refuse to allow the refund arbitrarily or capriciously. Wallace, J., dissenting that he deemed the statute permissive, and not mandatory. The words "hereby authorized" are equivalent to "may." United States v. Cornell Steamboat Co., 137 Fed. 455, 461, 69 C. C. A. 603.

Scope of authority

"Authority" as used in regard to the servant in such expressions as "scope of authority," is used in the sense of (1) real or actual authority, express or naturally implied; (2) fictitious or imputed authority; or (3) apparent authority. Penas v. Chicago, M. & St. P. R. Co., 127 N. W. 926, 933, 112 Minn. 203, 30 L. R. A. (N. S.) 627, 140 Am. St. Rep. 470.

The word "authority," as used in the rule that a master is only responsible for the acts of a servant within the scope of his authority, is not synonymous with "instructions," but often has a broader meaning. Weatherford, M. W. & N. W. Ry. Co. v. Crutcher (Tex.) 141 S. W. 137, 142.

"Authorized," as used in speaking of the liability of a master for the acts of his servants, does not mean authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to such servant by the master, even though in opposition to his express and positive orders. Steele v. May, 33 South. 30, 32, 135 Ala. 483 (quoting and adopting the definition in Wood, Mast. & Ser. § 307); Roberts v. Southern Ry. Co., 55 S. E. 509, 510, 143 N. C. 176 (quoting and adopting the definition in Wood, Mast. & Ser. §§ 288, 307); Sawyer v. Norfolk & S. R., 54 S. E. 793, 142 N. C. 1, 115 Am. St. Rep. 716, 9 Ann. Cas. 440.

In speaking of the master's liability for the acts of his servants, it has been said: "The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant 'authority' expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to

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his express and positive orders." Wood on Master and Servant, § 307, quoted in Compher v. Missouri & Kansas Telephone Co., 106 S. W. 536, 537, 127 Mo. 553.

As power

See Power.

AUTHORITY EXERCISED UNDER THE UNITED STATES

An alleged error in refusing an application to remove a cause to the federal court does not involve the validity of an "authority exercised under the United States" so as to give the Supreme Court jurisdiction of the appeal; that ground of jurisdiction involving acts done by federal officers or agents by virtue of authority having its foundation in the federal laws. Kettelhake v. American Car & Foundry Co., 147 S. W. 479, 480, 243 Mo. 412.

The right of a fraternal order to the use to its corporate name, and the incidental right to use the distinctive words in such name to designate the order, and to use the appropriate insignia, emblems, etc., when invoked in virtue of the authority to incorporate conferred by the federal general incorporation act of May 5, 1870, 16 Stat. at L. 98, chap. 80, is claimed under an "authority exercised under the United States" within the meaning of Rev. St. U. S. § 709, Judicial Code (36 Stat. at L. 1156, c. 231) § 237, governing writs of error from the federal Supreme Court to state courts. Creswill v. Grand Lodge, K. P. of Georgia, 32 Sup. Ct. 822, 826, 225 U. S. 246, 56 L. Ed. 1074.

AUTHORITIES

See Corporate Authorities; Local Authorities.

A statute provided that in case of the death or disability of a collector, the duties and "authorities" vested in him should devolve on his deputy. It was held that the word "authorities" was broad enough to include the emoluments of the office. The court said: "The 'authorities' of the office are the powers and prerogatives with which the officer is clothed, connected with the discharge of his duties, including not only such powers as are necessary to enable him to discharge his duties properly, but the right and the power to demand and receive the emoluments attached by law to the office." Merriam v. Clinch, 6 Blatchf. 9, 17 Fed. Cas. 70.

AUTHORIZED AGENT

See Duly Authorized Agent.

A lumber company and its servants, while using a railroad company's track under an agreement authorizing such use for certain hours of the day, subject to the control of the railroad company's train orders, are the "authorized agents" of the railroad company, within Civ. Code 1902, § 2135, making a railroad corporation responsible in damages to any person whose property may be injured by fire communicated by its engines or originating on its right of way in consequence of the acts of any of its authorized agents or employés. Bellamy v. Conway, Coast & W. R. Co., 67 S. E. 545, 546, 85 S. C. 450.

AUTHORIZED BY LAW

The phrase "authorized by law," as used in a city charter, relating to power given to a common council to raise by taxation money for the contingent expenses of the city and for all other objects and purposes authorized by law, does not necessarily mean expressly authorized by statute. Penrose v. Ventnor City, 77 Atl. 1061, 1062, 80 N. J. Law, 547.

A State Treasurer, as obligee in a bond given by a bank, agreed with the bank to make it a depositary of part of the surplus funds of the state as "authorized by law," and the bank agreed to accept and pay over the deposit on demand. Comp. Laws, § 1189, requires depositaries of state money to give the State Treasurer ample security for all money deposited. A bond referred to the contracts and limited the penalty to $50,000, and limited the liability of the surety to such proportion of the total loss sustained as the penalty of the bond bore to the total penalties of all the bonds furnished by the bank. On insolvency of the bank there was over $600,000 deposited in the bank, and the state only had $200,000 security. The receiver had paid in dividends 60 per cent. on savings deposits, and 40 per cent. on commercial deposits. The state debt was in excess of the assets of the bank, and the state received dividends like an ordinary creditor. Held, that the words as "authorized by law" in the agreement between the bank and the treasurer referred only to the appointment of the depositary, and did not mean that the bond was conditioned that the statute requiring ample security would be complied with, and hence the surety had no right to be subrogated to the state in the payment of dividends on the theory that the statute operated to limit the liability of the surety to such proportion of the whole debt which was fully secured. Neither, if the state had ample security for the full amount deposited, could the surety contend that its bond secured a particular deposit, to the rights of the state in which, it having paid, it was entitled to be subrogated, since, by the bond itself as to the proportion of the total deposit for which it would be liable, a different intention was shown. Zimmerman v. Chelsea Sav. Bank, 125 N. W. 424, 428, 161 Mich. 691.

The words "persons or courts," in Wilson's Rev. & Ann. St. 1903, § 5769, providing that bail may be taken by any of the "persons or courts" authorized by law to arrest and imprison offenders, do not include the clerk of the district court or his deputy, since the statute does not vest in them the power to arrest and imprison persons charged with criminal offenses. Territory v. Wood-

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ring, 82 Pac. 572, 573, 15 Okl. 203, 1 L. R. A. (N. S.) 848, 6 Ann. Cas. 950.

The words "persons or courts," in Code Cr. Proc. § 633 (Wilson's Rev. & Ann. St. 1903, § 5769), providing that any of the "persons or courts authorized" by law to arrest and imprison offenders may take bail, include a judge of the district court, who has power to imprison persons charged with the commission of a criminal offense and who possesses the power of a committing magistrate. Territory v. Allen, 82 Pac. 574, 15 Okl. 417; Territory v. Reynolds, 82 Pac. 574, 15 Okl. 185, 186.

The "authority" given to the presiding officers of five local miners' unions by Gen. St. Kan. 1901, § 4176, to demand that the president of the state association of miners shall convene delegates to such association by special call to elect a successor to the state secretary of mining industries, does not make such presiding officers "persons authorized by statute" to sue within the meaning of Laws 1909, c. 182, § 27, and does not give them an interest sufficient to maintain an action in their own names to compel the issuance of such call by mandamus. Titus v. Sherwood, 106 Pac. 1070, 1071, 81 Kan. 870.

AUTHORIZED CAPITAL

There is a wide distinction between authorized capital stock of a corporation and actual capital stock. Authorized capital may never become actual capital, and actual capital is the amount of its authorized capital that has been bona fide subscribed for and paid. Stemple v. Bruin, 49 South. 151, 153, 57 Fla. 173.

AUTHORIZED PERSON

See, also, Authorized by Law.

Rev. St. c. 23, § 68, relating to ways, and Rev. St. c. 53, § 19, relating to street railroads, read as follows: "Sec. 68. When a way or street is raised or lowered by a road commissioner or person authorized, to the injury of an owner of adjoining land, he may, within a year, apply in writing to the municipal officers, and they shall view such way or street, and assess the damages, if any have been occasioned thereby, to be paid by the town and any person aggrieved by said assessment, may have them determined on complaint to the Supreme Judicial Court, in the manner prescribed in section 20 of this chapter. Said complaint shall be filed at the term of the Supreme Judicial Court, next to be held within the county where the land is situated, after sixty days from the date of assessment." "Sec. 19. Said railroad shall be constructed and maintained in such form and manner, and with such rails and upon such grades, as the municipal officers of the cities and towns where the same are located, may direct, and, whenever, in the judgment of such corporation, it shall be necessary to alter the grade of any city, town or county road, said alterations shall be made at the sole expense of said corporation, with the assent and in accordance with the directions of said municipal officers. The said corporation may, at any time, appeal from the decision of such municipal officers determining the form and manner of the construction and maintenance of its railroad and the kind of rail to be used, to the board of railroad commissioners who shall, upon notice, hear the parties and finally determine the questions raised by said appeal." It was held that these two sections are to be considered together as statutes in pari materia, and so construed that when the grade is established by the municipal officers at the request of the railroad company, by virtue of said section 19, it shall be deemed to have been done by a "person authorized," within the meaning of said section 68, and that, in such a case, all formal objections and verbal criticisms are obviated by the statutory rules of construction (Rev. St. c. 1, § 6, rules 14 and 2), under which the word "person" may include a corporation and words of the singular number include the plural. Hurley v. Inhabitants of South Thomaston, 74 Atl. 734, 736, 105 Me. 301.

AUTOMATIC—AUTOMATICALLY

See Coupling Automatically.

"Automatically," when applied to a mechanical device, means acting without the continued application of human agency; that is, not acting rationally, or volitionally. State v. Louisville & N. R. Co. (Ind.) 96 N. E. 340, 343.

The word "automatically" may properly be applied to a mechanism which is hand-actuated, as well as to mechanism which is actuated by other mechanism, where, when so actuated, the parts co-operate and perform their functions automatically. W. H. Coe Mfg. Co. v. American Roll Gold Leaf Co., 199 Fed. 435, 438.

AUTOMATIC COUPLERS

See Buckeye Automatic Coupler.

See, also, Coupling Automatically.

Automatic couplers which will both couple and can be uncoupled without the necessity of men going between the cars are what are meant by the provision of Act March 2, 1893, c. 196, § 2, 27 Stat. 531, prohibiting common carriers from using any car in moving interstate commerce not equipped with "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Johnson v. Southern Pac. Co., 25 Sup. Ct. 158–162, 196 U. S. 1, 49 L. Ed. 363.

AUTOMOBILE

A statute requiring the licensing of operators of "automobiles" and motor cycles,

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and defining them as all vehicles propelled by other than muscular power, except railroad and railway cars, and motor vehicles running only upon rails or tracks, and road rollers, includes a road locomotive or traction engine used to draw cars. Emerson Troy Granite Co. v. Pearson, 64 Atl. 582, 74 N. H. 22.

An ordinance taxing automobiles and other vehicles is not objectionable because not including auto trucks; the term "automobile" being sufficiently comprehensive to cover them. Kellaher v. City of Portland, 112 Pac. 1076, 1078, 57 Or. 575.

Mr. Huddy, in his Law of Automobiles (page 3), speaking of the machines which he calls "automobiles" or self-moving carriages, says the only definition he has been able to find of them is that in English's Law Dic. p. 78, which states that the term means all motor traction vehicles capable of being propelled on ordinary roads. Specifically, horseless carriages. An automobile is a carriage within the meaning of a covenant in a deed reserving a strip of land for a carriage land forever. Diocese of Trenton v. Toman, 70 Atl. 606, 610, 74 N. J. Eq. 702 (citing Baker v. Fall River, 187 Mass. 53, 72 N. E. 336; Commonwealth v. Hawkins, 14 Pa. Dist. Rep. 592).

An "automobile" is an ordinary vehicle of pleasure and business, and is not necessarily a dangerous device, being no more dangerous per se than a team of horses and a carriage, or a gun, sailboat, or motor launch. Cunningham v. Castle, 111 N. Y. Supp. 1057, 1061, 127 App. Div. 580.

As carriage

See Carriage.

As household effects

See Household Effects.

As public conveyance

See Public Conveyance.

As tool

See Tools—Tools of Trade.

As vehicle

See Vehicle.

AUTOMOBILE REPAIRER

As wheelwright, see Wheelwright.

AUTO TRUCK

As automobile, see Automobile.

AUTOPTIC PROFERENCE

The expression "autoptic proference" means "real evidence," or "demonstrative evidence"; the word "autoptic" being a good word, with pride of ancestry, though without hope of posterity, but the word "proference" is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father. Morse v. State, 72 S. E. 534, 535, 10 Ga. App. 61.

AUTREFOIS CONVICT OR ACQUIT

"To entitle a defendant to the plea of autrefois convict, or acquit, it is necessary that the offense charged be the same in law and fact." People v. Kerrick, 77 Pac. 711, 712, 144 Cal. 46 (citing People v. Helbing, 61 Cal. 620).

The plea of "autrefois convict" is founded in the law that no one shall be twice put in jeopardy for the same offense; but the law does not consider that one has been put in jeopardy by a prosecution under an insufficient indictment, and it holds, moreover, that when his conviction is set aside, at his instance, on motion for a new trial or in arrest of judgment, he thereby waives any objection that he might otherwise urge against being tried again. State v. Foley, 38 South. 402, 403, 114 La. 412 (citing Const. art. 9; State v. Hornsby, 8 Rob. 583, 41 Am. Dec. 314; State v. Ritchie, 3 La. Ann. 715; State v. Foster, 7 La. Ann. 255; State v. Walters, 16 La. Ann. 400; State v. Cason, 20 La. Ann. 48; 12 Cyc. pp. 264, 265, 277, 278; McGinn v. State, 65 N. W. 46, 46 Neb. 427, 30 L. R. A. 450, 50 Am. St. Rep. 617).

"The 'plea of autrefois acquit' is of a mixed nature, and consists partly of matters of record and partly of matters of fact. The matter of record is the former indictment and acquittal. The matter of fact is the identity of person and offense. In all cases where the plea consists of matter of record and matter of fact, the issue made thereon is to the country; but this does not take from the court the right it possesses of determining exclusively what is of record and what is not." Watson v. State, 66 Atl. 635, 640, 105 Md. 650 (quoting and adopting the definition in Hite v. State, 9 Yerg. [Tenn.] 357).

AUTUMN ELECTION

See Spring or Autumn Election.

AUXILIARY CHANNEL

Act May 29, 1889, § 7, provides that the trustees of a sanitary district shall have power to lay out one or more main channels for carrying off the drainage, together with such adjuncts and additions thereto as may be proper. Act May 14, 1903, enlarging the boundaries of the sanitary district of Chicago, gave the trustees power to provide for the additional territory by constructing one or more channels together with such adjuncts and additions thereto as may be necessary, and shall maintain the same proportion of dilution of sewage through such auxiliary channels. Held, that the words "adjuncts" and "additions" were used as synonymous with "auxiliary channel," and did not mean city sewers connecting with the sanitary district outlet so as to authorize the district authorities to take charge of the

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building of sewers of municipalities within the district. City of Chicago v. Green, 87 N. E. 417, 422, 238 Ill. 258.

AUXILIARY RECEIVER

An "auxiliary receiver" is "a custodian of the property within the state where he is appointed for the purpose of preserving the assets belonging to the party or corporation proceeded against within the state, in order that creditors may reach them without being compelled to go to a foreign jurisdiction to prove their claims." Frowert v. Blank, 54 Atl. 1000, 1002, 205 Pa. 299.

AVAILABLE

AVAILABLE COAL

"Available coal," within the meaning of a contract referring to certain unmined coal, includes coal under a creek and under a railroad, which could be mined by leaving proper supports at a greatly enhanced cost. In re Redstone Oil, Coal & Coke Co.'s Dissolution, 56 Atl. 355, 356, 207 Pa. 125.

AVAILABLE FUNDS

In a contract to pay a teacher the available funds from certain school lands for one year, the words "available funds for one year" meant the profits derivable from the capital during that time, whether it was actually received by the commissioners before the close of the year or not. Commissioners of Section 16 v. Criswell, 6 Ala. 565, 571.

AVAILABLE USE

The contemplated use of the property sought to be taken to constitute an element of damages must not only be available, but valuable, and an available use means a possible use, not a use contingent on the abandonment of the use of adjoining property engaged by another in the public service of the state, or on conditions remote, uncertain, and speculative. Grays Harbor Boom Co. v. Lownsdale, 102 Pac. 1041, 1044, 54 Wash. 83.

AVENUE

An "avenue" is a passage; a way or an opening for entrance into a place; any opening or passage by which a thing is or may be introduced or approached; a roadway; a street; a broad street. St. Louis Southwestern Ry. Co. v. Underwood, 86 S. W. 804, 805, 74 Ark. 610 (quoting and adopting the definitions in Cent. Dict., Webst. Dict., and A Thesaurus of the English Language).

"An examination of the authorities will show that the terms 'street,' 'avenue,' 'road,' 'public road,' 'county road,' etc., are used loosely and indiscriminately in legislation and judicial decisions relating to public highways and little reliance can be placed on the particular term used to describe any given way. Undoubtedly, the term 'street' or 'avenue' commonly applies to a public highway in a village, town, or city and the term 'road' to suburban highways, but there may be roads in a city or town and streets or avenues in the country." Ballinger's Ann. Codes & St. § 3803, provides that any "county road" or part thereof, which remains unopened for public use for a space of five years after the order is made or authority granted for opening the same, shall be vacated and the authority for building is barred by the lapse of time. Held that, as boards of county commissioners have executive jurisdiction over all public highways within their respective counties and without the limits of incorporated cities and towns, such section was applicable to streets dedicated through platted land outside the limits of any incorporated city or town. Murphy v. King County, 88 Pac. 1115, 1116, 45 Wash. 587.

As used in Railroad Law, § 62, providing that the authorities of any village, town, or city within which a "street, avenue, or highway" crosses, or is crossed by a railroad at grade, may petition the public service commission for discontinuance of the grade crossing and the separation of travel, etc., the words "street, avenue, or highway" import ways of a public character only, and proceedings are authorized for the discontinuance of grade crossings only where a public street, avenue, or highway crosses a steam surface railroad at grade, and the railroad commissioners have no authority to charge a village with a part of the expense of eliminating crossings over streets or ways which were exclusively private. In re New York Cent. & H. R. R. Co., 93 N. E. 515, 516, 200 N. Y. 121 (modifying order Appeal of Village of Ossining, 121 N. Y. Supp. 524, 136 App. Div. 760).

AVERAGE

See General Average; Particular Average.

The word "average," as used in an instrument forming a part of a marine policy providing that enumerated products were insured to pay particular average if amounting to a specified per cent., is merely a symbol adopted by custom and means nothing more than marine loss. Kuh v. British American Assur. Co., 112 N. Y. Supp. 410, 412, 59 Misc. Rep. 589.

"Average" is obtained by calculating the mean of several amounts, numbers, or quantities. See Standard Dictionary, verbo. "Average" is necessarily an intermediate amount, number, or quantity between two extremes. Act No. 170 of 1898, § 7, relating to the duty of tax assessors, provides that in assessing mercantile firms the true intent and purpose of this act shall be held to mean the placing of such value upon the

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stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a "fair average" on the capital, both cash and credit, employed in the business of the party or parties to be assessed. It is held that there is no warrant for finding such average by adding up the receipts of merchandise during the year and dividing the total by 12, as such method would give the average of the monthly purchases rather than a fair average of the stock in trade employed in the business. Swift & Co. v. Board of Assessors, 38 South. 1006, 1007, 115 La. 321.

AVERAGE CAPITAL

"The amount of capital invested in a business ordinarily is the whole amount of money invested and used in carrying on that business. The 'average capital' of a grain dealer is defined by section 66, Revenue Law (Laws 1903, c. 73), to be the average amount which the total investment in the business of the grain dealer exceeds the tangible property which can be separately assessed at the time of assessment. The assessor, from the examination pointed out in the statute, must find what capital of the business there was, if any, from time to time during the tax year, not including in the computation the tangible property on hand and capable of assessment at the time of assessing, and the average or mean of the capital so found is to be assessed as property in addition to the tangible property." Central Granaries Co. v. Lancaster County, 113 N. W. 199, 200, 77 Neb. 319.

The "average capital" of grain dealers, mentioned in section 66 of the Revenue Law (Laws 1903, c. 73), is not the average of the total capital used in the business, but is the excess of such capital over the real estate and other tangible property which can be viewed by the assessor and "assessed separately." It is not average purchases, nor average sales, and cannot be found by adding together the amount of purchases or the amount of sales during the year and dividing the sum by an arbitrary divisor. It is the average of the amount of cash and all other property of every kind used in carrying on the business; and, if there is an excess of this average of capital over the amount of real estate and other tangible property that can be viewed by the assessor, then such excess is to be added for assessment. Central Granaries Co. v. Lancaster County, 113 N. W. 543, 544, 77 Neb. 327.

AVERTING DANGER

In passing on an instruction on the law of self-defense which told the jury that if they believed from the evidence that the defendant "believed, and had reasonable grounds for believing, he had no apparent and safe means of 'averting said danger' except by shooting said Nicholls, he is excusable on the ground of self-defense, and they should find him not guilty," the court said: "It is argued that the word 'averting' should not have been inserted in the instruction, that it is equivalent to the word 'escape' or 'escaping,' and that this court has heretofore decided that the word 'escape' should not be used in such cases, for the reason that it is liable to be understood as requiring the defendant to flee, retreat, or run away. Mr. Webster defines 'avert' as follows: 'To turn aside or away; as, "how can the danger be averted?" "To avert his ire." ' " It will thus be seen that the term used in the instruction could not fairly be understood as requiring the defendant to retreat or run away, and it is therefore unobjectionable; for it will be seen that, unless he had apparent and safe means of averting the danger, he was excusable for acting in his own self-defense. Barnes v. Commonwealth, 61 W. 733, 734, 110 Ky. 348.

AVOCATION

See Habitual Avocation.

The selling of liquors on Sunday has been held an "avocation." Voglesong v. State, 9 Ind. 112, 113.

AVOID

"Direction in a statute that collateral questions are to be 'avoided' indicates that they are not absolutely excluded from consideration." Moody v. Peirano, 88 Pac. 380, 382, 4 Cal. App. 411.

"In the self-defense instruction this language appeared: 'And there reasonably appeared to him no other safe means of avoiding impending danger.' If he could have averted or avoided the danger, it was his duty to do so, and it was eminently proper to put the expression quoted in the instruction. * * * The word 'averting' might have been used instead of avoiding, but it would have conveyed the same idea." Cook v. Commonwealth (Ky.) 72 S. W. 283, 284.

An affidavit averring that affiant on two occasions went to the residence of defendant to serve process on her, and was there informed that defendant was a trained nurse and was absent from home, engaged in pursuing her vocation, does not show that defendant was avoiding service of process, within Municipal Court Act, Laws 1902, p. 1500, c. 580, § 32, authorizing substituted service on a defendant avoiding service. New York Leasing Co. v. O'Brien, 110 N. Y. Supp. 1031, 1032.

AVOIDABLE

See Unavoidable.

AVOIDANCE

See Matter of Legal Avoidance.

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A pleading by way of "avoidance" contemplates the introduction of new or special matter, which, admitting the premises of the opposite party, repels his conclusions. Porter v. American Tobacco Co., 125 N. Y. Supp. 710, 712, 140 App. Div. 871.

In Code Civ. Proc. § 516, giving the court discretionary power to order a reply to new matter set up by way of avoidance, "avoidance" is the introduction of new or special matter, which, admitting the premises of the opposite party, avoids or repels his conclusions. In an action for broker's commissions, an answer denying the allegations of the complaint, and alleging that plaintiff was employed by some other person, to defendant unknown, to obtain defendant's consent to the lease for procuring which plaintiff seeks compensation, and that plaintiff specially waived all claim to commissions under the contract alleged in the complaint, does not set up matter in "avoidance," within Code Civ. Proc. § 516, authorizing the court to order a reply where the defendant sets up new matter by way of avoidance. Fragner v. Fischel, 126 N. Y. Supp. 478, 479, 141 App. Div. 869.

AVOIRDUPOIS WEIGHT

The phrase "avoirdupois weight," as used in Pol. Code, § 3215, means 16 ounces in weight. Hale Bros. v. Milliken, 90 Pac. 365, 369, 5 Cal. App. 344.

AVOW

In an action of ejectment, where the defense was adverse possession, the trial court left it to the jury to say whether the agent of the plaintiff's testator entered upon the land with the "avowed" object of claiming it for his principal. Counsel objected to the word "avowed" in that it conveyed to the jury the meaning that an entry to survey off a part of the land was not sufficient unless accompanied with some verbal declaration that such was the effect intended. The appellate court said: "But they had just been instructed, in the language of Judge Gibson, that the effect of an entry depends on the intent of it expressed in words, or intimated by an act equally significant; that there must be an explicit declaration, or an act of notorious dominion; and can it be doubted they would understand from all this that the intention could be 'avowed' as well by deeds as by words? An entry to toll the statute must not be accidental, nor by invitation of him in possession, nor for any equivocal purpose whatever, but to regain a pedal possession of the land for purposes inconsistent with the title of the occupier. An entry to measure off eight acres for another would be such a purpose, and how could it be more distinctly 'avowed' than by the act itself? A jury of common intelligence could not fail, we think, to get the very law of entry from all that the court placed before them. We are not, then, to reverse the judgment on a mere suggestion that they may have misunderstood the word 'avowed.'" Hood v. Hood, 25 Pa. 417, 423.

AVOWRY

"At common law, and under the Revised Statutes, rules of pleading and practice peculiar to the action of replevin prevailed. When both parties claimed the goods, both were deemed actors or plaintiffs. Coan v. Bowles, 1 Show. 165, 169; Carth. 122; Anon. 2 Mod. 199; Small v. Bixley (N. Y.) 18 Wend. 514; Persse v. Watrous, 30 Conn. 139, 146; Wells, Rep. § 21. When the defendant admitted and justified the taking, he was said to 'avow.' 3 Bl. Comm. 149; Whart. Law Dict. and Abb. Law Dict., Avowry. An 'avowry' was in the nature of a declaration (7 Bac. Abr. [7th Ed]. 103, title Replevin and Avowry; Whart. Law Dict., Avowry) which required a reply from the plaintiff, and in default of one the defendant was entitled to a judgment." Kilburn v. Lowe (N. Y.) 37 Hun, 237, 240 (citing People v. New York Common Pleas [N. Y.] 2 Wend. 644).

"When property was distrained the remedy by the owner of the property taken was an action of replevin. 'Upon this action being brought, the distrainor, who is now the defendant, makes "avowry"; that is, he "avows" taking the distress in his own right, or the right of his wife, and sets forth the reason of it, as for rent arrears, damage done, or other cause; or else, if he justifies in another's right, as his bailiff, or servant, he is said to make cognizance; that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain; and on the truth and legal merits of this "avowry," or cognizance, the case is determined.'" Richardson v. Williamson, 24 Cal. 289, 302 (quoting 2 Black. Comm. 149).

AVULSION

"Avulsion" is a rapid change in the course or channel of a river and does not work any change in the boundary, which remains as it was in the center of the river, though no water may be flowing therein. James v. State, 72 S. E. 600, 602, 10 Ga. App. 13 (citing Missouri v. Nebraska, 25 Sup. Ct. 155, 196 U. S. 23, 49 L. Ed. 372); Stockley v. Cissna, 104 S. W. 792, 798, 119 Tenn. 135 (citing Missouri v. Nebraska, 25 Sup. Ct. 155, 157, 196 U. S. 23, 49 L. Ed. 372; Nebraska v. Iowa, 12 Sup. Ct. 396, 143 U. S. 359, 36 L. Ed. 186).

An "avulsion" arises where a stream forming a boundary suddenly abandons its old channel and seeks a new one. It has no effect on the boundary, leaving it in the

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center of the old channel. McBride v. Steinweden, 822, 823, 72 Kan. 508.

To constitute "avulsion" along the Missouri river bordering upon Kansas, the bank must be destroyed or removed suddenly, visibly, rapidly, violently, in substantial quantity, and in a manner unusual to that river. To constitute "avulsion," it is not essential that the land torn away be removed intact, so as to be capable of location or identification. Wood v. McAlpine, 118 Pac. 1060, 1062, 85 Kan. 657.

"The terms 'avulsion' on the one hand, and 'gradual and imperceptible accretion' on the other, are used by writers on alluvion to contradistinguish a sudden disruption of a piece of ground from one man's land to another's, which may be followed and identified from that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification." Benson v. Morrow, 61 Mo. 345, 352.

"The channels of the rivers and other streams and bodies of water may and do become changed and their physical location altered by the forces of nature operating upon their shores or banks. When the change is made insensibly, by gradual and imperceptible washing away of one shore and the formation in like manner upon the other shore, it is said to be 'by erosion and accretion.' When it is made suddenly and violently, and is visible and the effect certain, it is called 'avulsion.' Where the boundary lines between individuals, as well as states and nations, are marked by streams, and the location of the stream is altered by erosion and accretion it continues to be the boundary line; but, where the alteration occurs as the result of an avulsion, no change is made, but the limits of the private estates or national territory and jurisdiction remain as before." State v. Muncie Pulp Co., 104 S. W. 437, 451, 119 Tenn. 47.

Where land bordering on a body of water is lost by "erosion," which is the gradual and imperceptible wearing away of the land by the natural action of the elements, the state succeeds to the ownership thereof; where the land is added by "accretion," which is such a slow and gradual deposit of articles that its progress cannot be measured though its results may be discerned from time to time, the new land formed belongs to the owner of the upland to which it attaches; but where lost by "avulsion," which is the sudden or violent action of the elements, the effect and extent of which is perceptible while it is in progress, the boundaries do not change. In re City of Buffalo, 99 N. E. 850, 852, 206 N. Y. 319.

AWAIT

AWAITING TRIAL

A criminal case is not "awaiting trial" when the accused has only been bound over and is not confined in jail, but at large under a bond for his appearance. State v. Fleming, 126 N. W. 565, 566, 20 N. D. 105.

AWARD

Board of awards as court, see Court (Of Justice).

An "award" in law is a judgment or finding upon a disputed matter submitted for decision. People ex rel. Hallock v. Hennessy, 98 N. E. 516, 518, 205 N. Y. 301.

"An 'award' is the judgment of a tribunal selected by the parties to determine matters actually in variance between them—not merely to appraise and settle the price of property contracted for under the stipulation that this term of the contract was to be so ascertained." Omaha Water Co. v. City of Omaha, 162 Fed. 225, 234, 89 C. C. A. 205, 15 Ann. Cas. 498.

The term "award," used in the condition of a writ of error bond instead of judgment of the court, is sufficient; the legal effect being the same. Richards v. Griffin, 5 Ala. 196, 198.

An "award" made by two of three arbitrators is valid. Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 106 C. C. A. 501.

Where disputed matters have been submitted to arbitration, the "award" is the decree or judgment of the arbitrator. Millsaps v. Estes, 50 S. E. 227, 228, 137 N. C. 535, 70 L. R. A. 170, 107 Am. St. Rep. 496.

An "award" is defined as "the judgment or decision of arbitrators or referees in a matter submitted to them." 1 Bouv. Law Dict. 205; 1 Words and Phrases, p. 656. The judgment of an arbitrator, as also the paper on which it is written, is called an "award." Rev. St. 1898, § 3223, provides that, when a submission is made an order of court, the arbitrators may be compelled to make an award which may be enforced as a judgment, and section 3227 declares that the award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties; that, when the submission is made an order of court, the award must be filed with the clerk, and a note thereof made on the register. Held, that it is no part of the duty of arbitrators to file their award with the clerk; such filing being required by the parties only when the party filing the award desires it to have the effect of a judgment. Richards v. Smith, 91 Pac. 683, 685, 33 Utah, 8.

An "award" is a final judgment, both at law and in equity, and cannot be classed with contracts, sealed or unsealed. Olston v. Oregon Water Power & Ry. Co., 97 Pac. 538, 52 Or. 343, 20 L. R. A. (N. S.) 915.

In Comp. St. 1905, c. 77, art. 9, § 7, providing that the county commissioners shall designate the newspaper in which certain no-

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tices shall be published, the word "designate" means to point out or select, and when the board "awarded" the printing of a list to a certain paper it clearly pointed out or selected such paper to do the work, and, so long as it did that, whether it used one word or another, is immaterial in the eyes of the law. State ex rel. Cronin v. Cronin, 106 N. W. 986, 987, 75 Neb. 738.

Under the federal statutes as construed by the federal courts, a bond conditioned to pay such damages as may be "awarded" by reason of the issuance or continuance of an injunction is not breached so as to make the surety liable until the amount of damages is assessed, and the principal obligor has refused to pay such amount. Umbreit v. American Bonding Co. of Baltimore, 129 N. W. 789, 144 Wis. 611.

Premium distinguished

"In a 'wager' or 'bet' there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must lose or win. In a 'premium' or 'award' there is but one party until the act, thing, or purpose for which it is offered has been accomplished. A 'premium' is an 'award,' or recompense for some act to be done. A 'wager' is a stake upon an uncertain event." The offering of a premium to a winner of a horse race is not a bet or wager within Code, § 4028, prohibiting the making of any bet or wager. Under Code, § 1109, authorizing the county agricultural societies to award premiums for the improvement of stock, a premium may be offered for the winner of a horse race. Delier v. Plymouth County Agricultural Society, 10 N. W. 872, 874, 57 Iowa, 481 (citing Alford v. Smith, 63 Ind. 58; Harris v. White, 81 N. Y. 532).

AWARD FOR COSTS

As judgment, see Judgment.

AWARE

"Aware," as applied to a motorman's duty to a traveler after becoming aware that the latter is in peril, means "informed." The requisite knowledge is of the fact that the party injured was in peril. Manifestly this condition (knowledge) to the duty (pretermitting wanton or willful misconduct, to be later considered) cannot arise out of a breach of duty to look out for persons, etc., in peril, whatever the place of injury. If the duty be to keep a diligent lookout, and the duty be merely negligently breached, the consequence is the opposite of knowledge, namely, want of knowledge, and attributable only to the failure to observe that course or conduct which would have probably led to knowledge. Anniston Electric & Gas Co. v. Rosen, 48 South. 798, 801, 159 Ala. 195, 133 Am. St. Rep. 32.

AWFUL

The unexpected jarring of a passenger car, variously described as "swift," "quite violent," "terrible," "awful," "very severe," and "unexpected," as the train was passing over a cross-over switch used during the repair of one of the railroad company's bridges, which resulted in a passenger, who was standing near the open door of a car, being thrown from the car and injured, did not constitute negligence on the part of the carrier. Foley v. Boston & M. R. R., 79 N. E. 765, 766, 193 Mass. 332, 7 L. R. A. (N. S.) 1076.

The jerk or lurch of a train may have been "awful hard" or the "severest" a witness had ever experienced, and yet may have been not such an extraordinary or unusual jerk or lurch as to be attributable to unskillful handling of the engine or management of the train. Young v. Missouri Pac. Ry. Co. (Mo.) 84 S. W. 175, 177.

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B

B/L

See New B/L.

B. O.

The letters "B. O." chalked on cars by a railroad car inspector mean bad order. Marshall v. St. Louis, I. M. & S. R. Co., 94 S. W. 56, 57, 78 Ark. 213, 115 Am. St. Rep. 27, 8 Ann. Cas. 420.

BABORD

The word "babord" is a French marine term meaning the port side. The Charles Tiberghien, 143 Fed. 676.

BACK

See Taken Back.
Revert back, see Revert.

BACK-FIRING

"Backing-firing," as applied to an engine, is an explosion of gas in either the exhaust or intake pipe. Templeman Bros. Lumber Co. v. Fairbanks, Morse & Co., 57 South. 309, 313, 129 La. 983.

BACK LINE

Where a grantor owned land located on the south side of a bayou and conveyed a portion of it by a description beginning at a point on the bayou and extending south a stated number of varas to a stake in the prairie on "back line," the grantee took to the south line of the grantor's land, though it was located at a greater distance from the bayou than indicated by the description. Morse's Heirs v. Williams (Tex.) 142 S. W. 1186, 1189.

BACK TAXES

Act March 15, 1906, art. 8, § 1, makes the sheriff by virtue of his office collector of state, county, and district taxes. Section 20 provides that the taxes shall be due March 1st, and, if not paid on November 1st, shall become delinquent, and a penalty of 6 per cent. be added. Under section 21 the sheriff is required within 15 days after delinquency to certify to the county clerk a list of all delinquent taxes. Under sections 22–27 the county clerk within 10 days thereafter must issue against each delinquent a tax warrant directed to the sheriff who is required to proceed thereunder as under an execution. Ky. St. 1909, § 4267, makes it the duty of the Auditor of Public Accounts to collect back taxes, etc., and gives him power to direct revenue agents to prosecute the collection of delinquent taxes. Held, that two distinct modes for the collection of taxes are provided, the duties of the revenue agents not being intended to conflict with the sheriff, on whom the duty of collecting the taxes is primarily placed, and the term "back taxes" in section 4267 refers to taxes on which the ordinary process of collection had been exhausted, and hence the revenue agent could not bring suit to collect a delinquent tax and penalties where the sheriff had levied his tax warrants, and a preliminary injunction restraining the collection had been issued and dissolved, the sheriff then having a right to collect the taxes, and the ordinary process in his hands not being exhausted. Commonwealth v. Louisville Water Co., 116 S. W. 712, 713, 132 Ky. 305.

BACK-UP SIGNAL

In railroad parlance there is a difference between a "back-up signal" and a "kick signal." "Back-up signal" means that the engineer shall back the train, while a "kick signal" means that the speed shall be sufficiently increased to throw the cut-off into the side track by the force of the increased momentum, without following the car into the switch with the rest of the train. Gulf, C. & S. F. R. Co. v. Hill, 69 S. W. 136, 138, 95 Tex. 629.

BACTERIOLOGY

"Bacteriology" is the science which investigates bacteria and other microbes, especially their life history and agency in the production of disease. State ex rel. Scholl v. Duncan, 50 South. 265, 162 Ala. 196.

BAD

BAD BEHAVIOR

"Bad behavior" is conduct such as the law punishes. United States v. Hrasky, 88 N. E. 1031, 1033, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279.

BAD BLOOD

"Bad blood" which produces a cherished intention to deliberately kill is not to be confused with "hot blood" excited by a sudden and unexpected emergency with which the slayer, through no fault of his own, is unfortunately confronted. Jenkins v. State, 51 S. E. 598, 600, 123 Ga. 523.

BAD CONDUCT

A factory employé's persistent violation of a rule requiring employés to keep their street clothing in a dressing room maintained by the employer for that purpose, and away from the machinery at which the men were at work, constituted "bad conduct," within a provision of the employment contract, permitting discharge for neglect of work, "bad conduct," etc. Thomas v. Houston, Stanwood

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& Gamble Co., 142 S. W. 214, 215, 146 Ky. 156, 37 L. R. A. (N. S.) 950, Ann. Cas. 1913C, 185.

BAD FAITH

"Good faith is the opposite of 'bad faith,' and bad faith and fraud are synonymous." State ex rel. Millice v. Petersen, 75 N. E. 602, 605, 36 Ind. App. 269 (quoting and adopting definition in Stark v. Starr, 1 Sawy. 15, 22 Fed. Cas. 1084).

In an action on an insurance policy, it was not error to charge that damages and attorney's fees could not be recovered unless the insurer had acted in bad faith; "bad faith" meaning a frivolous or unfounded refusal in law or in fact to comply with the policy, or to pay according to its terms and the conditions imposed by statute. American Ins. Co. v. Bailey & Musgrove, 65 S. E. 160, 6 Ga. App. 424.

Cobbey's Ann. St. 1907, § 9255, providing that, to constitute notice of an infirmity in an instrument, the person to whom negotiated must have actual knowledge thereof, or knowledge of such facts that his taking the instrument amounts to bad faith, does not change the rule that to constitute bad faith by the purchaser of a negotiable instrument, for value, before maturity, he must have acquired it with knowledge of an infirmity, or with a belief based on the circumstances known to him that there was a defense, or he must have acted dishonestly. Benton v. Sikyta, 122 N. W. 61, 62, 84 Neb. 808, 24 L. R. A. (N. S.) 1057.

"Bad faith," as used in Civ. Code 1895, § 2140, making bad faith in the refusal to pay loss on a policy the basis for damages and attorney's fees, is any frivolous or unfounded refusal in law or in fact to comply with the requisition of the policy holder to pay according to the terms of his contract and the conditions imposed by the statute. Missouri State Life Ins. Co. v. Lovelace, 58 S. E. 93, 103, 1 Ga. App. 446 (quoting and adopting the definition in Cotton States Life Ins. Co. v. Edwards, 74 Ga. 231).

Gross negligence, on the part of one to whom a note is negotiated, in not making inquiry as to defects suggested by the facts known to him, is evidence from which "bad faith," as used in the negotiable instruments law (Sanborn's St. Supp. 1906, § 1676–26), may be inferred, but it does not of itself constitute bad faith as a matter of law. Kipp v. Smith, 118 N. W. 848, 850, 137 Wis. 234.

Defendant trust company loaned $125,000 to U. and K. to purchase the stock of a corporation, which amount was equal to one-half of its entire capital. This loan was made in consideration of an usurious rate of interest, and also an additional bonus, the trust company requiring a transfer of the stock as collateral, and also two representatives on the board of directors. When the debt matured, U., as president of the corporation, procured a larger loan from a bank for the corporation's benefit, and as a part of the proceeds received a cashier's check payable to the corporation, which he indorsed as its president and paid to the trust company in payment of its loan to himself and K. as individuals and for a surrender of the stock. Held, that the trust company was bound to inquire through its representatives on the board of directors of the corporation concerning U.'s actual or implied power to so use the corporation's assets, and since such inquiry would have disclosed no such authority, but would also have shown that such use of the corporation's property would render it insolvent, the trust company was not a bona fide purchaser either as against the corporation or its creditors, under Negotiable Instruments Law, Laws 1897, p. 732, c. 612, §§ 91, 94, 95, declaring bad faith to consist of notice of facts which, if unexplained, would show that the purchaser was taking property to which the payer had neither right nor title. Ward v. City Trust Co. of New York, 84 N. E. 585, 589, 192 N. Y. 61.

Where a bill is filed for the foreclosure of a mortgage, which was given to secure the payment of a note, which note provides for the payment of the interest quarter-annually, and the mortgage contains a provision to the effect that, upon default in the payment of any installment of interest, the whole amount of such note shall thereby become due and payable, and there is a positive allegation in the bill that, at the time of the purchase of the note by the complainant bank, which was prior to the maturity of the principal of the note, it had no knowledge that there had been any default in the payment of interest, or that there was any defense on the part of the mortgagor against the note and mortgage, the fact that no payments of interest were indorsed on note or accompanying mortgage did not make the note dishonored, and the complainant must be deemed a holder in due course of such note, under the provisions of section 2985 of the General Statutes of 1906, and its action in taking such note under such circumstances did not amount to bad faith, which is required by section 2989 of such General Statutes, wherefore a demurrer interposed to the bill upon such grounds is properly overruled. Taylor v. American Nat. Bank of Pensacola, Fla., 57 South. 678, 686, 63 Fla. 631.

BAGGAGE

See Ordinary Baggage; Personal Baggage.

See, also, Personal Luggage.

"Baggage" is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either for immediate use or for use at the end of his journey. Kansas City Southern Ry. Co. v.

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Skinner, 113 S. W. 1019, 1020, 88 Ark. 189, 21 L. R. A. (N. S.) 850; Chicago, R. I. & P. Ry. Co. v. Whitten, 119 S. W. 835, 836, 90 Ark. 462, 21 Ann. Cas. 726.

"Baggage" means those articles of personal convenience and adornment usually taken by a passenger on a journey or a visit, and suitable to his station in life and social standing. Robert v. Chicago & A. R. Co., 127 S. W. 925, 928, 148 Mo. App. 96.

The term "baggage" includes such articles of necessity or convenience as are usually carried by passengers for personal use, comfort, or protection during the continuance of a journey; and what constitutes baggage in a given case depends in some measure on its own circumstances. Denver & R. G. R. Co. v. Johnson, 114 Pac. 650, 651, 50 Colo. 187, Ann. Cas. 1912C, 627.

Under Laws of the territory of Oklahoma as continued in force by schedule to the Constitution, § 2, "baggage" which a carrier must receive and transport without charge, except for excessive weight, means such articles as are intended for the use of passenger while traveling, or for his personal equipment. St. Louis & S. F. R. Co. v. Dickerson, 118 Pac. 140, 29 Okl. 386.

The "baggage" of a passenger is understood to consist of articles for personal use, such as wearing apparel and the like, which are intended to be used during the journey or immediately thereafter. It will be assumed, in the absence of an express agreement to the contrary, that in the checking thereof the carrier and passenger both contemplate and understand that the baggage is to be forwarded with the same expedition as that employed in the carriage of the passenger himself, so that it will be available for the intended use. Baggage is seldom, if ever, prepared for shipment as freight, and it would be a violation of contract duty for the carrier to forward it on freight trains. Griffith v. Atchison, T. & S. F. R. Co., 90 S. W. 408, 409, 114 Mo. App. 591.

The term "baggage," within the rule determining a carrier's liability, includes whatever the passenger takes with him for his personal use and convenience, either with reference to the immediate necessities or the ultimate purposes of the journey. Whether or not certain articles are within the term "baggage" is to be determined from the character and length of the journey, its purposes and objects, the owner's station in life, and the habits and uses of the class of travelers to which he belongs. House v. Chicago & N. W. Ry. Co. (S. D.) 138 N. W. 809, 812.

Under Public Service Commission Act, § 38, providing that every common carrier shall be liable for loss of property carried as baggage up to the full value, but that the value in excess of $150 shall be stated on delivery to the carrier, a provision in a railroad ticket that no risk was assumed on baggage except for wearing apparel, of $100 in value, referred to "baggage" which was checked, and not to luggage personally carried by the passenger and delivered temporarily to the carrier's servant. Hasbrouck v. New York Cent. & H. R. R. Co., 122 N. Y. Supp. 123, 126, 137 App. Div. 532.

Rev. St. 1899, § 1192, regulates the charges of railroads as common carriers of passengers, and provides that the charges shall be limited to compensation per mile for the transportation of any person with "ordinary baggage." Held, that the word "baggage" having been previously well defined to mean such articles of necessity, or personal convenience, as were usually carried by passengers for their personal use, and not merchandise or other valuable, though carried in the trunks of passengers, not destined for such use, but for other purposes, as for sale, and the like, the addition of the word "ordinary" did not limit the word "baggage" to wearing apparel and other articles ordinarily carried by a common traveler, but was used merely to recognize the well-established meaning of the word "baggage" as distinguished from "merchandise." Doerner v. St. Louis & S. F. R. Co., 130 S. W. 62–64, 149 Mo. App. 170.

Laws 1907, c. 429, §§ 2, 38, under which express companies are common carriers and made liable for loss of property, apply only to the personal baggage of a traveler; but it is not necessary to the status as "baggage" that a passenger should be carried at the same time the baggage is transferred. Under Laws 1907, c. 429, which provides by section 2 that express companies are common carriers, and by section 38 that every common carrier shall be liable for all loss of property carried as baggage, a trunk delivered to a transfer company, which, upon the statement that it was the baggage of a passenger, assumed to carry it to a given address, is "baggage" for the loss of which the company is liable. Meister v. Woolverton, 125 N. Y. Supp. 439, 441, 140 App. Div. 926.

A female traveler's own clothing, and that of her children, including fancy work and miscellaneous ornaments, a savings bank and contents, and a zither key, all of which are carried in her trunk, constitute baggage, for the loss of which she is entitled to recover. She may also recover for the loss of a small amount of her husband's underwear, which was being carried in her trunk as a part of her baggage; it appearing that her husband was traveling with her. She cannot, however, recover for the loss of articles constituting household goods, which she was carrying in her trunk, though she and her husband were changing their residence by removal from one state to another; the carrier having no notice of the fact that such goods were being transported as baggage.

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Yazoo & M. V. R. Co. v. Baldwin, 81 S. W. 599–602, 113 Tenn. 205.

Express distinguished

Public Service Commissions Law, § 38, provides that every common carrier shall be liable for loss of property carried as baggage, up to the full value, regardless of the character thereof, but value in excess of $150 shall be stated on delivery to the carrier, who may make a reasonable charge for the assumption of liability in excess of $150, and for the carriage of baggage exceeding 150 pounds in weight on a single ticket. Held, that the word "baggage," as used in such section, meant property carried as an incident to transportation of the owner as a passenger, and that the section had no application to a transfer company, carrying a trunk from a railroad terminal to a designated point as express without carriage of the owner as a passenger; the term "baggage" being confined to trunks, etc., which the traveler carries with him on a journey. Morgan v. Woolverton, 96 N. E. 354, 203 N. Y. 52, 36 L. R. A. (N. S.) 640.

Jewelry

A woman's jewelry, and every article pertaining to her wardrobe that may be necessary or convenient to her traveling, is regarded in law as "baggage." Galveston, H. & S. A. R. Co. v. Fales, 77 S. W. 234, 235, 33 Tex. Civ. App. 457.

The term "baggage" in so far as a female passenger is concerned, includes whatever property or articles of paraphernalia she chooses to carry on her journey, necessary to her use, enjoyment, or pleasure in traveling, and is therefore sufficiently broad to cover a diamond ring worn as a part of her wardrobe. Pullman Co. v. Vanderhoeven, 107 S. W. 147, 150, 48 Tex. Civ. App. 414.

Plaintiff, a passenger on defendant's railroad, carried in her card case in the bottom of a suit case, which was not checked, three rings, worth $1,500, for her personal wear at a reception she intended to attend at her destination, and which were adapted to her tastes, habits, and social standing. Held, that the suit case and contents were baggage, which is whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, and that the carrier, in the absence of any limitation by statute, regulation of the road, or inquiry as to value, was liable for the articles lost. Hasbrouck v. New York Cent. & H. R. R. Co., 95 N. E. 808, 813, 202 N. Y. 363, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150.

While a passenger is entitled to carry with her and retain in her immediate custody as baggage a reasonable quantity of personal effects for her use, comfort, and adornment during the journey, according to her station in life, a carrier or sleeping-car company owes her no duty with respect to valuable jewelry carried by her in a hand bag for transportation merely, without any intention or purpose of using it during the journey; the jewelry under such circumstances not being regarded as baggage. Bacon v. Pullman Co., 159 Fed. 1, 3, 89 C. C. A. 1, 16 L. R. A. (N. S.) 578, 14 Ann. Cas. 516.

Merchandise and household articles

Merchandise as including, see Merchandise.

Household articles carried by a passenger consisting of a drawnwork centerpiece, a tablecloth, doilies, a bed spread, and pillow shams, as well as a photographer's camera carried for sale as merchandise, do not constitute baggage, but a woman passenger's shawls, handkerchiefs, collars, dresses, and underskirts are baggage. Mexican Cent. Ry. Co. v. De Rosear (Tex.) 109 S. W. 949, 950.

"Baggage" is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of his journey, but baggage does not include articles transported by the passenger to be used after the consummation of his journey; and a passenger who is moving from one location to another, to settle at the latter location and engage in permanent business, cannot include as baggage such articles as are only useful and necessary for the business. St. Louis, I. M. & S. Ry. Co. v. Miller (Ark.) 145 S. W. 889, 890, 39 L. R. A. (N. S.) 634.

"Generally speaking, nothing is 'baggage' which a traveler is entitled to have transported by a carrier as an incident of the contract to carry him except articles of personal comfort, convenience, and ornament usually taken on journeys and visits. The term 'baggage' * * * does not, as a rule, include merchandise or furniture. To some extent, the question of whether in a given case a certain article was baggage will depend, not only on the condition in life of the traveler, but on the purpose of the journey." Hubbard v. Mobile & O. R. Co., 87 S. W. 52, 56, 112 Mo. App. 459.

Money

Money in a trunk not exceeding a reasonable sum for the personal expense of a traveler or guest is a part of his "baggage." Taylor v. Monnot, 11 N. Y. Super. Ct. 116, 119 (quoting and adopting definition in Orange County Bank v. Brown [N. Y.] 9 Wend. 119, 24 Am. Dec. 129).

"Baggage" means such goods and chattels as a passenger may see fit and proper to carry for his personal convenience, comfort, taste, pleasure, or protection, according to the wants or habits of the class to

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which he belongs, and with reference to the period of the transit, or the ultimate purpose of the journey. Broadly speaking, the term includes such articles as a passenger carries with him for his personal use and convenience on his journey and during his stay at the place to which he is going. In determining what is proper as "baggage," the purpose of the journey, the length of the journey, or of the proposed stay, and the business in which the person is engaged, are to be considered. It is not necessary that the articles should be used on the journey provided they are such as are reasonably necessary for the passenger either while in transit or temporarily staying at a particular place. Sufficient money for the purposes of a passenger's journey is personal baggage for the loss of which in transit the carrier is liable. Texas & N. O. R. Co. v. Lawrence, 95 S. W. 663, 664, 42 Tex. Civ. App. 318 (citing Lawson, Bailm. § 272; 4 Elliott Railroads, § 1647).

Plaintiff, a passenger, carried in her card case in the bottom of a suit case which was not checked $20 for use in emergency. Held, that the carrier was liable for the theft of the money as "baggage." Hasbrouck v. New York Cent. & H. R. R. Co., 95 N. E. 808, 813, 202 N. Y. 363, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150; Id., 122 N. Y. Supp. 123, 137 App. Div. 532; Id., 118 N. Y. Supp. 735, 64 Misc. Rep. 478.

Salesman's samples and articles for sale

Samples of stationery which a passenger was engaged in selling did not constitute "baggage." Rossier v. Wabash R. Co., 91 S. W. 1018, 1019, 115 Mo. App. 515.

A traveling salesman's sample case, containing patterns and designs used in the business of soliciting orders, carried by him in the passenger coach, is ordinary baggage, within a notice of the carrier for the storage of baggage, and fixing charges for storage on each piece of baggage after remaining at the station for a specified time; and baggage, within the notice, is not limited to baggage coming from or destined to a baggage car, but applies to baggage in the possession of a passenger at the end of his destination, and left for storage until called for. Milwaukee Mirror & Art Glass Works v. Chicago, M. & St. P. Ry. Co. (Wis.) 134 N. W. 379, 381, 38 L. R. A. (N. S.) 383.

Ordinary "baggage" is, in general, such articles of necessity and convenience as are usually carried by passengers for personal use and comfort, or protection. The property must have the characteristics of personal effects, and be carried for the passenger's use. Manifestly this excludes merchandise, and by weight of authority it excludes all property carried for trade purposes, or designed and intended to be used in connection with such purposes. Thus, samples carried by a passenger in his trunk to be used in making sales of goods are not "baggage," and it is immaterial that they are necessary to the object of the passenger's journey. And there is no principle on which to distinguish between a case involving samples of the goods to be sold and one involving models or photographs intended to represent the goods to be sold. So under Code, § 2077, requiring a carrier to accept and carry the ordinary baggage of a passenger, a carrier was not liable for delay in the delivery of a sample case checked by a passenger as "baggage" and containing photographs of articles of furniture which the passenger was engaged in selling as a commercial traveler. McElroy v. Iowa Cent. Ry. Co., 110 N. W. 915, 916, 133 Iowa, 544.

"Articles carried by passenger for sale are not 'baggage.' * * * It is, however, true that, if the carrier receives merchandise as 'personal baggage' knowing its true character, he will be liable as for baggage." Rossier v. Wabash R. Co., 91 S. W. 1018, 1019, 115 Mo. App. 515 (citing and adopting Spooner v. Hannibal & St. J. Ry. Co., 23 Mo. App. 403; Rider v. Wabash, St. L. & P. Ry. Co., 14 Mo. App. 529; Minter v. Pacific R. R., 41 Mo. 503, 97 Am. Dec. 288; Sherlock v. Chicago, R. I. & P. Ry. Co., 85 Mo. App. 46).

Tools

Razors and other tools of a barber in his suit case constitute "baggage," for loss of which a carrier is liable. Grzywacz v. New York Cent. & H. R. R. Co., 134 N. Y. Supp. 209, 210, 74 Misc. Rep. 343.

The word "baggage," having been held to include a "rifle, revolver, two gold chains, two gold rings, and silver pencil case" belonging to a fashionable gentleman traveling for pleasure and amusement, by the same process of reasoning includes the tools of a carpenter when en route to a place where he expects to use them in the carrying out of a contract he had made to build a house. Texas & N. O. R. Co. v. Russell (Tex.) 97 S. W. 1090, 1091 (citing Braty v. Grand Trunk Ry. Co., 32 U. C. Q. B. 66).

Under customs duties law

Merchandise for sale is not "baggage," within the meaning of section 2799, Rev. St. relating to the "personal baggage * * * of persons who arrive in the United States," and hence a declaration of value is not required. Where merchandise for sale is imported in a trunk, separate from the remainder of a passenger's effects, no effort being made to conceal it among the passenger's personal effects or to have it treated as personal baggage, the passenger is under no obligation to declare it as baggage under section 2799, Rev. St. The provision in Customs Administrative Act June 10, 1890, c. 407, § 4, 26 Stat. 131, that "except in case of personal effects, no importation of any merchandise" shall be entered without invoice, is equivalent to an exception of articles not

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personal effects from the provision relative to the declaration of "baggage" in section 2799, Rev. St. Congress having prescribed two independent systems of formalities for the importation of personal effects and of merchandise not personal effects, each complete in itself, under section 2799, Rev. St., and Customs Administrative Act June 10, 1890, c. 407, § 4, 26 Stat. 131, respectively, it could not have been intended that both should be applicable to merchandise imported by a passenger arriving in the United States, but not attempted to be concealed by dressing it up as baggage. United States v. One Trunk, 175 Fed. 1012, 1015.

Precious stones carried loose in a pocket of a passenger arriving in the United States, though not "baggage" within the common-law definition of that term, are baggage within the meaning of section 2802, Rev. St.; and the passenger is bound to declare them in the same way as articles contained in his trunk. United States v. 218½ Carats Loose Emeralds, 153 Fed. 643, 646 (citing United States v. One Pearl Necklace, 111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130; One Pearl Chain v. United States, 123 Fed. 374, 59 C. C. A. 499; United States v. Pearl Chain, 139 Fed. 517, 71 C. C. A. 500; United States v. Five Packages of Tapestry, 114 Fed. 496).

Held, that articles in the clothing are "baggage," within the meaning of section 2802, Rev. St., relating to the concealment of dutiable articles "found in the baggage of any person arriving within the United States," and that a package of precious stones found in the pocket of a passenger is forfeitable under said provision. Two Hundred and Eighteen and One-Half Carats Loose Emeralds v. United States, 154 Fed. 839, 840, 83 C. C. A. 475 (citing United States v. One Pearl Necklace, 111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130; One Pearl Chain v. Untied States, 123 Fed. 374, 59 C. C. A. 499; United States v. Pearl Chain, 139 Fed. 517, 71 C. C. A. 500; United States v. Five Packages of Tapestry, 114 Fed. 496).

BAGGAGE CHECK

As receipt, see Receipt.

BAIL

See Admission to Bail; Common Bail; Special Bail.

"Bail" is defined as to set at liberty a person arrested or imprisoned on security being taken for his appearance. State v. Davis, 75 Pac. 857, 858, 27 Utah, 368 (citing Black, Law Dict.).

The word "bail," as a verb, means to deliver an arrested person to his sureties on their giving security for his appearance at a time and place designated to submit to the jurisdiction and judgment of the court, and in its substantive sense it may be defined as the sureties into whose custody the person is delivered, and who are considered as having control of his person. State v. Western Surety Co., 128 N. W. 173, 175, 26 S. D. 170.

Bail, technically considered, is the delivery of a person to the sureties on his bond, he being supposed to continue in their friendly custody instead of in jail, the sureties being regarded as bailees or custodians of their principal's person, and entitled, at any time before entry of forfeiture, to surrender the principal and exoneration, as expressly authorized by Code, §§ 5528, 5529. State v. Sandy, 116 N. W. 599, 600, 138 Iowa, 580.

"Bail" is a delivery or bailment of the person to his sureties, on their giving, together with himself, sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail. This is the meaning of the word in Wilson's Rev. & Ann. St. 1903, § 5775, authorizing the sureties on a bond to cause the arrest of the principal at any time before they are finally discharged, and at the request of the bail the court, etc., shall recommit the party as arrested to the custody of the sheriff, etc. Territory ex rel. Thacker v. Conner, 87 Pac. 591, 594, 17 Okl. 135 (citing 4 Blackstone, 297).

The word "bail," in Code Cr. Proc. §§ 585–587, 589–592, providing that bail by sufficient sureties may be admitted on all arrests in criminal cases, that any party charged with a crime and admitted to bail may be arrested by his bail at any time, and providing for forfeiture of bail, etc., applies to the sureties only, and the obligation assumed by the sureties in a bail bond is the obligation contemplated by the Code of Criminal Procedure, and the obligation assumed by a surety in a bail bond who therein undertakes that the principal shall appear and answer to a criminal charge, is not affected by the fact that the principal also signed the bond, and an action on the bond for its breach may be brought against the surety alone. State v. Western Surety Co., 128 N. W. 173, 175, 26 S. D. 170.

As sureties

Comp. Laws, § 1036, provides that complainant and the witnesses on appeal in criminal cases in justice's court may be required to enter into recognizances to appear at the circuit court. Chapter 330, relating to examination of accused persons in cases not triable before justices of the peace, authorizes, in sections 11,856 and 11,857, the magistrate to bind by recognizance all material witnesses against the prisoner to appear and testify. Section 11,859 provides that all witnesses required to recognize shall, if they refuse, be committed to prison by the magistrate, to remain until compliance with the order, etc. Pub. Acts 1875, No. 177, provides, in section 1, as amended by Pub. Acts 1879, No. 141, that it shall not be necessary in any criminal case for any witness to give bail for his ap-

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pearance unless required to do so by order of a judge of a court of record or a circuit court commissioner, and that all contravening laws are repealed. Held that, while the latter act deprived justices of the peace of authority over the subject of requiring bail, it did not deprive them of authority to require personal recognizances; the word "bail" importing suretyship—the securing of the witness' attendance through the medium of sureties for such attendance. Bates v. Kitchel, 125 N. W. 684, 686, 160 Mich. 402.

Taking bail

Code Cr. Proc. § 551, defines the "taking of bail" to be the acceptance by a competent court or magistrate of the undertaking of sufficient bail for the appearance of the defendant according to the terms of the undertaking or that the bail will pay to the people of the state a specified sum. People v. Torn, 97 N. Y. Supp. 523, 524, 110 App. Div. 676.

BAIL BOND

A "bail bond" is a statutory undertaking to pay money under certain conditions, and, to be enforceable, it must be taken in substantial compliance with the terms of the statute authorizing it, and if not so taken, it cannot be enforced as a common-law undertaking, and the sureties are entitled to stand on their contract according to its terms. Malheur County v. Carter, 98 Pac. 489, 493, 52 Or. 616.

Recognizance distinguished

A "bail bond" is an obligation under seal, given by the accused with one or more sureties and made payable to the proper officer with condition to be void on performance by the accused of such acts as he may legally be required to perform. It differs from a "recognizance" merely in the nature of the obligation created. It creates a new obligation, while the recognizance is an acknowledgment of record of an existing debt. State v. Dorr, 53 S. E. 120, 122, 59 W. Va. 188, 5 L. R. A. (N. S.) 402, 115 Am. St. Rep. 915, 8 Ann. Cas. 1016.

BAIL BY SUFFICIENT SURETIES

Under Wilson's Rev. & Ann. St. 1903, § 5769, providing that " 'bail by sufficient sureties' shall be admitted upon all arrests in criminal cases where the offense is not punishable by death," it is not necessary for the principal in a bail bond to qualify. Territory ex rel. Thacker v. Conner, 87 Pac. 591, 593, 17 Okl. 135 (citing Tillson v. State, 29 Kan. 457; Ingram v. State, 10 Kan. 630; People v. Hammond, 7 N. Y. Supp. 219, 54 Hun, 635).

BAILEE

See Larceny by Bailee.
Any carrier or other bailee, see Any Other.
Other bailee, see Other.

A "bailee" is one to whom personal property which is the subject of larceny is delivered under a contract of bailment. State v. Seeney (Del.) 59 Atl. 48, 49, 5 Pennewill, 142.

One who is intrusted with a check so that he may collect the proceeds is a "bailee." State v. Fraley (W. Va.) 76 S. E. 134, 136, 42 L. R. A. (N. S.) 498.

The word "bailee," used in its broad sense, includes every person to whom the possession of personal property is delivered by another; but, as used in Pen. Code 1895, § 191, which provides that any factor, commission merchant, warehousekeeper, etc., or any other bailee, who shall fraudulently convert anything of value intrusted to him, is guilty of a felony, it is necessary that the character of the relation be a more fiduciary one than that arising from a mere loan for the borrower's benefit. Rice v. State, 64 S. E. 575, 6 Ga. App. 160.

The term "bailee," in statutes defining larceny by a bailee, is used, not in its large, but in its limited, sense, as including simply those bailees who are authorized to keep, transfer, or deliver, and who receive the goods bona fide and then fraudulently convert, and, where it does not appear that a fiduciary duty is imposed upon the person to return the specific goods of which the alleged bailment is composed, there is no bailment under the statute. Settles v. State, 122 S. W. 500, 92 Ark. 202.

A "bailment," as contemplated by the statute, punishing embezzlement by a bailee, consists in the delivery of personal property which is the subject of larceny, by one to another, to be held or used by the latter as directed, under a contract, express or implied, that it shall be redelivered after the purpose of delivery has been fulfilled, or disposed of pursuant to the direction of the person delivering it; the one to whom the property is delivered being a "bailee." State v. Brewington (Del.) 78 Atl. 402, 404.

Alleging that a person received as a "bailee" certain money is sufficient to advise such a person that he came into the possession of the money of another, to be held for the other for some special purpose, which special purpose being accomplished, the money is to be returned or delivered over. An indictment charging embezzlement in violation of Kirby's Dig. § 1839, and alleging that accused, being a "bailee" of another, received money, etc., is sufficient to advise accused that he came into possession of the money to be held for a special purpose. Storms v. State, 98 S. W. 678, 680, 81 Ark. 25.

"The common-law duty of a 'bailee' with respect to the thing bailed is to exercise a reasonable degree of care and skill for its preservation, and he is not liable for loss or injury to the thing bailed, occurring from any unforeseen and unexpected causes not

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naturally to be expected, and which could not be guarded against by reasonable foresight." * * * Blackstone states that a "bailee" who undertakes specially to keep the goods safely obligates himself to the ordinary diligence which the common-law demands (2 Bl. Comm. 452); otherwise, however, if the term of the contract is to do that absolutely which the law does not require to be done. Fairmont Coal Co. v. Jones & Adams Co., 134 Fed. 711, 713, 67 C. C. A. 265.

Kirby's Dig. § 1839, provides that if any carrier or other bailee shall embezzle or convert to his own use any money, etc., which shall have come to his possession, such bailee shall be deemed guilty of larceny, etc. Held, that the word "bailee" was not confined to bailees of the generic class, "carriers," but embraced all bailees; and hence a school director, who obtained by virtue of his office and converted money of the district by raising a warrant drawn to pay attorney's fees, was subject to indictment under such section. Compton v. State (Ark.) 143 S. W. 897, 903.

BAILEE FOR HIRE

Where plaintiff delivered to defendant a lot of carpet to be cleaned and stored until redelivered to plaintiff, for which service plaintiff was expected to pay, defendant was a "bailee for hire" and liable for the exercise of ordinary care. Bowen v. Isenberg Bros. Co. (Del.) 67 Atl. 152, 6 Pennewill, 230.

A safety deposit company which lets boxes in vaults, two keys being necessary for opening them, one of which is kept by the company, and the other given to the person renting a box, is a "bailee for hire" with respect to a deposit in a box and required to exercise the care of a prudent person to prevent access of unauthorized persons to the box; so that it not having explained the abstraction of a deposit while a depositor's key, which was found by an employé of the company, was lost, so as to show that it had used such care, it is liable therefor. Guaranty Trust Co. v. Diltz, 91 S. W. 596, 42 Tex. Civ. App. 26.

Where plaintiff left his huckster's wagon and merchandise therein in defendant's livery stable to be cared for during the night, having paid the usual price for such service in advance, defendant became a "bailee thereof for hire" and was bound to exercise such diligence as would be exercised by a person of ordinary prudence with reference to his own property, and if plaintiff's property was destroyed by fire, and could have been saved by ordinary diligence, defendant was liable. Welck v. Dougherty, 90 S. W. 966, 967, 139 Ky. 528, 3 L. R. A. (N. S.) 348.

BAILIFF

The crier and bailiff of a court are officers of the court, and bound to take notice of the orders of the court and "be ready to discharge their duties if required." Kelly v. United States, 41 Ct. Cl. 246, 250, 251.

As officer of court

See Court Officer.

As officer of United States

See United States Officer.

BAILMENT

See Gratuitous Bailment; Involuntary Bailment.

See, also, Commodatum.

"A 'bailment' is the delivery of a thing in trust for some special object or purpose and on a contract, express or implied, to conform to the object or purpose of the trust." William R. Trigg & Co. v. Bucyrus Co., 51 S. E. 174, 176, 104 Va. 79 (quoting and adopting definition in Story, Bailm. § 2); Jenkins v. Seaboard Air Line Ry. Co., 59 S. E. 1120, 1122, 3 Ga. App. 381 (Civ. Code 1895, § 2894); In re Allen, 183 Fed. 172, 174; Armour & Co. v. Ross, 58 S. E. 941, 942, 78 S. C. 294; Bates v. Bigby, 51 S. E. 717, 718, 123 Ga. 727.

" 'Bailment' is the delivery of goods for some purpose upon a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor or otherwise dealt with according to his directions or kept until he reclaims them." Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstory, 171 Fed. 375, 378, 96 C. C. A. 331 (quoting and adopting 2 Blackstone's Commentaries, 451; Story, Bailm. [9th Ed.] par. 2).

The Penal Code defines "bailment" as a contract of borrowing or hire. "A bailment is a delivery of goods for some purpose on a contract, express or implied, that after the purpose has been fulfilled, they should be redelivered to the bailor, or afterwards dealt with according to his directions or kept until he reclaims them." Northcutt v. State, 131 S. W. 1128, 1129, 60 Tex. Cr. R. 259, 31 L. R. A. (N. S.) 822.

"Bailment" signifies a contract resulting from delivery of goods on a condition that they be restored to the bailor, according to his directions, as soon as the purposes for which they were bailed are answered. Walker v. Norfolk & W. Ry. Co., 67 S. E. 722, 723, 67 W. Va. 273.

A bailment is a delivery of personal property in trust. The character of the trust may be as broad as its duties require; yet, speaking generally, all deliveries of personal property to another in trust for a lawful purpose are bailments. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575, 577.

A "bailment" is the delivery of some personal property, the subject of larceny, by one person to another to be held according to the purpose or the object of the delivery and to

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be returned or delivered when that object is accomplished. State v. Seeney (Del.) 59 Atl. 48, 49, 5 Pennewill, 142 (citing Ketchum v. Corse, 31 Atl. 486, 65 Conn. 89).

A "bailment," as contemplated by the statute, punishing embezzlement by a bailee, consists in the delivery of personal property which is the subject of larceny, by one to another, to be held or used by the latter as directed, under a contract, express or implied, that it shall be redelivered after the purpose of delivery has been fulfilled, or disposed of pursuant to the direction of the person delivering it. State v. Brewington (Del.) 78 Atl. 402, 404.

In respect to the proposition that to constitute a "bailment" the parties must have intended that there should be a return or delivery of the identical thing, it is well settled in law, and the nature of some transactions is such, that the rule can only be sufficiently answered by returning other property of like value and kind. Knapp v. Knapp, 96 S. W. 295, 298, 118 Mo. App. 685.

Civ. Code 1895, § 2894, defines "bailment" to be a delivery of goods or property for the execution of a special object, beneficial either to the bailor or bailee or both, and upon a contract expressed or implied to carry out this object and dispose of the property in conformity with the purpose of the trust. The bailee is such an agent of the bailor as that he is required, not only to use the property for the special object only for which he was intrusted with it and in conformity with the purposes of the trust, but to act in good faith where the interests of his principal are concerned. Haines v. Chappell, 58 S. E. 220, 221, 1 Ga. App. 480.

A contract inter partes is not essential to a bailment; but it is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment. Burns v. State, 128 N. W. 987, 990, 145 Wis. 373, 140 Am. St. Rep. 1081.

To constitute a "bailment" there must be an actual delivery to and acceptance by the bailee so as to give him, for the time being, sole custody. Bertig v. Norman, 141 S. W. 201, 204, 101 Ark. 75.

An essential of a bailment is the delivery of property by the bailor to the bailee for a particular purpose, and without such a delivery there can be no bailment, and it is also requisite that title to the property shall remain in the bailor. Northcutt v. State, 131 S. W. 1128, 1129, 60 Tex. Cr. R. 259, 31 L. R. A. (N. S.) 822.

Animals

A transaction is a "bailment" if the owner of cattle delivers them to another to be fed under an express agreement that the only interest which the other person shall have in the cattle is what he may put on them. First Nat. Bank of Concordia v. McIntosh & Peters Live Stock & Commission Co., 84 Pac. 535, 537, 72 Kan. 603.

Under 19 Del. Laws, c. 782, which provides that any bailee of money or other property, the subject of larceny, who shall embezzle or fraudulently convert the same to his own use, shall be guilty of a misdemeanor, a "bailment" consists in the delivery of some personal property, the subject of larceny, by one person to another, to be by him held and used according to the purpose for which it is delivered, upon an understanding, express or implied, that, after fulfillment of such purpose, it shall be returned to the bailor; and in a prosecution for the offense the state must prove that the defendant was in fact the bailee of the property which he is charged to have embezzled, and where a landlord, owing a cow, delivered it to his tenant to be kept on the farm, the tenant became a bailee as to the cow, and if the cow while on the farm gave birth to a calf, he became bailee as to the calf. State v. Lyons (Del.) 80 Atl. 976, 978.

A "bailment" is a "delivery of something of a personal nature by one party to another to be held according to the purpose or object of the delivery and to be returned or delivered over when that purpose is accomplished." A contract between a livery stable keeper and one who hires a horse and carriage from him is a "bailment," and the negligence of the bailee cannot be imputed to the livery stable keeper so as to prevent him from recovering for the death of the horse killed at a railroad crossing by the joint negligence of the bailee and the railroad company. Gibson v. Bessemer & L. E. R. Co., 75 Atl. 194, 195, 226 Pa. 198, 27 L. R. A. (N. S.) 689, 18 Ann. Cas. 535 (quoting and adopting definition in 1 Bouv. Law Dict. [Rawle's Ed. 1897] p. 213).

Conditional sale distinguished

It is of the essence of a contract of "bailment" that the article bailed is to be returned in its own or some altered form to the bailor. A contract made and to be performed in Pennsylvania for the sale and delivery of showcases, by which the seller retains title until the price and all costs representing the same are paid, is a contract of conditional sale and not a bailment. In re G. & K. Trunk Co., 176 Fed. 1007, 1008, 1009 (quoting and adopting definition in Stephens v. Gifford, 20 Atl. 542, 137 Pa. 219, 21 Am. St. Rep. 868).

Bankrupts at the time of the filing of the petition against them had been for more than 30 days in possession of machinery which had been shipped to them under contracts, by which they agreed to pay for the same within one year from shipment, and which provided that a retention of the property after 30 days from date of shipment

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should constitute a trial and acceptance. Held, that such contracts constituted "conditional sales" and not "bailments" under the law of Pennsylvania, and the property, being subject to transfer by the purchasers or to seizure and sale by their creditors under such law, passed to their trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 70a(5), 30 Stat. 566. In re Burt, 155 Fed. 267, 268.

Machinery was delivered to a bankrupt under a contract which provided that he should pay certain varying sums at irregular intervals as rent for the same, and that on a final small payment he should be entitled to a bill of sale. There was no provision for the return of the machinery aside from one giving the privilege of retaking it on default in making any of the payments. Held, that under the law of Pennsylvania such contract was one of conditional sale, and not of bailment, and that the property was assets of the bankrupt estate. In re Tice, 139 Fed. 52, 54.

Under a contract called a lease, one of the parties agreed to hire from the other for a definite period a piano, and to pay as security for the contract a certain sum each month, and to return the piano at the end of the period in as good condition as reasonable use would permit; and it was agreed that upon the failure to pay any installment of rent, or upon the removal of the property from his residence, the security money should be retained as damages for the breach, and the owner should have the right to take possession of the piano without demand or notice. It was further agreed that, if the installments of rent were paid as they fell due, the party paying the same should, while the lease continued in force, have the right to purchase the piano at an agreed price, all sums paid as security or as rent to be deducted from that price. Held, a "conditional sale" and not a "bailment" for hire. Hamilton v. Hilands, 56 S. E. 929, 931, 144 N. C. 279, 12 Ann. Cas. 876 (citing Baldwin v. Van Wagner, 10 S. E. 716, 33 W. Va. 293; Kimball v. Post, 44 Wis. 471; Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; Ott v. Sweatman, 31 Atl. 102, 166 Pa. 217; Puffer & Sons Mfg. Co. v. Lucas, 17 S. E. 174, 112 N. C. 377, 19 L. R. A. 682; Crinkley v. Edgerton, 18 S. E. 669, 113 N. C. 444; Clark v. Hill, 23 S. E. 91, 117 N. C. 11, 53 Am. St. Rep. 574; Barrington v. Skinner, 23 S. E. 90, 117 N. C. 47; Manufacturing Co. v. Gray, 28 S. E. 257, 121 N. C. 168; Thomas v. Cooksey, 41 S. E. 2, 130 N. C. 148; Wilcox v. Cherry, 31 S. E. 369, 123 N. C. 79; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Cottrell v. Merchants' & Mechanics' Bank, 15 S. E. 944, 89 Ga. 508).

Defendant executed a consignment receipt for a ring, reciting that it had been consigned on memorandum by prosecutor, to be returned on demand; that the same had not been sold, and that the title thereto did not pass; that all risks were assumed by the consignee; and that agreements not expressed in the writing were not part of the contract. At the same time defendant and prosecutor signed an alleged "deposit agreement," obligating defendant to deposit with prosecutor $30 on the execution of the agreement, and certain sums on specified dates thereafter, all of which should become prosecutor's absolute property, and that, when $175 had been deposited, prosecutor would deliver to defendant for his own use one diamond ring; that, if defendant made default, prosecutor might deliver articles as near like the article to be delivered, as possible, but reasonably worth the sums so deposited, and on delivery the agreement should be fulfilled. Held, that such agreements together constituted a conditional sale of the ring. People v. Gluck, 80 N. E. 1022, 1024, 188 N. Y. 167.

A contract between the furnisher of goods and the receiver that the latter may sell them at such price as he chooses, and that he will account for the goods sold at agreed prices, and will bear the expenses of insurance, freight, storage, and handling, and will hold the merchandise unsold subject to the order from furnisher, is an agreement for "bailment for sale," and not a conditional sale, and is unaffected by the statute rendering unrecorded contracts for conditional sales voidable by creditors and purchasers. In re Columbus Buggy Co., 143 Fed. 859, 861, 74 C. C. A. 611.

To constitute a "conditional sale" within the terms of Code, § 2905, requiring the recording of any written instrument evidencing a conditional sale, there must be a delivery of possession to the purchaser, with the intention of passing immediate ownership, subject only to the reservation of title to the seller as security for the purchase money. Defendant, a sheriff, levied an attachment on property in the hands of F., and sold it. Plaintiff, claiming to have been the owner, had a written agreement with F., reciting that plaintiff agreed to buy eight teams, the property in question; that the teams were to be used by F. in railroad grading; that plaintiff should receive at each pay day one-half of what the teams earned for the month at a certain rate per team, less the cost of keeping, etc.; that F. agreed to pay plaintiff one-half of the price of the teams before the completion of the grading, with interest, failing which plaintiff should receive compensation for the work done by the teams at the rate before mentioned; and that it was agreed that, in addition to the moneys paid plaintiff for the use of the teams, he should receive, on the completion of the work, one-half of the profits attributable to the use of the teams. Held, that F. was merely a

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"bailee" with a right of purchase, which, the evidence showed, had not been exercised; and hence the attachment could not be justified under Code, § 2905, requiring the recording of conditional sales in order to affect third persons. Donnelly v. Mitchell, 93 N. W. 369, 371, 119 Iowa, 432 (citing Wright v. Barnard, 56 N. W. 424, 89 Iowa, 168; Gaar, Scott & Co. v. Nichols, 88 N. W. 382, 115 Iowa, 223; Davis v. Giddings, 46 N. W. 425, 30 Neb. 209).

A contract providing that certain property should be held on consignment until sold by consignee with consignor's approval, that it should be invoiced to the consignee at a fixed price, and, while he could sell it at any price he saw fit, any overplus, after deducting expenses paid by him, should go to him as his compensation, and that the consignor could annul any sale and retake the property, and under which the consignee was not required to pay anything for the property, but was required merely to turn over certain of the proceeds of sales, the consignor having the right at any time to order the property returned, constituted a bailment for sale, and not a conditional sale, within Rev. St. 1909, § 2889, making conditional sales fraudulent as to creditors, unless acknowledged and recorded. Packard Piano Co. v. Williams, 151 S. W. 211, 212, 167 Mo. App. 515.

Where goods were delivered to A. before he became bankrupt, under a written agreement expressly providing that the property was delivered to him as a bailee on hire and that if default in payment of any of the rents for the use and hire of the goods, wares, and merchandise by the bailee were made, the bailor was authorized to repossess himself of the property, the transaction was a "bailment" and not a conditional sale. In re Angeny, 151 Fed. 959.

Debt distinguished

"If the goods delivered are to be returned though in a changed form, it is a 'bailment,' but, if the intention is that either money or goods are to be received in exchange for them, there is a transmutation of property, and the obligation created is a debt, and not a 'bailment,' a delivery of grain to another under an agreement that the identical grain or a similar kind or quality shall be returned from the common mass in which it is placed is a 'bailment.'" Savage v. Salem Mills Co., 85 Pac. 69, 76, 48 Or. 1, 10 Ann. Cas. 1065.

Deposit as security

A contract between a debtor and a creditor, whereby the debtor pledges collateral to secure the payment of his debt, is one of "bailment," and is of such class that the right to sell the security for the payment of the debt may be waived by an extension of the time without new consideration, and also by the conduct of the parties. Wyckoff, Church & Partridge v. Riverside Bank, 119 N. Y. Supp. 937, 939, 135 App. Div. 400.

Where a check is deposited in aid of a bond and to strengthen the security, the transaction is a bailment, and the application of a check to any other purpose than that for which it was deposited is a conversion on the part of the bailee, entitling the bailor to recover the check or the value thereof with interest. Haines v. Chappell, 58 S. E. 220, 221, 1 Ga. App. 480.

Loan distinguished

A general deposit in a bank creates the relation of debtor and creditor between the bank and the depositor, and, though called a deposit, it is a loan, and not a bailment. Pendleton v. Commonwealth, 65 S. E. 536, 538, 110 Va. 229.

Sale distinguished

A transaction is a "sale," as distinguished from a "bailment," when there is no obligation to return the specified article. In re Allen, 183 Fed. 172, 174.

An instrument in writing by which the manufacturer of certain passenger railroad cars leased them to a railroad company which had ordered them, but was unable to pay cash for them as agreed, at a specified rental per month, with the privilege to the lessee to purchase the cars, constitutes a "bailment," and not a sale. American Car & Foundry Co. v. Altoona & B. C. R. Co., 67 Atl. 838, 839, 218 Pa. 519 (citing Stiles v. Seaton, 49 Atl. 774, 200 Pa. 114; Lippincott v. Scott, 47 Atl. 1115, 198 Pa. 283, 82 Am. St. Rep. 801; Crist v. Kleber, 79 Pa. 290).

Plaintiff contracted to furnish certain pumping machinery, to be installed in the hull of a dredge being constructed by defendant. The contract provided that plaintiff should install the machinery at its own expense; that defendant should afford the facilities of its yards for such installation, and furnish men and material for that purpose at cost; that defendant should keep the machinery insured for the benefit of plaintiff; and that it should pay one-third of the price when the machinery was delivered, one-third when it was installed on board the dredge, and the balance on completion of the test by the party for whom the dredge was being constructed. Held, that on delivery of the machinery and payment of the first installment of the purchase price, there was a completed sale, and not a mere "bailment," of the machinery to defendant. William R. Trigg Co. v. Bucyrus Co., 51 S. E. 174, 176, 104 Va. 79.

A contract or lease of a certain number of sheep for a certain time, providing for payment of a certain amount of wool per head and a fixed increase per 100 head, stipulating for the payment of taxes and branding, and requiring their return at the expiration

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of the lease, unless it is renewed, is a "bailment" and not a sale. Wetzel v. Deseret Nat. Bank, 83 Pac. 570, 571, 30 Utah, 62.

Petitioners contracted with F. prior to his bankruptcy to ship certain goods to him to be sold for their account and to remain petitioners' property until sold. F. agreed to sell the goods at retail only, and to remit to petitioners each week the cost price of their goods sold during the previous week, and once each season to account and adjust the difference between sales and remittances. The contract also provided that if F. violated the contract, petitioners might take their goods back and hold F. for any loss they sustained, and that the stock should be fully insured against fire through petitioners, the cost to be paid by F. Held, that such contract constituted a valid "bailment" and not a sale as between petitioners and F., though not recorded, and, F. having failed to make the payments agreed on, petitioners were entitled to the goods or their proceeds as against F.'s trustee in bankruptcy. In re Fabian, 151 Fed. 949, 950.

Goods were billed by petitioners to a bankrupt at definite prices and on fixed terms of credit and discount; the bankrupt undertaking to settle or pay for them and to be responsible for the freight. He also agreed to give petitioners his exclusive trade and to render accounts for goods sold every six months. He was also required to hold separate and in trust all "goods unsold and all currency, open accounts, notes, liens, mortgages, or other values received for goods sold," and that, where goods were sold on credit, notes should be taken on blanks furnished by petitioners and made payable to their order; the bankrupt indorsing and guaranteeing them. Held, that the trust provision of the contract related merely to the manner of payment for the goods, and that the contract was one of "sale," and not of "bailment." In re Heckathorn, 144 Fed. 499, 501.

Complainant entered into a contract by which it agreed to furnish fertilizer to defendant to be paid for by him by a certain date at a stated price. The contract provided that the fertilizer should remain the property of complainant until sold by defendant, and that complainant should then become the owner of the proceeds, whether cash or notes, which should be held for its use and benefit until it should be fully paid. Held, that such contract was not one of "bailment" but of "sale," with an attempt to retain a lien upon the property sold, and that complainant could maintain an action at law thereon if valid to recover the price when due. Coweta Fertilizer Co. v. Brown, 163 Fed. 162, 165, 89 C. C. A. 612.

A contract for the reduction of ore between claimant and the T. Company, the bankrupt's predecessor, provided that the claimant should deliver ore to the T. Company for reduction on a schedule of treatment rates which included freight to the mill, that settlement for all ore shipped by claimant to the T. Company should be based on the latter's weights and samples, that, in case of disagreements as to assay values, the same should be submitted to certain arbitrators, and that payments for all gold ore delivered should be made by the T. Company promptly on agreement as to assay values, on a basis of $20 an ounce for gold, less treatment charges. On delivery of ore, each car was numbered and weighed, a test made to determine moisture, and samples taken and divided into three parts—one for the claimant, one for the T. Company, and a third for the umpire in case of dispute—after which the ore was mixed with ore shipped by others, and it was then impossible to identify claimant's ore. All risk of loss through theft or failure of the ore to come up to sample value was on the T. Company, and settlements were made by check of the latter in which it was treated as a debtor. Held, that the contract construed by the parties' method of business operated as a "sale" of ore delivered and not as a "bailment," so that claimant was not entitled to a preference in the distribution of the assets of the T. Company's bankrupt successor. Chisholm v. Eagle Ore Sampling Co., 144 Fed. 670, 671, 75 C. C. A. 472.

If the identical thing delivered is to be returned, it is a "bailment," and there is no transfer of title; but if the one to whom it is delivered may return another thing of the same kind, or an equivalent in the form of money, or otherwise, it will ordinarily constitute a sale, and effect a change of possession. Mining property, consisting of real estate and personal property, was leased by the owner to another for a term of years at a stipulated royalty, and it was agreed in the lease that at its expiration the personal property, which included some that would be consumed by use, should be returned by the lessee in kind or value, according to an invoice which had been made, at the option of the lessor. Held, that the transaction was in the nature of a sale of the personal property, and the title thereto passed to the lessee. Scott Mining & Smelting Co. v. Shultz, 73 Pac. 903, 904, 67 Kan. 605 (citing Carpenter v. Griffin [N. Y.] 9 Paige, 310, 37 Am. Dec. 396; Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973; Caldwell v. Hall, 60 Miss. 330, 44 Am. Rep. 410; Mallory v. Willis, 4 N. Y. 85; Hurd v. West [N. Y.] 7 Cow. 752; National Car & Locomotive Builder v. Cyclone Steam Snow Plow Co., 51 N. W. 657, 49 Minn. 125; Smith v. Smith's Estate, 51 N. W. 694, 91 Mich. 7; Barnes v. Morse, 38 Ill. App. 275; Herryford v. Davis, 102 U. S. 235, 26 L. Ed. 160, Jones, Bailm. § 74; Story, Bailm. § 47).

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Whether a transaction by which goods are placed by one party in the hands of another to be sold is a "bailment" or a sale depends on its inherent character and purpose, and it is immaterial what name is given to it, or that it is an agreed condition that title shall not pass until payment is made. A bankrupt for a number of years had dealt in silk thread which she purchased from claimants. Having fallen behind in her payments, it was arranged that thereafter the goods should be "consigned" to her, and that the goods on hand should be invoiced and credited on her general indebtedness and charged to her on "consigned account." She was to report monthly the goods on hand and the amount sold, paying for the latter at the regular wholesale prices at which the goods were billed to her. It was further agreed that the goods should remain the property of claimants and subject to their order. No restriction was made on the manner of selling, or the prices to be charged by her, and she kept no separate account of receipts from the goods sold. Held, that as to her creditors the transaction was a sale, and that the goods on hand at the time of bankruptcy could not be reclaimed, whether they were on hand when the arrangement was made or received thereafter. In re Wells, 140 Fed. 752, 753.

A bankrupt was a dealer in agricultural implements and bought goods from a claimant. In the fall, out of season, he wrote for certain articles to be shown at a fair, and they were shipped, and billed to him as sold "subject to next spring's terms." In the spring, shortly before the bankruptcy, claimant made a demand for the goods, which was refused. Held, that there was nothing in the transaction to indicate a "bailment," rather than a sale, or to overcome the presumption of ownership arising from the bankrupt's possession, and that claimant was not entitled to recover the property from the trustee. That goods are billed to a party as though it was a sale, while not conclusive, is of more or less persuasive force. In re Wood, 140 Fed. 964.

BAILMENT FOR SALE

See Bailment.

BAKER

BAKERY

See Basement Bakery.

The authorities of the city of Chicago have power to adopt an ordinance requiring bakeries to be licensed, defining a "bakery" as any place used for the purpose of mixing, compounding, or baking, for sale, or for purposes of a restaurant, bakery, or hotel, any bread, biscuits, etc., or any food product of which flour or meal is a principal ingredient, and providing for ventilation, light, and other sanitary requirements in such bakeries, under Cities and Villages Act, § 62, par. 50, authorizing cities to regulate the sale of meats, poultry, etc., and all other provisions, and to provide for place and manner of selling them, and paragraph 53, giving them power to provide for and regulate the inspection of meats, poultry, etc., and other provisions, the phrase "other provisions" including bakery products, covered by the ordinance, and the power to regulate including the power to license, and also, by paragraph 78, giving cities power to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. City of Chicago v. Drogasawacz, 99 N. E. 869, 870, 256 Ill. 34.

BALANCE

See Unpaid Balance.

A contract for the sale of a half interest in a barber shop by W. to H. provided that "it is understood and agreed that H. is to pay $1,912.50 for a one-half interest in barber shop, including all fixtures and everything pertaining to the same now contained in shop, and including lease. Said H. is to advance on debts such sum as may be necessary, and balance to be paid in regular course of business as the same may be necessary." Held, that the total amount that H. was to pay was $1,912.50; the word "balance" referring to the purchase price as named in the agreement and not to the subsisting debts of the seller over and above the $1,912.50. Halverson v. Walker, 112 Pac. 804, 805, 38 Utah, 264.

Of estate

A gift of testator's real and personal property to his wife "to her own private use forever" and after her death the "balance" to his and her relatives, in equal shares, is a gift to the wife in fee simple; the word "use" implying more than a mere usufruct, and the word "balance" meaning what remains or is left over. Brohm v. Berner (N. J.) 77 Atl. 517.

Testator directed that the residue of his estate, after deducting $5,000 for his widow, should be divided into three equal shares, one of which was to go to his daughter H., or her issue, and, in case she died subsequently to testator's death without lawful issue, then her shares should revert to the estate, to be distributed as the balance of his estate. Held, that H. took a life estate only in the share of the estate bequeathed to her, the words "balance of my estate," being used in the sense of the rest or residue of testator's estate, so that on the death of H. after the death of testator, and without issue, but leaving a surviving husband, her share passed to testator's other daughters as a part of the residue of his estate under the trust created of their shares, and the husband took no interest therein. In re Thompson's Estate, 85 Atl. 104, 105, 237 Pa. 165.

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Of unexpired term

In a provision of a city charter that the common council should appoint a person, in case a vacancy occurred in any elective office, to fill the vacancy for the balance of the unexpired term, the words "for the balance of the unexpired term" clearly indicate that the intention of the Legislature was that at the time of filling a vacancy some part of the term must have expired; and hence, where a person elected to office died before his term commenced, the vacancy could not be filled until after the commencement of the term. Palmer v. Stubley, 108 N. Y. Supp. 500, 501, 57 Misc. Rep. 480.

BALANCE AND RESIDUE

The words "balance and residue of my estate of every kind" included the reversionary interest in the real estate, and carried the fee subject to the life estate. Foil v. Newsome, 50 S. E. 597, 600, 138 N. C. 115, 3 Ann. Cas. 417.

BALANCE REMAINING

A contract between the heirs and another provided that it should purchase the lands of the estate and after a sale and the satisfaction of certain incumbrances the surplus should be divided in a specified manner. It was then agreed that a certain heir had a one-eleventh interest in the estate above the interest of any other heir, and that after such one-eleventh interest should be taken out he had an undivided one-fifth in the "balance remaining." Held, that the contract did not give title to one-eleventh of the land to such heir and one-fifth of the surplus, but the one-eleventh should be taken from the surplus. Howard v. Brown, 95 S. W. 195, 196, 197 Mo. 52.

BALE

In an action to recover the price of a "bale of cotton," it will be presumed, in the absence of evidence to the contrary, that the contract was made in the light of the commercial usage that a bale of cotton weighs 500 pounds. Watson v. Hazlehurst & McAllister, 56 S. E. 459, 460, 127 Ga. 298 (citing Stewart & Son v. Cook, 45 S. E. 398, 118 Ga. 541).

BALING COTTON

As manufacture, see Manufacture.

BALLOT

See By Ballot; Distinguished Ballot; Election by Ballot; Official Ballot; Secrecy of the Ballot; Separate Ballot; Void Ballot; Voting by Ballot; Written Ballot.

A "ballot" is a paper to express intent, and where its language is plain it must be so taken. Stanton v. O'Kane, 47 S. E. 245, 246, 55 W. Va. 601.

"The word 'ballot' runs back as far as to ancient Greece, and was derived from the Greek word βάλλω (ballo), to throw, and was originally applied to the casting of balls, shells, pebbles, or beans into a box, as the means of deciding, or voting, in both legislative and judicial bodies. It was not always secret, as it is said that the Grecian assemblies and courts were held in the daytime in public places, and the voters were separate from the popular audience only by a cordon of ropes, and when the voters went up and deposited their ballots it was known how they voted." Ex parte Owens, 42 South. 676, 678, 148 Ala. 402, 121 Am. St. Rep. 67, 8 L. R. A. (N. S.) 888.

A "ballot" is a printed or written expression of the voter's choice upon some material capable of receiving and reasonably retaining it, prepared or adopted by each individual voter and passing by the act of voting from his exclusive control to that of the election officers, to be by them accepted as the expression of his choice. State ex rel. Karlinger v. Board of Deputy State Sup'rs of Elections, 89 N. E. 33–35, 80 Ohio St. 471, 24 L. R. A. (N. S.) 188.

The paper called a "ballot" must not disclose for what or for whom it is voted except by the name of the person voted for and the office on the face thereof. If it has any mark or device on the outside and visible or apparent to common or casual observation that discloses for what or for whom it is voted, it is not a ballot. This is the strict meaning of a constitutional "ballot." State ex rel. Briesen v. Barden, 46 N. W. 899, 900, 77 Wis. 601, 10 L. R. A. 155.

A blank piece of paper, having on it no words or marks of any kind whereby the meaning and intent of the person who deposited it may be ascertained, is not a "ballot," and hence such paper cannot be considered in summing up the total vote, a majority of which a candidate must receive in order to be elected; for a ballot is a form of expression for a candidate to be voted for. Murdoch v. Strange, 57 Atl. 628, 629, 99 Md. 80, 3 Ann. Cas. 66.

Under P. L. N. J. 1898, p. 264, § 52, providing that where a question is to be submitted at any election the question shall be printed on the official "ballot," section 85, exempting boroughs from its provisions, and P. L. 1900, pp. 303, 304, amending section 52 by omitting the word "official" before the word "ballot" and prescribing the manner of presenting such question on the ballot, the "ballot" referred to in the amendment is the official ballot, and boroughs are exempted from its provisions. Fletcher v. Collingswood (N. J.) 59 Atl. 90, 91.

Laws 1905, c. 267, providing for and authorizing under certain conditions and restrictions the use of voting machines at elec-

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tions, does not contravene the provision of the Constitution that all elections shall be by ballot. If by the use of the machine the main purpose of the Constitution can be effectuated, if the elector may cast his ballot in secret with the assurance that it will be counted as cast, there can be no sound reason why it should be dismissed as an innovation upon the letter of the law. It is of no material consequence that each elector is not supplied with a separate ballot, so long as he may register his choice secretly upon an official record in the charge of and under the control of public officers, whose sworn duty it is to observe the requirements of the law respecting the conduct of the election, which includes the preservation and report of the result of the ballot. Elwell v. Comstock, 109 N. W. 698, 700, 99 Minn. 261, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270.

Lexicographers seem not agreed upon the derivation of the word "ballot." It has been said that it was adopted from the French language, without change of meaning; that it comes from the Greek word meaning to throw. In common speech, the word "ballot," is used to mean the ball or ticket used in voting; the act of voting; the result of voting. It seems clear, however, that from the earliest times voting by ballot has been a term used to contradistinguish open, viva voce, or public voting and secret voting. Const. art. 7, § 2, requiring all votes, except for township officers, to be given by ballot, merely declares the policy of the state to assure to the elector a secret, as distinguished from an open vote, and does not permanently establish a particular mode of voting, and is not infringed by Pub. Acts 1903, p. 383, No. 234, amending Comp. Laws 1897, §§ 3750–3758, authorizing the use of voting machines, and requiring all voting by machine to be by a secret vote. City of Detroit v. Board of Inspectors of Election for Fourth Election District of Second Ward of City of Detroit, 102 N. W. 1029, 1031, 139 Mich. 548, 69 L. R. A. 184, 111 Am. St. Rep. 430, 5 Ann. Cas. 861 (quoting definition in State v. Shaw, 9 S. C. 94, 138; 2 Cyc. p. 245; Bouv. Law Dict. [Rawle's Rev.] tit. Ballots).

The word "ballot" indicates a small ball which as is commonly known is used in social clubs and other societies to determine whether a candidate for membership will be admitted; the names of the candidates being announced before the balloting, and one or more black balls generally defeating elections. Wirth v. Fehlberg, 76 Atl. 438, 440, 30 R. I. 536.

"The term 'ballot' primarily signified a little ball. As used in the statutes providing for the election of public officers, or officers of a corporation, when required to be elected by ballot, it means a paper so prepared by printing or writing thereon as to show the voter's choice." In re P. B. Mathiason Mfg. Co., 99 S. W. 502, 504, 122 Mo. App. 487 (quoting and adopting definition in State ex rel. Runge v. Anderson, 76 N. W. 482, 100 Wis. loc. cit. 530, 42 L. R. A. 239; State v. Timothy, 49 S. W. 499, 147 Mo. loc. cit. 535).

A "ballot" originally consisted in a little ball, bean, or grain of corn, a coin or any other small article which could be concealed in the hand so that others might not know how the voter cast his ballot. Later, a slip or piece of paper was substituted for the ballot, on which were printed, or written, the names of the candidates to be voted for, and out of this latter method grew our present elaborate Australian system. It cannot be said that the word "ballot" is restricted in meaning to a slip, or sheet of paper, or parchment. Hence, Laws 1903, p. 178, provided for the use of voting machines which shall enable each voter to vote a straight party ticket, or to vote a ticket selected in part from the nominees, from any or all parties, as he may desire, must be sustained as to its constitutionality. The provisions of Gross' St. 1871–72, c. 37, entitled "Elections," providing for ballot boxes, for voting by ballot printed or written on plain paper, etc., do not constitute a contemporaneous construction by the Legislature of the word "ballot" in Const. 1870, art. 7, § 2, declaring that all votes shall be by "ballot," and do not limit the meaning of the word to a written or printed ballot. Lynch v. Malley, 74 N. E. 723, 724, 215 Ill. 574, 2 Ann. Cas. 837.

Vote distinguished

"Ballot" and "vote," though sometimes used synonymously, are not synonymous, and a "ballot" is the instrument by which a voter expresses his choice between candidates, or in respect to propositions; while his "vote" is the choice or election as expressed by his ballot. Clary v. Hurst, 138 S. W. 566, 569, 104 Tex. 423 (citing 8 Words and Phrases, pp. 7358, 7359).

The term "votes," in Const. art. 17, § 6, requiring a majority of the votes at a special election for the relocation of a county seat, is not the equivalent of "ballots," and distinguished, illegal, and blank ballots will not be considered in making up the aggregate number on which such majority is to be computed. Town of Eufaula v. Gibson, 98 Pac. 577, 578, 22 Okl. 507.

A "vote" is the registration, in accordance with law, of the preference or choice of an elector on a given subject. A voter, as distinguished from an elector, is an elector who actually votes. A ballot, as distinguished from a vote, is the sheet of paper on which the voter expresses his choice of candidate, or for or against a proposition, or both. State v. Blaisdell, 119 N. W. 360, 363, 18 N. D. 31.

"While the term 'ballot' and 'vote' are sometimes confused, and while they may

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sometimes be used synonymously, the 'ballot' is in fact the instrument by which the voter expresses his choice between two candidates or two propositions, and his 'vote' is his choice or election between the two, as expressed by his 'ballot,' and when his 'ballot' makes no choice between any two candidates, or on any question, then he casts no 'vote' for either of these candidates or on the question. Those 'ballots' are not 'votes.'" "The official 'ballot,' so called, is not complete when furnished to the elector as he enters the booth to prepare his 'ballot.' It is a mere form for a 'ballot.' When marked and prepared by a voter so as to show his choice at the election, then, and not until then, does it become his constitutional 'ballot.'" State v. Custer, 66 Atl. 306, 308, 28 R. I. 222 (quoting and adopting definition in Davis v. Brown, 34 S. E. 839, 841, 46 W. Va. 716, 723; State ex rel. Runge v. Anderson, 76 N. W. 482, 484, 100 Wis. 523, 530, 42 L. R. A. 239).

Under St. 1912, c. 559, pt. 3, § 1, revising the charter of the city of Salem, which provided that the act should be submitted to the registered voters at the state election in 1912, for a vote primarily on the question whether the present charter should be repealed, and secondarily on the question whether, if it was repealed, the new charter should be plan 1 or plan 2, and that if, on a "majority of the ballots cast," the votes should be for a repeal, the plan receiving the largest number of votes cast should be adopted as the city charter, the ballot on which the questions were printed contained, besides the names of a large number of candidates for state and national offices, questions upon the adoption of constitutional amendments, and the total number of ballots cast was 6,966, of which, on the question of repealing the charter 1,676 were blank, 2,240 were against repeal, and 3,050 were for repeal. Held that, in view of the legislative policy to make an acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question, the word "ballots" was synonymous with "votes," and that only the ballots carrying votes on the question of repeal were to be counted, and hence that, as there was a "majority of the ballots cast" in favor of repeal, the old charter was repealed, and the plan receiving the larger number of votes was adopted as the new charter. Cashman v. Entwistle, 100 N. E. 58, 59, 213 Mass. 153; State v. Miller (Ohio) 99 N. E. 1078, 1081.

BALLOT BOX

A "ballot box" is a receptacle provided by the officers of an election for receiving the ballots, which box must be kept secured until the election is finished. Clary v. Hurst, 138 S. W. 566, 570, 104 Tex. 423 (citing 1 Words and Phrases, p. 681).

BALSAMS ADVANCED IN VALUE OR CONDITION

Balsam in gelatin capsules cannot be considered simply as balsam and classified as "balsams * * * advanced in value or condition," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 152, because nothing whatever has been done to the balsam itself. United States v. Lehn & Fink, 172 Fed. 171, 172.

BAMBOO

Bamboo dyers' sticks, rounded at the ends and smoothed off at the joints, are covered by the enumeration of bamboo in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 700, 30 Stat. 202, rather than by the provision for wood, unmanufactured, in section 1, Schedule D, par. 198, 30 Stat. 167. United States v. Knipscher & Maas Silk Dyeing Co., 152 Fed. 590, 591.

BAND

See Impression-Receiving Band; Shell-Band.

BANISHMENT

"In Black's Law Dictionary 'banishment' is defined as a punishment inflicted upon criminals by compelling them to quit a city, place, or country for a specified period of time, or for life. It is inflicted principally on political offenders; 'transportation' being the word used to express a similar punishment of ordinary criminals." United States v. Ju Toy, 25 Sup. Ct. 644, 649, 198 U. S. 253, 49 L. Ed. 1040.

BANK

See Coal Bank.

The word "bank" is defined in standard dictionaries as "the face of a coal vein in process of being mined"; "the surface immediately about the mouth of a mine"; also, "to form or lie in banks." Chapman v. Mill Creek Coal & Coke Co., 46 S. E. 262, 263, 54 W. Va. 193.

BANK (In Commercial Law)

See Branch Bank; Foreign Bank; Funds of a Bank; Money Deposited in Bank; National Bank; Payable at Bank; Private Banker; Savings Bank.
Insolvency, see Insolvency—Insolvent.

"The receiving of deposits to be kept and returned on demand is the generally acknowledged feature of every bank, whether incorporated or unincorporated, whether its profits are obtained and business success accomplished." A bank cannot, by naming itself as a brokerage concern, conduct the banking business and receive deposits, the same as a bank, without being in fact sub-

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ject to the statute regulating banking. Individuals are not prohibited from engaging in, but are permitted to conduct, banking business. State v. Leland, 98 N. W. 92, 93, 91 Minn. 321.

Sess. Laws 1907, p. 519, c. 225, § 6, defining the term "bank," as used in that act, to mean every corporation domestic or foreign, except national banks and foreign banks not authorized to receive deposits, transacting a banking business in the state, makes it apparent, by including foreign banks transacting business in the state in the definition of the term "bank," that the term "branch bank" defined in the same section means a branch established in a town or city other than that in which the principal office is located, and refers to branches of domestic banking corporations only, and not to branches of foreign banking corporations. State ex rel. Flumerfelt v. Engle, 96 Pac. 1045, 1046, 50 Wash. 207.

As public corporation

See Public Corporation.

BANK (Of Stream)

See Out of Banks.

"The 'banks of a river' or stream are understood to be that which contains it in its ordinary state of high water." Minor's Heirs v. City of New Orleans, 38 South. 999, 1003, 115 La. 301; Ensley Development Co. v. Powell, 40 South. 137, 139, 147 Ala. 300.

The bank of a river is that line or ridge of earth which contains the river, holding the natural direction of its course, and if at any time, either from rains or other cause, the river has overflowed for a time that line, it does not by such overflow change its banks within the rule fixing high-water mark as a boundary between a riparian owner and the public. Sun Dial Ranch v. May Land Co., 119 Pac. 758, 762, 61 Or. 205.

"A river is a running stream of water, pent in on either side by banks, shores, or walls." "A fresh water river, like a tidal river, is composed of the alveus, or bed, and the water; but it has banks, instead of shores. The banks are the elevations of land which confine the waters in their natural channel, when they rise the highest and do not overflow the banks; and in that condition of the water the banks, and the soil which is permanently submerged, form the bed of the river." State v. Faudre, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104 (quoting Gould, Waters).

The "bank" is "any steep acclivity as one rising from a river, a lake, or the sea" (quoting Cent. Dict.). The shore of a stream is in law a space between ordinary or high-water mark and low-water mark, etc. City of Peoria v. Central Nat. Bank, 79 N. E. 296, 299, 224 Ill. 43, 12 L. R. A. (N. S.) 687.

Where deeds conveying land abutting on a highway along the high-water line, described the boundary as the "sea or highway," "beach and highway," "bank and highway," the grantee might adopt the boundary most favorable to him. The words "beach" and "bank" might be construed to mean the beach between high and low-water mark. Merwin v. Backer, 68 Atl. 373, 376, 80 Conn. 338.

BANK ACCOUNT

Where a bank, to which the bankrupt was largely indebted on the day the bankrupt became insolvent, closed its account and credited the balance, including a deposit just made, on the bankrupt's indebtedness to it, such deposit amounted to a payment pro tanto of the loan, and not a deposit to the bankrupt's account, since a bank account contemplates the right of the depositor to draw against it. Ernst v. Mechanics' & Metals' Nat. Bank of New York, 200 Fed. 295, 298; Id., 201 Fed. 664, 120 C. C. A. 92.

BANK BILL

See Common Carrier of Bank Bills; Fictitious Bank Bill.

As money, see Money.

BANK BOOK

Book as including, see Book.

BANK CHECK

See, also, Check.

A bank check is a contract in writing, by the execution and delivery of which the drawer contracts with the payee that the bank will, on presentation, pay to him or his order the amount designated, and is not a mere request upon a third person to pay, and in a suit by the payee thereon it is not necessary to allege the consideration for which the check was given or set forth any further showing than that plaintiff was named as payee, and that the check had been presented for payment, and payment refused. Byrd Printing Co. v. Whitaker Paper Co., 70 S. E. 798, 800, 135 Ga. 865, Ann. Cas. 1912A, 182.

BANK DEPOSIT

In the first clause of his will, a testator provided for the payment of his debts, funeral expenses, and expenses of settling his estate, and for the erection of suitable gravestones. In the second to the tenth clauses, inclusive, he bequeathed certain legacies. The eleventh clause provided for the specific gift of capital stock of a bank. The twelfth provided that, should there remain in the hands of his executor any money from the proceeds of his bank deposits after payment of all sums above required to be paid, he should pay over and divide it in equal shares to certain children. The thirteenth gave the remainder of his estate, both real and personal, to children of a brother in equal shares. Held, that he intended that the bank deposits

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should be the primary fund from which all debts, legacies, funeral charges, and expenses of settling his estate should be paid, and that cash found in his residence after his death, collections made thereafter, and dividends on the bank stock referred to, were not included in the term "bank deposits," but passed under the thirteenth clause of the will, as did also the household furniture, and that the bequest contained in the twelfth clause was of so much of the bank deposits as, thus construed, should remain after such payments were made. In re Appleby (R. I.) 73 Atl. 30.

As money

See Money.

BANK DIRECTOR

As trustee, see Trustee.

BANK NOTES

As money

See Money.

BANK OFFICER

See Officer (Of Corporation).

BANK SHARES

"Bank shares" are neither money loaned, solvent credits, nor credits of value, nor are the latter "bank shares." They are each of them a species and only a species of the generic class, moneyed capital, and, being of a different species of property from "shares of stock in an incorporated bank," they may be reasonably grouped into separate classes, and different methods of assessments provided. Hooper v. State, 37 South, 662, 664, 141 Ala. 111 (quoting and adopting definition in State Bank v. Board of Revenue, 8 South. 852, 91 Ala. 217).

BANK STOCK

As property

See Property.

BANK TELLER

See Teller's Check.

BANKABLE NOTE

See Secured Bankable Note.

Under an agreement by a seller to extend credit to a buyer if he would give a bankable note as security, a bankable note is one receivable as cash by a bank, and a note that banks will not buy is not bankable, regardless of the bank's reasons for refusing to buy, or the high character of the paper. Pasha v. Bohart, 122 Pac. 284, 288, 45 Mont. 76, Ann. Cas. 1913C, 1250.

BANKER

See Individual Banker; Private Banker.

A "banker" is one who traffics in money, receives and remits money, negotiates bills of exchange, receives money in trust, to be drawn again, or its equivalent, as the owner has occasion to use it. State v. Cramer, 119 Pac. 30, 36, 20 Idaho, 639.

A "banker" is one who traffics in money, receives and remits money, negotiates bills of exchange, receives money in trust, to be drawn again, or its equivalent as the owner has occasion to use it; and a man holding himself out as a "banker" gives public proclamation that he has money and property readily convertible into money in his possession and subject to his control, and for that reason he may be safely trusted. Under Code 1906, § 1169, imposing punishment on the president, manager, cashier, teller, or other employé or agent of a bank receiving a deposit, knowing or having good reason to believe the establishment to be in an insolvent condition, without informing the depositor of the condition, there may be a conviction of a director; the bank having been kept open by the director with knowledge of its status, though he did not actually receive the deposit. State v. Mitchell, 51 South. 4, 7, 96 Miss. 259, 26 L. R. A. (N. S.) 1072, Ann. Cas. 1912B, 309 (quoting and adopting definition in Baker v. State, 12 N. W. 16, 54 Wis. 376).

War Revenue Act June 13, 1898, c. 448, § 2, 30 Stat. 448, provided that bankers using a capital not exceeding $25,000 should pay a tax of $50 and $2 additional for every $1,000 in excess of $25,000, and that, in estimating, the capital surplus should be included. The section also declares that every person, firm, etc., having a place where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted on draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a "banker" within the act. Held, that it was only the capital surplus used in the banking business that was subject to tax, and hence the undivided profits of a trust company, invested in bonds and stocks, were not subject to taxation, though the corporation was engaged in some of the activities of a bank, and the profits so invested were available to make good losses in the corporation's enterprises and to increase its credit. Central Trust Co. of New York v. Treat, 171 Fed. 301, 302; Farmers' Loan & Trust Co. v. Same, 171 Fed. 302.

BANKER'S CHECK

A "banker's check," as popularly understood, is a check, draft, or other order for payment of money, drawn by an authorized officer of a bank upon either his own bank or some other bank in which funds of his bank are deposited. Holland v. Mutual Fertilizer Co., 70 S. E. 151, 152, 8 Ga. App. 714.

BANKING

"Banking" in its most enlarged sense includes the business of receiving deposits,

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paying checks, lending money, dealing in bills of exchange, etc., besides that of issuing paper money. Weed v. Bergh, 124 N. W. 664, 668, 141 Wis. 569, 25 L. R. A. 1217 (citing Boone, Bank. § 3).

The "banking business," as defined by laws and customs, consists, among other things, in making loans of money on collateral security. Earle v. American Sugar Refining Co., 71 Atl. 391, 395, 74 N. J. Eq. 751.

The business of banking is defined to consist in discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, receiving deposits, buying and selling exchange, coin, or bullion, lending money on personal security, and obtaining, issuing, and circulating notes; and to these specified powers and those necessary to the exercise of the powers expressed, the bank must confine its operations, and acts of officers not embraced in the terms of the law are not binding upon the corporation. Commercial Nat. Bank v. First Nat. Bank, 80 S. W. 601, 603, 97 Tex. 536, 104 Am. St. Rep. 879.

Any person engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of these functions is exercised. Under Laws 1909, c. 285, § 2024–78*l*, declaring the receiving of money on deposit as a regular business by a person or corporation to be a banking business, whether the deposit is made subject to check or is evidenced by a certificate of deposit, passbook, note, receipt, or other writing, a department store which received deposits up to a certain amount, issued passbooks, paid interest on the amounts deposited, and paid the principal, with interest thereon, on demand, in money or goods at the election of the depositor, was engaged in the banking business, and subject to the laws regulating it. MacLaren v. State, 124 N. W. 667, 668, 141 Wis. 577, 135 Am. St. Rep. 55, 18 Ann. Cas. 826.

A national bank is acting within the scope of its power, under U. S. Rev. Stat. § 5136, to exercise "all such incidental powers as shall be necessary to carry on banking," where it accepts an assignment of a judgment for collection, and agrees to hold the proceeds subject to the order of the assignor; and, if its attorney, after collecting the money, improperly pays it over to a corporation which claimed that the cause of action had been transferred to it prior to the rendition of the judgment, the bank may sue in its own name conformably to the local law, to recover from such attorney the proceeds of the judgment. Miller v. King, 32 Sup. Ct. 243, 223 U. S. 505, 56 L. Ed. 528.

"The 'business of banking,' as defined by law and custom, consists of the issuing of notes payable on demand, intended to circulate as money where the banks are banks of issue, in receiving deposits payable on demand, in discounting commercial paper, making loans of money on collateral security, buying and selling bills of exchange, negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations." A vendor of a bank who agrees to quit the banking business and not to start another bank in the same town violates the agreement and engages in the business of banking where he subscribed to stock in a new bank started in the same town and actually participates as assistant cashier in the business of such bank. Merica v. Burget, 75 N. E. 1083, 1086, 36 Ind. App. 453 (quoting and adopting definition First Nat. Bank of Richmond v. Turner, 57 N. E. 110, 112, 154 Ind. 456, 460).

BANKING COMPANY

The term "banking company," as used in the banking law denouncing the receipt of deposits after insolvency, refers to the individual partners composing a firm doing a banking business. An indictment for violating the statute must allege the names of the persons composing the partnership; the condition of insolvency referred to in the statute as applied to a partnership bank being referable to the insolvency of the individual partners, which must be alleged and proved. State v. Krasher, 83 N. E. 498, 499, 170 Ind. 43.

BANKING GAME

Other banking game, see Other.

A "banking game" of chance is one in which the banker or exhibitor is interested in the result of the play. Tully v. State, 114 S. W. 920, 921, 88 Ark. 411.

A faro game is a banking game. State v. Behan, 37 South. 714, 716, 113 La. 754.

Under the express terms of the statute, "monte" being a banking game and playing at it a crime, an instruction that it is as a matter of law a banking game is not error. Pruitt v. State, 109 S. W. 171, 53 Tex. Cr. R. 316; Chancellor v. State, 107 S. W. 823, 824, 52 Tex. Cr. R. 464; Arredondo v. State, 124 S. W. 930, 931, 58 Tex. Cr. R. 145.

A slot machine wherein a fund is placed and constantly kept against which players play and to which their losses are added and from which their earnings are taken, the machine being what is known as a percentage game, and the chances being unequal in favor of the machine, is a "banking game" of chance within Laws 1907, c. 64, § 1. Territory v. Jones, 99 Pac. 338, 341, 14 N. M. 579, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128.

A slot machine which pays money to a player who wins out of all the deposits of the previous players, and which plays against any and all players who choose, and which has the greater number of chances of win-

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ning, is essentially a "banking game" within a statute making it an offense to keep for exhibit a gaming table commonly called A B C or E O tables, faro bank, or keno table, or table of like kinds under any denomination. State v. Gaughan, 48 S. E. 210, 211, 55 W. Va. 692.

A banking game is a game of one against the many. A game of dice, in which one persons sits behind the table and takes all the bets of the persons playing on the outside, the dice being thrown by the parties alternately, is a "banking game," punishable under Pen. Code 1895, art. 388, providing that any person who shall bet at any gaming table or bank shall be punished. Faucett v. State, 79 S. W. 548, 46 Tex. Cr. R. 113.

Where the players in a game of craps or other gambling game bet against each other and settle with each other, the game is not a banking game, but, where a person posing as the proprietor or responsible party stands ready, by himself or through another, to take all bets, and, receiving all that is lost by the other players, pays all that is won by them, or all that is won save a percentage which he retains, the game is a banking game. Whether, however, the conditions first mentioned or those last mentioned exist in a particular case is a question of fact, which, in a criminal prosecution for keeping a banking game, this court has no power to review. State v. Rabb, 57 South. 1008, 1010, 130 La. 370.

Banker or exhibitor

Kirby's Dig. § 1732, making it an offense to set up, keep, or exhibit any gaming table or gambling device, etc., applies only to banking games, and that the owner of a table or other device plays in a game with others and furnishes the chips does not make him a "banker or exhibitor" within the statute. Tully v. State, 114 S. W. 920, 921, 88 Ark. 411.

BANKING INSTITUTION

The words "banking institution," as used in a statute declaring guilty of larceny every officers of any "banking institution" who shall receive deposits after he has knowledge that the bank is insolvent, have been construed to mean an incorporated bank. In re Wisner, 92 Pac. 958, 959, 36 Mont. 298.

Laws 1903, c. 79, § 2, relating to bank inspection, provides that, where reference is made to banks, bankers, or banking in the act, the same shall be construed as applying to any corporation, association, firm, or individual engaged in such business; and section 26 declares that every officer, agent, or clerk of any banking institution within the title, who subscribes or makes any false statement or enters or subscribes or exhibits any false paper, etc., shall be subject to imprisonment, etc. Held that the expression any "banking institution" as employed in section 26 embraced a private bank or banker. State v. Struble, 104 N. W. 465, 466, 19 S. D. 646.

BANKRUPT

Assets of bankrupt, see Assets.
Bankrupt's receiver, see Receiver.
See, also, Insolvency—Insolvent.

A "bankrupt" is one who, by his acts and conduct, affords evidence of his inability to pay, or his intention to avoid payment of, his debts; and within Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 546) § 3, defining acts of bankruptcy, a person guilty of any of such acts is a bankrupt. Continental Building & Loan Ass'n v. Superior Court of State of California in and for City and County of San Francisco, Department No. 1, 126 Pac. 476, 477, 163 Cal. 579.

The term "bankrupt," defined by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, includes a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition or has become a bankrupt, and does not include officers of a corporation declared a bankrupt. United States v. Lake, 129 Fed. 499, 502.

Bankrupt Act July 1, 1898, c. 541, § 8, 30 Stat. 549, provides that insanity of a bankrupt shall not abate the proceedings; and section 1 (30 Stat. 544) declares that the word "bankrupt" shall include a person against whom an involuntary petition has been filed. Held that, if an alleged bankrupt committed an act of bankruptcy while sane, and by reason of such act the bankruptcy court obtained jurisdiction, it could continue the proceedings notwithstanding the bankrupt's subsequent insanity, but that if the bankrupt was insane when the alleged acts of bankruptcy were committed an adjudication of bankruptcy against him was improper. In re Kehler, 159 Fed. 55, 56, 86 C. C. A. 245.

An alleged bankrupt for whose property a receiver has been appointed in involuntary proceedings pending a hearing on the petition is a " 'bankrupt' whose estate is in process of administration under this act," within Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552. In re Fleischer, 151 Fed. 81, 82.

Bankr. Act July 1, 1898, c. 541, § 1, subd. 4, 30 Stat. 544, defines a "bankrupt" as a person against whom an involuntary petition has been filed, and subdivision 10 defines the terms "date of bankruptcy," "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, to mean the date when the petition is filed. Section 8 declares that the death of a bankrupt shall not abate the proceedings. Held, that the death of a bankrupt after the filing of an involuntary petition against him,

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though prior to service, does not abate the proceedings. Shute v. Patterson, 147 Fed. 509, 510, 78 C. C. A. 75 (citing In re Walker, 3 Morrell, Bankr. Cas. 69; In re Easy, 4 Morrell, Bankr. Cas. 281; In re Hicks, 107 Fed. 910; Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312).

BANKRUPT ESTATE

See Necessary Cost of Preserving Estate of Bankrupt.
Interest in, see Interest.

BANKRUPTCY

See Act of Bankruptcy; Court of Bankruptcy; Discharge in Bankruptcy; Time of Bankruptcy; Trustee in Bankruptcy.
Date of bankruptcy, see Date.
Trustee as creditor, see Creditor.
Voidable preference, see Voidable.
See, also, Preference.

As disability

See Disability.

Insolvency synonymous

See Insolvency—Insolvent.

BANKRUPTCY PROCEEDINGS

See Controversy Arising in Bankruptcy Proceedings.

"A 'proceeding in bankruptcy' is a proceeding in equity, and the rules and practice in equity prevail in its conduct as far as they are consonant with the speedy administration of justice which it prescribes." In re Broadway Savings Trust Co., 152 Fed. 152, 153, 81 C. C. A. 58 (citing Lockman v. Lang, 132 Fed. 1, 6, 65 C. C. A. 621, 626; Files v. Brown, 124 Fed. 133, 142, 59 C. C. A. 403, 412; Nelson v. Eaton, 66 Fed. 376, 378, 13 C. C. A. 523, 525; Davis v. Davis, 62 Miss. 818; Fisher v. Simon, 67 Fed. 387, 14 C. C. A. 443; French v. Hay, 89 U. S. [22 Wall.] 238, 246, 22 L. Ed. 799; Blythe v. Hinckley, 84 Fed. 228, 242).

"A 'bankruptcy proceeding' cannot be said to be an ordinary civil suit. It is sui generis, and it is far-reaching and drastic in its effects. Whether accompanied by actual seizure of the bankrupt's property or not, it places an embargo on his right to dispose of his property and of his business generally." An action for malicious prosecution will lie for the institution and prosecution of a proceeding in bankruptcy without probable cause and with a malicious intent, although not accompanied by any actual seizure of the alleged bankrupt's property. Wilkinson v. Goodfellow-Brooks Shoe Co., 141 Fed. 218, 219, 220.

A "proceeding in bankruptcy," within the meaning of Bankr. Act July 1, 1898, c. 541, § 25, 30 Stat. 544, providing for appeals in bankruptcy proceedings from courts of bankruptcy to the Circuit Courts of Appeals to review judgments allowing or rejecting a debt or claim of $500 or more, is instituted by presenting to the trustee in bankruptcy a claim upon notes of the bankrupt in excess of that amount, joined with the statement that the claimant had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets, although the trustee makes no objection to the amount found due upon the notes and only seeks by his appeal to contest further the right to security. Coder v. Arts, 29 Sup. Ct. 436, 442, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

A decision of a controversy in bankruptcy involving the validity of a claim to a lien on the bankrupt's property is a proceeding in bankruptcy within Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553, and reviewable on petition to revise. In re Lee, 182 Fed. 579, 581, 105 C. C. A. 117.

A suit in equity, commenced by a trustee in bankruptcy in a District Court against an adverse claimant of property to litigate the title thereto under authority of Bankr. Act July 1, 1898, § 67e, c. 541, 30 Stat. 564, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 800, is not a proceeding in bankruptcy, but an independent suit, and a decree or order therein is not subject to revision by the Circuit Court of Appeals under section 24b of the act (30 Stat. 553), although the District Court is also the court of bankruptcy administering the estate, and an injunction is also asked to restrain the defendant from prosecuting an action of replevin for the property in a state court. Doroshow v. Ott, 134 Fed. 740, 743, 67 C. C. A. 644.

False testimony given by a bankrupt on his examination in respect to his ownership of, or interest in, property conveyed to his wife some years before the bankruptcy proceedings constitutes the making of a false oath in relation to a "proceeding in bankruptcy," within the meaning of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554, subjecting him to punishment if the testimony was knowingly and fraudulently false. In re Conroy, 134 Fed. 764, 765.

An action by a trustee to recover property from a third party, alleged to have been transferred by the bankrupt prior to the bankruptcy as a preference, is not a "proceeding in bankruptcy," within Bankr. Act July 1, 1898, c. 541, § 23a, 30 Stat. 552. In re Walsh Bros., 163 Fed. 352, 353.

A petition by a trustee in bankruptcy to a court of bankruptcy for a summary order on a receiver of a state court to deliver property to the petitioner is a proceeding in bankruptcy, and the order made thereon is reviewable by the Circuit Court of Appeals in matter of law on a petition to revise under Bankr. Act July 1, 1898, c. 541, § 24b,

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30 Stat. 553. In re Hecox, 164 Fed. 823–825, 90 C. C. A. 627.

When an adverse claimant voluntarily comes into a court of bankruptcy and claims property in the possession of the trustee, wherever situated, or asserts a lien thereon and seeks to have it established, enforced, or protected, the proceeding becomes a "proceeding in bankruptcy" in the course of collecting the estate, reducing the same to money, and distributing the same, and a "controversy" in relation to the estate within the jurisdiction of the bankruptcy court, under Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 546, giving such court jurisdiction of proceedings to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, except as otherwise provided. In re MacDougall, 175 Fed. 400, 405.

A "proceeding in bankruptcy" is not a criminal case, although it may disclose acts of criminality. It is simply the procedure for the collection and distribution among creditors of the bankrupt's estate so that an admission by a bankrupt, though constituting a confession of criminality, is nevertheless competent in such proceedings to show the liability of his estate for moneys in his hands because of the disposition he has made of them. Smith v. Township of Au Gres, 150 Fed. 257, 264, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876.

The distinction between "proceedings in bankruptcy," reviewable by petition for review, as authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553, and "controversies arising in bankruptcy proceedings" reviewable by appeal, as authorized by section 24a, is that the former refers to and includes administrative orders and decrees in the ordinary course of the administration of a bankrupt's estate between the filing of the petition and the final settlement thereof, while the latter refers to and includes those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustees representing the estate and claimants representing some right or interest adverse to the bankrupt or his general creditors; the remedies afforded by the two subsections being mutually exclusive. Where a bankrupt's trustee instituted proceedings to set aside certain conveyances of real estate alleged to have been made to defraud the bankrupt's creditors, and also to vacate the lien of a mortgage thereon as against the mortgagee, who was no party to the bankruptcy proceedings and was not a creditor of the estate, but a stranger thereto, asserting rights paramount to and independent of those of the estate, the controversy, so far as it related to such lien, was not a "proceeding in bankruptcy," reviewable by petition for review, as authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553, but was instead a "controversy arising in bankruptcy proceedings," reviewable only as provided by section 24a. Barnes v. Pampel, 192 Fed. 525, 527, 113 C. C. A. 81.

Proceedings by a court of bankruptcy upon a petition filed by a trustee for an order to sell real estate and also to bring in third persons asserting liens thereon for the purpose of determining their rights as incidental to such sale are "proceedings in bankruptcy" and are reviewable by the Circuit Court of Appeals on petition for revision under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 552. In re McMahon, 147 Fed. 684, 689, 77 C. C. A. 668.

The term "proceedings in bankruptcy," as used in a bankruptcy act, broadly speaking, covers questions between the alleged bankrupt and his creditors as such, commencing with a petition for adjudication, ending with the discharge and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate. Judgments or orders of a district or circuit court entered in controversies arising in bankruptcy proceedings, as distinguished from those entered in bankruptcy proceedings proper, are reviewable by the Circuit Courts of Appeals only by appeal or writ of error under their general appellate jurisdiction as provided in Bankr. Act July 1, 1898, c. 54, § 25a, 30 Stat. 553. In re Mueller, 135 Fed. 711, 713, 68 C. C. A. 349 (quoting and adopting In re Friend, 134 Fed. 778, 67 C. C. A. 500).

An order establishing as a lien against the bankrupt estate a claim, the validity of which as a general claim the trustee does not contest, is not reviewable by a circuit court of appeals, in the exercise of its power under the bankrupt act of July 1, 1898, 30 Stat. at L. 553, chap. 541, § 24b, to superintend and revise in matter of law the proceedings of inferior courts of bankruptcy, since this revisory proceeding is not intended as a substitute for the appeal which would lie under § 25a, giving appellate jurisdiction to the circuit courts of appeals in bankruptcy proceedings. In re Loving, 32 Sup. Ct. 446, 448, 224 U. S. 183, 56 L. Ed. 725.

Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553, confers on the appellate federal courts jurisdiction of "controversies arising in bankruptcy proceedings," and section 24b declares that the Circuit Courts of Appeal shall have jurisdiction in equity to superintend and revise in matter of law the "proceedings of the several inferior courts of bankruptcy" within their jurisdiction. Held, that "controversies arising in bankruptcy proceedings" appealable under section 24a embrace questions between the trustee repre-

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senting the bankrupt and his creditors, on the one side, and adverse claimants, on the other, not directly affecting the administrative orders and judgments ordinarily known as "proceedings in bankruptcy," which are confined to questions arising between the bankrupt and his creditors and are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, including intermediate administrative steps, and such controversies as arise between the parties to the bankruptcy proceedings as are involved in the allowing of claims and fixing their priorities, sales, allowances, and other matters which are disposed of summarily, and hence the term "controversies arising in bankruptcy proceedings" does not include an order dismissing a petition for the revocation of the bankrupt's discharge. Thompson v. Mauzy, 174 Fed. 611, 614, 98 C. C. A. 457.

"Proceedings in bankruptcy" reviewable on petition, as authorized by Bankr. Act July 1, 1898, c. 541, § 24, 30 Stat. 553, include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claims of a creditor, and directing a set-off of mutual debts, and orders confirming compositions. Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, 339, 100 C. C. A. 647.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, providing that the United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from "proceedings in bankruptcy," between trustees as such, and adverse claimants, concerning the property acquired or claimed by the trustees, etc., the term "proceedings in bankruptcy" embraces controversy arising in bankruptcy proceedings as well as bankruptcy proceedings proper and sets them both over against plenary suits between trustees and adverse claimants touching rights or property not in the custody of the court. Thomas v. Woods, 173 Fed. 585, 588, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080.

The hearing in a proceeding in the District Court exercising jurisdiction as a bankrupt court between the trustee in bankruptcy and a prior assignee to determine the right to the property of the estate in the custody of the court or its proceeds was a hearing under a "proceeding in bankruptcy" within the meaning of Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553, so that any order made therein was reviewable only on a petition to revise and not by appeal. O'Dell v. Boyden, 150 Fed. 731, 737, 80 C. C. A. 397, 10 Ann. Cas. 239.

As judicial process

See Judicial Process.

As proceeding in rem

While an adjudication of bankruptcy in an involuntary proceeding is a judgment in rem in the sense that it determines the status of the bankrupt, the ordinary proceedings taken in a bankruptcy proceeding are not proceedings in rem and do not bind persons who are not parties thereto. Whitney v. Wenman, 140 Fed. 959, 960.

As suit

See Suit.

BANQUETTE

To "banquette a street" can have no other meaning than to construct along the side of it such a sidewalk as is required by the city ordinances; that is, a sidewalk up to grade. Redersheimer v. Bruning, 36 South. 990, 991, 113 La. 343.

BAR

See Gone from the Bar; Plea in Bar.

San Jose city ordinance July 1, 1908, is entitled "An ordinance establishing the limits within which retail and wholesale licenses and transfers thereof will be granted," and provides that no license for any bar, barroom or saloon, or other public drinking place should be granted, etc. Held, that the word "bar" was used, according to its commonly accepted definition, to mean a room or place where intoxicating liquors were sold, and that the ordinance was therefore not objectionable because the body thereof did not in terms mention intoxicating liquors. Richter v. Lightston, 118 Pac. 790, 791, 161 Cal. 260, Ann. Cas. 1913B, 1028.

BAR ASSOCIATION

See Political Corporation.

BAR IRON

"Bar iron" means the finished product of pig iron. Imported muck bars, produced by converting pig iron into wrought iron in the puddling furnace, and then rolling the wrought iron through a set of rolls, from which it comes in the form known as "muck bars," are within the meaning of "bar iron," as used in Tariff Act, c. 11, § 1, Schedule C, par. 123, 30 Stat. 159. Moorhead Bro. & Co. v. United States, 127 Fed. 779, 780.

The words "bar iron," as used in an order for "1,000 net pounds of bar iron," were shown by the evidence to refer to a certain base size; bar iron being made in various sizes, and there being a difference in the cost of making iron above the base size. Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co., 109 S. W. 47, 53, 210 Mo. 715.

BARROOM

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its within which retail and wholesale licenses and transfers thereof will be granted," and provides that no license for any bar, barroom or saloon, or other public drinking place should be granted, etc. Held, that the word "barroom" was used, according to its commonly accepted definition, to mean a room or place where intoxicating liquors were sold, and that the ordinance was therefore not objectionable because the body thereof did not in terms mention intoxicating liquors. Richter v. Lightston, 118 Pac. 790, 791, 161 Cal. 260, Ann. Cas. 1913B, 1028.

An incorporated social club maintained in the club quarters containing parlors, bedrooms, dining rooms, etc., a room where liquors were furnished to members and nonresident guests. Slips were signed by the member showing the character of the liquors furnished and the cost thereof, and these slips were turned in by the employé in charge of the room to the club's bookkeeper, and were charged to the accounts of the member, and were paid by him. The liquors were purchased by the club at wholesale, and were furnished to the members and nonresident guests at the prices usually charged by retail dealers. Held, that the transaction was a sale within an ordinance prohibiting any person from selling or disposing of liquors without obtaining a license, and authorizing a person desiring to keep a barroom to apply for a license, etc.; a "barroom" being a room in which liquors are kept with the intention to furnish them to be drunk on the premises. City of Spokane v. Baughman, 103 Pac. 14, 17, 54 Wash. 315.

The words "barrooms and other places" in Ky. St. 1903, § 2565, providing that all "barrooms and other places" where intoxicating liquors are sold shall be closed on any election day, include any room where intoxicating liquors are sold, and a liquor dealer cannot keep a saloon open if in the same room he runs some other business, and where he runs a drug store or a family grocery he must not keep them in the same room with the saloon if he wishes to keep them open every day. A liquor dealer had a store in which he had drugs, groceries, etc. Back of the room was a place where he kept and sold liquor and hardware. There was a partition a certain distance from the front, and back of this partition was the saloon part of the business. The liquor dealer was guilty of violating the statute if he opened his place of business by opening the front and back doors and the door in the partition on an election day, though there was no proof that he sold or offered to sell any liquor. Mallon v. Commonwealth (Ky.) 98 S. W. 315, 316.

BARTENDER

See Saloon Bartender.

An allegation of the answer in an action on a benefit certificate that insured while a member engaged in the sale of malt, spirituous, and vinous liquors to be used as a beverage in the capacity of proprietor, agent, and servant—"that is to say, that on or about" a certain date, insured "engaged in the occupation of bartender in a saloon in the city of B."—sufficiently alleged a breach of the by-laws providing that a member who engages in the manufacture or sale of spirituous or malt liquors to be used as a beverage in the capacity of agent or servant shall forfeit all rights of membership; a "bartender" being one who works in a saloon serving the patrons with liquid refreshments. Schwanekamp v. Modern Woodmen of America, 120 Pac. 806, 807, 44 Mont. 526.

As laborer

See Laborer.

BARBER

As mechanic, see Mechanic.

BARBER SHOP

As place of public accommodation, see Place of Public Accommodation.
As workshop, see Workshop.

BARBERING

As mechanical pursuit, see Mechanical Pursuit.

BARE

"Bare," as regards wires carrying a current of electricity, means uninsulated. New England Telephone & Telegraph Co. v. Butler, 156 Fed. 321, 324, 84 C. C. A. 217.

BARE LICENSEE

See Licensee.

BARGAIN

See Complete Bargain; Grant, Bargain, and Sell.

A "bargain" is an agreement or a stipulation such as an agreement for the sale of property or a contract by which one party binds himself to transfer property for a consideration; and hence an answer setting up that a bargain for the sale of land was not evidenced by any memorandum in writing is equivalent to an allegation that a contract for the sale of land was not evidenced by a memorandum in writing. Koenig v. Dohm, 70 N. E. 1061, 1064, 209 Ill. 468 (citing Webster's Dict.).

To "bargain," as used in written authority to brokers to bargain and sell in the owner's name, implies negotiation over the terms of an agreement. Golden v. Claudel, 118 Pac. 77, 78, 85 Kan. 465.

BARGAIN AND SALE

"A deed of 'bargain and sale' is a real contract whereby a person bargains and sells his land to another for a pecuniary consideration, in consequence of which a use arises

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to the bargainee, and the statute of uses immediately transfers the legal estate and actual possession to the cestui que use without any entry or other act on his part, a kind of real contract whereby the bargainer, for some pecuniary consideration, contracts to convey the land to the bargainee, and the statute of uses completes the purchase." Lewis v. Yates, 59 S. E. 1073, 1082, 62 W. Va. 575 (quoting and adopting 5 Cyc. p. 616).

The words "bargain and sale" import a sale which vests the property in the buyer. A contract for the sale of hotel furniture by the successors of the buyer holding under a conditional sale, providing that grantors did thereby "grant, bargain, sell, and convey" all their interests in the furniture, imported a sale of the property and not merely the interest of the sellers therein. Bevan v. Muir, 101 Pac. 485, 488, 53 Wash. 54, 32 L. R. A. (N. S.) 588.

A conveyance of land containing a covenant of general warranty sealed and acknowledged and reciting a valuable consideration may constitute a deed of "bargain and sale," though it does not contain granting words. Such a deed will pass title to the land under the statute of uses (Code 1906, § 3033, Code 1899, c. 71, § 14). The form of deed given in chapter 72 of the above act was not designed to abolish other modes of conveyance but was remedial only, intending to make the word "grant" pass real estate which it could not do before the adoption of the Code of 1899. Such conveyance is not a future one but is an executed transfer of title. According to 2 Blackstone's Comm. 339, a bargain and sale of lands is a species of conveyance, introduced by the statute of uses, and is a kind of real contract whereby the bargainor, for some pecuniary consideration, bargains and sells (that is, contracts to convey) to the bargainee and by such bargain becomes a trustee for, or seised to the use of, the bargainee, and the statute of uses completes the purchase; the bargain vesting the use and the statute vesting the possession. According to 13 Cyc. 524, "any writing that sufficiently identifies the party, describes the land, acknowledges a sale in fee of the vendor's right for a valuable consideration, and is signed and sealed by the grantor and duly attested is held to be a good deed of bargain and sale." (See, also, 13 Cyc. 601, 602). According to 2 Lomax Dig. p. 129, "a bargain and sale to uses is a contract by which a person conveys his lands to another for a pecuniary consideration, in consequence of which a use arises to the bargainee; and St. 27, Hen. VIII, immediately transfers the legal estate and possession to the bargainee, without any entry or other act on his part; or in Virginia, in consequence of the pecuniary consideration paid for the land, a use is raised to him who paid it, which constitutes him a bargainee, and then, because he is a bargainee, the act of assembly transfers to him the possession of the bargainor. The proper and technical words of this conveyance are 'bargain and sell'; but any other words that would have been sufficient to raise a use upon valuable considerable before the statute are now sufficient to constitute a good bargain and sale; but proper words of limitation must be inserted." (See, also, Devlin, Deeds, §§ 22, 23). Where the instrument is executory and contemplates a future conveyance, it is not a deed of bargain and sale, unless a future conveyance is not necessary and the words of the instrument are sufficient to pass the estate. Many executory contracts operate as deeds of bargain and sale under the statute of uses and do not require any further conveyance, and many useless suits for specific performance are brought. Waldron v. Pigeon Coal Co., 56 S. E. 492, 493, 61 W. Va. 280 (citing Uhl v. Ohio River R. Co., 41 S. E. 340, 51 W. Va. 106, 114; McDougal v. Musgrave, 33 S. E. 281, 46 W. Va. 509; Lindsey v. Eckels, 40 S. E. 23, 99 Va. 668; Ocheltree v. McClung, 7 W. Va. 232).

Gift distinguished

See Gift.

BARGE

The word "boat," when used in its ordinary sense, means any water craft, while a "barge" is a flat-bottomed freight boat or lighter for harbors and inland waters. In an action by a servant for personal injuries alleged to have been caused by stepping upon a defective portion of a "barge," evidence that the injury occurred because defendant stepped upon a defective portion of a "boat" was not at variance, although the tow, which plaintiff was engaged in assisting to make up at the time he was injured, consisted of crafts some of which were technically known as "boats" and others as "barges." Monongahela River Consol. Coal & Coke Co. v. Hardsaw (Ind.) 77 N. E. 363–365; Monongahela River Consol. Coal & Coke Co. v. Hardsaw (Ind.) 79 N. E. 1062, 1064.

As vessel

See Vessel.

BARK

See Salts of Cinchona Bark.

BARN

A "barn," when conveyed or reserved by name, may include a shed connected with it and other privileges. Baker v. Bessey, 73 Me. 472, 478, 40 Am. Rep. 377 (citing Cunningham v. Webb, 69 Me. 92).

A "barn" is defined as a covered building designed for the storage of grain, hay, flax, or other farm produce. In America, barns also usually contain stabling for horses and cattle. The word "corncrib," as used

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in a statute providing that "any person who willfully sets fire to or burns * * * any corncrib or corn pen containing corn, or any barn * * * is guilty of arson in the second degree," means a building or structure in its entirety and not a room or apartment in a building or structure. Therefore an indictment charging the burning of a corncrib is not sustained by proof that the building destroyed was a barn in which one room was partitioned off as a corncrib. Jackson v. State, 40 South. 979, 980, 145 Ala. 54 (quoting and adopting definition in Century Dictionary and Webster's International Dictionary).

A "barn" signifies a place greatly different from a wharf or warehouse and does not, within any ordinarily accepted meaning of the word, indicate a place where the business of "storing the goods of others for hire" is conducted. McReynolds v. People, 82 N. E. 945, 950, 230 Ill. 623.

As building

See Building (In Insurance).

As dwelling

See Dwelling—Dwelling House.

As warehouse

See Warehouse.

BARRATRY

See Champerty; Common Barrator.

BARREL

It appeared that salted herring are dealt in by the barrel, that in wholesale trade a "barrel" means 200 pounds of net fish, that it is usual to deliver 228 pounds of fish as taken from the hold of a vessel, in accordance with a long-standing custom to allow for salt, scale, and dirt, and that at no time does this extra 28 pounds enter into the marketable weight of the merchandise. Held that, in assessing duty on the weight of such fish under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 260, 30 Stat. 171, a like allowance should be made. Lincoln, Willey & Co. v. United States, 178 Fed. 599, 601.

BARRISTER

In England the legal practitioners are divided into two classes, denominated solicitors or attorneys and "barristers," and their respective duties and functions are well defined. It is only "barristers" and not attorneys that at common law could not recover for professional services, and it is not and never has been the common law in England or in this state that an attorney could not so recover. In this case the plaintiff described himself as an attorney and counselor at law, indicating that in Missouri, as in this state, the distinction between an attorney and counselor at law no longer obtains. Spencer v. Busch, 98 N. Y. Supp. 690, 692, 50 Misc. Rep. 284.

BARTER

See Sell, Barter or Loan.

"Where one commodity is exchanged for another of the same or different kind, without agreement as to price or reference to money payment, the transaction is not a sale but a 'barter' or 'exchange.'" State v. Brown, 102 S. W. 394, 395, 83 Ark. 44, 119 Am. St. Rep. 109 (quoting and adopting the definition in Gillan v. State, 2 S. W. 185, 47 Ark. 555).

Proof that accused furnished prosecutor a quart of whisky under an agreement that he was to return other whisky shows a "barter or exchange" within the statute prohibiting the sale, barter, or exchange of intoxicating liquor, though prosecutor testified that defendant lent him the whisky. Clark v. State, 52 South. 893, 894, 167 Ala. 101, 31 L. R. A. (N. S.) 517.

Plaintiff and his brother were both retail dealers in oleomargarine, and had paid the tax for the first six months of 1910. Plaintiff, having purchased a wholesale shipment of oleomargarine, which had not arrived, borrowed from his brother a package of the same material which the brother had obtained from the same wholesale dealer from whom plaintiff's supply had been ordered. A few days thereafter, plaintiff's shipment arrived, and he returned to his brother the precise amount borrowed of the same product and brand. Held, that such transaction constituted a barter, and not a sale, and did not subject plaintiff to the tax imposed on wholesale dealers in oleomargarine. Ewers v. Weaver, 182 Fed. 713, 714.

Sale distinguished

See Sale.

BASE

See At the Base.

Webster defines "base" as that on which something is supported, as the base of a column, the base of a mountain; i. e., at the foot of the column, at the foot of the mountain. The phrase "at the 'base'" in a deed conveying timber above a certain size at the base when cut at any time within 15 years meant at the ground, though it was customary in that vicinity to cut timber 2 feet above the ground. Banks v. Blades Lumber Co., 54 S. E. 844, 845, 142 N. C. 49.

BASEBALL

As labor, see Labor.
As other amusement, see Other.
As sport, see Sport.
As sporting, see Sporting.
Playing baseball on Sunday as a crime, see Crime.

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"Baseball" is not of the same class of games as horse racing, cock fighting, or card playing, not being an immoral or gambling game, though to some extent affected by chance, but is an athletic sport which has become the great national game. Playing of baseball on Sunday is not prohibited by a statute punishing every person guilty of horse racing, cock fighting, or playing at cards "or game of any kind" on Sunday. State v. Prather, 100 Pac. 57, 59, 79 Kan. 513, 21 L. R. A. (N. S.) 27, 131 Am. St. Rep. 339.

BASEBALL BAT

As deadly weapon, see Deadly Weapon.

BASE FEE

See, also, Determinable Fee; Qualified Fee.

An "estate in fee" may not be an estate in fee simple properly speaking, which is a pure inheritance, free from any and every qualification or condition. Estates in fee are not thus restricted in their nature. Every estate which may pass to heirs general by descent and continue forever is a fee; the owner having the entire property in himself. Such an estate may be a pure fee simple, or it may be a "base fee." The latter is an estate which may continue forever and is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent, though the object on which it rests for perpetuity may be transitory or perishable; yet such an estate is deemed a fee, because, as is said, it has a possibility of enduring forever. A limitation to a man and his heirs, so long as A. shall have heirs of his body, or to a man and his heirs, tenants of the manor of Dale, or till the marriage of B, or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books of this species of fee. The material difference between a fee simple and other fees is "that the former estate will, the latter may, continue forever." Waldron v. Glanini (N. Y.) 6 Hill, 601, 604, 605 (citing 4 Kent's Com. [5th Ed.] 5, 9; 2 Bl. Comm. 104, 106, 109; 1 Cruise's Dig. 68, §§ 42–86; 1 Preston, Estates, 429–431); Moss Point Lumber Co. v. Harrison County, 42 South. 290, 314, 89 Miss. 448 (citing Anderson's Law Dict.; 2 Bl. Comm. 109).

Ed. died in 1798, having by his last will and testament devised a farm to his son M., his heirs and assigns forever, and another farm to his son J. in like manner. The will contained this clause: "It is my will, and I do order and appoint, that if either of my sons should depart this life without lawful issue, his share or part shall go to the survivor." In 1801 the sheriff sold all the estate which M. then had in his share by virtue of a fi. fa. against him; and J. died in 1813, leaving M. surviving. Held, that the estate devised to M. was a "base," qualified, or determinable fee, which became a fee simple on the death of J., and belonged to W. Waldron v. Glanini (N. Y.) 6 Hill, 601, 604, 605 (citing 4 Kent's Com. [5th Ed.] 5, 9; 2 Bl. Comm. 104, 106, 109; 1 Cruise's Dig. 68, §§ 42–80, 81–86; 1 Preston, Estates, 429–431).

"Whenever a fee is so qualified as to be made to determine, or liable to be determined, at the happening of some contingent event or act, the fee is said to be 'base.' There are four classes of such fees, viz., fee upon condition, fee upon limitation, a conditional limitation, and a fee conditional at common law." Testator first devised to his wife and her heirs one half of all his property to hold, use, and manage during her life, remainder to testator's son, if he survived her. Testator then devised to the son and his heirs the other half of the property to have, hold, use, and manage in his discretion "during his natural life," and in case the wife survived the son at his death the property so devised to him should belong to her. Held that, under Rev. St. 1879, § 4008, requiring all courts concerned in the execution of wills to have due regard to the directions of the will and the true intent of the testator, the will should be construed as giving to the widow and son each a freehold estate for the life of the one who might first die, with cross-determinable fees in remainder; the one to be enlarged into a fee simple in the survivor. Tebow v. Dougherty, 103 S. W. 985, 988, 205 Mo. 315 (quoting and adopting the definition in Tiedeman, Real Prop. p. 28, §§ 44, 271).

A "base fee" is such a one as hath a qualification subjoined thereto and which must be determined whenever the qualification annexed to it is at an end (quoting and adopting the definition in 2 Black, Com. 109). A deed which in consideration of a sum paid by A. and K., a committee of a certain church society "or their successors to that office for the time being," conveyed "unto the said A. and K." a certain tract "to have and to hold the aforegranted premises to the said A. and K. and to their successors in office to their use and behoof forever," conveyed a fee simple and not a base or qualified fee which would terminate when the church society ceased to exist. Hamlin v. Perticular Baptist Meeting House, 69 Atl. 315, 317, 103 Me. 343.

Under a patent to the Choctaw Nation by which it conveyed and granted certain lands to said nation in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent, the estate conveyed is a "base fee." Dukes v. McKenna, 69 S. W. 832, 834, 4 Ind. T. 156.

A "base fee" is distinguished from a life estate in that such fee may last forever in case the first taker dies leaving a child or

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children entitled to take under the will but is liable to be terminated by the death of such first taker without leaving a child or children, while a life estate terminates absolutely on the death of the life tenant. Ahlfield v. Curtis, 82 N. E. 276, 277, 229 Ill. 139.

BASE PROPERTY

At common law a dog was declared to be "base property." Columbus R. Co. v. Woolfolk, 58 S. E. 152, 153, 128 Ga. 631, 10 L. R. A. (N. S.) 1136, 119 Am. St. Rep. 404.

BASED

BASED ON REASON

There is not much difference between the expressions "reasonable" and "based on reason," so that an instruction that by the term "reasonable doubt" was meant an actual substantial doubt based on a reason arising either from the evidence or want of evidence and sufficient to cause an ordinarily prudent person to hesitate and refuse to act in the most important affairs of life was not prejudicial to an accused. Turley v. State, 104 N. W. 934, 938, 74 Neb. 471.

BASED UPON THE ACTUAL EARNINGS

A statute provided that the price which a city should pay for a gas or electric plant purchased from a private owner should be its fair market value for the purposes of its use, including as an element of value the earning capacity of such plant "based upon the actual earnings" being derived from such use at the time the city voted to establish the plant and including the market value of any other locations or similar rights acquired by the owners of the plant, with the intention of using them in connection with such plant, less the amount of any incumbrances. Held, that the phrase "based upon the actual earnings" did not mean that the earning capacity of the plant purchased should be appraised solely on the basis of its actual earnings, as other conditions could be considered, such as the fact that the productive power of the plant might have been strained to an extent at the time of the purchase which could not be maintained, and the fact that there might be defects in the plant which would have to be corrected; the real criterion in determining the value being the amount of net profits then derived and which would be derived from the use of the plant. Norwich Gas & Electric Co. v. City of Norwich, 57 Atl. 746, 751, 76 Conn. 565.

BASEMENT

See Corner Basement.

Tenement House Act (Laws 1901, p. 910, c. 334) § 91, subd. 7, declares "a 'basement' is a story partly but not more than one-half below the level of the curb." People ex rel. Cohen v. Butler, 109 N. Y. Supp. 900, 904, 125 App. Div. 384.

The question being whether the lowest inhabited floor of a tenement house should count as a "story," and this depending on whether it was a "basement" more than five feet above the "grade," and assuming that "grade" is synonymous with "curb level" as used in the statute, but the word "curb level" being susceptible of two meanings one of which would result in the lowest floor being counted as a story and the other would not, it was incumbent on the plaintiff to show facts which would require the application of the former meaning. Board of Tenement House Supervision of New Jersey v. Schlechter, 83 Atl. 783, 784, 83 N. J. Law, 88.

As building

As building, see Building (In Criminal Law).

BASEMENT ADJOINING THE CORNER

A subtenant could not sustain his right to hold a "corner basement" under a lease covering the "basement adjoining the corner," where there was ample evidence that there was a basement other than the one occupied by the tenant answering such description in the absence of a reformation of the lease or acts of the landlord after the making of such lease recognizing the identity of the basements; the expressions not being apparently synonymous. Kasower v. Sandler, 96 N. Y. Supp. 734, 736.

BASEMENT BAKERY

Ovens and chimneys were part of premises leased as a "basement bakery," being connected with the basement of such premises. Lubelsky v. Haimowitz, 123 N. Y. Supp. 974, 975.

BASES

Umbrellas sold in the umbrella trade without handles are known as "bases." Fire Ass'n of Philadelphia v. Allesina, 89 Pac. 960, 962, 49 Or. 316.

BASIN

See Drainage Basin.

BASIS

See Buyer's Tank Basis; Cash Basis.

Evidence was admitted by experts in the cotton business that the term "basis," as used in cotton contracts and transactions, meant the price per pound for cotton of the grade known as "middling," relatively to which the price of all other grades is fixed. Daniel v. Maddox-Rucker Banking Co., 53 S. E. 573, 574, 124 Ga. 1063.

The evidence showed that the words "basis Kaw," as used in an order for the purchase of corn telegraphed to the seller's

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place of business at the town of Kaw, "accept four cars mixed ear corn basis Kaw," meant that the purchaser would pay the freight on the corn equal in amount to the freight from Kaw, regardless of where the corn might be shipped from. Kaw City Mill & Elevator Co. v. Purcell Mill & Elevator Co., 91 Pac. 1022, 1023, 19 Okl. 357.

BASTARD

See, also, Illegitimate Child; Lawful Issue.

Under the common law a child not conceived or born in lawful wedlock was denominated filius nullius—a bastard. Rohwer v. District Court of First Judicial Dist. (Utah) 125 Pac. 671, 674.

"A child of a married woman, begotten by one who is not the husband of the mother, is a 'bastard.'" McLoud v. State, 50 S. E. 145, 146, 122 Ga. 393.

The word "bastard," in our language, both in its legal signification and in its literary use, has a well-defined meaning. Webster defines it as follows: "A natural child; a child begotten and born out of wedlock." Now, in order that the child be begotten and born out of wedlock, it follows that the mother is an unmarried woman. In law the word is defined as follows: "A child whose parents were not married to each other at the time of its birth." Campion v. Lattimer, 97 N. W. 290, 291, 70 Neb. 245.

Since a bastard at common law was filius nullius, he was therefore kin of nobody, and had no ancestor from whom any inheritable blood could be derived. Truelove v. Truelove, 86 N. E. 1018, 1020, 88 N. E. 516, 172 Ind. 441, 27 L. R. A. (N. S.) 220, 139 Am. St. Rep. 404.

In Rev. St. § 5614, providing that, when an unmarried woman who has been delivered or is pregnant with a bastard child makes complaint thereof in writing under oath before any justice of the peace charging a person with being the father of the child, the justice shall issue his warrant for the arrest of the person so charged, the common-law definition of the word "bastard," namely, one that is begotten and born out of lawful matrimony, must be given in the statute. Powell v. State, ex rel. Fowler, 95 N. E. 660, 661, 84 Ohio St. 165, 36 L. R. A. (N. S.) 255.

The phrase "bastard son of a bitch," addressed by decedent to accused, "was intended as an insulting remark to" accused, "but evidently not a reflection or intended reflection upon his mother." Hayman v. State, 83 S. W. 204, 205, 47 Tex. Cr. R. 263 (citing Simmons v. State, 5 S. W. 208, 23 Tex. App. 653; Levy v. State, 12 S. W. 596, 28 Tex. App. 204, 19 Am. St. Rep. 826).

Child of Slaves

The child of a woman slave by a white man is a bastard, and cannot inherit the succession of the mother opened in Louisiana since Acts 1894, No. 54, prohibiting marriage between white persons and persons of color. Succession of Davis, 52 South. 266, 268, 126 La. 178.

BASTARDY PROCEEDING

A bastardy proceeding is a civil action for the enforcement of a police regulation, so far as it is necessary for the purpose of securing an allowance to the woman, and to relieve the county from the burden of supporting the child. State v. Currie, 76 S. E. 694, 695, 161 N. C. 275.

A "bastardy proceeding" is neither a civil nor criminal action, strictly speaking, but is a mere statutory proceeding designed primarily to enable the injured female to recover, of the person who, in the eyes of the law, has committed a grievous injury to her, compensation therefor. Meyer v. Meyer, 102 N. W. 52, 55, 123 Wis. 538.

"Bastardy proceedings" are so far of a criminal nature that a person who is within the state only for the purpose of putting in special bail in an action in which he was arrested under a capias is not privileged from arrest on a charge of bastardy. Cady v. St. Clair Circuit Judge, 102 N. W. 1025, 139 Mich. 618.

A "bastardy proceeding" is civil and not criminal in its nature, and is intended merely for the enforcement of a police regulation. State v. Addington, 57 S. E. 398, 399, 143 N. C. 683, 11 Ann. Cas. 314 (citing State v. Liles, 47 S. E. 750, 134 N. C. 735).

A "bastardy proceeding" held a civil suit under a statute providing that no person shall be excluded from being a witness in any "civil suit" by reason of his interest. Murray v. Joyce, 44 Me. 342, 348 (citing Wilbur v. Crane, 30 Mass. [13 Pick.] 284).

BATCH MIXERS

Among concrete mixing machines, "'batch mixers' are to be distinguished from 'continuous mixers.' The latter are long cylindrical devices which receive materials and discharge them when mixed as a continuous operation." They were said to be less effective than batch mixers in mixing the material and to be subject to other objections. Ransome Concrete Machinery Co. v. United Concrete Machinery Co., 177 Fed. 413, 101 C. C. A. 217.

BATTERY

See Assault and Battery; Primary Battery; Secondary Battery; Storage Battery.

Pen. Code 1895, § 96, defines a "battery" to be the unlawful beating of another. Harris v. State, 60 S. E. 127, 3 Ga. App. 457.

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A battery is the actual infliction of an injury. State v. Dyer (Del.) 58 Atl. 947, 948, 5 Pennewill, 88.

A "battery" is the application to a person of attempted force and violence. Stark v. Epler, 117 Pac. 276, 278, 59 Or. 262.

"Battery" is the actual accomplishment of an unlawful attempt with violence to do an injury to the person of another. State v. Brittingham (Del.) 80 Atl. 242, 243.

"Battery" is the unlawful beating of another whether it be done with malice or without malice but in anger. A provocation which merely substitutes into the offense the element of anger for that of malice does not alter the nature of the crime but the element of unlawfulness which in battery is the only necessary element remains. Cole v. State, 59 S. E. 24, 26, 2 Ga. App. 734.

Under the statute defining a "battery" to be any "willful or unlawful" use of force or violence upon the person of another, an instruction that a " 'battery' is any unlawful or willful" use of force or violence upon the person of another was erroneous for using the disjunctive between "willful and unlawful"; it being necessary that the force be both willful "and" unlawful. State v. Magill, 122 N. W. 330, 331, 19 N. D. 131, 22 L. R. A. (N. S.) 666.

A "battery" was not committed unless the act alleged to constitute it was committed against the will of the injured party. Ross v. State, 93 Pac. 299, 301, 16 Wyo. 285 (citing 2 Bish. New Crim. Law, §§ 23, 28, 70).

Assault distinguished

See Assault.

Assault included

Every "battery" implies an assault, because there can be no "battery" without an assault, but there may be an assault without any "battery." The jury may convict of an assault under an indictment for assault and battery but may not convict of assault and battery with no evidence of battery. Montgomery v. State, 37 South. 835, 836, 85 Miss. 330 (quoting and adopting 1 Whart. Crim. Law [10th Ed.] § 640).

Force

To constitute a "battery" there must be an actual touching of the person assaulted, however slight. State v. Cruikshank, 100 N. W. 697, 699, 13 N. D. 337.

Intent

"Battery" is the carrying out of an intent to assault by actual infliction of the injury. Luther v. State, 98 N. E. 640, 641, 177 Ind. 619.

A "battery" is any violence to the person of another with intent to injure, and, if unjustified, it is unlawful. Cox v. State, 130 S. W. 989, 99 Ark. 90.

BAWDYHOUSE

Keeper of bawdyhouse, see Keeper.

By Acts 1907, c. 132, a "bawdyhouse" is defined to be one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation. Mosher v. State, 136 S. W. 467, 468, 62 Tex. Cr. R. 42.

Intercourse of defendant with another cannot be relied on for a conviction for keeping a "bawdyhouse," defined by the statute as one kept for prostitution, or where prostitutes are permitted to resort or reside for purpose of plying their vocation; this contemplating that there must be other women resorting to or residing at the place. Riley v. State, 125 S. W. 582, 58 Tex. Cr. R. 176.

A "bawdyhouse" is a house kept for the purpose of prostitution; that is, for men and women to have unlawful, illicit sexual intercourse together therein. The statute uses the words "bawdyhouse or brothel, or house of assignation." A "bawdyhouse" is a house of ill fame. An "assignation house" is a house resorted to for purposes of prostitution, and is synonymous with "bawdyhouse" or "brothel." State v. Keithley, 127 S. W. 406, 408, 142 Mo. App. 417.

As house of ill fame

A "bawdyhouse" is a house of ill fame, kept for the resort and commerce of lewd people of both sexes. A meeting place and opportunity for the commission of sexual offenses. These facts and the presence there of lewd men and women are all the facts necessary to stigmatize the place as a bawdyhouse; acts of sexual misconduct being presumed and need not be proved. State v. Price, 92 S. W. 174, 175, 115 Mo. App. 656.

BAY

The place in question was a long strip of beach which curved somewhat inward from a certain head and mountain, so that a straight line drawn from the shore at the head to the shore at the mountain would be about two nautical miles and include a comparatively narrow strip of water, and the subtending chord of the arc so made is not more than three nautical miles in length but is several times the length of the bisecting radius between the chord and circumference. Held, that the area of water so circumscribed was a "bay" within a statute prohibiting the taking of certain kinds of fish in bays, etc., where the distance from opposite shores of the same at any point is not more than three nautical miles in width; any part of the sea bounded on three sides by land and upon the fourth side by a line not more than three nautical miles in length which touches both opposite shores coming within the statute. State v. Murray, 24 Atl. 789, 84 Me. 135.

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BAY HORSE

See Dark Bay.

The term "bay," as applied to the description of the color of horses, appear, according to the lexicographers, to have reference to "reddish brown." Stickney v. Dunaway & Lambert, 53 South. 770, 771, 169 Ala. 464.

BAY RUM

"Bay rum" is a fragrant spirit, obtained by distilling the leaves of the pimenta acris with rum, or by mixing the volatile oil procured from the leaves by distillation with alcohol, water, and acetic ether. It is also defined as an aromatic liquid obtained by distilling the leaves with the bayberry, or by mixing various oils, as the oils of myrica, of orange peel, and of pimenta, with alcohol. Under the decision of the Circuit Court of Appeals, it must be held that it is neither a "distilled spirit," as that term is defined by Rev. St. U. S. § 3248, nor a "product of distillation," within section 3254, providing for internal revenue taxation of products of distillation as distilled spirits. Roche v. Jordan, 175 Fed. 234, 236.

BAY WINDOW

As building, see Buildings.

BAYOU

"Bayou" means an offshoot of a river, an outlet of a lake, a small river, or creek. In the Southern United States, the outlet of a lake or one of the several outlets of a river through its delta, a sluggish water course; and hence an indictment alleging that defendant placed and maintained a seine net in a bayou sufficiently alleged that the net was placed in the waters of the state. Richardson v. State, 91 S. W. 758, 759, 77 Ark, 321 (quoting and adopting the definition in Webster's Dict. and Cent. Dict.).

Parol evidence is admissible to show that the word "bayou," as used in a contract of sale, meant a variety of ponds known as bayous. Gardiner v. McDonogh, 81 Pac. 964, 966, 147 Cal. 313.

BAZAAR

The word "bazaar" is indiscriminately applied to shops, singly or in groups, where goods are displayed for sale, to fairs or sales for the benefit of churches or charities, and to other places fitted up for the sale of goods. It cannot be the subject of a trade-name in which any one can acquire an exclusive proprietary right. Ball v. Broadway Bazaar, 87 N. E. 674, 194 N. Y. 429.

BE—BEING

See Have Been; Life or Lives in Being; May Be; Not Being.

The word "being" is equivalent to which is. State ex rel. Porter v. Ritchie, 91 Pac. 24, 27, 32 Utah, 381.

"Be," as used in a statute providing that no person shall be an alderman in a city of the fourth class unless he is a resident of the ward from which he is elected, is not used in the restricted narrow meaning of become; such statute not only forbidding a person to become an alderman unless he is eligible under the section but forbidding him to be one (that is, to remain one if he becomes disqualified). State ex rel. Johnston v. Donworth, 105 S. W. 1055, 127 Mo. App. 377.

The verb "to be" means to exist as well as to become. The former meaning signifies continuance in a present state, the latter a future entry into a different condition. The agreement of the parties that the excess of the plaintiff's advances "shall be secured by the guaranty of the defendants is as consistent with the meaning that from the date of the contract it shall exist or stand secured by that guaranty as it is within the meaning that it shall subsequently become secured. Guaranty Trust Co. of New York v. Koehler, 195 Fed. 669, 679, 115 C. C. A. 475.

A clause avoiding an insurance if "with the knowledge of insured foreclosure proceedings 'be' commenced," and similar clauses, have been construed as "directed to the fact of knowledge on the part of the insured of the commencement of foreclosure proceedings and not to the time he may obtain such knowledge; the reasonable construction to be given to the clause is that whenever he shall have knowledge of the proceedings, and not before, and shall fail to obtain the consent of the insurer thereto, the policy shall be avoided." The majority of the court is in full accord with such construction. Parker, J., dissenting, with whom Hocker, J., concurs, says that clearly the words "relate to the time of commencement of the foreclosure proceedings and not to the fact of commencement." Kelly Co. v. St. Paul Fire & Marine Ins. Co., 47 South. 742, 750, 56 Fla. 456, 16 Ann. Cas. 654 (quoting and adopting Schroeder v. Imperial Ins. Co., 63 Pac. 1074, 132 Cal. 18, 84 Am. St. Rep. 17).

The words "that there 'be' and hereby is granted," contained in the grant to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat. 365, 367), imported a transfer of present title not a promise to transfer one in the future. Northern Lumber Co. v. O'Brien, 27 Sup. Ct. 249, 250, 204 U. S. 190, 51 L. Ed. 438.

BE GOVERNED

An agreement by a member of a beneficial association that he should "be governed" by all rules, laws, and regulations of

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the association then in force or that might be thereafter enacted bore reference to such laws as were then in force or future laws as might be provided tending to regulate his conduct as a member and the internal affairs of the association, and a further agreement that his contract should "be controlled" by all laws, rules, and regulations then in force or that might be thereafter enacted bore reference only to such present and future laws as were in aid and in furtherance of the essential elements of indemnity, vouchsafed in his contract, and did not authorize a subsequent by-law reducing the amount of recovery in case of suicide. Lewine v. Supreme Lodge, Knights of Pythias of the World, 99 S. W. 821, 825, 122 Mo. App. 547.

BE IN FORCE

A policy of life insurance and the application on which the same was issued provided that it should not "take effect or be in force" until delivered to the applicant in person during his lifetime and while in good health. The expression "take effect or be in force" merely intended to distinguish between policies which have not been delivered and those which have been delivered. Austin v. Mutual Reserve Fund Life Ass'n, 132 Fed. 555, 559.

BE NO DEFENSE

The term "it shall be no defense," as used in Rev. St. Mo. 1899, § 7896, which provides that, in all suits upon policies of insurance on life heretofore issued by any company doing business in this state to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or the jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, is grammatically the equivalent of "it shall not be a defense" and means that the given fact of suicide shall not bar an action on the policy and does not affect a provision of the policy that in case of suicide the beneficiary shall receive a specified sum, less than the face of the policy. Whitfield v. Ætna Life Ins. Co., 125 Fed. 269, 270.

BE PAID

A testamentary direction that one-fourth of the principal of the residue shall "be paid" to certain children or descendants of a child was applicable exclusively to personalty. Robinson v. Robinson, 72 Atl. 883, 885, 105 Me. 68, 32 L. R. A. (N. S.) 675, 134 Am. St. Rep. 537.

BE RESPONSIBLE FOR

A treasurer of a corporation, merely empowered by the by-laws to "have charge of and be responsible for" the securities of the corporation, has no authority to change the registration and sell certain of its bonds without special authority. Jennie Clarkson Home for Children v. Chesapeake & O. R. Co., 87 N. Y. Supp. 348, 353, 92 App. Div. 491.

BEING INSOLVENT

"Being insolvent" refers to the status or condition of insolvency. In re Douglas Coal & Coke Co., 131 Fed. 769, 773.

BEING PERFORMED

The words "has been and is being performed," as used in a petition in an action by a railroad company on a contract binding defendant to pay to it a specified sum on condition that it shall establish and maintain a station at a designated place, which recites that the condition of the contract has been and is "being performed," refer to the performance of the condition of constructing a depot at the designated place and to the maintenance of the depot at that point. Piper v. Choctaw Northern Townsite & Improvement Co., 85 Pac. 965, 966, 16 Okl. 436.

BEING REINED

"Being reined," when referring to the driving of mules, may mean more than the manner in which they were driven. St. Louis Southwestern R. Co. of Texas v. Dixon (Tex.) 91 S. W. 627, 628.

BEING TRANSPORTED

A passenger is "being transported" from the time of the beginning of the journey until its termination. Fremont, E. & M. V. R. Co. v. Hagblad, 106 N. W. 1041, 1042, 72 Neb. 773, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096.

BEING UNDERSTOOD

The words, "it being understood," in the ordinary use of that phrase, have the same force and effect as the words "it is agreed." Lind v. United States, 44 Ct. Cl. 558, 567.

BEING UPON FARMS

Comp. Laws 1897, c. 195, providing for the organization of mutual insurance companies, authorizes them to insure farm property, buildings, and their contents, farm implements, livestock, wagons, etc., "being upon farms, as farm property." Held, that a policy covering farm products, farm implements, carriages, and livestock on premises, did not cover the fixtures and utensils of a slaughterhouse which were no part of a farm. Geraghty v. Washtenaw Mut. Fire Ins. Co., 108 N. W. 1102, 1103, 145 Mich. 635.

BEING WITHIN

See Lying or Being Within.

BEACH

See Public Beach.

The words "beach" or "ocean front," as used in Act April 6, 1889 (Laws 1889, p. 206), authorizing cities on the ocean to lay out streets, drives, and walks on the beach

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or ocean fronts, include the entire beach covered by ocean tides within the limits of the city. State v. Wright, 23 Atl. 116, 118, 54 N. J. Law, 130.

As land between high and low water mark

"The term 'beach' is used sometimes for the shore between high and low water mark and sometimes for a strip of land lying next to and above such shore." Dawson v. Town of Orange, 61 Atl. 101, 109, 78 Conn. 96.

The word "beach" is of doubtful meaning when used as a boundary, as it means in one case the sea side and in another case the land side of the "beach." The meaning to be attached to the word when used in a deed must depend upon the instrument in which it occurs, taken as a whole, and upon surrounding circumstances. It does not include the space between high and low water mark, if the word is used in its technical sense. Haskell v. Friend, 81 N. E. 962, 963, 196 Mass. 198 (citing Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155).

The margin of the bed of a river which lies between high and low water mark is called the "beach" or "shore," which is actually a part of the bed of the river, and, when the river is at its full flow, whether caused by the tide or by the natural increase of waters, by rains, floods, and the like, filling its natural bed to its highest reach of flow, it marks its high-water, while its lessened range of flow by summer heats shows its low-water, mark. Sun Dial Ranch v. May Land Co., 119 Pac. 758, 762, 61 Or. 205.

An ancient patent to an individual bounded the land on the south with the "main sea or ocean to low-water mark," and on the west with the inlet which makes the bay between Jamaica and a neck of land, together with ponds, beaches, etc. Held, that the grant was to low-water mark; the word "beach," in describing the thing granted, meaning tide way, though it may be used, for purposes of boundary, to describe the shore above high-water mark. Rockaway Park Improvement Co. v. City of New York, 124 N. Y. Supp. 1096, 1104, 140 App. Div. 160.

A conveyance which makes the "upper edge of the beach" a boundary, and which expressly provides that "no part of the beach is hereby conveyed," conveys only to the line of mean high-water mark, and does not include the "beach," which, in its usual signification in grants of land bounded on tidal waters, means the space between ordinary high and low water mark, or the space over which the tide usually ebbs and flows; and the fact that the shore above high-water mark is covered by the heavy spring tides does not make it a part of the "beach," within the meaning of that word in the conveyance. Castor v. Smith, 98 N. E. 31, 211 Mass. 473.

An ordinance prohibiting the removal of stone, sand, or earth from the beach, or from the water within 300 feet of high-water mark along a navigable lake between the northern and southern city limits, does not assume to prohibit interference above high-water mark, but prevents such removal from the beach, or from the water within 300 feet of high-water mark along the shore of the lake; the word "beach" being synonymous with "shore," and meaning that portion of the shore or lake between ordinary high and low water mark. C. Beck Co. v. City of Milwaukee, 120 N. W. 293, 296, 139 Wis. 340, 131 Am. St. Rep. 1061; Damman v. Same, 120 N. W. 298, 139 Wis. 356.

Where deeds conveying land abutting on a highway along the high-water line, described the boundary as the "sea or highway," "beach and highway," "bank and highway," the grantee might adopt the boundary most favorable to him. The words "beach" and "bank" might be construed to mean the beach between high and low-water mark. Merwin v. Backer, 68 Atl. 373–376, 80 Conn. 338.

As meadow

See Meadow.

BEADS

See Loose Beads; Pearl Beads.

The word "beads," as used in the Tariff Act, must be given the meaning applied to it commercially. They have been defined to be little perforated balls to be strung on a thread and worn as an ornament. The trade meaning of the word does not differ from the dictionary meaning. Opal beads and rondelles are not beads within the classification of the Tariff Act. United States v. American Gem & Pearl Co., 142 Fed. 283, 284.

"From an early day up to and including the Act of 1883 beads had separate classification, and were dutiable at a higher rate than precious stones or imitations of them. Precious stones set and unset; imitations of them set and unset, and compositions of glass or paste when not set, were separately mentioned, and bore a different rate of duty from beads, and were not confounded with beads by resemblances, indeed not always by identity of material." "As early as 1858 the Treasury Department decided that genuine pearls, when imported strung on a thread to be used as beads for necklaces without further manufacture, were dutiable as beads. And later jet and coral necklaces were classed as beads and bead ornaments. Also glass balls and oval pieces of onyx, and pieces of glass or paste capable of being strung, were held to be beads against a claim of being imitations of precious stones." "It may be that in construing a tariff act it is the essential nature of the

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article, not the purpose of the importer, which determines its classification; but if color may be regarded to bring the article to the resemblance of a precious stone its other conditions may be regarded to bring it to the character of a bead—a manufacture of glass, a mere hat or dress trimming, or an ornament for embroidery." United States v. Morrison, 21 Sup. Ct. 195, 197, 179 U. S. 456, 462, 45 L. Ed. 275.

"Beads" are not to be included within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189, for beads "not threaded or strung," because they are strung only temporarily. Henry E. Frankenberg Co. v. United States, 146 Fed. 63, 64, 76 C. C. A. 514.

BEADS OF ALL KINDS

The provision in Tariff Act July 24, 1897, c. 11, Schedule N, § 1, par. 408, 30 Stat. 189, for "beads of all kinds, not threaded or strung," does not include beads strung or threaded temporarily. Henry E. Frankenberg Co. v. United States, 144 Fed. 704, 706; Id., 146 Fed. 63, 76 C. C. A. 514.

Pierced imitation pearls are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189, relating to "beads of all kinds, not threaded or strung," rather than under paragraph 435 (30 Stat. 192), as imitations of precious stones. United States v. Weinberg, 139 Fed. 1006.

In construing the provisions in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, pars. 408, 435, 30 Stat. 189, 192, for "beads of all kinds," and "precious stones," respectively, held, that pierced opal balls about one-fourth of an inch in diameter and pierced rock-crystal rondelles, or small, flat, faceted disks, are dutiable under the latter provision rather than the former; these articles not being commercially known as beads. Held, also, as to the rock-crystal articles, that they are dutiable under said latter provision rather than as manufactures of rock crystal under paragraph 115, Schedule B, § 1, of said act (30 Stat. 159). United States v. American Gem & Pearl Co., 142 Fed. 283, 284.

The provision in paragraph 408, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 189, for "beads of all kinds not threaded or strung," was intended to exclude only beads permanently metal beads intended for the manufacture of fabrics and other articles, and is held to include metal beads intended for the manufacture of purses, threaded or strung temporarily for the purposes of transportation and sale only, on cheap, weak cotton threads, and arranged in bunches. United States v. Buettner, 133 Fed. 163, 164, 66 C. C. A. 289.

BEAGLE HOUND

A "beagle hound," which is a breed of dogs trained to hunt rabbits only, does not come within a statute prohibiting the owners of dogs of a breed commonly used for hunting deer, moose, or caribou from permitting them to run at large in forests inhabited by such animals. State v. Zonetti, 67 Atl. 817, 818, 80 Vt. 348.

BEAMS

See I Beams.

The "beams" of a ship are the timbers extending across the vessel to support the deck and to keep the sides of the vessel in shape. W. S. Keyser & Co. v. Duit, 150 Fed. 328, 80 C. C. A. 212 (citing Patterson's Nautical Ency. verbo "Beam").

BEAR

The words "bear arms" in the Constitution refer to their military use and not to wearing them about the person as a part of the dress. Ex parte Thomas, 97 Pac. 260, 262, 21 Okl. 770, 20 L. R. A. (N. S.) 1007, 17 Ann. Cas. 566.

On a trial for unlawfully carrying a pistol, where the evidence merely showed that two witnesses saw accused put a pistol in a pan, and did not see where he got it but only saw it while it was in his hand, it was error to give the general charge against accused since "carry" in Acts 1909, p. 258, § 2, is synonymous with "bear," and it was for the jury to say whether accused carried the pistol in the sense of bearing arms. Nichols v. State, 58 South. 681, 682, 4 Ala. App. 115.

Section 4 of the Bill of Rights, which provides that "the people have the right to 'bear' arms for their defense and security," is a limitation on legislative power to enact laws prohibiting the bearing of arms in the militia or any other military organization provided for by law but is not a limitation on legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons. City of Salina v. Blaksley, 83 Pac. 619, 620, 72 Kan. 230, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196.

Within the Constitution of the state (article 1, § 1, par. 22), providing that the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms shall be borne, and within the Constitution of the United States, providing that, a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed, "the word 'arms' evidently means the arms of a militia man, the weapons ordinarily used in battle, to wit, guns of every kind, swords, bayonets, horseman's pistols, etc. The very words 'bear arms' had then and now have a technical meaning. The 'arms-bearing' part of a peo-

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ple were its men fit for service on the field of battle. That country was 'armed' that had an army ready for fight. The call 'to arms' was a call to put on the habiliments of battle, and I greatly doubt if in any good author of those days a use of the word 'arms,' when applied to a people, can be found which includes pocket pistols, dirks, sword canes, tooth picks, bowie knives, and a host of other relics of a past barbarism, or inventions of modern savagery of like character." The act of the General Assembly, approved Aug. 12, 1910 (Laws 1910, p. 134), entitled "An act to prohibit any person from having or carrying a revolver without first having obtained a license from the ordinary of the county of said state, in which the party resides, and to provide how said license may be obtained and a penalty prescribed for a violation of the same and for other purposes," is not void because in violation of article 1, § 1, par. 22, of the Constitution of the state, or in violation of article 8, § 2, of the Constitution of the United States. Strickland v. State, 72 S. E. 260, 264, 137 Ga. 1, 36 L. R. A. (N. S.) 115, Ann. Cas. 1913B, 323 (quoting and adopting definition in Hill v. State, 53 Ga. 472).

BEAR DOWN

Statement by section foreman to the men when they were starting the hand car in the evening to "bear down" meant to go in a hurry. Brooks v. Louisville & N. R. Co. (Ky.) 71 S. W. 507.

BEARER

The "bearer" is the person in possession of a bill or note which is payable to bearer. Steinhilper v. Basnight, 69 S. E. 220, 221, 153 N. C. 293 (quoting and adopting the definition in Mayers v. McRimmon, 53 S. E. 447, 448, 140 N. C. 643, 111 Am. St. Rep. 879).

A county warrant payable to "A, B, or bearer" is legally equivalent to one payable simply to "bearer," and under the Judiciary Act of March 3, 1887, the assignee thereof may sue thereon in a federal court without reference to the citizenship of A. B. if the other requisite jurisdictional facts appear. Thompson v. Searcy County, 57 Fed. 1030, 1036, 6 C. C. A. 674.

BEAT

A letter known as a "beat" is one addressed to a person not to be found in the district of the letter carrier in the common understanding of postal employés. Goode v. United States, 16 Sup. Ct. 136, 137, 159 U. S. 663, 40 L. Ed. 297.

"To 'beat' is not necessarily to whip, to injure, or to hurt, but includes any unlawful imposition of the hands or arms." Lowry v. State, 69 S. E. 34, 8 Ga. App. 379.

A witness, in testifying as to the accused's character, was asked whether accused was "reputed to have committed grand larceny and to have 'beaten' the case." It was held that this question did not imply that he escaped from conviction by corrupt method, since the word "beat" is sometimes used in the sense of winning. People v. Callahan, 130 N. Y. Supp. 1041, 1042, 73 Misc. Rep. 455.

BEAVER STRIPS

"Beaver strips" are in the form of rectangular strips or bands of various sizes, consisting of rabbit fur and woolen cloth, used in the making of hats, the fur being the component material of chief value, and are dutiable as a manufacture of fur. Hermann v. United States, 145 Fed. 843; Herrmann v. Same, 141 Fed. 486.

BECAUSE OF

The words "because of," in an instruction authorizing recovery for suffering sustained because of injury, is equivalent to the word "caused." Merrill v. Los Angeles Gas & Electric Co., 111 Pac. 534, 538, 158 Cal. 499, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

BECOME

See May Become.

"Become" means to pass from one state to another, to enter into some condition by a change from another condition, or by receiving new or additional properties or qualities. A by-law of a fraternal insurance society, which provides that, if any member heretofore or hereafter adopted shall "become" intemperate in the use of drugs, the benefit certificate held by such member shall by such acts become and be absolutely null as to benefits, and all payments made thereon shall be thereby forfeited, does not apply to the case of a member who, prior to the enactment of such by-law, had become intemperate in the use of drugs and continued so thereafter. Taylor v. Modern Woodmen of America, 83 Pac. 1099, 1101, 72 Kan. 443, 5 L. R. A. (N. S.) 283.

BECOME DUE

Gen. St. 1906, § 541, provides that all taxes shall be due and payable on or after the first Monday of November of each year, and makes the duty of the collector to collect by levy and sale taxes unpaid on the first Monday in April. A contract required a company to pay all taxes on land for certain years, and provided that, if it should for three months after taxes become due and payable fail to pay such taxes, all rights should immediately cease as to all tracts of land on which it had failed to pay such tax-

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es. Held, that a forfeiture would not be incurred by a delay to pay the taxes until the March succeeding the first Monday of November; the word "become" meaning "be." McCaskill v. Union Naval Stores Co., 52 South. 961, 963, 59 Fla. 571.

Rev. Laws 1902, c. 141, §§ 26–28, authorize a creditor of an estate to recover his claim from the heirs or legatees under certain circumstances, but not in cases covered by section 13, which provides that a creditor, whose cause of action does not accrue within two years from the giving of the administration bond, may present his claim to the probate court before the estate has been fully administered, and if found to be justly due, or liable to "become due," the court shall order assets to be retained to satisfy the claim. A resident stockholder of an insolvent Minnesota corporation had been judicially determined, before his death, to be liable for the debts of the corporation to the amount of the face value of his stock, which liability, under the Minnesota statutes, might be collected by one or more assessments, as required, dependent on the solvency, etc., of other stockholders. Held, that this was a liability which might "become due," within section 13, and might therefore have been presented to the probate court, and hence the receiver could not maintain an action to collect any part thereof against the heirs of the stockholder and legatees of his widow. Converse v. Nichols, 89 N. E. 135, 137, 202 Mass. 270.

BECOME UNSAFE

The words "become unsafe" in Laws 1890, c. 568, § 10, as amended by Laws 1895, c. 606, providing that "if any highway or bridge shall at any time be damaged or destroyed by the elements or otherwise, or become unsafe, the commissioner of highways of the town may cause the same to be immediately repaired or rebuilt, if consented to by the town board," when considered in connection with the preceding section of the statute, which provides that, in case the highway commissioner shall determine that the sum of $500 will be insufficient he may cause a vote to be taken at an annual or special town meeting authorizing such additional sum to be raised as he shall deem necessary, not exceeding a specified per cent. on the taxable property, etc., must be restricted to the evident intent of the section, and the words do not give the commissioner power to rebuild with the consent of the town board, whether the unsafe condition arises from natural wear and decay or from destruction and impairment by the elements, and the commissioner has authority under the statute to rebuild a bridge on consent of the town board only in case it is destroyed or becomes unsafe through some extraordinary means. Livingston v. Stafford, 91 N. Y. Supp. 172, 173, 99 App. Div. 108.

BED

See Coal Bed; Confined to Bed: Highest Above Bed of River; River Bed; Roadbed.

Of mineral

A "bed" has been defined as being synonymous with vein, and, where a deed conveyed all of a certain coal bed, the word was held synonymous with coal vein and passed to the grantee the entire bed or vein of coal. Delaware, L. & W. R. Co. v. Gleason, 159 Fed. 383, 385, 86 C. C. A. 383.

As a geological term, "bed" is synonymous with "vein" or "stratum"; but the term "coal bed" may be used to mean "quarry." Hoysradt v. Delaware, L. & W. R. Co., 151 Fed. 321, 326, 331.

BED AND COHABIT

An indictment for fornication and adultery denounced by Revisal 1905, § 3350, in the language of the statute that defendants, a man and woman, "not being married to each other," did unlawfully "bed and cohabit together," but omitting the words "lewdly and lasciviously," is sufficient; the words "bed and cohabit" expressing the charge of illicit intercourse. State v. Britt, 63 S. E. 1056, 1057, 150 N. C. 811.

BEDROOM

As public place, see Public Place.

BEEF

As farm product, see Farm Product.

BEER

See Lager Beer; Near Beer; Stock Beer; Strong Beer.

"The primary meaning of the word 'beer' is a malt and fermented liquor containing more or less alcohol." Webster's Dict.; Cent. Dict.; Black, Intoxicating Liquors. "There is a secondary sense in which the word 'beer' is used to describe certain non-alcohol beverages, as root or persimmon beer; but, when so used, it is generally preceded by a word descriptive of the kind of beer referred to, as persimmon beer, root beer, and the like. When the word 'beer' is used alone, without the descriptive word, it is generally, almost universally, taken as referring to the malt liquor sold under that name." Williams v. State, 77 S. W. 597, 598, 72 Ark. 19 (quoting Black, Intoxicating Liquors).

"Beer" is an alcoholic liquor made from any farinaceous grain, but generally from barley, which is first malted and ground, and its fermentable substance extracted by hot water; a fermented extract of the roots or products of various plants, as ginger, spruce, molasses, beet, etc. People ex rel. Lanci v. O'Reilly, 114 N. Y. Supp. 258, 261, 129 App. Div. 522.

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Code, § 2382, prohibits the sale of intoxicating liquor, including alcohol, ale, wine, beer, and malt liquor except as otherwise provided. Held, that the word "beer," as so used, meant a fermented liquor made from malted grain, and that since the term was used in the alternative with malt liquor a manufacturer could not bring a malt liquor within the class of liquors not prohibited by the statute by giving it a name other than that of beer, nor by so adding a qualifying descriptive term to the word "beer" used in the name, and that any liquor manufactured from a malted grain by a process involving fermentation, no matter how slight, and irrespective of the amount of alcohol actually contained therein, was within the statutory prohibition. Sawyer v. Botti, 124 N. W. 787, 788, 147 Iowa, 453, 27 L. R. A. (N. S.) 1007.

Cider is not "beer" or any mixture thereof. Donithan v. Commonwealth, 64 S. E. 1050, 109 Va. 845.

A Japanese alcoholic beverage made from rice by processes similar to those in making beer, which resembles still wine in its percentage of alcohol, which in quality is only remotely similar to beer, is not sufficiently similar to warrant its classification as such, under Act July 24, 1897, c. 11, § 1, Schedule H, par. 297, 30 Stat. 174. Nishimiya v. United States, 131 Fed. 650, 651.

As intoxicating liquor

"The word 'beer,' without restriction or qualification, denotes an intoxicating malt liquor and is within the meaning of the words 'intoxicating liquor' as used throughout the statute." Feddern v. State, 113 N. W. 127, 129, 79 Neb. 651.

"Beer" is defined as a beverage made from various formulas containing different degrees of alcoholic strength. Under the decisions of the Texas courts, "beer" is not an intoxicant; and evidence of a sale of beer is not proof of the sale of an intoxicant, in the absence of further description of the beer sold or of evidence as to its intoxicating character. Potts v. State (Tex.) 89 S. W. 836.

A charge of unlawfully selling intoxicating liquor is sustained by proof of sale of "beer," without any further description or testimony that it was intoxicating. State v. Carmody, 91 Pac. 446, 447, 50 Or. 1, 12 L. R. A. (N. S.) 828.

When the word "beer" is used without restriction, it denotes an intoxicating malt liquor, and being included by the constitutional provision among intoxicating liquors, one unlawfully handling it has the burden of showing that it is not intoxicating if he so claims. Rochester Brewing Co. v. State, 109 Pac. 298, 26 Okl. 309; Antonelli v. State, 107 Pac. 951, 953, 3 Okl. Cr. 580; Id., 107 Pac. 953, 3 Okl. Cr. 585; Petitti v. Same, 107 Pac. 954, 955, 3 Okl. Cr. 587.

The word "beer," as used in an indictment for the illegal sale of liquor, means, in the common acceptation, a fermented liquor. The Missouri Statute (Rev. St. 1899, § 3016) regulating the sale of intoxicating liquors defines intoxicating liquors to mean "fermented, vinous, or spirituous liquors, or any composition of which fermented, vinous, or spirituous liquors is a part." State v. Watts, 74 S. W. 377, 101 Mo. App. 658.

In a prosecution for unlawfully giving intoxicating liquor to a minor, evidence that the minor was in accused's saloon, that he had a bottle in his hand, and drank therefrom a liquor that smelled like beer, is sufficient to authorize instructions that the minor was given intoxicating liquor, as the word "beer," when employed in connection with sales in a place where intoxicating liquors are usually sold, means an intoxicating drink. Hall v. People, 134 Ill. App. 559, 560.

Unnecessary allegations in an information are material, and must be proved as alleged, if they are descriptive of the identity of what is essential; so, under an information charging accused with unlawfully selling "distilled, fermented, and intoxicating liquor, to wit, one bottle of beer," the state must prove that the liquor sold came within the generic term "beer," the word "beer" including any liquor made from any malted grain, but commonly from barley malt, with hops, etc., and having different names, according to its strength or quality, such as ale, porter, etc. In a prosecution for selling intoxicating liquor in violation of the local option law (Laws 1887, p. 179), the allegation under a videlicet of the particular kind of liquor sold, as "intoxicating liquor, to wit, one bottle of beer," will excuse strict proof of the specific kind of liquor sold, unless the word "beer" is descriptive of the offense; Rev. St. 1909, § 7239, applicable to local option elections, requiring them to be held "to determine whether or not spirituous or intoxicating liquors shall be sold within the limits of such city," without specifying any particular kind of liquor. State v. Burk, 131 S. W. 883, 885, 151 Mo. App. 188.

"* * * The preponderance of authority is to the effect that when the word 'beer' is used, without any restriction or qualification, it denotes intoxicating malt liquor; that when occurring in an indictment or complaint or in the evidence, it is presumed to include only that species of beverages; and that, being taken in this sense, it will be sufficient, unless it is shown by evidence that the particular liquor was described as nonalcoholic." A charge of unlawfully selling intoxicating liquor is sustained by proof of sale of "beer," without any further description or testimony that it was intoxicating. State v. Carmody, 91 Pac. 446, 447, 50 Or. 1, 12 L. R. A. (N. S.) 828 (quoting and adopting definition in Black, Intoxicating Liquor, § 17).

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Judicial notice of intoxicating character

The court will take judicial notice of the fact that beer is a malt liquor. Lambie v. State, 44 South. 51, 53, 151 Ala. 86.

And that it contains sufficient alcohol to produce intoxication. State ex rel. Lyon v. City Club, 65 S. E. 730, 731, 83 S. C. 509; State v. Mitchell, 114 S. W. 1113, 134 Mo. App. 540; Vines v. State, 116 Pac. 1013, 1016, 19 Wyo. 255; Moreno v. State, 143 S. W. 156.

As malt liquor

See Malt Liquor.

As spirituous liquor

Where a person, prosecuted for illegal sale of liquor, was charged with selling "vinous and spirituous liquors," instead of alcoholic or intoxicating liquors, as was permissible, a conviction could not be sustained by proof of the sale of "beer," which, as commonly prepared, is a malt liquor. Smith v. State, 49 South. 113, 94 Miss. 255.

BEER GARDEN

A complaint charging the employment of an infant to work in a "beer garden" charges an offense under the statute prohibiting the employment of an infant to work in a place where intoxicating liquors are sold; a beer garden being such a place within the statute, since its words must be construed in the plain, ordinary meaning. State v. Hall, 123 N. W. 251, 252, 141 Wis. 30.

BEER MATS

As printed matter, see Printed Matter.

BEETS

See Crop of Beets.

BEFORE

See At or Before; Die Before; On or Before.

The word "before," as ordinarily used in a note containing the on or before privilege, is inserted for the purpose of giving the payor the privilege of paying the note at any time before the date named on which payment must be made. Henry v. Lovenberg (Tex.) 128 S. W. 675, 676.

Where a patent license required a second payment of $5,000 royalty to be made on January 20, 1909, unless defendant had given and the licensor had received notice of cancellation of the contract before that date, a telegram sent by defendant to the licensor on January 20, 1909, at 12:32 p. m., was neither sent nor received "before" the date specified, and was therefore no defense to an action for the second payment. Quereau v. Computing Scale Co. of Dayton, Ohio, 133 N. Y. Supp. 501, 503, 148 App. Div. 860.

It is not a material alteration of an order for goods made subject to countermand "by" a certain time to write the word "before" over the word "by"; the legal effect of the instrument not being changed. Express Pub. Co. v. Aldine Press, 17 Atl. 608, 609, 126 Pa. 347.

Before assessment of any tax

Gen. Laws 1896, c. 46, § 6, provides that "before assessing and tax" the assessors shall give notice of the time and place of their meeting, requiring taxpayers to file a true account of all ratable estate, specifying the value at such time as the assessors may prescribe. Section 7 declares that whoever neglects to bring in such account, if overtaxed, shall have no remedy. By sections 1 to 4 the electors of a town are authorized, not only to levy a tax, but to order the time when such tax shall be assessed and paid: the assessors being required to assess and apportion the same "at the time ordered by the town." The only remedy for overtaxation is provided by Gen. Laws 1896, c. 46, and Court and Practice Act 1905, §§ 1099, 1100, providing for the filing of an account and for appeal to the superior court; the hearing on the appeal being on the account so filed, the issues being defined by section 17 to be whether the taxpayer has willfully concealed or omitted property from his account or has not placed a fair value thereon, etc. Held that the words "before assessing any tax," in section 6, c. 46, referred to the completed assessment; and hence a notice requiring taxpayers to present their accounts for assessment between two dates prior to that specified in the notice on which the assessors would meet for the purpose of assessing the tax, and as to which the ownership of the property for the purpose of taxation was to be determined, was void. Matteson v. Warwick & Coventry Water Co., 68 Atl. 577, 578, 28 R. I. 570.

Before notice of any transfer

Under Code Civ. Proc. § 1909, providing that, where a claim or demand can be transferred, the transfer thereof passes an interest which the transferee may enforce, subject to any defense or counterclaim existing against the transferror "before notice of the transfer," the words quoted do not mean that a claim may be offset if it were acquired after the assignment and before notice of it, unless such claim were due at the time of the assignment or transfer. Michigan Savings Bank v. Millar, 96 N. Y. Supp. 568, 570, 110 App. Div. 670 (citing Fera v. Wickham, 31 N. E. 1028, 135 N. Y. 223, 17 L. R. A. 456; Martin v. Kunzmuller, 37 N. Y. 396; Hamilton v. Piza, 39 N. Y. Supp. 773, 6 App. Div. 598).

Before physicians of her own sex

Code Civ. Proc. § 873, providing that, in an action for personal injuries, the court in granting an order for examination of plain-

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tiff before trial may, on application of defendant, direct that plaintiff submit to a physical examination by physicians to be designated by the court, and that, if plaintiff be a female, she shall be entitled to have such examination "before" physicians of her own sex, means the examination of a female plaintiff shall be by, and not merely in the presence of, physicians of her own sex. Potter v. Village of Hammondsport, 98 N. Y. Supp. 186, 187, 112 App. Div. 91.

Before removal

A provision in a bill of lading that the shipowner shall not be liable "for any damage to any goods, * * * notice of which is not given before the removal of the goods," construed to mean "before removal" from the ship's custody and control, is lawful and valid; and a shipper under such a bill, seeking to recover for damage to cargo, must show a compliance with its terms. The Persiana, 185 Fed. 396, 397, 107 C. C. A. 416.

BEFORE OR AFTER

The statute allowing amendments "before or after judgment" means at any time. Knight, Yancey & Co. v. Ætna Cotton Mills, 61 S. E. 396, 397, 80 S. C. 213.

Before the time

Under Comp. Laws 1897, § 8709, requiring service of citation on an alleged incompetent person 14 days "before the time" fixed to hear an application for the appointment of a guardian, in computing the time the day of hearing should be included and the day of service excluded, and hence citation is properly served on the 4th day of a month for a hearing on the 17th. In re Miller's Estate (Mich.) 139 N. W. 17, 18.

Before trial

Under Rev. Code, § 183, subds. 1, 4, providing that a judgment of nonsuit may be entered by plaintiff at any time "before trial," where a trial has been entered, a motion by plaintiff for nonsuit is but an offer to abandon, and must be denied; the phrase "before trial" meaning before the commencement of the trial. Empire Ranch & Cattle Co. v. Herrick, 124 Pac. 748, 749, 22 Colo. App. 394.

BEGET

See Heirs Lawfully Begotten.

The word "beget" means to procreate, to produce, and, as used in a deed to one only for her natural life and to the heirs of her body begotten, it means the child or children begotten immediately upon and of her body. Ault v. Hillyard, 115 N. W. 1030, 1031, 138 Iowa, 239.

BEGIN

BEGINNING

Beginning of transit

The "beginning of the transit" is the point of time when an article is committed to a carrier for transportation or started on its ultimate passage. General Oil Co. v. Crain, 28 Sup. Ct. 475, 481, 209 U. S. 211, 52 L. Ed. 754.

Beginning of trial

The calling of the case for trial and the drawing of a juror is the "beginning of the trial," within Code Cr. Proc. § 292, permitting accused, before trial begun, to file an affidavit of prejudice of the presiding judge. State v. Johnson, 124 N. W. 847, 848, 24 S. D. 590.

BEGUN

A prosecution is "begun" when an information is filed before a magistrate and a warrant is issued for defendant's immediate arrest. State v. Disbrow, 106 N. W. 263, 266, 130 Iowa, 19, 8 Ann. Cas. 190.

The provision of section 28 of the Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1220, that "nothing contained in this act shall affect any prosecution or other proceeding, criminal or civil, 'begun' under any existing act or any acts hereby amended, but such prosecution and other proceedings, criminal or civil, shall proceed as if this act had not been passed," is not limited in its application to prosecutions or proceedings which had been "begun" before the passage of the act but applies to those thereafter begun under the old law, based on acts committed before its repeal or amendment. The word "begun" as here employed is not the preterit of begin, expressing that verb in its past tense; it is the past participle, performing solely the function of a connective—the verbal adjective—qualifying any prosecutions in mind, pending or future; its sole purpose being to show that such prosecution is one under the act of 1875. It was not the purpose of Congress in the employment of the word "begun," in the connection here used, to provide that there should be no prosecutions under the old statute unless they had been already begun. Congress presumably, was looking to the future, as well as to the past. It meant that in the matter of importations of this character there should be no interim of noncriminality. The amendatory statute only enlarged and tightened the preceding statute. No prosecutions could be based on the amendatory statute for acts done prior to its enactment; what Congress meant in the section preserving the right to prosecute under the statute was that no prosecutions begun under that statute, whether they were then pending or should thereafter be brought, should lapse by reason of this effort to enlarge and tighten the hold of the government upon this class of importations. It is to carry out this purpose that the word "begun" is employed, merely as a connective to identify a prosecution pending or to be brought, with the statute under which it is brought. Lang v.

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United States, 133 Fed. 201, 204, 66 C. C. A. 255.

The provision of an act providing that nothing therein "shall affect any prosecution or other proceeding * * * 'begun' under any existing act hereby amended * * * and such proceeding shall proceed as if this act had not been passed" is not limited in its application to prosecution or proceedings which had been "begun" before the passage of the act but applies to those thereafter begun under the old law based on acts committed before its repeal or amendment. United States v. Standard Oil Co., 148 Fed. 719, 724 (quoting and adopting definition in Lang v. United States, 133 Fed. 201, 66 C. C. A. 255).

BEGOTTEN

See Beget.

BEHALF

See In Behalf of.

BEHAVIOR

See Bad Behavior; During Good Behavior; Good Behavior; Misbehavior.

"Behavior" is the bearing with respect to propriety, morals, and requirements of law. United States v. Hrasky, 88 N. E. 1031, 1033, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279.

"Behavior," as used in Consolidation Act (Laws 1882, c. 410) § 1458, making it disorderly conduct to use any threatening, abusive, or insulting behavior, etc., means demeanor or deportment, and refers to action in the presence of others. People v. Robinson, 132 N. Y. Supp. 674, 677, 73 Misc. Rep. 343.

BEING

See Be—Being.

BELIEF

See Best of His Knowledge and Belief; Confidence; Conscientious Belief; Honest Belief; Reasonable and Well Grounded Belief; Reasonable Ground to Believe.

Reasonable cause to believe, see Reasonable Cause.

"Belief" is that conviction which follows from the consideration of facts or evidence, while a "thought" may be no more than a mere conceit or fancy. Sloss-Sheffield Steel & Iron Co. v. O'Neal, 52 South. 953, 955, 169 Ala. 83.

Judgment synonymous

As used in a stipulation of facts stating that in the judgment of the respondents the bridge in question was not a practical bridge, the word "judgment" was used as synonymous with "belief." State ex rel. Ellis v. Switzer, 112 N. W. 297, 300, 79 Neb. 78.

BELIEVE

See Good Faith Believe; Good Reason to Believe; Ground to Believe; I Believe; Reasonable Ground to Believe.

Reasonable cause to believe, see Reasonable Cause.

The words "to the satisfaction of the jury" used in an instruction are equivalent to find or "believe." Terre Haute Traction & Light Co. v. Payne, 89 N. E. 413, 417, 45 Ind. App. 132.

"Believe" is nearly synonymous with rely and means to accept as true on the confidence of others. Spencer v. Hersam, 77 Pac. 418, 31 Mont. 120 (citing the Standard and Century Dicts.).

Men oftentimes express their honest convictions by the indefinite term "believe so." Strong v. State, 109 S. W. 536, 537, 85 Ark. 536, 14 Ann. Cas. 229.

A request to charge that defendant waived fraud if he gave the note in suit after he "believed" he had been defrauded does not present the question of the entertainment of a settled conviction by defendant that he had been defrauded, but to raise such question the request should have used the word "knew" instead of "believed." Smith v. McDonald, 102 N. W. 738, 739, 139 Mich. 225.

BELL

The term "bell" used in a patent for a graphophone means the amplifying horn used in sound-reproducing machinery. Victor Talking Mach Co. v. Duplex Phonograph Co., 182 Fed. 822, 823, 105 C. C. A. 254.

BELLIED OUT

A shuttle guard which is so swollen from the face of the handrail or reed cap as to allow the shuttle to leave its proper course is "bellied out." Chambers v. Wampanoag Mills, 75 N. E. 1093, 1094, 189 Mass. 529.

BELLIGERENTS

Rebels who have declared their independence, cast off their allegiance to the regular government, and organize armies and commence hostilities are "belligerents." La Rue v. Kansas Mut. Life Ins. Co., 75 Pac. 494, 496, 68 Kan. 539.

BELONG—BELONGING

See Property Alleged to Belong to Estate; Property Belonging to Estate in Bankruptcy.

"Belong to" means to be in the power of or at the disposal of. In re Hitchin's Es-

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tate, 89 N. Y. Supp. 472, 476, 43 Misc. Rep. 485.

"Belonging" is that which belongs to one, pertains to one; hence, goods or effects. Dimmick v. United States, 135 Fed. 257, 265, 70 C. C. A. 141 (quoting Webster's Dict.).

One elected on a regular party ticket "belongs" to that party within the purview of Laws 1898, c. 349, § 19, providing that members of the county board of supervisors belonging to the principal political parties shall designate a newspaper to publish the session laws. Norris v. Wyoming County Times, 82 N. Y. Supp. 323, 325, 83 App. Div. 525.

Under the constitutional guaranty of trial by jury, every court possesses, by virtue of its establishment, the power to provide itself with a jury, and such power "belongs" to the court in the most vital and integral sense and is not merely "attached" to the court as something extra to its ordinary functions, although the distinction between duties which "belong" to and which are "attached" to an office is artificial and unsubstantial. Under Laws 1907, p. 374, c. 232, requiring the judge of the district court in certain counties to perform the duties of jury commissioner, and authorizing him to appoint a jury clerk, the duties described belong to or fall within the scope of the office of judge of the district court. Moore v. Nation, 103 Pac. 107, 112, 80 Kan. 672, 684, 23 L. R. A. (N. S.) 1115, 18 Ann. Cas. 397.

"The phrase 'belonging to' is defined by Webster thus, 'To be a part of,' in which sense it is frequently used, especially in conveyances of property." The words "belonging to" in Rev. St. 1895, art. 1984, providing that if there be a business belonging to the estate, and the disposition thereof is not especially directed by will, and it is not required to be sold to pay debts, it shall be the duty of the executor or administrator to carry on the business or to rent it, as shall appear to him to be most for the interest of the estate, "are used to express the relation of the business to be continued to the estate to be administered; that is, the business must be such as implies property which is a part of the estate to be administered by the executor or administrator." Altgelt v. Alamo Nat. Bank, 83 S. W. 6, 10, 98 Tex. 252 (citing Martin v. Cope, 28 N. Y. 180; Pender v. Pender, 18 Wkly. Rep. 309).

As expression of ownership

"Belonging" is synonymous with "owned by." In re Assessment of Property of Northwestern University, 69 N. E. 75, 77, 206 Ill. 64.

"Belonging to" is a sufficient allegation of ownership in an indictment for embezzlement. Strobhar v. State, 47 South. 4, 6, 55 Fla. 167.

Property owned by a private individual and used by him directly and exclusively for educational purposes is exempt from taxation, under Code 1906, § 4251, par. "d," as property "belonging to" a college or institution for the education of youth; the statute making no distinction between natural and artificial persons. City of Jackson v. Preston, 47 South. 547, 549, 93 Miss. 366, 21 L. R. A. (N. S.) 164.

The word "belonging," as used in Bennett Medical College Charter, § 8, exempting all property belonging to said corporation, means "to be the property of," and denotes title or ownership. People ex rel. v. Bennett Medical College, 94 N. E. 110, 111, 248 Ill. 608, 140 Am. St. Rep. 237.

Where testator's will after legacies to other relatives provided that "all the balance of my belongings to 'belong' to my wife," the words "belongings" and "belong" were used in the same sense, as importing full ownership. Lee v. Moore's Ex'r (Ky.) 93 S. W. 911.

Under Comp. Laws 1907, §§ 2829, 2830, providing that a homestead shall be "the absolute property of" the surviving spouse and minor children, or of the minor children if there is no surviving spouse, and that the homestead and exempt personalty "shall belong to" the surviving spouse and minor children, or where there are no minor children to the surviving spouse, or where there is no surviving spouse to the minor children, and that if the surviving spouse again marries, or when all the minor children arrive at full age, the homestead may be partitioned, a homestead set apart to the surviving spouse and minor children, or where there are no minor children to the surviving spouse, or where there is no surviving spouse to the minor children, becomes the absolute property of the person, or persons, to whom it is set apart, and it belongs to him or them, subject to incumbrances, and the other heirs of the intestate, and who had arrived at full age at the time of his death, or at the time of setting the homestead apart, have no interest in the homestead; the word, "belong" expressing ownership. Christiansen v. Robinson, 99 Pac. 458, 459, 35 Utah, 67.

Where a testator in his will directs that certain property, after the death or remarriage of his widow, "shall go to and belong to" other relatives, the words "go to and belong to" are not equivalent to pay and divide. On the marriage or death of the widow, the property "goes" (that is, moves, passes, proceeds) and belongs to (that is, comes under the physical power of and is at the disposal of) those persons to whom the legal title was transferred at his death. Thus the language used correctly describes the progress of the tangible property from the possession of the testator to that of the beneficiary, and has nothing of the meaning of "paying and dividing." In re Hitchins' Estate, 89 N. Y. Supp. 472, 476, 43 Misc. Rep. 485.

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Code 1860, art. 45, §§ 1, 2, providing that the property "belonging" to a married woman should be held by her for her separate use with power to devise, and if she died intestate without issue her husband should have a life estate in her property and that her personal property should vest in him absolutely. Held, that a vested fee-simple estate in remainder, title to which was in a married woman, was real property "belonging" to her notwithstanding an intervening tenancy which deferred her actual possession thereof. Snyder v. Jones, 59 Atl. 118, 120, 99 Md. 693.

Belong to town

The phrase "town to which he belongs," within Rev. St. c. 18, § 51, providing for the furnishing of nurses, etc., to a quarantined person at the charge of the town to which he belongs, means the town in which he has his pauper settlement. Inhabitants of Eden v. Inhabitants of Southwest Harbor, 81 Atl. 1003, 1006, 108 Me. 489.

The words "the town to which he belongs," in Rev. St. 1883, c. 14, § 1, relating to the care of a diseased person at his expense if able, otherwise at that of the town to which he belongs, mean the town in which he has his pauper settlement. Inhabitants of Machias v. Wesley, 58 Atl. 240, 241, 99 Me. 17.

Belong to the owner

Code Civ. Proc. § 1200, providing that on the contractor abandoning the work the portion of the contract price applicable to the liens of others shall be fixed by deducting, from the value of the work and materials done and furnished, including materials on the ground which shall belong to the owner, the payments then due and paid, etc., refers to a case where the owner has made and recorded a valid contract with a contractor who abandons the building in an unfinished condition, and contemplates its completion by the owner, whose liability to lien claimants is limited by his contract with the contractor, but does not define the contractual relation between the contractor and his subcontractors, until the latter have brought themselves within the lien law; the words "belong to the owner" not meaning materials which have never been sold and delivered to the contractor for use in the construction of the building, but which in fact belong to some other person. Steiger Terra Cotta & Pottery Works v. City of Sonoma, 100 Pac. 714, 715, 9 Cal. App. 698.

Where a public improvement contract provided for termination at the election of the United States on the contractor's default, in which event the Secretary of the Interior might take possession of all materials "belonging" to the contractor delivered on the ground and might use the same to complete the work, rock excavated by certain subcontractors and placed in position convenient to a crusher plant to be crushed, though material placed or "delivered" within the contract, was nevertheless not the property of the contractor, and hence was not subject to appropriation by the government on terminating the contract. Tinker & Scott v. United States Fidelity & Guaranty Co., 169 Fed. 211, 215.

Belonging to or appertaining to office

The phrase "belonging or appertaining to the office," within Comp. Laws, § 11361, making the mutilation of records belonging or appertaining to the office of a township an offense, includes a statement of personal property for taxation given to the supervisors in accordance with section 3843, though there was an intention to amend the statement by substituting another therefor which was not carried out. People v. Jewell, 101 N. W. 835, 138 Mich. 620.

Belonging to and due

Where a garnishee answered that it had a certain sum of money in its possession "belonging to and due" defendant, the officer's return was properly made in conformity to Rev. St. 1899, § 388, subd. 4, providing that "where goods and chattels, money or evidences of debt are to be attached the officer shall take the same," etc., and not to subdivision 5 relating to the attachment of credits. Heffner v. Rice, 108 S. W. 590, 129 Mo. App. 667.

Belonging to the navy

An infant not eligible to enlistment in the navy, but who enters therein without the consent of his parents or guardian, is not a person "belonging to the navy," within the meaning of the federal statute, providing for the punishment of offenses committed by persons belonging to the navy. Ex parte Lisk, 145 Fed. 860, 863.

Belonging to state

Property belonging to state, see Property of the State.

The words "belonging to," in Hartford City Charter, § 132, providing that the city in making assessments for benefits may assess benefits on the real estate "belonging to" the state situated within the city, and specially benefited, etc., import beneficial ownership, but contain no implication that land on which the state has a mortgage for the benefit of the school fund may be assessed for benefits. State v. Kilburn, 69 Atl. 1028, 1029, 81 Conn. 9, 129 Am. St. Rep. 205.

BELONGINGS

By giving all the balance of his "belongings" to his wife, testator meant to give all the remainder of his property to her; the words "belong" and "belongings" having been used several times in the will. Lee v. Moore's Ex'r (Ky.) 93 S. W. 911.

A will bequeathed sums of money to various persons, including testatrix's sister and

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heir at law, but made no disposition of the residue of the estate after paying the amounts therein named and the debts, nor of testatrix's household furniture, clothes, and personal belongings. A codicil bequeathed to two of the legatees in the original will "all my belongings, furniture, and clothes included." Held that, by the term "belongings," testatrix did not mean money, but meant her ornaments, books, pictures, besides her furniture and clothes, which she had not disposed of by the original will. In re Koch's Estate, 96 Pac. 100, 101, 8 Cal. App. 90.

BELOW

See Court Below.

BELT

See Maritime Belt.

The object of a coil clasp patented was declared to be to provide a simple and efficient clasp for mail bags, boots and shoes, gloves, trunks, valises and traveling bags, grain bags, corsets, belts, and for similar uses, and the inventor stated that the coils could, after being fastened, be pressed into various shapes, such as oval, oblong, etc. Held, that the term "belts," as used in the declared purpose of the patent, included all belts, such as machinery belts, etc., and was not confined to ladies' belts; that being its most doubtful use. Diamond Drill & Machine Co. v. Kelly Bros., 120 Fed. 282, 283.

BELT DRIVE

A "sprocket chain drive" is the equivalent of a "belt drive" as a means for propelling railway motor velocipedes. Sheffield Car Co. v. Buda Foundry & Mfg. Co., 177 Fed. 713, 715.

BELT LACER

A "belt lacer" in a factory is one whose duty the evidence showed was to look after the belting and keep it in running order. Lang v. Kansas City Bolt & Nut Co., 110 S. W. 614, 131 Mo. App. 146.

BELT RAILROAD

As common carrier, see Common Carrier.

A "belt railroad" is one which furnishes convenient means of transfer from one through line of railroad to another or others, and also furnishes opportunity for the location of manufacturing establishments needing railway facilities and making it convenient for them to exist in the neighborhood of such cities without bordering on such through lines of railway. Sometimes such "belt railroads" are constructed and maintained by independent corporations wholly distinct as to ownership from the through lines connected therewith. Toledo, St. L. & W. R. Co. v. Bond, 72 N. E. 647, 650, 35 Ind. App. 142.

BELT SHIFTERS

See Proper Belt Shifter.

BELTING

An "emery belt" does not come within the term "belting," as employed in the statute requiring the guarding of all vats, pans, saws, planers, cogs, gearing, belting, shafting, and set screws, and "machinery of every description." La Porte Carriage Co. v. Sullender, 75 N. E. 277, 281, 165 Ind. 290.

A machine consisting of rollers and knives, revolving at a high speed and set immediately below an opening in the floor, for the purpose of mixing sawdust, clay, and dirt thrown into the opening, is not a "belting" within a statute requiring all belting, cogs, gearing, etc., in manufacturing establishments to be guarded. National Fire Proofing Co. v. Roper, 77 N. E. 370, 371, 38 Ind. App. 600.

Belting, shafting, and gearing

A sprocket wheel and chain are within St. 1898, § 1636j, requiring all belting, shafting, and gearing, so located as to be dangerous to employés in the discharge of their duties, to be securely guarded or fenced. Under St. 1898, § 1636j, requiring all belting, shafting, and gearing, so located as to be dangerous to employés in the discharge of their duties, to be securely guarded or fenced, findings that an unguarded sprocket wheel causing injury was so located as to be dangerous to employés in the discharge of their duties, and that plaintiff was injured by it without contributory negligence in discharging his duty, are sufficient to make a case against the defendant. Schweikert v. John R. Davis Lumber Co., 130 N. W. 508, 509, 145 Wis. 632.

BENCH

The word "bench," as used in connection with a furnace in a window glass factory, is described as meaning the bottom or floor of the furnace, which is made of ground fire clay mixed with water and tamped until firm. Wilkinson Co-Operative Glass Co. v. Dickinson, 73 N. E. 957, 958, 35 Ind. App. 230.

BENCH DOCKET

The court or bench docket is not a record of the court in which its official entries are kept, but is merely a docket for the convenience of the court, and the notes of the judge are not the record entries to be incorporated in a transcript for the appeal of the case, and in determining what the record discloses the entries on such docket may not be considered. Pittsburgh, C., C. & St. L. Ry. Co. v. Johnson, 93 N. E. 683, 686, 49 Ind. App. 126.

BENCH METHOD

The term "bench method," as used in connection with the excavation of a bank of

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clay, means the removal of the top in such a way as to create a terrace or slope from the top down. Reilly v. Troy Brick Co., 94 N. Y. Supp. 576, 578, 47 Misc. Rep. 530.

BENEFICIAL

In a will giving all testator's property to certain persons, and then providing that, if there should be a surplus, it should be paid to the named beneficiares pro rata, the term "beneficiaries" is limited to those who survive the testator; "beneficial" being defined as receiving, or entitled to have or receive, advantage, use, or benefit. In re Jones' Estate, 134 N. Y. Supp. 859, 863, 75 Misc. Rep. 47.

An irrigation act was attacked for uncertainty in the description of those portions of the state to which it was made to apply, the alleged insufficient description being as follows: "Those portions of the state of Texas in which, by reason of insufficient rainfall, or by reason of irregularity of the rainfall, irrigation is beneficial for agricultural purposes." The appellate court, in passing on this objection, held that the act was not void for uncertainty, basing this holding on the holding of the court in the case of McGhee Irrigation Ditch Co. v. Hudson, 22 S. W. 398, 85 Tex. 587, 590, in which case it was held that a similar irrigation act, which described the portions of the state to which it applied "as those in which, by reason of insufficient rainfall, irrigation is necessary for agricultural purposes," was not void for uncertainty. The only difference in the description in that act and the act under consideration is in the use of the word "necessary," instead of the word "beneficial"; and the court held this difference immaterial. Borden v. Trespalacios Rice & Irrigation Co. (Tex.) 82 S. W. 461, 465.

BENEFICIAL ASSOCIATION

See Fraternal Association.
As charity, see Charity.

The great underlying purpose of a "beneficial association" is not to indemnify or secure against loss but to accumulate a fund from the contribution of its members for beneficial or protective purposes to be used in their own aid or relief in the misfortune of sickness, injury, or death, thus distinguishing such associations from insurance companies. Brenizer v. Supreme Council, Royal Arcanum, 53 S. E. 835, 839, 141 N. C. 409, 8 L. R. A. (N. S.) 235 (quoting and adopting definition in Commonwealth v. Equitable Ben. Ass'n, 18 Atl. 1112, 137 Pa. 412).

BENEFICIAL CONSIDERATION

"A distinction must be made between a 'beneficial consideration,' which is a mere inducement to enter into the suretyship contract, and a beneficial participation in the main contract. It is the latter only which takes the case out of the statute of frauds. The promisor may receive a money consideration for his promise or he may be induced to make the contract for other valuable considerations beneficial to him, yet it will be void if not in writing; but if the performance of the main contract, to which his suretyship is collateral, is a benefit to him, a verbal promise in guaranty is sufficient." Rowell v. Smith, 102 N. W. 1, 6, 123 Wis. 510, 3 Ann. Cas. 773 (quoting and adopting definition in Stearns' Law of Suretyship, § 39).

BENEFICIAL INTEREST

See, also, Beneficially Interested.

A "beneficial interest," when considered as a designation of the character of an estate, is such an interest as a devisee takes solely for his own use or benefit and not as a mere holder of the title for the use of another. People v. McCormick, 70 N. E. 350, 352, 208 Ill. 437, 64 L. R. A. 775 (citing In re Seaman's Estate, 41 N. E. 401, 147 N. Y. 69).

Where a lease recited that the guaranty of the rent by a brewing company was in consideration of a covenant between all parties that no beer save that of the guarantor should be sold on the premises during the term, and that it was agreed that the lease should not be assigned, or the premises used for any purpose but a saloon, without the guarantor's consent, it had a "beneficial interest" in the lease, and it could not be surrendered without its consent. St. Louis Brewing Ass'n v. Kaltenbach, 84 S. W. 151, 153, 108 Mo. App. 637.

"The expression 'beneficial use' or 'beneficial ownership or interest' in property is quite frequent in the law and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf. And one is also said to have the beneficial ownership of land who has done everything to entitle him to a patent from the government, and who therefore has the legal right to such patent, and all that remains to be done is for the proper officer to issue it." Montana Catholic Missions v. Missoula County, 26 Sup. Ct. 197, 200, 200 U. S. 118, 50 L. Ed. 398 (citing Wisconsin C. R. Co. v. Price County, 10 Sup. Ct. 341, 133 U. S. 496, 33 L. Ed. 687; Central P. R. Co. v. Nevada, 16 Sup. Ct. 885, 162 U. S. 512, 40 L. Ed. 1057).

BENEFICIAL LEGACY

Under Rev. Laws, c. 135, § 3, which provides that a beneficial devise or legacy to a subscribing witness shall be void, unless there are three other competent subscribing witnesses to such will, a legacy to one of the

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three witnesses to a codicil of all money left by testatrix to another legatee, after the death of that legatee and the payment of her funeral expenses, etc., is a "beneficial legacy," and void. Under Rev. Laws, c. 135, § 3, a legacy of money to one of three subscribing witnesses to a codicil, to be "held in trust by my executors, the income to be paid her as they think best for her support, the principal not to be used unless necessary," is a "beneficial legacy," and void. Lougee v. Wilkie, 95 N. E. 221, 209 Mass. 184.

BENEFICIAL POWER

Under 1 Rev. St. (1st Ed.) pt. 2, c. 1, tit. 2, § 79, declaring a general or special power beneficial, where no person other than grantee has by the terms of its creation any interest in its execution, a power reserved to the settler of a trust of appointment of remainders by will among her children is not a general beneficial power, but a power in trust, and cannot be released. Newton v. Hunt, 112 N. Y. Supp. 573, 576, 59 Misc. Rep. 633.

BENEFICIAL USE

"The expression 'beneficial use' or 'beneficial ownership or interest' in property is quite frequent in the law and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf. And one is also said to have the beneficial ownership of land who has done everything to entitle him to a patent from the government, and who therefore has the legal right to such patent, and all that remains to be done is for the proper officer to issue it." Montana Catholic Missions v. Missoula County, 26 Sup. Ct. 197, 200, 200 U. S. 118, 50 L. Ed. 398 (citing Wisconsin C. R. Co. v. Price County, 10 Sup. Ct. 341, 133 U. S. 496, 33 L. Ed. 687; Central P. R. Co. v. Nevada, 16 Sup. Ct. 885, 162 U. S. 512, 40 L. Ed. 1057).

Complainant owned several hundred acres of land, which it improved at great expense for a summer resort. On the lands is Cascade Cañon through which a small, precipitous stream flows. The seepage from the flow of the stream and the mist and spray from its falls produces a luxuriant and exceptionally beautiful growth of vegetation on the floor and sides of the cañon, thus rendering the cañon and the stream with its falls flowing through it rare in beauty and the chief attraction of the resort, and they were so advertised by complainant. Held, that such use of the cañon and the stream and its falls therein constituted a "beneficial use" and operated as an appropriation of the waters in said stream within the requirements of Const. Colo. art. 16, § 6, conferring the right to divert the unappropriated waters of any natural stream to beneficial uses, and that said waters could not thereafter be impounded above the cañon and falls and piped away by defendant and used to generate electricity for sale as a commodity. Cascade Town Co. v. Empire Water & Power Co., 181 Fed. 1011, 1016.

BENEFICIALLY ENTITLED

Testator devised the residue of his estate to a son, as trustee, to be managed for 20 years, with directions that from the net income the annuity of a specified sum should be paid to testator's three children, and provided for the disposition of the income in case any of the children died during the period, and for the distribution of the residue at the end of the period, and for the contingency of each of the children dying prior to the expiration of that period without issue surviving the period. Under Hurd's Rev. St. 1901, c. 120, § 366, imposing a tax on the transfer of property by will where one becomes "beneficially entitled in possession or expectation to any property or income thereof," the residuary estate could not be taxed until the expiration of the 20-year period; for until that time it could not be known who would be beneficially interested therein. People v. McCormick, 70 N. E. 350, 352, 208 Ill. 437, 64 L. R. A. 775.

BENEFICIALLY INTERESTED

See, also, Beneficial Interest.

A city is the party beneficially interested in mandamus to compel its treasurer to deposit the money in his hands belonging to the city, in a bank designated by an ordinance of the city from which it would receive interest on the money so deposited within Comp. Laws 1897, § 2762, providing that mandamus shall issue on the information of the party beneficially interested. Territory v. Matson, 113 Pac. 816, 818, 16 N. M. 135.

Where the relator in a mandamus proceeding is a resident and taxpayer of a school district, the board of trustees of which have removed the schoolhouse site contrary to law because without a vote of the electors, so that children are required to go three and one-half miles further to school, and are likely to be deprived of school benefits, because of the danger in crossing a river, etc., he is a "party beneficially interested," within the meaning of Code Civ. Proc. 1895, § 1962, providing that a writ of mandamus must be issued upon affidavit on the application of the party beneficially interested. State ex rel. Bean v. Lyons, 96 Pac. 922, 926, 37 Mont. 354.

Under Rev. Codes 1905, § 7811, requiring an application for a writ of certiorari to be made by the party beneficially interested, a citizen and taxpayer of territory sought to be included in a city by extension of its limits is a party beneficially interested, and certiorari to review such proceedings was prop-

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erly brought in the name of the state on the relation of such taxpayer. State ex rel. Johnson v. Clark, 131 N. W. 715, 720, 21 N. D. 517.

The plaintiff is a citizen of Weir, the owner of a home there, and the head of a family. He is a coal miner by trade and the superintendent of several coal mines in his vicinity. He desires and intends to attend the school of mines and metallurgy created by chapter 30, Laws of 1911, and educate himself in the branches of learning required to be taught there, having already taken a considerable portion of the courses of study provided for, and he has a son whom he desires and intends to educate at the school. Held, he is entitled to maintain an action of mandamus in his own name to compel the establishment of the school under section 715 of the Code of Civil Procedure, which provides that the writ of mandamus may issue on the information of "the party beneficially interested." Young v. Regents of University of Kansas, 124 Pac. 150, 152, 87 Kan. 239.

The phrase "party beneficially interested," in a statute giving the party "beneficially interested" the right to bring mandamus to compel the canvass of votes cast at an election, will not receive a close construction but must be applied liberally to promote the ends of justice. Under Code, § 2448, providing that in cities of more than 5,000 inhabitants intoxicants may be sold with the consent of a majority of the voters but in towns of less population 80 per cent. of the voters must assent, and sections 2450 and 2453 providing that the sufficiency of the voters' consent may be questioned by any citizen, and requiring the county auditor to keep for the inspection of any citizen all papers required, individual citizens of a city may enjoin the retaining of names on the census roll fraudulently placed there to show more than 5,000 inhabitants, thus permitting saloons to operate on a consent of a bare majority of the voters; and, in a suit to correct a census enumeration of a city fraudulently padded to show a population of more than 5,000, the census enumerator is a proper and necessary party defendant and liable for costs. Semones v. Needles, 114 N. W. 904, 906, 137 Iowa, 177, 14 L. R. A. (N. S.) 1156, 15 Ann. Cas. 1012 (quoting in support of definition State ex rel. Byers v. Bailey, 7 Iowa, 390).

Under Rem. & Bal. Code, § 1028, providing that a writ of prohibition shall issue in proper cases on the application of a person "beneficially interested," a taxpayer without other interest may not obtain a writ of prohibition to restrain the summoning and impaneling of a grand jury for error in drawing the same. State ex rel. Hanna v. Main, 113 Pac. 632, 633, 62 Wash. 242, 34 L. R. A. (N. S.) 255.

Civ. Code 1901, par. 3794, provides that quo warranto may be brought by the district attorney on the verified complaint of any person against any person who usurps any public franchise. Civ. Code 1901, par. 3074, provides that mandamus shall issue on the application of the party beneficially interested. Held, that as any person may lay the complaint before the district attorney upon which it may become his duty to bring quo warranto, if he unlawfully refuses to act, the person complaining is the person "beneficially interested" in the subject-matter of a writ of mandamus to compel his appropriate action, and hence entitled to the writ. Duffield v. Ashurst, 100 Pac. 820, 822, 12 Ariz. 360.

Personal Property Law provides that, upon the written consent of all the persons beneficially interested in a trust in personal property, the creator of the trust may revoke it. Section 11 provides that the same rule which regulates future estates in land is applicable to future estates in personal property. Real Property Law, §§ 35, 36, provide that an estate in which the right of possession is postponed to a future time is an estate in expectancy, and that all expectant estates except such as are enumerated in this article are abolished, and expectant estates are divided into future estates and reversions. Section 59 provides that an expectant estate is descendible, devisable, and alienable in the same manner as an estate in possession. A trust deed provided that the settler should receive the income from the trust fund for life, and, if he left surviving a wife and children, the fund should be divided equally between them, but that, if the settlor died without wife or children or issue of children surviving, the income should be paid to the settlor's mother and brother during her life and upon her death the whole to the brother, or, if either the mother or brother died before the death of the settlor, the income should be paid to the survivor during life, and upon termination of the trust the trustee should pay over the principal fund to such persons as at said time might be the settlor's next of kin on his father's side. Held, that a brother and nephew of the settlor's deceased father were not "beneficially interested" in the estate within the meaning of section 23, as their interest was not devisable, descendible, or alienable, and hence the settlor could revoke the trust without their consent. Robinson v. New York Life Ins. & Trust Co., 133 N. Y. Supp. 257, 266, 75 Misc. Rep. 361.

BENEFICIARY

See Lawful Beneficiary; Principal Beneficiary.

A "beneficiary" is defined as one who receives a benefit or advantage: a person to whom a policy of insurance effected is pay-

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able. State v. Willett, 86 N. E. 68, 71, 171 Ind. 296, 23 L. R. A. (N. S.) 197 (citing 1 Words and Phrases, p. 750).

Any person who derives any advantage from another's beneficience may be styled a "beneficiary," with equal propriety as one for whose benefit his trust is created. Nicols v. Board of Police Pension Fund Com'rs, 82 Pac. 557, 558, 1 Cal. App. 494.

A remainderman is a beneficiary, within Real Property Law, Laws 1896, p. 574, c. 547, § 91, providing that a substitute trustee shall not be appointed till the beneficiaries of the trust are brought into court by notice. In re Earnshaw, 112 N. Y. Supp. 197, 199.

The term "beneficiary," as used in insurance, means such person as should stand in the capacity of the beneficiary according to the established course of the insurance business of the company with its policy holders when the policy becomes payable. Metropolitan Life Ins. Co. v. Hooppel, 74 Atl. 467–469, 76 N. J. Eq. 94.

The word "beneficiary" does not appear to be recognized by lexicographers as having the precise meaning usually given it when employed in actions to recover damages by wrongful death, but to designate the person beneficially interested in a trust, being so defined by statute in some states, and the word is also used to designate a person to whom a policy of insurance is payable. Phœnix Ry. Co. v. Landis, 108 Pac. 247, 248, 13 Ariz. 80 (citing 1 Words and Phrases, p. 750).

Where the by-laws of a police benefit association, as they stood at the time decedent became a member, gave his sister, whom he had designated as beneficiary, no right as against the association on his death within 18 months after becoming a member, but in the meantime the by-laws were amended by a provision that, if a member in good standing for 1 month or over were killed in the discharge of his duty, his "beneficiary" might receive the benefits, but that no one should receive such benefits excepting the wife, child, father, or mother of the member, and on the death of the member 11 months after joining the association the association paid the benefit into court, his sister was not entitled to the benefit as against his widow; the term "beneficiary," as used in the amendment, including not only the beneficiary designated by the member, but also a beneficiary specified in the by-laws. Boyle v. Fitzgerald, 131 N. Y. Supp. 469, 471, 146 App. Div. 668.

The word "beneficiary" appropriately designates an assignee of a life insurance policy as well as what is ordinarily termed the beneficiary; any person, whether as assignee or otherwise, who is entitled to take under a policy of life insurance being in a broad sense a beneficiary, though a mere beneficiary is not an assignee. Stoll v. Mutual Ben. Life Ins. Co., 92 N. W. 227, 279, 115 Wis. 558.

In a will giving all testator's property to certain persons, and then providing that, if there should be a surplus, it should be paid to the named beneficiaries pro rata, the term "beneficiaries" is limited to those who survive the testator; "beneficial" being defined as receiving, or entitled to have or receive, advantage, use, or benefit. In re Jones' Estate, 134 N. Y. Supp. 859, 862, 863, 75 Misc. Rep. 47.

Assured synonymous

See Assured.

BENEFICIARY ASSOCIATION

See Beneficial Association; Fraternal Associations.

BENEFICIARY CERTIFICATE

A "beneficiary certificate" of a fraternal association is a contract of insurance subject to the same rules of interpretation as other contracts. Bornstein v. District Grand Lodge No. 4, Independent Order B' Nai B'rith, 84 Pac. 271, 272, 2 Cal. App. 624.

BENEFIT

See Common Benefits; For His Own Use and Benefit; For Our Own Benefit; For the Benefit of; Full Benefit and Enjoyment; General Benefits; Pecuniary Benefit; Property Benefited; Public Benefit; Right and Benefit; Special Benefits.

Especially benefited, see Especially.

The word "benefit," as used in the definition of valuable consideration to the effect that it may consist of a "benefit" to the promisor, means that the promisor has in return for his promise acquired some legal right to which he would not otherwise have been entitled. Harness v. McKee-Brown Lumber Co., 89 Pac. 1020, 1022, 17 Okl. 624 (quoting Page, Contracts, vol. 1, par. 274).

"Benefited" means enhanced in value. Williams, Belser & Co. v. Rowell, 78 Pac. 725, 726, 145 Cal. 259.

Where an owner of land granted a right of way to a railroad company with the understanding and intention that the company would perform switching services for two furnaces located on the land, a switching contract between the owner's lessee and the railroad was for the benefit of the owner, within the rule that a contract may be enforced by one for whose benefit it is made. Baird v. Erie R. Co., 132 N. Y. Supp. 971, 978, 148 App. Div. 452.

Where a will offered for probate is contested, the "benefit" derived therefrom inures to the successful claimants, which is the benefit contemplated by the rule making the expenses payable out of the estate as a bene-

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fit thereto. In re Statler's Estate, 108 Pac. 433, 434, 58 Wash. 199.

"Ordinarily when we speak of 'benefits' to us, we mean and refer to what is advantageous to us, whatever promotes our prosperity, or enhances the value of our property, or property rights, or rights as citizens, as contradistinguished from what is injurious." The term "benefits" within a statute providing that foreign corporations failing to comply with certain requirements shall not be entitled to the "benefits" of the corporation laws of the state does not include the right to sue. A. Booth & Co. v. Weigand, 83 Pac. 734, 740, 30 Utah, 135, 10 L. R. A. (N. S.) 693.

Where a mortgage payable to a corporation was assigned as collateral security to the first indorser of notes of the corporation, he being financially responsible, a president of the corporation as second indorser, having received no part of the funds derived from the notes, was not a "person benefited" by the assignment within the bankruptcy law (Act July 1, 1898, c. 541, § 60b, 30 Stat. 562) so as to render him liable for the amount or value of the mortgage. Page v. Moore, 179 Fed. 988, 989.

A transfer of property by an insolvent debtor by means of which a note given by him and a surety was paid, and the purchaser, who had obligated himself to indemnify the surety against loss thereon, was released from his liability, was one by which such purchaser was "benefited" within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 800, and, where the other elements of a voidable preference were present, the property or its value is recoverable by the debtor's trustee in bankruptcy. Huntington v. Baskerville, 192 Fed. 813, 816, 113 C. C. A. 137.

Of separate property

A rental contract of a farm constituting the separate property of a married woman, which gives to the lessee the use of the farm for his own benefit for a year in consideration of a stipulated rental in money, is not a contract for the benefit of the separate property of the wife within Rev. St. 1895, art. 2970, authorizing a wife to incur debts for the benefit of her separate property, and she is not bound thereby. Taylor v. Thomas (Tex.) 145 S. W. 1061.

BENEFIT CERTIFICATE HOLDER

A "benefit certificate holder" of a fraternal insurance society is one who has been initiated and has also received a benefit certificate. Tracy v. Supreme Court of Honor, 93 N. W. 702, 704, 4 Neb. (Unof.) 189.

BENEFIT FROM PUBLIC IMPROVEMENT

"Benefits" flowing from a public improvement are both general and special; general benefits consisting in increase in the value of land common to the community in general, and special benefits consisting of that increase in the value of land caused immediately by the construction of the improvement. Beveridge v. Lewis, 70 Pac. 1083, 1085, 137 Cal. 619, 59 L. R. A. 581, 92 Am. St. Rep. 188.

The rule that the cost of a municipal improvement, if assessed against abutting property, must be assessed in proportion to the amount of "benefits" accruing to the property owners only requires that there should be some rule of apportionment of the whole charge, having reference to the benefit received by the respective owners, and not that no owner should be charged in excess of actual benefits received. Harton v. Town of Avondale, 41 South. 934, 937, 147 Ala. 458 (citing Mayor and Aldermen of City of Birmingham v. Klein, 7 South. 886, 89 Ala. 461, 8 L. R. A. 369; City Council of Montgomery v. Moore, 37 South. 294, 140 Ala. 650).

An original assessment roll in proceedings by drainage commissioners to levy an assessment for paying for a ditch contained a column headed "benefits," one headed "damages," and a third headed "total benefits," and the column headed "damages" was blank so far as the property of an objector to the assessment was concerned. Held, that it would be presumed that an entry in the column headed "benefits" showed benefits in excess of damages. Commissioners of Fountain Head Drainage Dist. v. Wright, 81 N. E. 849, 850, 228 Ill. 208 (citing Lovell v. Sny Island Levee Drainage Dist., 32 N. E. 600, 159 Ill. 188; Huston v. Clark, 112 Ill. 344).

Benefit common to other property

"Benefits common to other property" are those general, intangible benefits which are supposed to flow to the public generally from a public improvement. Spokane Traction Co. v. Granath, 85 Pac. 261, 263, 42 Wash. 506.

BENEFIT INSURANCE

As life insurance, see Life Insurance.

BENEFIT OF CREDITORS

See Assignee for Benefit of Creditors; Assignment for Benefit of Creditors.

BENEVOLENCE

"Benevolence" is an act of kindness or charity. In re Graves' Estate, 89 N. E. 672, 673, 242 Ill. 23, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137.

"Benevolence" includes all acts or gifts prompted by good will or kind feelings and may be entirely independent of any thought or intention of charity. The recipient or beneficiary may be well-to-do and not in need of charity. The word "benevolent," as used in a bequest in trust for charitable and benevolent institutions in a city, is coupled

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with the word "charity," and the institutions intended as beneficiaries must be both charitable and benevolent, and the word "benevolent" means charitable. People v. Powers, 41 N. E. 432, 433, 147 N. Y. 104, 35 L. R. A. 502.

"Benevolence" is the doing of a kind or helpful action toward another under no obligation except an ethical one; it includes all gifts prompted by good will or kind feeling toward the recipient, whether an object of charity or not. A benevolent society does not include a society organized for mutual benefit and advantage of its members, and not merely from motives of charity, or with the desire or the design of doing good to others, which is the very essence of "benevolence." State v. Dunn, 46 S. E. 949, 950, 134 N. C. 663 (citing and adopting Black's Law Dict.).

BENEVOLENT

"Benevolent" means having a disposition to do good; possessing or manifesting love to mankind and a desire to promote their prosperity and happiness; disposed to give to good objects; kind; charitable. State v. Dunn, 46 S. E. 949, 950, 134 N. C. 663 (citing and adopting Webster's Dict.; State ex rel. Attorney General v. Critchett, 32 N. W. 787, 37 Minn. 13; Foster v. Moulton, 29 N. W. 155, 35 Minn. 458; Gorman v. Russell, 14 Cal. 531).

Laws 1907, c. 408, § 2, exempts from taxation all that part of any building, together with the ground on which it stands, belonging to any benevolent or charitable corporation or organization, situated under any lodgeroom, etc., used by such corporation, or the compartments, etc., used as appurtenants to such lodge, when such part of the building is leased for legitimate purposes, and the net rents or earnings are applied exclusively to benevolent or charitable purposes. Held, that a part of the rents of a building owned by a subordinate lodge of Odd Fellows which was applied to paying for the property was profits, so that the rents were not applied exclusively to "benevolent and charitable" purposes so as to exempt the property from taxation. Summunduwot Lodge No. 3, I. O. O. F., v. Spaeth, 106 Pac. 1077, 1078, 81 Kan. 894.

Charitable distinguished

"Benevolent" is wider than "charitable" in its legal signification. A trust for benevolent and charitable objects, as the trustee may select, is void as being indefinite and vague. Hegeman's Ex'rs v. Roome, 62 Atl. 392, 393, 70 N. J. Eq. 562.

"Benevolent" includes objects and purposes that are not charities. Van Syckel v. Johnson, 70 Atl. 657, 658, 80 N. J. Eq. 117.

Comp. Laws, §§ 8258–8263, as originally enacted, was entitled "An act to provide for the incorporation of benevolent societies," and authorized a corporation to provide for the relief of distressed members, the visitation of the sick, etc., and such other "benevolent and worthy purposes" and objects as affect the members of the corporation, and gave the corporation power to receive and enjoy property, and to sell, mortgage, and dispose of the same, provided that the proceeds arising from all estate and investments should be devoted exclusively to the benevolent purposes and objects of the corporation. Held, that the word "benevolent" has a much broader significance than the word "charity," and includes things which are in no sense charities, and refers to the kind intention of the donor rather than the condition of the donee, meaning in its broader sense liberality and generosity, though its meaning may be circumscribed by the circumstances, and, as used in the statutes, it denotes acts tending to relieve misfortune and confer a benefit on a needy member, though he may not be an actual object of charity, so that a conveyance by the society to all of its members was not a disposition for "benevolent purposes," and hence was beyond the powers of the society. German Corp. of Negaunee v. Negaunee German Aid Society, 138 N. W. 343, 345, 172 Mich. 650 (quoting 1 Words and Phrases, pp. 753–756).

Charitable synonymous

The words "benevolent" and "charitable" are nearly synonymous in meaning, and as frequently used are entirely so, especially when applied to purposes or institutions. Kansas Masonic Home v. Board of Com'rs of Sedgwick County, 106 Pac. 1082, 1086, 81 Kan. 859, 26 L. R. A. (N. S.) 702.

"Charity" is defined as "benevolence." Any act of kindness or benevolence and "charitable" is defined as pertaining to or characterized by charity, benevolence, or kindness. In re Graves' Estate, 89 N. E. 672, 673, 242 Ill. 23, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137.

"Charity" is a gift to promote the welfare of others in need, and "charitable," as used in constitutional and statutory provisions relating to exemptions from taxation, means intended for charity, and "benevolent," as used therein, is entirely synonymous with "charitable." Mason v. Zimmerman, 106 Pac. 1005, 1008, 81 Kan. 799.

Where testatrix authorized her executors to divide the estate among such religious, charitable, and benevolent purposes as they might think best, the use of the word "benevolent," in connection with the words "charitable and religious," did not render the trust so indefinite that it became inoperative. Though the word "benevolent" covers a wide field, its essential and substantial meaning is familiar and easily grasped. It is little, if any, more indefinite than the word "charitable," and in many cases it has been

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held to have been synonymous with "charitable." In re Dulles' Estate, 67 Atl. 49, 50, 218 Pa. 162, 12 L. R. A. (N. S.) 1177.

In a bequest to be divided among such benevolent charitable and religious institutions and associations as might be selected by the testator's executors, the word "benevolent" should be construed synonymous with "charitable," and a bequest was therefore not void for uncertainty. In re Murphy's Estate, 39 Atl. 70, 71, 184 Pa. 310, 63 Am. St. Rep. 802.

BENEVOLENT ASSOCIATION

A cemetery corporation, selling lots to members of the public generally, is not a charitable or benevolent corporation within St. 1909, c. 490, pt. 1, § 5, cl. 3, exempting from taxation the property of "benevolent" and "charitable" institutions. Town of Milford v. Commissioners of Worcester County, 100 N. E. 60, 61, 213 Mass. 162.

Rev. St. 1909, § 7109, requires a benevolent association to be a corporation, society, or voluntary association, organized and conducted for the sole benefit of its members and their beneficiaries and not for profit, to have a lodge system with ritualistic form of work, and a representative form of government, making provision for payment of benefits for death to be derived from assessments collected from its members. Held, that the question whether an insurer was a benevolent association within the meaning of the statute was to be determined in part from the certificate of incorporation and in part from facts showing that its business was conducted in the manner prescribed by statute for benevolent associations, and if an association did not have a lodge system or ritualistic form of work and did not pay benefits entirely from assessments, it would not be a benevolent association within the statute. Thompson v. Royal Neighbors of America, 133 S. W. 146, 149, 154 Mo. App. 109.

A Young Men's Christian Association was incorporated for "the improvement of the spiritual, mental, social and physical condition of young men," with a membership made up of active members with the exclusive right to vote and hold office, of associate members enjoying all other privileges, and limited members, not permitted to use the gymnasium and other means of amusement, together with sustaining members, and unlimited members, who paid certain fees annually for privileges; there being no religious test applied to associate members. The association work included services in different school houses and churches at its own expense, educational classes, charging a small fee, but never conducted at a profit, classes in rowing, swimming, etc.; and it also maintained a reading room open to the public, and held meetings for social purposes, public receptions, etc. It depended for support mainly upon subscriptions, derived no profit from its work, had no capital stock, and no paid officers, except a secretary. Held, that the association was a benevolent or charitable corporation, within St. 1909, c. 490, pt. 1, § 5, cl. 3, and that funds held in trust for it were exempt from taxation. Little v. City of Newburyport, 96 N. E. 1032, 1033, 210 Mass. 414, Ann. Cas. 1912D, 425.

An association formed to extend aid to sick members and to defray burial expenses of their dead from funds accumulated from initiation fees and monthly dues is not a benevolent or religious society, within a code provision relating to misdemeanors of treasurers of such societies. State v. Dunn, 46 S. E. 949, 134 N. C. 663.

BENEVOLENT CORPORATION

See Benevolent Association.

BENEVOLENT SOCIETY

See Benevolent Association.

BENT

A contrivance used to place the top of a rock crusher into position and consisting of two upright pieces and a crosspiece some ten feet long connecting the two uprights is a "bent." Choctaw, O. & G. R. Co. v. Jones. 92 S. W. 244, 246, 77 Ark. 367, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430.

BEQUEATH

See Give and Bequeath; Give, Devise, and Bequeath.

Devise synonymous

"Bequeath" is synonymous with "devise" when used with reference to a gift of real estate. Gannon v. Albright, 81 S. W. 1162, 1163, 183 Mo. 238, 67 L. R. A. 97, 105 Am. St. Rep. 471.

The word "bequeath," when expressly applied to real estate, is equivalent to the word "devise"; words of inheritance being made unnecessary by 3 Gen. St. 1895, p. 3763, § 35. Centenary Fund & Preachers' Aid Soc. of New Jersey Annual Conference of Methodist Episcopal Church v. Lake, 66 Atl. 601, 72 N. J. Eq. 808.

While the word "devise" is the appropriate term to pass title to real estate, and "bequeath" the term applicable to gifts of personal property, a strict adherence to technical words is not necessary to give effect to a testator's intent, and the fact that the word "devise" is not used does not prevent the title to real estate passing by the use of the word "bequeath." Mills v. Tompkins, 97 N. Y. Supp. 9, 10, 110 App. Div. 212.

In a strictly modern legal sense, the word "bequeath" is the appropriate term for making a gift by will of personalty, and the word "devise" for a gift of realty; but as it

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is evident that the testator used the former words in their popular sense, and as applicable alike to a gift by will of property of any kind, they cannot be limited to gifts of personalty. In re Zien's Estate, 134 N. W. 498, 500, 117 Minn. 178.

Although the word "devise" properly and technically applies only to real estate, and "bequeath" only to personal property, they have been made interchangeable by Ky. St. 1903, § 467. Roberts v. Chenoweth (Ky.) 112 S. W. 625, 627.

Where circumstances indicated that a sale of testator's property would be necessary and the entire will showed that he probably contemplated that there should be a sale, a provision that he did "give," "devise," and "bequeath" to his two sons each $500 and $500 to three daughters, who should share equally of his estate both real and personal with the two sons, the word "devise" was not used in its technical or legal sense but as synonymous with "give" and "bequeath." Schwingel v. Anthes, 101 N. W. 335, 336, 72 Neb. 645.

In common acceptation, "bequest" and "legacy" are synonymous terms, but "bequeath" is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed. The words "devise," "bequest," and "legacy" are not infrequently used in wills in a sense different from their strict legal meaning. It is stated in a recent work on wills that, "of the verbs used to denote the act of making a will, 'devise' is properly used of realty, and 'bequeath' of personalty. Of the nouns used to name the various forms of gift, 'devise' is used of a gift of realty. 'Legacy' is used of a gift of personalty in general. None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy. A devise is often miscalled a 'bequest,' or 'bequest' is often used to include both realty and personalty or is used of a gift of money alone. So the verb 'devise' is often used to refer to personalty alone." In re Campbell's Estate, 75 Pac. 851, 853, 27 Utah, 361 (citing Page, Wills, § 2).

While the word "bequeath" is naturally applicable to personal property, yet, when associated in a will with the word "give," it is capable of transmitting real estate if such appears to have been testator's intention. Campbell v. Cole, 64 Atl. 461, 462, 71 N. J. Eq. 327.

As limited to personalty

"Bequeath" is properly used only in making a testamentary transfer of personal property. Harris v. Ingalls, 68 Atl. 34, 36, 74 N. H. 339; Mills v. Tompkins, 97 N. Y. Supp. 9, 10, 110 App. Div. 212.

BEQUEST

See By Right Devise or Bequest; Collateral Bequest or Devise.
Residuary bequest, see Residuary.
Specific bequest, see Specific Legacy.

"Bequests" refer to personalty. Dickson v. New York Biscuit Co., 71 N. E. 1058, 1063, 211 Ill. 468.

A "bequest" ordinarily passes personal property. Clark v. Goodridge, 103 N. Y. Supp. 36, 44, 52 Misc. Rep. 239.

While the word "devise" is usually employed to denote a gift of real estate or an interest therein, the word "bequest" may mean any gift by will, whether it consists of personal or real property, and the use of the word "bequeath" in a will instead of "devise" will not necessarily lead to the conclusion that the property which a testatrix thereby intended to dispose of was personalty; but where the word "bequeath" is coupled with the word "give," which is of the largest possible signification, "bequeath" is applicable as well to real as personal estate. Rickman v. Meier, 72 N. E. 1121, 1126, 213 Ill. 507.

In a strictly modern legal sense, the word "bequest" is the appropriate term for making a gift by will of personalty, and the word "devise" for a gift of realty; but as it is evident that the testator used the former word in its popular sense, and as applicable alike to a gift by will of property of any kind, it cannot be limited to gifts of personalty. In re Zien's Estate, 134 N. W. 498, 500, 117 Minn. 178.

A will provided, after directing the payment of debts, that testator's wife should have the family residence for life, remainder to his three daughters, and then directed that his executor should have power to convert into money any property, real or personal, of which he might die possessed, and divide and distribute it as follows: To his granddaughter one-fifth of a $2,000 life policy, the amount to be paid out of the estate if the policy was not paid in full, and to his wife the household and kitchen furniture, and immediately following this clause the will read: "It is my special desire that my wife and three daughters shall share equally in the distribution of my estate after the bequests already made are complied with." Held, that the word "bequests" was not meant to be used in a technical sense and referred to the devise of the family residence and the legacy of $400 to the grandchild. Thomas' Ex'x v. Thomas' Guardian (Ky.) 110 S. W. 583, 855.

Although properly and technically the word "bequest" applies only to personal property, it has been made interchangeable by Ky. St. 1903, § 467, which provides that "the words 'legatee' and 'devisee' shall each be held to convey the same idea; and the

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words 'bequeath' and 'devise' to mean the same thing; and the words 'bequest' and 'legacy' shall each be held to mean the same thing and to embrace and include either real or personal property or both." Roberts v. Chenoweth (Ky.) 112 S. W. 625, 627.

Codicil

In reply to counsel's argument that the term "codicil," used by the notary, designated the last bequest as a separate act, and not as a part of the one will, the district court said that the notary did not use the term "codicil" alone but styled the additional bequest a "codicil and addition to the will," but, if he had used the term "codicil" alone, he would have been using a term synonymous with the word "bequest" or "disposition"; that the Civil Code uses the word "codicil" as synonymous with the word "disposition" or "legacy" in the provision that no "disposition" mortis causa shall henceforth be made otherwise than by a last will or testament, but the name given to the act of last will is of no importance, and dispositions may be made by testament or under that institution of heir, legacy, codicil, donation mortis causa, or under any other name indicating the last will, provided that the act be clothed with the forms required for the validity of the testament, and the clauses it contains clearly establish that it is a disposition of last will. The conclusions of the district court were affirmed. Oglesby v. Turner, 50 South. 859, 864, 124 La. 1084.

Legacy synonymous

In common acceptation, "bequest" and "legacy" are synonymous terms; but "bequeath" is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed. In re Campbell's Estate, 75 Pac. 851, 853, 27 Utah, 361 (citing Page, Wills, § 2).

BERRY JAMS

As edible fruit, see Edible Fruit.

BESIDES

A marriage contract recited that the woman owned and brought in marriage as her paraphernal and extra dotal property her interest in the community of acquets and gains which had existed between her and her late husband, whose succession was in the course of administration and which interest had not yet been liquidated, "and besides her said rights, yet unliquidated, she brings in marriage certain goods, the value of which appears" at a certain sum. Held, that the word "besides" meant "together with" or "in addition to" the property first described. Joly v. Weber, 35 La. Ann. 806, 811.

BEST

See Deem Best; Think Best.

BEST AND MOST APPROVED

An appliance which is "the best and most approved" is necessarily one of the safest character, so that it was not error to instruct in an action against a railroad company for injury to property by fire that defendant must show that its engine was equipped with the best and most approved appliances, etc., to arrest sparks. Cleveland, C., C. & St. L. R. Co. v. Hornsby, 66 N. E. 1052, 1054, 202 Ill. 138.

BEST ENERGIES

Where plaintiff, when making a contract for the exclusive agency for defendant's automobiles in New England, was carrying on the business of selling and repairing bicycles and motorcycles; and it was not contemplated that he should abandon same, but should rather enlarge it by the addition of defendant's automobiles, a provision in the contract that he was to devote his "best energies" to the sale of defendant's product did not require that he give defendant's machines his exclusive attention, but merely required that he should conduct the business in his own way, with the right to add agency to sell noncompeting automobiles. Randall v. Peerless Motor Car Co., 99 N. E. 221, 226, 212 Mass. 352.

BEST EVIDENCE

In law "best evidence" is a technical term. It does not necessarily mean that which is most credible, though generally it is supposed to refer to that fact. By the rule requiring the introduction of the "best evidence" is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The transcript of the testimony of a deceased witness, testifying at a former trial, may be proved by the official stenographic reporter and read by him as evidence when the reporter testifies that the testimony was taken down accurately and correctly transcribed. Austin v. Commonwealth, 98 S. W. 295, 297, 124 Ky. 55 (citing in support of the definition 1 Greenl. Ev. § 82).

Where a witness testified that he worked for his father and had no money, except such as his father gave him, a question on cross-examination as to whether he had not presented a claim for $115 against a certain estate and whether that sum had not been paid was not objectionable as not the "best evidence" of the presentation of the claim, which was made of record. Joyce v. Joyce, 67 Atl. 374, 375, 80 Conn. 88.

To say that certain evidence is the best kind of evidence is tantamount to saying that it is better than any other kind. Wittick's Adm'r v. Keiffer, 31 Ala. 199, 201.

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BEST INTERESTS OF TERRITORY

The "best interests of the territory," which authorize a county board to organize a new school district, means the best interests of the people of the territory. In re Irons, 137 N. W. 303, 305, 119 Minn. 119.

BEST JUDGMENT

"Best judgment" means substantially the same thing as "opinion" or "belief." Harris v. State, 137 S. W. 373, 376, 62 Tex. Cr. R. 235.

BEST MANNER

The charter of a seminary provided that property held by its trustees and necessary for carrying out the design of the seminary in the "best manner" should be free from all taxation while used exclusively for such purpose. Held that, so far as the Legislature could aid the seminary, the general purpose of the seminary could be accomplished in the "best manner" only by exempting from taxation all of its property, the income from which and the use of which were exclusively devoted to the purpose of founding and maintaining the seminary as an institution of learning and not merely by exempting property actually used for buildings. Colorado Seminary v. Board of Com'rs of Arapahoe County, 71 Pac. 410, 413, 30 Colo. 507.

BEST OF ABILITY

Where one employing himself as a cheesemaker agreed that he would do the work to the "best of his ability," if his employer knew when he was employed that he was a novice in the cheesemaking trade, the quoted phrase might well mean that he should only devote such skill and industry as he possessed to the work, though it might not equal that ordinarily exercised; but, if both parties contemplated that the employé was an extraordinary skillful man in the trade, the quoted phrase might even require a higher degree of skill than ordinary. Wenger v. Marty, 116 N. W. 7, 8, 135 Wis. 408.

BEST OF HIS KNOWLEDGE AND BELIEF

The term "best of the knowledge and belief," as used in a statute providing that an order for the examination of a judgment debtor shall issue only if certain facts be made to appear by affidavit, which affidavit shall be made to the best of the knowledge and belief of affiant, does not permit an affidavit to be made on the best information and belief of affiant. Ackerman v. Green, 81 S. W. 509, 512, 107 Mo. App. 341.

BEST QUALITY

Where a contract for the construction of a public improvement specified that the "best quality of Portland cement" should be used, the contract could not be satisfied by the use of any sound imported Portland cement which would have filled the three special requirements as to tensile strength, fineness, and weight. Drainage Commission of New Orleans v. National Contracting Co., of New York, 136 Fed. 780, 792 (citing McIntire v. Barnes, 4 Colo. 287).

BEST SKILL AND DISCRETION

Where testatrix directed her trustees to invest a fund for the benefit of the beneficiary to their "best skill and discretion," such provision required the exercise of more than ordinary care and prudence in the investment of the fund, but did not enlarge the powers or discretion of the trustees. Michigan Home Missionary Society v. Corning, 129 N. W. 686, 689, 164 Mich. 395.

BEST USE

See Highest and Best Use.

BET

See, also, Wager—Wagering Contract.

The legal meaning of the term "bet" is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties according to the result of the trial of chance or skill, or both combined. Mayo v. State (Tex.) 82 S. W. 515, 516; Melton v. State (Tex.) 124 S. W. 910, 911; State v. Way, 93 Pac. 159, 160, 76 Kan. 928, 14 L. R. A. (N. S.) 603.

An agreement that the loser of a pool game shall pay the fee for the use of the table constitutes a "bet." Berry v. State, 92 S. W. 1081, 1082, 49 Tex. Cr. R. 376; Hopkins v. State, 50 S. E. 351, 122 Ga. 583, 69 L. R. A. 117, 2 Ann. Cas. 617.

The question as to whether or not a bet has been made is entirely independent of the parties thereto having any conversation between themselves with reference to the betting, and it is not necessary in order to constitute a "bet" upon a gaming table that there be an express understanding between the parties to that effect. Rainbolt v. State, 101 S. W. 217, 218, 51 Tex. Cr. R. 153.

A "bet" is ordinarily an agreement between two or more that a sum or value or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event at the present an uncertainty. Thomson v. Hayes, 111 N. Y. Supp. 495, 498, 59 Misc. Rep. 425 (quoting Harris v. White, 81 N. Y. 532, 539).

A bet, like an ordinary contract, involves a concurrence of wills. There must be an offer and an acceptance thereof in accordance with its terms; and the acceptance will not be complete until it is actually or constructively communicated to the party making the offer. McQuesten v. Steinmetz, 58 Atl. 876, 877, 73 N. H. 9, 111 Am. St. Rep. 592.

In order to constitute a bet, there must be a tender or offer to bet by one party and

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the acceptance by the other. The party who tenders the debt is not the party to accept the bet. It is the party to whom the tender is made who is the acceptor, and a person tendering or offering a bet on a horse race was not within Acts 1903, p. 68, c. 50, § 1, making it an offense to take or accept any bet on a horse race. Windsor v. State, 79 S. W. 312, 313, 46 Tex. Cr. R. 140.

A "bet" or wager is ordinarily an agreement between two or more that a sum of money, or some valuable thing, in contributing which all agree to take part, shall become the property of one or more of them on the happening in the future of an event at the present uncertain or upon the ascertainment of a fact in dispute. Rich v. State, 42 S. W. 291, 292, 38 Tex. Cr. R. 199, 200, 38 L. R. A. 719.

A "bet" is "an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event at the present uncertain; the mutual agreement and tender of a gift of something valuable, which is to belong to the one or the other of the contracting parties, according to the result of the trial or chance or skill, or both combined; a wager; to put to hazard a sum ascertained upon a future happening of some event then uncertain; the thing or sum wagered." Stevens v. Cincinnati Times-Star Co., 73 N. E. 1058, 1061, 72 Ohio St. 112, 106 Am. St. Rep. 586 (quoted and adopting definition in 5 Cyc. p. 684).

An intention to "settle by the payment of differences," "betting on future prices," or "closing up without delivery by the payment of differences" is equivalent to and means an intention by one who has sold for future delivery to buy on the same board for the same delivery and to offset the purchase against the sale and receive or pay the difference. Carson v. Milwaukee Produce Co., 113 N. W. 393, 395, 133 Wis. 85.

Ordinary "betting" has never been made a crime, while the keeper of a gambling house is subjected to severe punishment. Under Code Cr. Proc. § 742, requiring the information to contain a brief description of a statutory crime, an information charging defendant with engaging in bookmaking, and stating that he did quote and lay odds, by publishing the terms on which he was willing to bet against horses on the result of races, etc., but failing to allege the writing or recording of anything, was insufficient to charge a violation of Pen. Code, § 351, making it a misdemeanor to engage in bookmaking, since there can be no bookmaking without writing or recording; the word in "betting," as used in the Penal Code, implying the use of a book, or sheets of paper, or a bulletin board, or some such thing. People ex rel. Jones v. Langan, 116 N. Y. Supp. 718, 719, 132 App. Div. 393; Id., 116 N. Y. Supp. 720, 132 App. Div. 937.

Gaming distinguished

"Betting" does not constitute gaming unless a wager is laid on a game. In re Opinion of the Justices, 63 Atl. 505, 507, 73 N. H. 625, 6 Ann. Cas. 689.

"There has always been observed distinction between 'betting' and 'gambling' or the maintaining of a house or place to which people could resort to gamble. At common law wagers on different subjects were legal and might be enforced, while a gambling house or a resort for gamblers was a public nuisance. The same distinction obtains in New York where ordinary betting has never been made a crime, while the keeping of a gambling house has been subjected to severe punishment." The laying of odds alone on a horse race would not therefore constitute a crime. People ex rel. Lichtenstein v. Langan, 89 N. E. 921, 922, 196 N. Y. 260, 25 L. R. A. (N. S.) 479, 17 Ann. Cas. 1081.

Play synonymous

See Play.

Premium or award distinguished

"In a 'bet' there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must lose or win. In a 'premium' or 'award' there is but one party until the act, thing, or purpose for which it is offered has been accomplished. A 'premium' is an 'award' or recompense for some act to be done. A wager is a stake upon an uncertain event." The offering of a premium to a winner of a horse race is not a 'bet' or wager within Code, § 4028, prohibiting the making of any bet or wager. Under Code, § 1109, authorizing the county agricultural societies to award premiums for the improvement of stock, a premium may be offered for the winner of a horse race. Deller v. Plymouth County Agri. Soc., 10 N. W. 872, 874, 57 Iowa, 481 (citing Alford v. Smith, 63 Ind. 58; Harris v. White, 81 N. Y. 532).

As a wager

A "bet" is defined as that which is laid, staked, or pledged as between two persons upon the event of a contract or any contingent issue, the act of giving such a pledge, and to be synonymous with "wager" applied both to the contract of betting and wagering and to the thing or sum bet or wagered. Ex parte Walsh, 129 S. W. 118, 121, 59 Tex. Cr. R. 409 (citing 1 Words and Phrases, p. 764).

BETTING BOOK

A "betting book," as used in Act No. 57, p. 64, of 1908, forbidding gambling on horse races by betting books, is a book kept for registering bets upon the result of horse

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races, and includes the whole scheme of betting. State v. Scheffield, 48 South. 932, 934, 123 La. 271.

BETTERMENT

The improvements, for which Sand. & H. Dig. § 2590, authorizes compensation to one holding under color of title before causing possession to be transferred to the real owner after judgment in ejectment, are technically and commonly denominated "betterments"; and the definition of the term "betterments" to be found in the books is "improvements made to an estate. It signifies such improvements as have been made to the estate, which render it better than mere repairs. * * * The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc. To entitle one to betterments depends upon his bona fide supposition that he bought the title in fee." Bouvier, Law Dict. This definition is that given substantially in all jurisdictions having similar statutes. Sometimes we say the improvements must be permanent, and not merely temporary. The idea seems to pertain that the improvements are such as were added to the value of the land as it shall come into occupancy and use of the true owner; for he is the person required to pay for them, although they have been made without his consent. Greer v. Fontaine, 77 S. W. 56, 57, 71 Ark. 605.

A railroad corporation chartered to take over the properties of another corporation and to provide for its liabilities issued bonds providing that the interest thereon should be payable out of the net earnings and income of the railroad company applicable to such purpose when ascertained and fixed as provided in the mortgage securing the bonds. The mortgage provided that the fund available for interest was to be ascertained by deducting from the gross earnings and income of the railroad company all costs of repairs, renewals, etc., and reasonable betterments to the railroad equipment and property, and certain other items of expense and charges. Held, that the betterments permissible as an item of deduction related to the betterment of the equipment of the railway company, such as would benefit the railroad equipment and other property used in the operation of the railroad company, reasonable in character and proper for the economical and efficient operation of the railroad company, not limited to renewals or replacement of equipment, but including additions thereto, provided such enlargement of equipment was reasonable and proper in the economical operation of the railroad to keep its equipment in a state of efficiency to enable the company to discharge its duty to the public, but did not include the purchase or lease of other railroads or lands acquired for expansion or extension of the railroad. Central of Georgia Ry. Co. v. Central Trust Co. of New York, 69 S. E. 708, 712, 135 Ga. 472.

BETWEEN

Where a testator orders a division between two groups, the word "between" imports that not more than two persons or groups are set against one another. McIntire v. McIntire, 24 Sup. Ct. 196, 197, 192 U. S. 116, 48 L. Ed. 369.

As among

Where a distribution was directed to be made "between" persons more than two, the word is equivalent in meaning to "among." In re Kleeman, 115 N. Y. Supp. 982, 983, 61 Misc. Rep. 560.

The word "between" ordinarily refers to two only and not more, but is frequently used, especially by the uneducated and colloquially, in the sense of among, as referring to more than two objects. Where a trust deed provided that the proceeds of a sale should be divided equally between the beneficiaries and each of his children, the use of the word "between" did not indicate the purpose to require the division of the fund into two parts, one to the beneficiary and the other to be equally divided between the children. Jones v. Day, 62 Atl. 364, 102 Md. 99.

While, in a strictly technical sense, the word "between" implies a division between two persons or classes, yet frequently by the uneducated and colloquially it is used in the sense of "among," especially where it follows the word "divide." Rogers v. Morrell, 64 S. E. 143, 144, 82 S. C. 402, 129 Am. St. Rep. 899.

The word "between" is not always to be given a strict etymological signification, "between two," but may, where the context demands it, be construed as "among." The decisions show innumerable instances of the interchangeable use of the words. When they follow the word "divide," their general signification is very similar, and in popular use they are synonymous, though "among" denotes a collection and is never followed by two of any sort, whilst "between" may be followed by any plural number and seems to denote rather the individuals of the class than the class itself generically. Edwards v. Kelly, 35 South. 418, 420, 83 Miss. 144.

In devises, as by classes

The word "between" is not always to be given a strict etymological signification, "between two," but may, where the context demands it, be construed as "among." The decisions show innumerable instances of the interchangeable use of the words. When they follow the word "divide" their general signification is very similar, and in popular use they are synonymous, though "among"

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denotes a collection and is never followed by two of any sort, whilst "between" may be followed by any plural number and seems to denote rather the individuals of the class than the class itself generically. Where the joint will of a husband and wife provided that, in case of the death of either, the property of the one first dying should vest in the survivor, unless the survivor marry again, when the property inuring to the survivor's benefit by the death of the other should be divided equally "between" the survivor and the children of the survivor and the deceased, the survivor did not take one half of the estate and the children the other half, but the word "between" was used in the sense of "among." Edwards v. Kelly, 35 South. 418, 420, 83 Miss. 144.

A devise to a trustee to pay from the income a specified sum monthly to a son of testator, and at his death to equally divide between testator's surviving children and a daughter of the son, is a devise to the children of testator living at his death, except the son, and to his daughter, equally; the word "between" meaning "amongst." Spencer v. Adams, 97 N. E. 743, 744, 211 Mass. 291.

Same—As per capita

Where testator bequeathed to H. (his son) and to "W., L., and G." (children of a predeceased daughter) all his notes, mortgages, and moneys, "to be equally divided between them," and also his other personal property "to be sold to the highest bidder, and the money equally divided between the legatees above named," the word "between" was intended to mean "among," and the parties took per capita, and not per stirpes. Rogers v. Morrell, 64 S. E. 143, 144, 82 S. C. 402, 129 Am. St. Rep. 899 (citing 1 Words and Phrases, p. 768).

Where a husband and wife, having no children, executed a joint will providing that the husband transferred to the wife the right and authority over their joint property and, in case she should outlive him, to live thereon till her death, the property left thereafter to be divided equally "between" "our lawful heirs on both sides," the wife's heirs, after her death, she having survived her husband, were entitled to share in one-half of the land so devised by him per stirpes and not per capita. Knutson v. Vidders, 102 N. W. 433, 435, 126 Iowa, 511.

The word "between," if accurately used, imports that not more than two persons or groups are set against each other, and those groups are earmarked and shown to be regarded as groups. The children of the brothers of an illiterate testator take per capita, and not per stirpes, under the residuary clause of a will in which, after making a bequest to certain nephews and nieces, the testator provides for an equal division of the remainder "between my brothers Edwin and Charles children." McIntire v. McIntire, 24 Sup. Ct. 196, 197, 192 U. S. 116, 48 L. Ed. 369 (citing Ihrie's Estate, 29 Atl. 750, 162 Pa. 369; Records v. Fields, 55 S. W. 1021, 155 Mo. 314).

Testator devised the income of certain real estate to his daughter for life, and provided that at her death, should she have issue, such issue should receive one half of the income, and the other half be equally divided between testator's other heirs, as thereafter mentioned, but, should there be no issue of the daughter, then the property should revert to testator's estate, and the income be equally divided between his surviving heirs and the children of such of his heirs who had died leaving issue; that the property should not be sold, but should be kept as a source of income to his heirs. The balance of his real and personal property was given to specifically named persons. Held, that the word "heirs," as used in the will, meant children, and that the devisees under such clause took per capita, and not per stirpes; the word "between" not being used in its technical sense as a reference to two only, but as applying to a division among many. Guesnard v. Guesnard, 55 South. 524, 526, 173 Ala. 250.

Same—As per stirpes

While "between" may sometimes mean "among," a direction in a will to divide property equally between the children of one and those of another requires a division per stirpes and not per capita. Van Houten v. Hall, 67 Atl. 1052, 1053, 73 N. J. Eq. 384.

Between and including

Pub. Acts 1905, No. 200, providing for the education of children "between and including" the age of 7 and 15 years, does not apply to children who have reached their fifteenth year. Jackson v. Mason, 108 N. W. 697, 698, 145 Mich. 338.

Between piers

See Lying Between Piers.

Between two counties

"Between two counties" means having one county on one side and one on the other. Dodge County v. Saunders County, 97 N. W. 617, 618, 70 Neb. 442.

Between two points

Interstate Commerce Law, Act. Feb. 4, 1887, c. 104, § 6, 24 Stat. 380, declares that it shall be unlawful for any common carrier, party to any joint tariff, to charge or receive a greater or less compensation for the transportation of persons or property or for any services in connection therewith, between any points as to which a joint rate is named thereon than specified in the schedule filed by the commission in force at the time. Held, that the words "between two points" did not limit such section to points on the established route, but that the section prohibited the transportation of property between terminals in different states at a great-

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er or less rate than the established rate, without reference to routes. United States v. Pennsylvania R. Co., 153 Fed. 625, 627.

BEVERAGE

See For Beverage Purposes; Harmless Beverage; Sale as a Beverage.

The word "beverage" ordinarily means mixed drinks, but under the local option law (Rev. St. 1906, § 3464—25) it means intoxicating liquors given or sold to persons other than guests and drunk not for medicinal purposes. State v. Linder, 81 N. E. 753, 754, 76 Ohio St. 463.

The terms "beverage," "liquid mixture," or "decoction," as used in Ky. St. 1903, § 2557a, making the sale at retail of a beverage, liquid mixture, or decoction which produces intoxication, unlawful in a territory wherein the sale of intoxicating liquor is prohibited, are used interchangeably, each synonymous with the other. Commonwealth v. Jarvis & Williams, 86 S. W. 556, 557, 120 Ky. 334.

The mere fact that a liquid can be and is swallowed does not make it a "beverage"; the question being whether it was intended to be used as a beverage. State v. Costa, 62 Atl. 38, 41, 78 Vt. 198.

The use of liquor as a "beverage" does not mean simply that the same is to be drunk, but the word "beverage" is used to distinguish the act of drinking liquor for the mere pleasure of drinking, from its use for medicinal purposes. Gue v. City of Eugene, 100 Pac. 254, 256, 53 Or. 282 (quoting 1 Words and Phrases, p. 769).

A registered pharmacist may sell drugs and medicine containing intoxicating liquor or alcohol without a license authorizing him to sell liquor, provided the drugs and medicines are so compounded that they cannot be used as a beverage. Tonic bitters containing 30 per cent. alcohol, and capable of being used as a beverage, held a beverage, and not a medicine, and hence could not lawfully be sold by a pharmacist without a license to sell intoxicating liquors. McNiel v. Horan, 133 N. W. 1070, 1071, 153 Iowa, 630.

In view of prior legislation on the liquor traffic, the word "sale" in the title of Acts 1909, c. 1, entitled an act to prohibit the "sale" of intoxicating liquors as a beverage near a schoolhouse, where a school is kept, whether the school be in session or not, includes all sales without regard to their form or character; and the word "tipple," in section 1, declaring it unlawful "to sell or tipple" any intoxicating liquors as a beverage within four miles of such a schoolhouse, denotes a subdivision of the more comprehensive term "sale," as used in the title, and its equivalent "to sell" as used in the body; and the word "or," between "sell" and "tipple," is used in a disjunctive sense, the prohibition not being against tipple sales alone, but as well against any other sales; and the words "as a beverage" refer to a sale of liquor, not necessarily to be consumed by the immediate purchaser, but to be finally used, when it reached the consumer, as a beverage, so that a sale in wholesale quantities of intoxicating liquors, by a manufacturer thereof to a wholesaler, with only a general and promiscuous purpose, includes a beverage sale within the prohibition of the statute. J. W. Kelly & Co. v. State, 132 S. W. 193, 199, 123 Tenn. 516.

BEYOND

BEYOND THE CONTROL

Where a contract for the sale of coal provided that the delivery should be excused for causes "beyond the control of the seller," and required delivery at the buyer's dock, the inadequacy of the buyer's unloading facilities, of which the seller had notice when the contract was made, was not a cause affecting nondelivery beyond the control of the seller, for which delivery of a balance of the coal contracted for would be excused. Pittsburgh Coal Co. v. Northy, 123 N. W. 47, 48, 158 Mich. 530.

Where plaintiff contracted to construct a steel tower complete and ship within 45 working days from the date of the contract, but was not to be "responsible for delays in transportation, strikes, fires, floods, storms, nor any other circumstance beyond its reasonable control," a delay occasioned by inability to get material was not "beyond its reasonable control" within the contract, under the rule that the general limitation will include only causes similar to those specifically mentioned. American Bridge Co. of New York v. Glenmore Distilleries Co. (Ky.) 107 S. W. 279, 283.

BEYOND A REASONABLE DOUBT

See Reasonable Doubt.

Full satisfaction distinguished, see Full Satisfaction.

BEYOND SEAS

"In several of the states, the English statute of limitations has been adopted, with various modifications; but in the saving clause the expression 'beyond the seas,' is retained. These words in some of the states are construed to mean 'out of the state,' and in others a literal construction has been given to them." Green v. Neal, 31 U. S. (6 Pet.) 291, 300, 8 L. Ed. 402.

Under an indemnity policy covering only injuries "received within the United States (not including its parts beyond the seas), Mexico and Canada," the Canal Zone on the Isthmus of Panama is "beyond the seas" within the meaning of the policy. Currie v. Continental Casualty Co., 126 N. W. 164, 165, 147 Iowa, 281, 140 Am. St. Rep. 300.

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The term "beyond seas," as used in the statute of limitations, means beyond the state. Reichers v. Dammeier, 90 N. E. 644, 45 Ind. App. 208.

The words "beyond seas" were construed in Murray v. Baker, 16 U. S. (3 Wheat.) 541, 4 L. Ed. 454, to mean "without the limits of the state." Osgood v. Central Vermont Ry. Co., 60 Atl. 137, 138, 77 Vt. 334, 70 L. R. A. 930; Wadsworth v. Marshall, 34 Atl. 30, 31, 88 Me. 263, 32 L. R. A. 588.

BIAS

"Bias," as applied to the competency of jurors, is synonymous with "partiality." Macon Ry. & Light Co. v. Barnes, 49 S. E. 282, 284, 121 Ga. 443.

"Bias of mind" is, until demonstrated by act, purely a mental state, and where an affidavit of objection to the regular judge of the circuit court in a contest of a local option election case stated that he was "opposed to the sale and traffic in such liquors to the extent that he has a pronounced bias against it," without stating that he was personally hostile or biased against the litigants, and his official integrity was unquestioned, it was insufficient to show such bias or hostility as to disqualify him from sitting in the case. Erwin v. Benton, 87 S. W. 291, 292, 120 Ky. 536, 9 Ann. Cas. 264.

BIBLE

The "Bible" is the inspired word of God. The Creator of the Universe is its author. It is a book of divine instruction as to the creation of man, his relation to, dependence on, and accountability to, God. People v. Board of Education of Dist. 24, 92 N. E. 251, 252, 254, 245 Ill. 334, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220.

As sectarian book

See Sectarian Book.

As symbol

See Symbol.

BICYCLE

As carriage or vehicle

See Carriage; Vehicle.

BID

See Unbalanced Bid.

A "bid" for property of a bankrupt means an offer by a purchaser to pay something to the bankrupt's receiver for the property purchased, which the receiver may distribute among creditors. In re J. B. & J. M. Cornell Co., 186 Fed. 859.

"Bidding," within the act of 1874 (P. L. p. 73) relating to building and loan associations, requiring them to make loans by offering the money in open meeting and that the stockholder who shall bid the highest premium for the preference of priority shall be entitled to receive a loan, implies open competition at auction and is not satisfied by the submission of written offers which are dealt with in the order of priority of date. Klein v. Pennsylvania Savings Fund & Loan Ass'n, 65 Atl. 1103–1105, 216 Pa. 516, 116 Am. St. Rep. 784.

As contract

See Contract.

As offer to purchase

"Biddings at an auction" are mere offers which may be retracted at any time before the hammer falls and the offer has been accepted. McPherson v. Okanogan County, 88 Pac. 199, 200, 45 Wash. 285, 19 L. R. A. (N. S.) 748.

BIDDER

See Highest Bidder; Responsible Bidder. Lowest bidder, see Lowest Bidder.

BIDDING

See Chilled the Bidding; Open Bidding.

BIENNIAL

Under the statutes prior to 1893, the trustees of the state charitable institutions were to be appointed biennially, and hold office for the term of two years. By an act approved April 5, 1893, the separate boards were abolished, and it was provided that the Governor should biennially appoint one board of trustees for the state charitable institutions. By the amendatory act of February 23, 1905 (Acts 1905, p. 136), a seventh member was added to be appointed upon the passage of the act, his term to "expire simultaneously with that of the other six." The act of May 14, 1907, authorized the board of trustees to make contracts for the purchase of fuel for 12 months, provided this period shall not extend beyond the tenure of the office of the board. Held, that in view of the previous policy as to a fixed tenure, and the apparent construction of the law by subsequent acts, the members of the board hold office by appointment for a fixed term, for the word "biennial" means once in two years, and, while the use of the word does not necessarily impose a limitation upon the space of time which must intervene, and it may under some circumstances be held to mean that the thing in question shall occur as often as once in two years, its use in this instance carries with it the meaning of a fixed term of two years, and that appointment to membership shall conform to the expiration of the term. Bruce v. Matlock, 111 S. W. 990, 991, 86 Ark. 555.

BIENS

The word "biens," as used in the French Civil Code, means property in its general

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sense. Randolph v. Kraft, 55 South. 340, 341, 128 La. 743.

The Norman French term "biens," which corresponds to goods, is said to include property of every description, except estates of freehold. State v. Fontenot, 36 South. 630–633, 112 La. 628 (quoting and adopting the definition in McCaffrey v. Woodlin, 65 N. Y. 468, 22 Am. Rep. 644).

"Biens" is defined as property of every description except estates of freehold and inheritance. In the French law the term includes all kinds of property, real and personal. "Biens" are divided into "meubles," movable property, and "biens immeubles," immovable property. Lindsay v. Wilson, 63 Atl. 566, 569, 103 Md. 252, 2 L. R. A. (N. S.) 408 (quoting Bouv. Law Dict.).

BIGAMY

"Bigamy," as defined in Rev. St. 1899, § 2169, providing that every person having a husband or wife living who shall marry another person without this state in case where such marriage would be punishable, if contracted or solemnized within this state, and shall afterwards cohabit with such person within the state, shall be guilty of bigamy and punished, etc., makes it "bigamy" for a man having a former wife living, from whom he had not been divorced, to cohabit with another woman in Missouri after having been married to her in another state, notwithstanding such second marriage was absolutely void. State v. Stewart, 92 S. W. 878, 881, 194 Mo. 345, 112 Am. St. Rep. 529, 5 Ann. Cas. 963.

In a prosecution for bigamy, the proper certificates showing the two marriages were sufficient proof of the corpus delicti to admit a confession of defendant, as it is not necessary, in order to prove bigamy, under Code 1907, § 6389, to prove cohabitation under either the first or the second marriage, to constitute "bigamy." Reid v. State, 53 South. 254, 255, 168 Ala. 118.

Hurd's Rev. St. 1905, c. 38, § 28, provides that whoever, having a former husband or wife living, marries another person, shall be deemed guilty of bigamy, provided that such provision shall not extend to any person whose husband or wife shall have been continuously absent for the space of five years, or to any person who is lawfully divorced at the time of the second marriage, or where the former marriage has been declared void. Held, that the naming of these exceptions should be held to exclude other exceptions not named, and that one prosecuted for bigamy is not entitled to show that the second marriage was entered into in good faith under an honest, but mistaken, belief that his first wife had obtained a divorce. People v. Spoor, 85 N. E. 207, 209, 235 Ill. 230, 126 Am. St. Rep. 197, 14 Ann. Cas. 638.

The constitutional provision prohibiting "bigamous, polygamous, plural, celestial, and patriarchal marriages" was intended to prohibit a man from having more than one wife at any one time under whatever name he might choose to designate his marriage. Toncray v. Budge, 95 Pac. 26–38, 14 Idaho, 621.

BILBREF

Under the law of Sweden a receipt taken by one who lent money for the construction or maintenance of a ship is called a "bilbref." The Underwriter, 119 Fed. 713, 717.

BILL

See Any Bill; First Bill.

In commercial law

See Buying of a Bill; Domestic Bill; Waybill.

All forms of paper money are commonly called "bills." Long v. State, 127 S. W. 961, 962, 94 Ark. 570.

Same—As account, charge, or claim

V. S. 305 (P. S. 411), provides that the State Auditor shall require all bills presented to him for allowance to be fully itemized and accompanied as far as possible with vouchers, which shall be kept in his office. Held, that the term "bill," as used in such section, includes all claims and accounts which by law may be presented to the Auditor for allowance, and the term, "vouchers" includes all books, papers, receipts, and receipted bills and documents which serve to prove the truth of the claims and accounts presented. Clement v. Graham, 63 Atl. 146, 152, 78 Vt. 290.

"The word 'bill' means charge against another in an account for future payment; to book or charge on account; an account of charges and particulars of indebtedness by the creditor to his debtor." Racine Wagon & Carriage Co. v. Liegeois, 98 N. W. 218, 219, 120 Wis. 497 (quoting and adopting the definitions in the Century and Standard Dicts.; 5 Cyc. p. 705).

A claim of the superintendent of the poor of the county is a "bill," within Acts 1903, No. 397, establishing a board of auditors of Saginaw county, and providing that no bills against the county shall be audited in any other manner than as provided by the act, except the bills of the county drain commissioner and the expenditures authorized by the board of supervisors. Morrison v. Kent, 97 N. W. 45, 135 Mich. 38, 67 L. R. A. 365.

Same—As draft

A "bill" is an order drawn by one person on another to pay a third person a certain sum of money absolutely and at all events. Waddell v. Hanover Nat. Bank, 97

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N. Y. Supp. 305, 306, 48 Misc. Rep. 578 (quoting Munger v. Shannon, 61 N. Y. 253, 255, 256); Hibbs v. Brown, 82 N. E. 1108, 1110, 190 N. Y. 167 (quoting and adopting the definition in Munger v. Shannon, 61 N. Y. 251).

A "bill" is presumed to be drawn on funds with the understanding between drawer and drawee that it is an appropriation of the funds of the latter in the hands of the former. Ragsdale v. Gresham, 37 South. 367, 369, 141 Ala. 308 (quoting and adopting 1 Parsons, Notes & B. p. 323).

Same—As security

See Security.

Same—As specialty

See Specialty.

In legislation

See New Bill.

Return of bill as presented, see Return.

A "bill" is a draft of a proposed statute submitted to the Legislature for enactment. It cannot become a law by the action of the Senate alone or of the Assembly alone but only by the action of both, when it becomes an act of the Legislature, subject to the approval of the Governor. It may originate in either house, and when introduced in either it is before the Legislature, or else no bill can ever get before it, for each House is part of the Legislature. People ex rel. Hatch v. Reardon, 77 N. E. 970-972, 184 N. Y. 431, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515.

A statute providing that no law shall be enacted except by "bill" and that no "bill" shall be passed except by the assent of a majority of the members of the Legislature is equivalent to a provision that no "law" shall be passed except by the assent of a majority of such members. People v. Lawrence (N. Y.) 36 Barb. 177, 187.

Where a journal entry recited the reading and signing of certain "House bills, the title of which are set out in the foregoing message from the House. The reading of said bill having been dispensed with by a two-thirds vote," etc., the use of the singular instead of the plural form does not indicate that the reading of any one of the bills theretofore mentioned was dispensed with, for the word "said" is a word of reference, and means, as there used, "before mentioned," or "aforesaid," and though "bill" is employed in the singular, it is colored by the antecedent to which "said" refers it, namely, the "House bills" mentioned. Moreover, the error is self-correcting when the phrase is considered as a whole, for the period after the word "house" will not be permitted to separate the phrase from its relation to the subject-matter to which it obviously refers. State ex rel. Woodward v. Skeggs, 46 South. 268, 272, 154 Ala. 249.

In pleading

See Certiorari Bill; Creditors' Bill; Cross-Bill; Supplemental Bill; True Bill.

A bill in equity is in reality a petition by another name; the only difference being that a petition is less formal in its averments and prayers, and defendant is brought in by a citation, instead of by subpœna ad respondendum, and is required to answer in a shorter time. A suit in the court of chancery when brought by a citizen is commenced by petition called a "bill," and when by the Attorney General by a petition called an "information." The provision in Divorce Act (P. L. 1907, p. 474) § 10, that suits for divorce shall be commenced by petition does not operate to prevent the petitioner from alleging in such pleading the existence of a fraudulent divorce obtained in another jurisdiction and praying for the avoidance of the alleged fraudulent decree as an impediment to the granting of relief sought in the suit for divorce. Fraser v. Fraser, 75 Atl. 979, 980, 77 N. J. Eq. 205 (quoting and adopting definition in Dan. ch. Pl. & Pr. p. 1 et seq.).

BILL FOR RAISING REVENUE

"Bills for raising revenue" within Const. art. 1, § 7, cl. 1, providing that all "bills for raising revenue" shall originate in the House of Representatives, are those that levy taxes in the strict sense of the word and are not bills for other purposes which may incidentally create revenue. Bills for other than tax purposes, but which may incidentally create revenue, such as Acts Feb. 12, 1901, cc. 353, 354, 31 Stat. 767, 774, and Feb. 28, 1903, c. 856, 32 Stat. 909, for the elimination of grade crossings and for a union railway station in the District of Columbia, which provide for the payment of a sum of money to the railway companies, to be raised by a tax on property in the District, are not revenue bills which, under Const. art. 1, § 7, cl. 1, must originate in the House of Representatives. Millard v. Roberts, 26 Sup. Ct. 674, 675, 202 U. S. 429, 50 L. Ed. 1090 (quoting and adopting definition in 1 Story, Const. § 880).

The phrase as used in Const. art. 5, § 32, means "bills" intended to levy taxes in the strict sense of the word and not bills for other purposes which may incidentally create revenue as Laws 1907, c. 29, authorizing the establishment of a county free high school, and providing for the taxation of property to maintain the same. Evers v. Hudson, 92 Pac. 462, 466, 36 Mont. 135.

A "bill for raising revenue" within Const. art. 5, § 33, are only those, the principal object of which is to provide for the levy of taxes in the strict sense of the word and does not include bills for other purposes which may incidentally create revenue. Thus Laws 1907-08, p. 789, c. 81, art. 9, providing for the discovery of property not

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listed for taxation, is not a bill for raising revenue, within such constitutional provision. Anderson v. Ritterbusch, 98 Pac. 1002, 1005, 1006, 22 Okl. 761 (quoting The Nashville, 17 Fed. Cas. 1176.

BILL IN EQUITY

As petition, see Petition.

BILL IN THE NATURE OF INTERPLEADER

See, also, Bill of Interpleader.

A bill in the nature of a bill of interpleader is one in which complainant seeks some relief of an equitable nature concerning the fund or other subject-matter in dispute in addition to the interpleader of conflicting claimants. A bill by a railroad company against construction contractors, subcontractors, etc., alleging that claims were outstanding against a subcontractor on account of work done; that a contractor was withholding the amount due the subcontractor on account of such claims; that the railroad company owed the contractor a certain sum, and praying that all persons holding time checks for work under the subcontractor be made defendants; that the subcontractor and others be restrained from suing the railroad company for their claims until the amount owed by the contractor to the subcontractor be ascertained, and applied on the claims—was good as a bill in the nature of a bill of interpleader resting on the equitable jurisdiction of avoiding a multiplicity of suits. Chicago, R. I. & P. Ry. Co. v. Moore, 123 S. W. 233, 237, 92 Ark. 446.

"A 'bill in the nature of a bill of interpleader' is one where complainant seeks relief of an equitable nature concerning the fund or subject-matter in the suit in addition to the interpleader of conflicting claimants. The complainant is not required as in strict interpleader to be an individual stakeholder without interest in the subject-matter; but the facts on which he relies must entitle him to equitable rather than legal relief, and he cannot under the guise of a bill in equity litigate purely legal claims." McKinney v. Daniels, 68 S. E. 1095, 1096, 135 Ga. 157 (quoting and adopting the definition in 5 Pomeroy's Eq. Jur. § 60).

BILL OF ATTAINDER

"'Bills of attainder' are acts of the supreme power, pronouncing capital sentences, where the Legislature assumes judicial magistracy; and bills of pains and penalties, those which inflict milder punishments. It is believed that 'bill of attainder' is a generic term, comprehending both descriptions of acts; such, at least, is believed to be its true signification as used in our Constitutions. 'A bill of attainder may affect the life of an individual or may confiscate his property, or both.'" Norris v. Doniphan, 61 Ky. (4 Metc.) 385, 427 (quoting and adopting definition in Doe ex dem. Gaines v. Buford 31 Ky. [1 Dana] 509).

A resolution of the Senate resulting in the expulsion of a member is not a bill of attainder within the inhibition of U. S. Const. art. 1, § 10, and State Const. art. 1, § 16. French v. Senate of California, 80 Pac. 1031, 1034, 146 Cal. 604, 69 L. R. A. 556.

BILL OF DISCOVERY

A "bill of discovery" in the old chancery court was an auxiliary or assistant proceeding to the courts of law and arose from the defects in the courts of common law to compel a complete discovery by the oath of the parties in the suit. Under the present system of courts full relief can now be obtained in the court in which the action is proceeding and the old bill has been either expressly or impliedly abolished. Wright v. Superior Court, 73 Pac. 145, 146, 139 Cal. 242.

A "bill of discovery" seeks disclosure of facts within the knowledge of the defendant, or of papers in his possession, in aid of some other action or proceeding. The discovery may be sought in the same suit in which the ultimate relief is pursued; or it may be sought merely in aid of some other proceeding pending or to be brought. The matters as to which discovery is sought must be material to the existing suit or to the one which is to be instituted. Union Collection Co. v. Superior Court of City and County of San Francisco, 87 Pac. 1035, 1036, 149 Cal. 790.

Pub. St. 1901, c. 148, § 12, provides that all records and papers of a corporation shall be open to inspection of stockholders, and such portions thereof as have any relation to an unpaid demand of a creditor or to the collection of any demand shall be open to the inspection of the creditor and his attorney. Held that, where a creditor of a corporation was entitled as an absolute right to an inspection of certain records of the corporation, a proceeding to compel such inspection was a proceeding at law, and not in the nature of a "bill for discovery." Hub Const. Co. v. New England Breeders' Club, 67 Atl. 574, 575, 74 N. H. 282.

A "bill of discovery" may be invoked in the federal courts. As said by Sanborn, J., in Kelley v. Boettcher, 85 Fed. 56, 66, 29 C. C. A. 14: "It is true that the federal and state statutes now in force which enable the complainant to obtain such an examination have greatly diminished the need of these discoveries; but it is none the less true that these statutes have neither abrogated the right nor curtailed the power of courts of equity to enforce them. They have only added another right to that which had already been secured in courts of chancery. Every bill for relief exhibited in a court of equity is, in effect, a 'bill for discovery,' because it asks or may ask from the defendant

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an answer upon oath relative to the matters which it charges. The power to enforce such a discovery is one of the original and inherent powers of a court of chancery, and the right of a party to invoke its exercise is enjoyed in every case in which he is entitled to come into a court to assert an equitable right or title, or to apply an equitable remedy." Bills for discovery and relief inhered in the ancient jurisdiction of courts of chancery in England at the time of the adoption of the federal judiciary act, and this being so, the like jurisdiction inheres in the federal courts unless abolished by statutes, or changed or modified by some rule adopted by the Supreme Court. While bills of discovery in the state courts are measurably discountenanced in view of the Code authorizing the examination under deposition de bene esse of the defendant, and the compulsory production of books and papers in his possession or under his control, such Code provisions are aids to the methods of procedure in the federal courts in actions at law, but are not entire substitutes for bills of discovery and relief in equity in federal practice. So where, under contracts for the sale and delivery of large quantities of lumber of different qualities and varying dimensions, at designated places, the vendee being a nonresident of the state from that of the place of delivery, and for his better protection against mistakes or frauds of the vendor he puts an authorized agent at the place of delivery to inspect the lumber and keep memoranda thereof, but the vendor fraudulently, with the use of intoxicating liquors, renders such agent subservient to his will, or renders the protection to the vendee unavailing, whereby the evidence of the quantity and quality of the lumber delivered is especially in the breast and keeping of the vendor, a bill of discovery will lie in a suit for accounting against the vendor. McMullen Lumber Co. v. Strother, 136 Fed. 295, 301, 69 C. C. A. 433 (citing Ryder v. Bateman, 93 Fed. 31; Indianapolis Gas Company v. City of Indianapolis, 90 Fed. 196; Brown v. McDonald, 133 Fed. 898, 67 C. C. A. 59, 68 L. R. A. 462).

BILL OF EVIDENCE

A "bill of evidence" is the stenographer's bill attested by the trial judge. Latham v. Lindsay (Ky.) 112 S. W. 584, 585.

BILL OF EXCEPTIONS

See Certificate to Bill of Exceptions; General Bill of Exceptions; Skeleton Bill.
Settlement of, see Settle—Settlement.
Settlement of as constituting a proceeding, see Proceeding.
Tender of, see Tender.
See, also, Transmit—Transmission.

Cases on appeal are tried from a bill of "exceptions," not a bill of "objections." It is true that the word "object" in certain connections may have the same meaning as "except." In the course of a trial an objection is made to the end that a ruling of the court may be had. This ruling is not upon what the court itself has done, but upon what the parties are doing or offering to do. The objection goes to the act of persons other than the court and is made to get action from the court. When the court acts, the error is preserved by an exception to the ruling. Thus the origin of the term "bill of exceptions." Harding v. Missouri Pac. R. Co., 134 S. W. 641, 643, 232 Mo. 444, Ann. Cas. 1912B, 1221.

The office of a "bill of exceptions" is to bring on the record such matters as are not already a part of the record in the case. Hanson v. Anderson, 121 S. W. 736, 737, 91 Ark. 443 (citing Berger Mercantile Co. v. Houghton, 105 S. W. 582, 84 Ark. 342; Lesser v. Banks, 46 Ark. 482; St. Louis, I. M. & S. Ry. Co. v. Godby, 45 Ark. 485); Fenn v. Reber, 132 S. W. 627, 632, 153 Mo. App. 219.

"The object of a 'bill of exceptions' is to put upon the record all the facts touching the decisions of the court respecting questions of law which do not appear upon the record, and which arise in the course of the trial, so that when the case is removed to an appellate court by writ of error a 'bill of exceptions' may be taken into consideration. The term 'bill of exceptions' is in the plural and strictly speaking means, ex vi termini, more than one objection to the rules of the trial court is embodied in and certified thereby." Brown v. Hall, 7 S. E. 182, 85 Va. 146, 151.

The only office of a "bill of exceptions" is to bring to the Court of Appeals the evidence, objections, and exceptions relating thereto, instructions, objections, and exceptions thereto, and such motions, exhibits, objections, and exceptions thereto, or papers, that are used or offered to be used on the trial, and are not filed in court and made a part of the record by being mentioned in the orders. Barnard Leas Mfg. Co. v. Washburn (Ky.) 99 S. W. 664, 665.

"Exceptions" and "error" are inherently proceedings of different character. On exceptions, various specific rulings, whether interlocutory or final, whether brought up immediately or only after final judgment, are made direct and independent subjects for review; only so much of the record is brought up as is necessary for passing upon the specific exceptions; the decision usually is that the exceptions be sustained or overruled and that such further proceedings be had as the rulings on the exceptions call for. On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final

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judgment; the entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant, as shown by the entire case. Cotton v. Hawaii, 29 Sup. Ct. 85, 89, 211 U. S. 162, 53 L. Ed. 131 (citing 17 Hawaii, 379).

The office of a bill of exceptions is to bring before the court the record, authenticated by the trial judge, of things that transpired in the trial court, that do not appear on the record book of the trial court, and it is not necessary to put in the bill of exceptions the pleadings, orders of court, or any motion or paper that is mentioned in the orders of court which have been offered or filed as a part of the record, though it may not be copied on the record book, as the fact that it is there mentioned is sufficient identification to make it a part of the record. Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co., 122 S. W. 852, 854, 136 Ky. 843.

The official shorthand notes filed with the clerk at the close of the trial, but not certified by the trial judge or reporter in longhand, any certificate attached thereto being in shorthand is not a bill of exceptions within the statute. In re Skillman's Estate (Iowa) 134 N. W. 1064.

A mere statement of facts on the issue presented by a motion for a change of venue, which nowhere contains an exception to the court's ruling, can in no view be construed a bill of exceptions for the purpose of reviewing the court's action in granting the change to a county whose seat is not the least distant from the county seat where the case was brought, even though the statement was filed in the lower court within the time required by law. Panhandle & G. Ry. Co. v. Kirby (Tex.) 108 S. W. 498, 499.

The special statutory "bill of exceptions" authorized by Rev. St. 1892, §§ 1090, 1091, should be complete in itself, without reference to the regular bill of exceptions, since the expression "bill of exceptions" indicates that it must contain exceptions. Kelgans v. State, 41 South. 886, 895, 52 Fla. 57 (citing United States v. Jarvis, 3 Woodb. & M. 217, 26 Fed. Cas. 593; Kearney v. Snodgrass, 7 Pac. 309, 12 Or. 311, text 312; 1 Words and Phrases, p. 783).

Leave by the court to file a "bill of exceptions" authorizes appellant to file separate bills, one embracing the evidence, and the other the ruling of the court in directing a verdict. Davis v. Mercer Lumber Co., 73 N. E. 899, 900, 164 Ind. 413.

Statement distinguished

There is no substantial difference between a "bill of exceptions" and a "statement." Consequently, a "bill of exceptions" or "statement" would be considered though the motion in the trial court was for leave to file a statement and the notice of intention to move for a new trial recited that it would be made on a "bill of exceptions." Sauer v. Eagle Brewing Co., 84 Pac. 425, 427, 3 Cal. App. 127.

The only difference between a "bill of exceptions" and a "statement of the case," within a statute requiring a party intending to move for a new trial to serve a notice of his intention, designating the ground on which the motion will be made, and whether the same will be made on affidavits or by a "bill of exceptions," or a "statement of the case," is that in a statement of the case the moving party, in addition to setting forth in the body of the document the exceptions which were taken at the trial, must also specify the particular ones upon which he relies in support of his motion, and, if the insufficiency of the evidence is the ground of an exception, or is stated in a notice of a motion for a new trial, the particulars in which the evidence is claimed to be insufficient must be specified in either document. Pease v. Fink, 85 Pac. 657, 659, 3 Cal. App. 371.

An order denying a new trial recited that the motion was presented on all the grounds stated in the notice of intention to move for new trial, and upon the statement of the case previously settled. The record contained a bill of exceptions in which the insufficiency of the evidence to sustain the findings was specified, but the order denying the new trial did not clearly state that the grounds on which the motion was based were those specified in the settled statement; the document referred to as a statement of the case being denominated on its face, as a "bill of exceptions." Held that, since the expressions "bill of exceptions" and "statement of the case" would be considered synonymous when necessary to accomplish the ends of justice, the recital in the order that the motion was presented on the statement of the case previously settled would be deemed sufficient evidence that the objections set forth in the statement were the grounds of the motion, so as to authorize a consideration of the evidence on appeal, though the copy of the notice of intention printed in the transcript was not authenticated by a bill of exceptions, and therefore could not be considered, under Code Civ. Proc. §§ 661, 951, 952. Dennis v. Gordon, 125 Pac. 1063, 1064, 163 Cal. 427.

BILL OF EXCHANGE

See Foreign Bill of Exchange; Inland Bill of Exchange; Negotiable Bill of Exchange.

A bill of exchange is a written order or request by one person to another for the payment of a special sum of money to a third person absolutely. Vaughn v. Farmers' & Merchants' Nat. Bank of Alvord (Tex.) 126 S. W. 690, 691 (quoting 1 Words and Phrases, p. 784); Newman v. Frost, 52 N. Y. 422, 425.

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An order drawn on another to pay a sum certain to the order of the drawer and to charge the same to the drawer's account is a bill of exchange. H. T. Woodall & Son v. People's Nat. Bank of Leesburg, Va., 45 South. 194, 195, 153 Ala. 576.

An order drawn by one person on another in favor of a third person for a specific amount is a "bill of exchange" which can only be accepted by a writing signed as required by Code 1896, § 880. Faircloth-Byrd Mercantile Co. v. Adkinson (Ala.) 52 South. 419, 420.

Laws 1899, p. 362, c. 149, § 126, defines a bill of exchange as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom addressed to pay on demand or at a fixed or determinable time a sum certain to order or to bearer. Section 127, p. 363, provides that a bill of itself does not operate as an assignment of the funds in the hands of the drawee, and that the drawee is not liable unless he accepts the same. Held, that a writing addressed by one to another, requesting him to pay a third person at the end of each month the amount due for boarding such other's horses, was within section 126, and that the mere delivery of the same to such third person was not an assignment of the funds in the hands of the person to whom addressed, and that he would not be liable thereon until it was accepted in writing. Frederick & Nelson v. Spokane Grain Co., 91 Pac. 570, 571, 47 Wash. 85.

As bank check

A check is a "bill of exchange," sometimes defined as an "inland bill of exchange." State v. Fraley (W. Va.) 76 S. E. 134, 135, 42 L. R. A. (N. S.) 498.

A bank check is a "bill of exchange" within the statute providing that no one shall be charged as an acceptor of a bill of exchange unless the acceptance is in writing, etc. Interstate Nat. Bank v. Ringo, 83 Pac. 119, 122, 72 Kan. 116, 3 L. R. A. (N. S.) 1179, 115 Am. St. Rep. 176.

A bank check is a "bill of exchange" within the meaning of Gen. St. 1901, § 548, providing that an acceptance of a bill of exchange shall not bind the acceptor except in favor of a bona fide holder of the paper. First Nat. Bank of Atchison v. Commercial Sav. Bank, 87 Pac. 746, 74 Kan. 606, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281.

A check is a "bill of exchange" payable on demand without interest. Hobart Nat. Bank v. McMurrough, 103 Pac. 601, 24 Okl. 210.

Negotiable Instruments Law, § 185, provides that a check is a "bill of exchange" drawn on a bank payable on demand, and, except as otherwise provided, the provisions of the act applicable to a bill of exchange payable on demand apply to a check. National Bank of Commerce in St. Louis v. Mechanics' American Nat. Bank, 127 S. W. 429, 433, 148 Mo. App. 1; Same v. German-American Bank, 127 S. W. 434, 148 Mo. App. 21.

Under Civ. Code, § 3254, a check is a "bill of exchange." Du Brutz v. Bank of Visalia, 87 Pac. 467, 469, 4 Cal. App. 201.

A "bill of exchange" defined by the Negotiable Instrument Law, as an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer, includes a "check," defined by section 185 as a "bill of exchange" drawn on a bank payable on demand, and except as otherwise provided the act applicable to a bill of exchange payable on demand shall apply to a check, and a check as a species of bill of exchange need not, under section 143, be presented for acceptance unless it contains an express stipulation to that effect. Van Buskirk v. State Bank of Rocky Ford, 83 Pac. 778, 35 Colo. 142, 117 Am. St. Rep. 182.

Under Rem. & Bal. Code, §§ 3516, 3575, defining a "bill of exchange" as an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a specified sum, to order or bearer, and defining a "check" as a bill of exchange drawn on a bank payable on demand, a certificate of deposit properly indorsed by the depositor is a "check" within an information charging larceny of a check by means of false pretenses. State v. Garland, 118 Pac. 907, 910, 65 Wash. 606.

Where an instrument for the payment of the price of a shipment of iron was drawn by the seller on the buyer, who resided in a foreign country, and, with the bill of lading attached, was indorsed for discount, it was a foreign bill of exchange, and not a check, under Negotiable Instrument Law, §§ 210, 321, defining a bill of exchange as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the addressee to pay on demand, or at a fixed or determinable time, a certain sum of money to order or to bearer, and defining a check as a bill of exchange, drawn on a bank payable on demand. Amsinck v. Rogers, 93 N. Y. Supp. 87, 91, 103 App. Div. 428.

Negotiable Instrument Law, § 1684–1 defines a check as a "bill of exchange" drawn on a bank payable on demand, and provides that, except as otherwise provided, the provisions of the act applicable to a bill of exchange payable on demand apply to a check. Columbian Banking Co. v. Bowen, 114 N. W. 451, 452, 134 Wis. 218.

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A voucher draft containing a statement of indebtedness, a form of receipt, and stating that, when properly receipted, the voucher would become a draft on the debtor, payable through a certain bank and signed by the debtor, is not a "bill of exchange," as defined by the statute; but it was within the power of the debtor to make it such, when properly accepted and receipted by the payee. Val Blatz Brewing Co. v. Interstate Ice & Cold Storage Co., 143 S. W. 542, 543, 161 Mo. App. 531.

Draft synonymous

See Draft.

As money

See Money.

As security

See Security.

BILL OF INDICTMENT

See, also, True Bill.

BILL OF INTERPLEADER

See Bill in Nature of Interpleader.

The remedy of "interpleader" requires four elements: (1) The same thing, debt, or duty must be claimed by all the parties against whom relief is demanded; (2) all their adverse titles or claims must be dependent or derived from a common source; (3) the person asking the relief must not have nor claim any interest in the subject-matter; (4) he must have incurred no independent liability to either of the claimants. Where an insurance society was sued by various claimants of the proceeds of a certificate, and the claim of the administrator of the original beneficiary depended solely on his claim that the society was an old line insurance company, while the other claimants contended that the society was a beneficial association, there was a question of sufficient doubt raised by that issue to entitle the society to file a bill of interpleader. A valid doubt respecting either a question of fact or law with reference to a stakeholder's obligation to pay the fund to one of several claimants is sufficient to justify the filing of a bill of interpleader. Smith v. Grand Lodge A. O. U. W. of Missouri, 101 S. W. 662, 669, 124 Mo. App. 181 (quoting and adopting the definition in 4 Pom. Eq. Jur. [3d Ed.] § 1322; 2 Sto. Eq. Jur. [13th Ed.] p. 136–150; Atkinson v. Manks [N. Y.] 1 Cow. 691–703; Roselle v. Farmers' Bank of Norborne, 24 S. W. 744, 119 Mo. 84; Supreme Council of the Legion of Honor v. Palmer, 80 S. W. 699, 107 Mo. App. 157).

The law applicable in actions of "interpleader" seems to be well settled. They may be divided into two classes, actions of strict interpleader, and actions in the nature of interpleader. The distinction is that in actions of strict interpleader legal rights only are enforced, while in actions in the nature of interpleader equitable relief is sometimes given if a proper case is made. The purpose of an action of interpleader is to permit a party who holds a fund or property, or who owes a debt, to which two or more persons make claim, and it is uncertain to which claimant the fund or debt belongs, to commence an action against such claimants for the purpose of having it determined between them to which the fund, property, or debt owing belongs, so that it may be paid accordingly, and the holder of the fund, or the debtor, as the case may be, relieved from the danger of a double liability for the same demand. Smith v. Mosier, 169 Fed. 430, 442.

"A bill of strict interpleader" is one in which the complainant asserts his possession of some fund or something in which he claims no personal interest but in which other persons, made defendants, set up conflicting claims, and complainant cannot safely determine to which claim he should yield. Carter v. Cryer, 59 Atl. 233, 68 N. J. Eq. 24 (citing Story, Eq. Pl. § 291; Williams v. Matthews, 20 Atl. 261, 47 N. J. Eq. 196; Packard v. Stevens, 46 Atl. 250, 58 N. J. Eq. 489; Ireland v. Kelly, 47 Atl. 51, 60 N. J. Eq. 308).

A "bill of interpleader" is strictly a "proceeding in equity" that before the Constitution regularly would have been tried without a jury. Hubbard v. Lamburn, 75 N. E. 707, 709, 189 Mass. 296.

A "bill of interpleader" is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt, or duty, but who has incurred no independent liability to any of them, and who does not himself claim an interest in the matter. Detroit Trust Co. v. Hunrath, 131 N. W. 147, 151, 168 Mich. 180.

A "bill of interpleader" by an administrator against a judgment creditor of decedent and her attorneys who have filed notice of lien for services in procuring the judgment, which proceeds on the theory that the administrator who is willing to pay the judgment is in doubt as to who is entitled to the money because of the conflicting claims between the judgment creditor and the attorneys and between the attorneys themselves, states a cause of action as against a demurrer; a bill of interpleader being filed to protect persons from whom several persons claim legally and equitably the same thing, debt, or duty, and who has incurred no independent liability to any of them. Michigan Trust Co. v. McNamara, 130 N. W. 653, 654, 165 Mich. 200, 37 L. R. A. (N. S.) 986 (quoting 1 Words and Phrases, p. 788 et seq.).

A "bill of interpleader" lies where several persons claim the same debt, and the debtor has incurred no independent liability to any of them, and does not himself claim an interest in the matter, and the bill may be resorted to where the several claimants, instead of claiming the whole fund or matter

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in dispute, claim different portions thereof, and the aggregate of all the claims exceeds the full amount of the fund, and the complainant is unable to determine in what proportion the payment should be made. Chicago, R. I. & P. Ry. Co. v. Moore, 123 S. W. 233, 237, 92 Ark. 446.

A bill, showing that complainants were defendant's decedent's agents to buy cotton, grain, and securities, receive deposits of money from him for that purpose according to an account embracing more than 100 debit items and a larger number of credit items, that codefendant claims balance due him under transactions with decedent relating to a fund held by complainants, and that suits at law have been brought severally by the defendants on account of such fund, and praying to be permitted to deposit the fund in court, and that the suits at law be enjoined, and also praying general relief, is not bad as being without equity; an accounting being properly required to determine the amount of the fund. Hayward & Clark v. McDonald, 192 Fed. 890, 892, 113 C. C. A. 368.

Strictly speaking, a bill of interpleader is one in which complainant claims no relief against either defendant, merely asking that he be permitted to pay the money or deliver the property claimed by both defendants to the court, to be awarded to him to whom it belongs, and that he may thereafter be protected against both claims. Hayward & Clark v. McDonald, 192 Fed. 890, 892, 113 C. C. A. 368.

"An 'interpleader' in equity is for relief when there are at law separate and conflicting claims for the same thing, and when a recovery by one would not protect a party against a recovery for the same thing by the other." The remedy given by statute in the nature of interpleader in courts of law does not oust courts of equity of their jurisdiction. Wheeler v. Armstrong, 51 South. 268, 271, 164 Ala. 442.

The action of "interpleader" is concurrent and is not superseded by the remedy authorized by Code, § 3427, providing that a plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of the Code, had jurisdiction. The object of a bill of interpleader is, not to protect a party against double liability, but a double vexation in respect to one liability, and the action will not lie where defendants are making claims against plaintiff under distinct and independent contracts not necessarily in conflict, payment of one of which will not extinguish the other. Hoyt v. Gouge, 101 N. W. 464, 465, 125 Iowa, 603.

BILL OF LADING

See Through Bill of Lading.
As instrument subject to forgery, see Instrument.

"To facilitate commercial transactions, a 'bill of lading' has grown to be regarded as the symbolical representation of the goods which it describes." Webster v. Bear, 125 S. W. 815, 817, 141 Mo. App. 531 (citing Branson v. Heckler, 22 Kan. 610).

A bill of lading in the first instance represents the contract between the shipper and the carrier, by which, for a specified sum, the carrier undertakes to deliver the goods received to the rightful owner, and the consignee named in the bill is presumptively the owner. Gass v. Astoria Veneer Mills, 118 N. Y. Supp. 982, 984, 134 App. Div. 184.

The term "bill of lading," strictly speaking, is one to be applied only to the written evidence of a contract for the carriage and delivery of goods shipped by C., though it is now in common use in connection with the affreightment of goods by water other than the sea or carriage by rail. "Freight bill" or "freight receipt" is perhaps the most technically correct term to employ in referring to the receipts given on the shipment of freight by a railroad. Sellers v. Savannah, F. & W. R. Co., 51 S. E. 398, 400, 123 Ga. 386 (citing 5 Cyc. 707; Cyc. Law Dict. 965).

A "bill of lading" is "a memorandum or acknowledgment in writing, signed by" the carrier, acknowledging the receipt of goods therein described, to be transported on the terms therein expressed to the place of destination, and there to be delivered to the consignee or parties therein designated. A bill of lading, to be valid, must be signed by the carrier. A bill of lading containing a carrier's limited liability stipulation, delivered unsigned by the carrier's agent, is ineffectual as a contract to limit liability. Missouri, K. & T. Ry. Co. v. Patrick, 88 S. W. 330, 332, 5 Ind. T. 742.

A "bill of lading" is defined to be "a written acknowledgment by the common carrier of the receipt of certain goods, and an agreement, for a consideration, to transport and to deliver the same at a specified place to a person therein named, or his order." According to this definition, one of the essentials of a "bill of lading" is an agreement between the carrier and the shipper, and an instrument delivered by a carrier's agent to the shipper, reciting the delivery of certain packages "marked and signed as stated to be shipped as per directions below, subject to the conditions and exceptions of the company's 'bill of lading,'" signed by the shipper and by the carrier's agent, was a mere receipt of the goods for the purpose of shipping them to the point named in the memorandum following the shipper's signature, and was not a contract by the carrier to ship the goods. Pittsburgh, C., C. & St. L. Ry. Co. v. Bryant, 75 N. E. 829, 830, 36 Ind. App. 340 (citing 4 Elliott, Railroads, § 1415; Union R. & Transp. Co. v. Yeager, 34 Ind. 1).

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As negotiable instruments

A bill of lading is a negotiable instrument, under Acts 1868, p. 193, No. 150, and may be transferred for an antecedent or pre-existing debt, or for any consideration sufficient to support a simple contract, under Acts 1904, p. 152, No. 64, § 24. Scheuermann v. Monarch Fruit Co., 48 South. 647, 648, 123 La. 55.

While a "bill of lading" is in a sense a negotiable instrument, it is not such as to preclude in the hands of a bona fide purchaser all inquiries respecting its issue. Bramley v. Ulster & D. R. Co., 126 N. Y. Supp. 854, 856, 142 App. Div. 176.

The assignment of a "bill of lading" is a symbolic "delivery" of the property represented by the bill. Kentucky Refining Co. v. Bank of Morilton (Ky.) 89 S. W. 492.

A bill of lading is assignable, such an assignment constituting in the law a complete legal delivery of the goods thereby evidenced to be in the hands of the carrier, as effectually as an actual sale and delivery thereof. Gratiot St. Warehouse Co. v. Missouri, K. & T. R. Co., 102 S. W. 11–16, 124 Mo. App. 545.

Though a "bill of lading" is a negotiable instrument, it is simply a symbol or representative of the goods for which it is issued, and when issued in the usual form by a railroad company consigning the shipment to the shipper's order with an indorsement on its back to "deliver to A.," signed by the consignee, such indorsement is a valid and sufficient assignment of the bill. Allen, McIntosh & Co. v. Farmers' & Traders' Nat. Bank of Covington, Ky., 59 S. E. 813, 816, 129 Ga. 748.

" 'Bills of lading' stand as the substitute and representative of goods described therein, and, while quasi negotiable instruments are not negotiable in the full sense in which that term is applied to bills and notes, the transfer of the bill passes to the transferee the transferror's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. Roy & Roy v. Northern Pac. Ry. Co., 85 Pac. 53, 55, 42 Wash. 572, 6 L. R. A. (N. S.) 302, 7 Ann. Cas. 728 (quoting and adopting definition in The Carlos F. Roses, 20 Sup. Ct. 807, 177 U. S. 665, 44 L. Ed. 929, citing Lazard v. Merchants' & Miners' Transp. Co., 26 Atl. 897, 78 Md. 13).

A " 'bill of lading' is a symbol of ownership of the goods described therein. In a sense it stands in the place of the goods." The delivery of an unindorsed bill of lading constitutes a good symbolical delivery of the goods represented by the bill of lading only when such was the intent and purpose of the party. Where a consignee named in a bill of lading was arrested and thrown into jail and the bill of lading was taken from his person by the jailer and was never assigned or indorsed by the consignee, a delivery of the goods by the carrier to a person who by some means obtained possession of the bill of lading from the jailer did not discharge it from liability, though it acted in good faith in surrendering the property. Florence & C. C. R. Co. v. Jensen, 108 Pac. 974, 975, 48 Colo. 28.

Rev. St. Mo. 1909, § 11,956, provides that all bills of lading issued by a railroad company shall be negotiable by written indorsement thereon and delivery, the same as bills of exchange and promissory notes. Bills of lading in that state were already negotiable in the sense of being transferable by indorsement and delivery, so as to enable an assignee to sue in his own name. Held, that the statute makes them negotiable in the stricter meaning of the term, giving them the quality of investing an innocent purchaser with greater rights than those possessed by the original holder, and under such section a railroad company is bound by a bill of lading which has passed into the hands of an innocent purchaser, though no goods were in fact received by the company, and such rule is not altered by the fact that the statute makes it a criminal offense for any agent of a railroad company to issue a bill of lading, unless the goods have actually been received. Sealy v. Missouri, K. & T. Ry. Co., 114 Pac. 1077, 1079, 84 Kan. 479, 41 L. R. A. (N. S.) 500.

Ballinger's Ann. Codes & St. §§ 3590, 3598–3601, define a "bill of lading," make bills of lading negotiable, and provide that a bill of lading does not alter the rights or obligations of the carrier, unless it is plainly inconsistent therewith. A bill of lading acknowledged the receipt of property described from a person named, and gave the name of the consignee and destination, and stated that it was not negotiable or assignable. Held, that the bill of lading was in effect a receipt for the goods and a contract between the shipper and the carrier that it should be neither negotiated nor assigned, and a delivery of the bill of lading without indorsement, together with the invoice properly assigned, passed no title or right to the goods. Bonds-Foster Lumber Co. v. Northern Pac. Ry. Co., 101 Pac. 877, 878, 53 Wash. 302.

A "bill of lading" is a commercial instrument, and is a written acknowledgment signed by the master of a vessel or by a common carrier that he has received the goods therein described from the shipper, to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or parties therein designated. It is a symbol of the ownership of the goods covered by it; a representative of the goods. It is regarded as so much merchandise. The merchan-

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dise is very often sold or pledged by the transfer of the bill of lading which covers it. Yegen v. Northern Pac. R. Co., 121 N. W. 205, 208, 19 N. D. 70.

At common law, a "bill of lading" is a muniment of title to the goods or property therein specified. It is a symbol or representative of the goods and, "when properly indorsed and delivered with the intention of passing the title to them, is a symbolic or constructive delivery of the goods themselves, and, when assigned, the carrier, having notice of the assignment, becomes bound to deliver the goods to the assignee if the goods by the terms of the bill of lading are deliverable to the order of the shipper. The carrier should not deliver except on production of a bill of lading properly indorsed by the shipper, for this is notice to the carrier that the shipper intends to retain in his power ultimate disposition of the goods. Arkansas S. R. Co. v. German Nat. Bank, 92 S. W. 522, 524, 77 Ark. 482, 113 Am. St. Rep. 160.

A "bill of lading" represents the goods described in it. Bills of lading by the law merchant are representatives of the property for which they have been given, and the indorsement and delivery of a bill transfer the property from the vendor to the vendee, is a complete legal delivery of the goods, and divests the vendor's lien. National Bank of Bristol v. Baltimore & O. R. Co., 59 Atl. 134, 137, 99 Md. 661, 105 Am. St. Rep. 321 (citing 6 Cyc. 426).

As receipt

Bills of lading are practically no more than receipts for the goods, and are contracts only in name. Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co., 114 S. W. 436, 442, 52 Tex. Civ. App. 156.

As both receipt and contract

A bill of lading is a receipt acknowledging the delivery and acceptance of freight and a contract binding on the parties. Williams v. Louisville & N. R. Co. (Ala.) 58 South. 315, 318.

A "bill of lading" is a written acknowledgment of the receipt of goods and an agreement, on consideration, to transport and deliver them at a specified place to a person named on his order. Illinois Match Co. v. Chicago, R. I. & P. Ry. Co., 95 N. E. 492, 494, 250 Ill. 396.

A bill of lading is an instrument issued by a carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination. Whitnack v. Chicago, B. & Q. R. Co., 118 N. W. 67, 69, 82 Neb. 464, 19 L. R. A. (N. S.) 1011, 130 Am. St. Rep. 692.

A "bill of lading" represents the property. It is a muniment of title and is both a receipt and a contract. Garner v. St. Louis, I. M. & S. R. Co., 96 S. W. 187, 79 Ark. 353, 116 Am. St. Rep. 83 (citing Turner v. Israel, 41 S. W. 806, 64 Ark. 244; Ray, Negligence of Imposed Duties of Freight Carriers, § 25).

A bill of lading is an instrument of a twofold character, being at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of the property by the carrier, and in the latter it is a contract to safely carry and deliver. Cobb v. Brown, 193 Fed. 958, 960, 113 C. C. A. 586.

"A 'bill of lading' is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of the property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry and to deliver. And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land as well as by sea." Arthur v. Texas & P. Ry. Co., 139 Fed. 127, 133, 71 C. C. A. 391 (citing Pollard v. Vinton, 105 U. S. 8, 26 L. Ed. 998).

"A 'bill of lading' is twofold in character. It is a receipt as to the quantity and description of the goods shipped, and a contract to carry and deliver the good to the consignee upon the terms specified in the instrument." So far as it constitutes a receipt, it is, like other receipts, subject to be contradicted or explained by proof of the facts, though it may not be varied by parol evidence in the absence of fraud or mistake so far as it embodies the terms of the contract. A bill of lading as a receipt establishes prima facie the receipt of the quantity of goods named by the carrier, which prima facie case may be overthrown by proper evidence contradicting the fact, which may be done under the general denial. Cohen Bros. v. Missouri, K. & T. R. Co. of Texas, 98 S. W. 437, 438, 44 Tex. Civ. App. 381.

A "bill of lading" has a twofold aspect. It is both a receipt and a contract. As a receipt, it is prima facie and not conclusive evidence of the facts recited, and between the parties is impeachable for mistake, error, or false statements therein. St. Louis, I. M. & S. R. Co. v. Citizens' Bank of Little Rock, 112 S. W. 154, 157, 87 Ark. 26, 128 Am. St. Rep. 17.

A "bill of lading" is of a dual effect, one is that of a receipt and the other that of a contract. A bill of lading as a receipt is open to explanation or modification by parol evidence, but as a contract it must be construed according to its terms, and, in the absence of fraud or mistake, it is presumed that oral negotiations respecting its terms and conditions are merged therein, so that

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it forms the final evidence of the agreement as to the reception, rate, and route, etc. Alabama Great Southern R. Co. v. Norris, 52 South. 891, 892, 167 Ala. 311.

C. O. D. shipment

"It cannot be said that the two ('bill of lading' and 'C. O. D. shipment') are not in some of their features alike. Both are, in a sense, contracts for the shipment of goods. A 'bill of lading' is a contract between the carrier and the sender, for a consideration, to transport and deliver goods at a specified place to a person therein named, or to his order, and in commercial usage it may be, in a sense, negotiable; that is, the bill of lading has become symbolical, and stands for the property itself. We do not understand that a C. O. D. has this characteristic. Ordinarily, where goods are shipped under a bill of lading, the property passes as soon as they are delivered at the point of shipment to the common carrier. But if the bill of lading is taken in favor of the consignor himself, or some agent of his, by commercial usage and the decisions of the court the property does not pass, though intended for some consignee at the point of destination, until some stipulation is complied with, as payment of the purchase money." Concurring opinion of Henderson, J. Keller v. State, (Tex.) 87 S. W. 669, 687, 1 L. R. A. (N. S.) 489.

BILL OF PARCELS

A "bill of parcels" is informal and is not designed or employed to set forth the terms of the bargain or sale. A writing reading: "100 cases eggs 3,000—19c. * * * He to pay interest at 6 per cent. on amount exceeding deposits of $1 per case"—is nothing more than a mere "bill of parcels" with a statement of interest to be charged, and not a "contract in writing"; and hence parol evidence as to what the terms of the contract were was admissible. North Packing & Provision Co. v. Lynch, 81 N. E. 891, 892, 196 Mass. 204 (citing Hildreth v. O'Brien, 92 Mass. [10 Allen] 104; Stacy v. Kemp, 97 Mass. 166; Hazard v. Loring, 64 Mass. [10 Cush.] 267; Edgar v. Joseph Breck & Sons Corp., 52 N. E. 1083, 172 Mass. 587; Dunham v. Barnes, 91 Mass. [9 Allen] 352; Schenck v. Saunders, 79 Mass. [13 Gray] 37; Atwater v. Clancy, 107 Mass. 369; Commonwealth v. Jeffries, 89 Mass. [7 Allen] 548–564, 83 Am. Dec. 712; Walker v. Staples, 87 Mass. [5 Allen] 34; Caswell v. Keith, 78 Mass. [12 Gray] 351; Harper v. Ross, 92 Mass. [10 Allen] 332).

BILL OF PARTICULARS

A "bill of particulars" is appropriate in all descriptons of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put on trial with greater particularity than is required by the rule of pleading, and the granting rests largely in the discretion of the trial court. Commonwealth v. Chesapeake & O. R. Co., 110 S. W. 253, 255, 128 Ky. 749.

A "bill of particulars" need not contain the names of a party's witnesses; its office being solely to inform the opposite party of the precise nature and extent of the claim on which the plaintiff intends to rely. Cairnes v. Pelton, 63 Atl. 105, 106, 103 Md. 40.

"The only proper office of a 'bill of particulars' is to give information of the specific proposition for which the pleader contends in respect to any material and issuable fact in the case, but not to disclose the evidence relied upon to establish any such proposition." In an action for libel defendant pleaded in mitigation that the article published was founded upon statements of residents of the police precinct of which plaintiff was captain, to a reporter of defendant, who believed them to be true. A bill of particulars containing the name and address of the reporter and the names and addresses of the residents of plaintiff's precinct who made the statement to defendant's reporter was properly refused. Knipe v. Brooklyn Daily Eagle, 91 N. Y. Supp. 872, 874, 101 App. Div. 43 (quoting and adopting the definition in Ball v. Evening Post Publishing Co., 38 Hun, 11, 15).

"The office of a 'bill of particulars' is to amplify a pleading and to inform the party with reasonable certainty of the nature of the claim made by his adversary, in order to prevent surprise and to enable him to intelligently meet the issue upon the trial." In an action for damages resulting from the loss of a suit case alleged to contain mining stocks and contracts, where the greater portion of plaintiff's claim is based on items of special damage, of which particulars have been denied, it was error to deny defendant's motion for a "bill of particulars." McIntosh v. Pullman Co., 103 N. Y. S. 223, 224, 53 Misc. Rep. 286 (citing in support of general rule Messer v. Aaron, 91 N. Y. Supp. 921, 101 App. Div. 169).

The "bill of particulars" referred to in Rev. Codes N. D. 1905, § 6868, providing that a party need not set forth in his pleading the items of an account alleged therein, but may deliver to his adversary a copy of the account, and that the court may in all cases order a bill of particulars of the claim of either party to be furnished, may be demanded on a claim which has no reference to accounting, and where the pleading is definite and certain, but further facts are required before the defendant can intelligently prepare for trial. Hanson v. Lindstrom, 108 N. W. 798, 799, 15 N. D. 584.

The office of a "bill of particulars" is not to expose one's evidence to one's adversary, but only to amplify the pleadings and indicate with more particularity than is or-

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dinarily required in a formal plea the nature of the claim made, in order that surprise upon the trial may be avoided; and while the name of a witness, as such, may not be required to be disclosed, the name of an individual with whom it is claimed that the transaction which is one of the issues in the case was had may be required to be specified in a proper case, though it may be the intention of the opposite party to prove the fact by such individual as a witness. Sundheimer v. James S. Barron & Co., 114 N. Y. Supp. 804, 805, 62 Misc. Rep. 263.

As part of pleading

A bill is not a pleading in any court. It may restrict, but cannot enlarge, the scope of recovery permissible under the declaration, and the issue is not changed by its amendment. Applebaum v. Goldman, 121 N. W. 288, 290, 155 Mich. 369.

A bill of particulars served on demand or order is part of the pleadings within Code Civ. Proc. § 1237, providing what the judgment roll shall contain, especially where plaintiff requests that it be included therein, and defendants in making it up do so. Steiger v. London, 122 N. Y. S. 1028, 1029, 138 App. Div. 246.

As facts admitted in a pleading do not deprive the other party of his right to examination before hearing of the party making the admissions, and as a "bill of particulars" is an extension of the complaint or answer and is a part of the pleading, a party asking for a bill of particulars does not lose his right to examine his adversary before trial. Tisdale Lumber Co. v. Droge, 131 N. Y. Supp. 683, 685, 147 App. Div. 55.

The office of a "bill of particulars" is to amplify a pleading, and to inform the party with reasonable certainty of the nature of the claim made against it; but it forms no part of the pleading, nor of the judgment roll, and it may not be resorted to in aid of a complaint wholly deficient in stating facts on which a recovery may be based. Samuelson v. Mayer, 120 N. Y. Supp. 75, 77, 78, 65 Misc. Rep. 518.

As part of statement of demand

See Statement of Demand.

Copy of account

A "copy of an account" and a "bill of particulars" do not necessarily mean the same thing. A bill of particulars may be demanded on a claim which has reference to an accounting. Hanson v. Lindstrom, 108 N. W. 798, 799, 15 N. D. 584.

Items of account synonymous

In the statute (Rev. Codes, § 7007) which defines the complaint in justices' courts as a concise statement, in writing, of the facts constituting the plaintiff's cause of action, or a "copy of the account" upon which the action is based, and section 7016, which provides that when the cause of action arises upon an account the court may require either party to furnish to the other the "items of an account" or a "bill of particulars," the term "bill of particulars" is synonymous with "items of an account" as distinguished from the "account" itself. The term "copy of account" is not used interchangeably with the term "items of account." A complaint in the form of copy of an account which is sufficient to enable a person of common understanding to know what is intended is not objectionable because the items of account are not set out therein. Moran v. Ebey, 104 Pac. 522, 523, 39 Mont. 517.

In criminal law

The office of a "bill of particulars" provided for by Code Pub. Gen. Laws 1904, art. 27, § 440, providing that in an indictment for false pretenses it shall not be necessary to state the false pretenses intended to be relied on, but defendants shall on application be entitled to the names of the witnesses and a statement of the false pretenses, is to inform the defendant of the name of the witnesses the state expects to call and furnish him with a statement of the false pretenses to be relied on and given in evidence, and it is no part of the pleading and cannot be demurred to, but must be excepted to if insufficient. Schaumloeffel v. State, 62 Atl. 803, 804, 102 Md. 470.

The bill of particulars is not a part of the information. It is quite generally, if not universally, held by the courts that the effect of a bill of particulars is to limit the claim and restrict the proof to the very matters therein specified. The sole office of the bill of particulars is to give the adverse party information which the pleadings, by reason of their generality, do not give. State v. Dix, 74 Pac. 570, 572, 33 Wash. 405. (citing Spokane & I. Lumber Co. v. Loy, 58 Pac. 672, 60 Pac. 1119, 21 Wash. 501).

In a homicide case, a motion made by defendant on return of the indictment, and before he pleaded to it, that the district attorney be ordered to furnish him with a copy of the autopsy, and of the alleged confession made by the defendant to the police, with a transcript of the evidence on which the grand jury found the indictment, and to afford defendant's attorneys an opportunity to inspect all weapons and other exhibits and things in the district attorney's possession, and also that the district attorney be ordered to furnish certain physicians portions of the body taken at the time of the autopsy, was not a motion for a bill of particulars, but an attempt to compel the commonwealth to disclose its evidence, in part, at least; and it was within the discretion of the court to grant or refuse it. The office of a "bill of particulars" is not to compel the commonwealth to disclose its evidence, but to give defendant such information, in addition to that contained in the com-

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plaint or indictment regarding the crime charged, as law and justice require that he should have in order to safeguard his constitutional rights, and to enable him to fully understand the crime, and to prepare his defense; and it should appear that without the desired information justice may not be done. Commonwealth v. Jordan, 93 N. E. 809, 811, 207 Mass. 259.

An indictment for nuisance, which merely charges the frequent and rapid passing and repassing of trains of defendant over a public road or street, acts which are entirely allowable in themselves, cannot be cured by a "bill of particulars," for that supplement to an indictment cannot give force to what was originally invalid. Commonwealth v. Baltimore & O. R. Co., 72 Atl. 278, 279, 223 Pa. 23, 132 Am. St. Rep. 723.

BILL OF PEACE

"Bills of peace" were used, first, to prevent vexatious recurrence of litigation by several asserting the same right, and, second, to prevent reiteration of an unsuccessful claim. Where a man sets up a general and exclusive right to lands or tenements, and many persons controvert it and he cannot quiet it except by resort to numerous actions at law, he has his remedy by a "bill of peace" in equity, in which he may join all of the adverse claimants. Vandalia Coal Co. v. Lawson, 87 N. E. 47, 50, 43 Ind. App. 226.

A "bill of peace" is a bill filed to secure an established legal title against the vexatious recurrence of litigation by a numerous class insisting on the same right, or by an individual relitigating an unsuccessful claim, the equity being that a right established at law is intended to protection; and, in order to originate this jurisdiction where a numerous class insist on the same right, it is essential that there be a single claim of right in all arising out of some privity or relationship with the plaintiff. A bill filed by the guardian of a minor at the instance of the other heirs, who together are liable to litigation, both by a sublessee who went into possession under a lessee of the deceased owner and the assignee of a purchaser in a contract of sale executed by deceased owner, cannot be maintained as a bill of peace for the avoidance of a multiplicity of suits, since the rights of the sublessee and the purchaser are independent of and adverse to each other, and they have a right to litigate their claims separately, and to have them decided on their own merits without the expense and complications of a litigation which includes the rights of others. Detroit Trust Co. v. Hunrath, 131 N. W. 147, 152, 168 Mich. 180.

BILL OF PRIVILEGE

Attorneys, being officers of the court, are not liable to be arrested by its ordinary process, but must be sued by bill called a "bill of privilege"; it being presumed that they are in court as officers of the tribunal. Greenleaf v. People's Bank of Buffalo, 45 S. E. 638, 640, 133 N. C. 292, 63 L. R. A. 499, 98 Am. St. Rep. 709 (quoting 3 Black. Comm. p. 289).

BILL OF REVIEW

A "bill of review," strictly speaking, is a proceeding to correct a final decree in the same court, for error apparent on the face of the decree or on account of new evidence discovered since the final decree. The decree being final, the bill of review is not regarded as a part of the cause in which the decree was rendered, but as a new suit, having for its object a correction of the decree in the former suit. Hardwick v. American Can Co., 89 S. W. 735, 115 Tenn. 393, 1 L. R. A. (N. S.) 1029 (quoting and adopting the definition in Laidley v. Merrifield, 34 Va. [7 Leigh] 346, 353, 354).

A "bill of review" is a bill or complaint seeking after the lapse of the term, to reverse or modify a decree that has been made or entered in the case, and can only be filed on leave first obtained from the chancellor in whose court the decree attacked was rendered, and is based on errors of law apparent on the face of the decree, or on account of new facts discovered since the decree was entered. Smith v. Rucker, 129 S. W. 1079, 1080, 95 Ark. 517, 30 L. R. A. (N. S.) 1030.

A suit to cancel a decree against plaintiff for the amount due on a note, as a cloud on the title to his realty, and to enjoin its enforcement on the ground that defendant had agreed with plaintiff to indemnify him against the payment of the note as a consideration of plaintiff's assignment of the mortgage securing the note, is not in the nature of a "bill of review," within B. & C. Comp. § 391, abolishing that form of suit. Smith v. Nelson, 78 Pac. 740, 741, 46 Or. 1.

BILL OF SALE

"A 'bill of sale' is a written agreement, either under seal or not under seal, by which one person transfers his right to or interest in personal chattels to another. Such is the definition of a 'bill of sale' where the purpose of the instrument is to pass the absolute title from the person executing the paper to the person to whom the paper is delivered. A 'bill of sale' to secure a debt is simply a bill of sale executed by the debtor to his creditor, having the effect to transfer the title to the property to be held by the creditor until the debt is paid; that is to say, a bill of sale to secure a debt is to personal property as a security deed is to real property. * * * Where one sells to another an article of personal property, and takes a note for the purchase money, in which the purchaser agrees that the title to the property shall remain in the seller until the purchase money is paid, the promissory note with such a stipulation in it has none

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of the elements necessary to constitute a bill of sale. * * * A conditional sale of personal property, evidenced by a promissory note, is therefore not a bill of sale to secure a debt." Berry v. Robinson & Overton, 50 S. E. 378, 122 Ga. 575 (citing Bouv. Law Dict. [Rawle's Rev.] Stroud's Jud. Dict. [2d Ed.]).

As chattel mortgage

See Chattel Mortgage.

BILL PAYABLE

All bills payable, see All.

BILL QUIA TIMET

A "bill quia timet" is in the nature of a writ of prevention and is entertained as a measure of precaution, justice, and to forestall wrongs or anticipated mischiefs, as where a guardian or other trustee is squandering an estate, or where one in possession of property which another unjustly claims is likely to lose the evidence of his title by delay in asserting and testing the hostile claim. Bailey v. Briggs, 56 N. Y. 407, 415.

A "bill quia timet" is a bill in equity whereby clouds are removed from complainant's title, and complainant must set forth his title and defendant's title, and has the burden of proof, and so differs from the statutory suit to quiet title provided for by act N. J. March 2, 1870 (P. L. p. 20). which places the burden of proof on defendant. Fittichauer v. Metropolitan Fire Proofing Co., 61 Atl. 746, 748, 70 N. J. Eq. 429.

BILL RECEIVABLE

A debt due for goods sold is a bill receivable of the seller within an assignment of his "bills receivable." Rogers v. Abbot, 92 N. E. 472, 473, 206 Mass. 270, 138 Am. St. Rep. 394.

BILLED PRICES

Where a manufacturer communicated with a customer by letter by using the term "old prices," that term meant "billed prices," or the prices at which the goods were originally sold to the customer. Danziger v. Pittsfield Shoe Co., 68 N. E. 534, 537, 204 Ill. 145.

BILLING

See Blind Billing.

BILLIARDS

BILLIARD TABLE

The term "billiard table," as used in a statute empowering cities to suppress "billiard tables," while that term was applied to tables substantially the same as pool tables of the present time, may be construed to include pool tables so as to authorize an ordinance prohibiting their use. City of Clearwater v. Bowman, 82 Pac. 526, 527, 72 Kan. 92.

A license to keep a "billiard table" does not authorize its use for the game of pool. Rodgers v. State, 26 Ala. 76, 77.

As gambling device

See Gambling Device.

BIND

A memorandum in the form of an application for insurance, containing a brief statement of particulars and marked "binding," containing an agreement for insurance to a certain amount at a reasonable premium and providing for a policy when the facts are found by applicant and made known to the insurer, is an agreement for insurance to continue at a reasonable rate of premium until the applicant had opportunity to furnish further particulars, and would so furnish them, and that both parties would then endeavor to agree on a premium and make a contract in the form of a policy. Scammell v. China Mut. Ins. Co., 41 N. E. 649, 650, 164 Mass. 341, 342, 49 Am. St. Rep. 462.

A surety of mortgaged property standing as surety is released, if, without the surety's consent, a binding agreement is made between the creditor and principal debtor for an extension of the maturity of the debt with prejudice to the surety's right to pay the debt and proceed against his principal; but such a "binding agreement" must be conclusive against both the creditor and the principal, and hence an agreement for an extension of maturity procured by the principal's fraud, not being binding on the creditor, does not release the surety. Red River Nat. Bank v. Bray (Tex.) 148 S. W. 290, 291.

BIND OVER

Where the record transmitted to the circuit court by the justice holding a preliminary examination showed that there had been an examination, and that accused was "bound over" to the circuit court, and that a bond for his appearance was approved, the irregularity, if any, in summarily overruling a plea in abatement for want of a preliminary examination was not prejudicial; the words "bind over" being understood in law as requiring one to give bail to appear at the trial of a given case. Hack v. State, 124 N. W. 492, 493, 141 Wis. 346.

BINDINGS OR BRAIDS

Narrow woven cotton strips bearing "featherstitch" or "herringbone" ornamentation, used largely for binding seams, but commercially known as "featherstitch braids" at and prior to the enactment of Tariff Act July 24, 1897, 30 Stat. L. 181, c. 11, which shifted braids from the lower duty of the notions schedule, par. 320, to the higher duty of the trimmings schedule, par. 339, without any change of phraseology to indicate that it was the purpose to depart from the settled commercial meaning of the word "braids," must be deemed dutiable at 60 per cent. un-

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der the trimmings schedule, as cotton braids, and not at 45 per cent. under the notions schedule, as "bindings" or as "tapes,"—especially in view of the settled administrative construction to such effect. United States v. Baruch, 32 Sup. Ct. 306, 223 U. S. 191, 56 L. Ed. 399.

BIRDS

Guinea fowl and turkeys, that are not shown to be in fact wild birds, are more appropriately classified as "poultry," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172, rather than as "birds and land * * * fowls" under section 2, Free List, par. 494, 30 Stat. 196. Silz v. United States, 178 Fed. 273, 101 C. C. A. 537.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 426, 30 Stat. 191, for "furs dressed on the skin," does not include dressed goose skins with the down on. Such articles are dutiable as "bird skins, * * * dressed * * * or manufactured in any manner," under paragraph 425, 30 Stat. 191. Herskovitz & Roth v. United States, 180 Fed. 631, 632.

In regard to stuffed skins of domestic chicks and ducklings, used by confectioners and dealers in Easter goods and novelties, held, that they are not "toys" within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, but "birds, stuffed," under paragraph 493, § 2, Free List, 30 Stat. 196. Morimura Bros. v. United States, 141 Fed. 383.

As animals

See Animals.

BIRDS' EGGS

See Eggs of Birds.

BIRTHDAY

Where a voter was born June 9, 1883, and an election was held on June 8, 1904, the day following the election was his "birthday." Erwin v. Benton, 87 S. W. 291, 294, 120 Ky. 536, 9 Ann. Cas. 264.

BISHOP

As corporation, see Corporations.
As institution, see Institution.

BITCH

See Whoring Bitch.

Want of chastity imported

"Bitch" is a term which may be "applied opprobriously to a woman; strictly a lewd or sensual woman" (Oxford Dictionary); "an opprobrious name for a woman, especially a lewd woman" (Webster); "a term of reproach for a lewd woman" (Chambers); "a wench or lewd woman" (March's Thesaurus); though it may be used as a general term of opprobrium without any definite reference to chastity. Where a declaration in slander by the words "damned bitch" laid an innuendo that plaintiff was thereby charged with adultery, she being a married woman, an amendment after limitations by adding the words "Whore and" should have been allowed, and the question left to the jury, since the words so understood are generically the same. Stoner v. Erisman, 56 Atl. 77, 206 Pa. 602.

A statement, made of and concerning a married woman, that she was "a God damned little black bitch" was not slanderous per se; but a further statement that she was "a God damned little whoring bitch" was slanderous per se. Cameron v. Cameron, 144 S. W. 171, 173, 162 Mo. App. 110.

BITTERS

See Intoxicating Bitters.
As mixture, see Mixture.

BITULITHIC

"Bitulithic" is the name of a particular kind of pavement invented by Warren Bros., of Boston, Mass. Lacoste v. City of New Orleans, 44 South. 267, 268, 119 La. 469.

The word "bitulithic" is a coined registered trade-mark used to designate a bituminous macadam pavement made according to the Warren Bros. process. Seibert v. City of Indianapolis, 81 N. E. 99, 102, 40 Ind. App. 296.

BLACK ROT

"Black rot" is a disease incident to grape culture which does not attack the plant itself, but is a fungus growth on the fruit and is supposed to originate from spores in the air. Lurch v. Holder (N. J.) 27 Atl. 81, 82.

BLACKLIST

The term "blacklisting" did not include a case where manufacturers of patent medicines, who had contracted with wholesale dealers to handle the goods at a uniform price, were furnished by the wholesale dealers with a list of dealers who had cut the established price, resulting in the refusal of the manufacturers to sell to such wholesale dealers except at the long or retail price. John D. Park & Sons v. National Wholesale Druggists Ass'n, 67 N. E. 136, 143, 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578.

The "blacklisting of employés" by an association of employers is not an actionable wrong unless actual damages occur. Willner v. Silverman, 71 Atl. 962, 964, 109 Md. 341, 24 L. R. A. (N. S.) 895.

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BLACKMAIL

"Extortion" is a synonymous term with "blackmail."

"'Blackmail' is an extortion of hush money; obtaining value from a person as a condition of refraining from making an accusation against him, or disclosing some secret calculated to operate to his prejudice." Ex parte Algoe, 104 N. W. 751, 74 Neb. 353 (quoting Rap. & L. Law Dict.).

A scheme to collect an alleged debt by putting the alleged debtor in fear and inducing him to pay a price to evade the threatened danger of prosecution constitutes "blackmail." One who pays money to a collector of alleged debt to prevent the collector from making damaging disclosures to a prosecuting officer is "blackmailed." United States v. Horman, 118 Fed. 780, 781.

The gist of "blackmail," under Burns' Ann. St. 1901, § 1999, punishing one who accuses another of immoral conduct with intent to extort or gain, etc., is the extortion of things of value from a person by menaces of personal injury, or by threatening to accuse him of crime or any immoral conduct, which, if true, tends to degrade and disgrace him. Eacock v. State, 82 N. E. 1039, 1041, 169 Ind. 488.

The sending of letters purporting to come from the society of the "Black Hand," stating that the society had decided prosecutor's case and demanded from him a specified sum of money or death would be the prosecutor's reward, constitutes "blackmail." People v. Triscoli, 102 N. Y. Supp. 328, 330, 117 App. Div. 120.

The gravamen of the offense of "blackmail," as defined in Pen. Code 1895, § 116, providing that if any person shall accuse another of a crime or offense, or expose or publish any of his personal acts, infirmities, failings, or compel any person to do any act or to refrain from doing any lawful act against his will with intent to extort money or other thing of value from any person, or if any person shall attempt or threaten to do any of the acts enumerated with the intent to extort money or other thing of value, such person shall be guilty of blackmail, is the "intent to extort money or other thing of value." Chunn v. State, 54 S. E. 751, 752, 125 Ga. 789.

One attempting to obtain money from another with his consent by the wrongful use of fear, and a verbal threat to publicly accuse him of adultery, is guilty of the felony of an attempt to commit "extortion," defined by Penal Law, §§ 850, 851, as the obtaining of property from another with his consent induced by wrongful use of fear and by a threat to accuse him of any crime, and is not guilty of the misdemeanor denounced by section 857, providing that a person who verbally makes such a threat as would be criminal if made in writing is guilty of a misdemeanor, which applies only to "blackmail," defined by section 856 as the extorting of money from another by any writing threatening to accuse a person of crime, for the threats under sections 850, 851, may be written or verbal. A threat that will produce the fear that constitutes an element of the crime of extortion, if verbal, is only a misdemeanor, under Penal Law (Consol. Laws, c. 40) § 857. People ex rel. Perry v. Gillett, 124 N. Y. Supp. 470, 471, 140 App. Div. 27.

BLANCO P. CARRARA

Where a subcontract for the furnishing of the marble work of an office building provided that the marble should be "Blanco P. Carrara" marble, and plaintiff's witnesses testified that such marble was not pure white, but was marble of the character furnished, and that pure white marble was known as "Blanco Puro," while the architects testified that by "Blanco P. Carraro" they meant to specify pure white marble, whether plaintiff had substantially complied with the contract was a question for the jury. George A. Fuller Co. v. B. P. Young Co., 126 Fed. 343, 345, 61 C. C. A. 245.

BLANK

See Indorsement in Blank.

One of the definitions of the word "blank," as given by Webster's Dict., is a piece of metal prepared to be made into something by a further operation, as a coin, screw, nuts. State v. Nelson, 60 Atl. 589, 590, 27 R. I. 31.

Code 1907, § 379, provides that there shall be on the right of each ballot a column containing only the printed titles of the office for which candidates may be voted for by the electors, which column is designated as the "blank column"; but the form of ballot appended to section 380 does not show a "blank column." Section 380 permits the elector to write in the column below, under the title of the office, the name of any person, whose name is not printed upon the ballot, for whom he may desire to vote. Section 414 provides that no ballot shall be rejected for technical error which does not make it impossible to determine the elector's choice. *Held*, that there was no doubt as to the elector's choice, where the printed name of a candidate in the Democratic column was erased, and another name written immediately thereunder, with a cross-mark placed in front of it, so that such ballot was properly counted. Wilkerson v. Cantelou, 51 South. 799, 165 Ala. 619.

An amendment of a writ by the court filling the blank after the word "defendant" is not "filled by another" in the sense of Code Civ. Proc. § 920, providing that no paper save a subpœna issuing from a justice

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court shall be valid if there are "blanks left to be filled by another." Brann v. Blum, 72 Pac. 168, 171, 138 Cal. 644.

BLANK INDORSEMENT

See Indorsement in Blank.

BLANKS

Papers to be used as envelopes and cut in that form but not yet pasted are not dutiable as paper envelopes under paragraph 399, Schedule M, § 1, Act of July 24, 1897, 30 Stat. 188, but are "blanks" dutiable as manufactures of paper under paragraph 407, 30 Stat. 189. Hunter v. United States, 134 Fed. 361, 362, 67 C. C. A. 343.

Rev. St. 1895, art. 4571, requiring the Railroad Commission to prepare "suitable blanks" with questions eliciting information concerning roads desired by the commission, and imposing a penalty for failure of a company or its officers to fill out and return the "blanks" or correctly answer questions propounded therein, imposes a penalty only when the questions propounded and information requested on face of the "blanks" are not answered and furnished, and orders passed by the commission requiring a company to give information as to the number of freight cars handled at designated stations during specified months, and calling for information as to salaries of attorneys, etc., are not the "blanks" required, and to authorize imposition of the penalty it must appear that the commission forwarded to the company blanks calling for the information, and that it failed to fill them up and return them to it. State v. Gulf, C. & S. F. Ry. Co., 118 S. W. 736, 738, 55 Tex. Civ. App. 108.

BLANKET

Burlap manufactured into covers for horses are "blankets" within the purview of a schedule of railroad rates including that sort of articles as blankets. Smith v. Great Northern R. Co., 107 N. W. 56, 57, 15 N. D. 195.

BLANKET CONSENT

A consent for a street railway to use the city streets, which does not mention the termini or the routes, is a "blanket consent" and is invalid when questioned by proper authority. State ex rel. Caldwell v. Citizens' St. Ry. Co., 114 N. W. 429, 430, 80 Neb. 357.

BLANKET NOTICE

A notice given by a purchaser of a certificate of land sold for taxes, which includes many descriptions, is insufficient, being a "blanket notice." Ambler v. Patterson, 114 N. W. 781, 782, 80 Neb. 570.

BLANKET POLICY

A "blanket policy" of insurance on a quantity of grain does not apply specifically to any particular number of bushels of grain that may have been in any particular granary at the time the policy was written, but applies to this class of property, even though replaced by other of a similar specie during the entire term of the policy. Johnston v. Phelps County Farmers' Mut. Ins. Co., 102 N. W. 72, 73, 73 Neb. 50 (citing and following State Ins. Co. v. Schreck, 43 N. W. 340, 27 Neb. 527, 6 L. R. A. 524, 20 Am. St. Rep. 696).

BLAST

See Double Blast.

A "blast" is a strong charge of explosive that both tears and throws the earth and rock and so is different from a "spring shot," which simply makes a chamber at the bottom of the drilled hole. City of Spokane v. Patterson, 89 Pac. 402, 403, 46 Wash. 93, 18 L. R. A. (N. S.) 1104, 123 Am. St. Rep. 921, 13 Ann. Cas. 706.

BLEACHED

As to cotton cloth which is unbleached, except with respect to figures covering about one-eighth of the surface of the fabric, which are made of bleached threads, held, that these figures do not make the goods "bleached," within the meaning of the various provisions for bleached cotton cloth which are found in Tariff Act July 24, 1897, c. 11, § 1, Schedule 1, 30 Stat. 175. United States v. Beer, 143 Fed. 918, 919.

BLEACHERS

Seats at a ball park made of boards and without any covering are called "bleachers." Heigert v. State, 75 N. E. 850, 851, 37 Ind. App. 398.

BLEACHERS' BLUE

"Bleachers' blue," which is not used as a color or dye, but solely as a bleaching mixture, although a coal tar product, does not fall within the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 151, including coal tar colors or dye, but within the further provision of the same parapraph providing for duties on coal tar preparations that are not colors or dyes. Abram De Ronde v. United States, 148 Fed. 653, 654.

BLEED OR DRAIN VALVE

A "bleed or drain valve" is a valve used for the purpose of draining the pipe leading from the boiler into the engine. Roche v. Llewellyn Ironworks, 74 Pac. 147, 148, 140 Cal. 563.

BLEND

As expressly defined by Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 770,

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"blend" is a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only. Savage v. Jones, 32 Sup. Ct. 715, 725, 225 U. S. 501, 56 L. Ed. 1182.

Food and Drug Act June 30, 1906, c. 3915, § 8, 34 Stat. 771, provides that an article which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded, if labeled so as to plainly indicate that it is a compound imitation or blend, and the word "blend" is plainly stated on the package, which term shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for coloring or flavoring only. Held that, where syrup consisting of refined cane sugar flavored with an extract of maple wood was sold under a label describing it as "Western Reserve Ohio Blended Maple Syrup," the word "blend" indicated that the article was a mixture and imitation, and there was therefore no violation of the act. United States v. Sixty-Eight Cases Syrup, 172 Fed. 781, 783.

In view of Food and Drug Act June 30, 1906, c. 3915, § 8, 34 Stat. 770, providing that the term "blend" shall be construed to mean a mixture of like substances, and regulation 27a, made under the authority of such act, and providing that the terms "mixture" and "compound" are interchangeable, "blend" is a "compound"; but a "compound" may or may not be a "blend." In other words, the term "compound" does not necessarily denote a mixture of unlike substances. Frank v. United States, 192 Fed. 864, 869, 113 C. C. A. 188.

BLENDED FLOUR

"Blended flour" is flour mixed with corn meal, about half and half, of a dark color and of a peculiar odor. Bunch v. Weil Bros. & Bauer, 80 S. W. 582, 72 Ark. 343, 65 L. R. A. 80.

BLIND BILLING

The act of shipping without stating the charges is called "blind billing." Standard Oil Co. of New York v. United States, 179 Fed. 614, 616, 103 C. C. A. 172.

BLIND STITCHES

"Blind stitches" are ones which enter the cloth without going entirely through it and show only on one side. Acme Keystone Mfg. Co. v. Dearborn, 180 Fed. 766, 768, 769.

BLIND TIGER

A "blind tiger" is a place where intoxicants are "sold on the sly." Town of Ruston v. Fountain, 42 South. 644, 645, 118 La. 53 (citing Stand. Dict.).

A "blind tiger" is a place where intoxicating liquors are kept for illegal sale in defiance of law. Allison v. State, 55 South. 453, 454, 1 Ala. App. 206.

A "blind tiger" is a place where liquors are sold on the sly, in violation of law, and is a common nuisance. Callaway v. Mims, 62 S. E. 654, 656, 5 Ga. App. 9 (citing 1 Words and Phrases, p. 808).

A "blind tiger," within Pen. Code 1895, art. 406, is any place in which intoxicating liquors are sold by any device whereby the party selling or delivering the same is concealed from the person buying or to whom the same is delivered. Fitch v. State, 127 S. W. 1040, 1043, 58 Tex. Cr. R. 366.

It is well known that a keeper of a "blind tiger" in its general acceptation and understanding means a person engaged in the unlawful sale of intoxicating beverages. State v. Tabler, 72 N. E. 1039, 1040, 34 Ind. App. 393, 107 Am. St. Rep. 256 (citing Stand. Dict.; Rush v. Commonwealth [Ky.] 47 S. W. 586).

An information, charging that accused violated an ordinance by having in his possession a jug of whisky within the city limits, sufficiently charged him with running a "blind tiger," defined by the ordinance to be a nuisance. State ex rel. Johnson v. Thompson, 35 South. 582, 111 La. 315.

BLINDNESS

See Color Blindness.
As sickness, see Sickness.

BLIZZARD

The term "blizzard" is a familiar term in the Mississippi Valley applying to certain violent storms. This term has found its way into dictionaries, and is defined by Webster as: "A violent blow. A dry, intensely cold, violent storm, with high wind and fine driving snow, such as those which originate on the eastern slope of the Canadian Rocky Mountains." Jordan v. Iowa Mut. Tornado Ins. Co., 130 N. W. 177, 178, 151 Iowa, 73, Ann. Cas. 1913A, 266.

BLOCK

See Lots, Blocks, Tracts, and Parcels of Land; Snatch Block; Solid Block.

The "block" of a railway switch frog is a piece of wedge-shaped wood driven in the point where the two rails come together to keep one's foot from being caught in the frog. Schroeder v. Chicago & N. W. R. Co., 103 N. W. 985, 986, 128 Iowa, 365.

As building

Under an insurance policy covering goods contained in "brick block situated at Nos. 82-90 W. St.," where it appeared that insur-

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ed occupied the fifth story over stories No. 84-90, and also the fifth story over a store No. 80; that the only entrance to the premises was a stairway at No. 82, except a freight elevator in the rear of No. 80; and that the entire premises from No. 80 to No. 90 were built and remodeled at the same time, the front upon the street being the same in appearance and owned by the same person; and that from the halls over No. 82 doors opened on both sides into rooms occupied by insured—it was held that there was nothing in the word "block" which required a holding, as a matter of law, that the part of the building running from the west side of the doorway numbered 80 to the east end of the building was a separate and distinct block by itself, but that the question was one of fact for the jury, who would be warranted in finding that it was merely a part of a large block. Westfield Cigar Co. v. Insurance Co. of North America, 43 N. E. 504, 506, 165 Mass. 541, 545.

As land inclosed by streets

Land as including, see Land.

A "block" is "a square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots." City of Ottawa v. Barney, 10 Kan. 270, 278 (quoting and adopting a definition in Webster, Dict.); Olsson v. City of Topeka, 21 Pac. 219, 220, 42 Kan. 709, 712 (quoting and adopting the definition in Webster, Dict.).

A "block" in a city is a part of the city inclosed by streets, whether occupied by buildings or composed of vacant lots. A statute relative to disconnecting territory from a town provided that it must appear that no part of the territory has been platted into "lots" or "blocks" as part of the town. Held, that where the territory in question constituted a portion of a subdivision of the town included in the town site at the time of the incorporation and the plat of the subdivision showed the streets of the town proper running east and west, and each alternate street running north and south laid out through the subdivision, and the spaces between the streets divided into parcels of various dimensions, the parcels being numbered, the territory could not be disconnected; it being platted into lots and blocks. Town of Fruita v. Williams, 80 Pac. 132, 133, 33 Colo. 157.

A tract of platted ground, surrounded by streets and forming a portion of a city, constitutes a block, within Gen. St. 1909, § 1374, relating to the method of assessing the cost of street improvements, and providing the same shall be made for each block separately, though the donor of the plat divided the tract into two portions by an alley and designated each portion a block. Bowlus v. City of Iola, 109 Pac. 405, 406, 82 Kan. 774.

A square surrounded by streets is a "block" within the meaning of Denver City Charter, § 75, providing that no license for the sale of intoxicating liquors shall be granted "except on petition of the owners of a majority of the real estate within the frontage of the block in which such liquors or any thereof are to be sold," though such square is made up of two platted subdivisions, and one-half of the square is designated as a block in one of the subdivisions. Slater v. Fire & Police Board of City & County of Denver, 96 Pac. 554, 555, 43 Colo. 225.

The annexation act (Acts 1888, p. 113, c. 98), as amended by the Foutz act (Acts 1902, p. 198, c. 130), defines a block for taxation purposes to be an area bounded by streets, etc., opened, graded, curbed, and otherwise improved from curb to curb by pavement by some substantial material, etc. A particular avenue was opened, graded, and curbed on both sides, and has properly paved gutters. The space occupied by car tracks, and two feet outside of them was paved. The remaining strips lying between the gutters and the paving along the tracks which are six or seven feet wide have substantial bases and a pike macadam condition. Held, that the avenue is improved within the statute. Coulston v. City of Baltimore, 71 Atl. 990, 991, 109 Md. 271.

A tract of land containing 200,660 superficial square feet is not taxable at the full city rate under Acts 1902, c. 130, defining "landed property" within Acts 1888, c. 98, § 19, relating to the taxation of property annexed to Baltimore, and providing that a "block of ground" shall be deemed to mean a tract not exceeding 200,000 superficial square feet bounded by improved streets or alleys. City of Baltimore v. Harris, 77 Atl. 835, 836, 113 Md. 227.

Section 19 of the act annexing certain territory to Baltimore City (Acts 1888, c. 98) declares that until the year 1900 the right of taxation on all "landed property" in the territory annexed shall not exceed the rate for Baltimore county; that from the year 1900 "the property, real and personal," shall be liable to taxation as property within the city's old limits, provided that after the year 1900 the Baltimore county rate of taxation at the time of the passage of the act shall not be increased for such purposes "on any landed property within the city territory until avenues, street, or alleys shall have been opened and constructed through the same, nor until there shall be upon every block of ground so to be formed at least six dwellings or store houses ready for occupation." Acts 1902, c. 130, amendatory of Annexation Act, defines "landed property" as real estate, whether in fee simple or leasehold, and whether improved or unimproved, and provides that "until avenues,

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streets, or alleys shall have been opened and constructed," shall be construed to mean until avenues, streets, or alleys shall be opened, graded, curbed, and otherwise improved from curb to curb by pavement or other substantial material. It also provides that the words "avenues," "streets," and "alleys" are used interchangeably, and that "block of ground" shall be construed to mean an area not exceeding 200,000 superficial square feet, formed and bounded on all sides by intersecting improved avenues, streets, or alleys. Held, that the effect of the amendatory act was to retain the county rate of taxation in the annexed territory until landed property therein situated became urban property within the terms of the act. Mayor, etc., of City of Baltimore v. Gail, 68 Atl. 282, 285, 106 Md. 684.

Square synonymous

The words "square" and "block," when used to designate a piece of land in a city, are synonymous terms. We find the word "square" used chiefly in southern cities, and the word "block," elsewhere, but they mean the same thing; they mean a piece of land defined by streets surrounding it. Gilsonite Roofing & Paving Co. v. St. Louis Fair Ass'n, 132 S. W. 657, 660, 231 Mo. 589.

The word "block," as used with reference to subdivisions of land, is synonymous with the word "square," and means the territory bounded by four streets. An application for a liquor license, under an ordinance requiring that it shall be signed by a majority of the property owners, according to the frontage, "on both sides of the street in the block upon which such dramshop is to be kept, and * * * by a majority of the bona fide householders and persons and firms doing business on each side of the street in the block upon which the dramshop is to have its main entrance," though signed by the property owners and householders and persons or firms doing business on both sides of the street in the block in which the dramshop is to have its main entrance, is insufficient to compel the issuance of a license, where it does not have the signatures of a majority of the property owners on both sides of the streets bounding the block in which the dramshop is to be located, for the word "block," as used in the first clause recited, means the territory inclosed by the four streets, and is synonymous with the word "square." Harrison v. People ex rel. Boetter, 63 N. E. 191, 192, 195 Ill. 466 (citing Cent. Dict.; Webster, Dict.; City of Ottawa v. Barney, 10 Kan. 270; Olsson v. City of Topeka, 21 Pac. 219, 42 Kan. 712; State v. Deffes, 10 South. 597, 44 La. Ann. 164; Todd v. Kankakee & I. R. R. Co., 78 Ill. 530; City of Chicago v. Stratton, 44 N. E. 853, 855, 162 Ill. 494, 501, 35 L. R. A. 84, 53 Am. St. Rep. 325).

The word "block" ordinarily contemplates a territory divided by streets into blocks or squares. As defined by Webster, it is a "square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots." This definition was evidently not the one intended in Ky. St. § 3449, authorizing the common council of cities of the third class to pass ordinances requiring the improvement of streets and alleys by grading any portion thereof not less in length than one "block," since such construction would deny the city the right to require owners living in territory within the city not capable of division into blocks or squares to contribute their just proportion of the expense of improving the sidewalks, guttering, and curbing in front of their property. In the absence of a statutory definition of what constitutes a block, its length is a question of fact to be determined from the evidence as any other disputed fact. Evidently the purpose of the Legislature was to require a city, when it undertook to improve streets or alleys, to improve not less than a block in territory divided into squares or blocks, or, if not so divided, to improve not less than a block in distance. Board of Councilmen of City of Frankfort v. Brislan, 104 S. W. 311, 312, 126 Ky. 477.

Rev. St. 1909, § 7201, makes it unlawful for a county court to grant a license to keep a dramshop in a town or city containing 2,000 inhabitants or more until a majority of the taxpaying citizens and guardians of minors holding property in the "block or square" in which the dramshop is to be kept shall sign the petition asking for such license to keep a dramshop in such block or square. Held, that the words "block" or "square" as so used were synonyms and contemplated a portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots; the term "block or square" meaning a portion of ground in a town or city surrounded by streets, and hence a petition signed by only a majority of the owners of property within a section of a city bounded on two sides by streets, neither dedicated nor open to the public, but shown on the plat of that portion of the city, was insufficient. Kochtitzky v. Herbst, 140 S. W. 925, 929, 160 Mo. App. 443.

As street lying between two cross-streets

Acts 1904, relating to the obstruction of sidewalks in the city of Baltimore, defines "block" to mean a portion of one side of any street included between the nearest two cross-streets. Storck v. Baltimore City, 61 Atl. 330, 331, 101 Md. 476.

The word "block" used in an ordinance prohibiting the erection of a blacksmith's shop in any block in which two-thirds of the buildings on both sides of the street are used

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exclusively for residence purposes, without the written consent of a majority of the property owners, "provided that in determining whether two-thirds of the buildings * * * are used exclusively for residence purposes, any building fronting on another street and located upon a corner lot shall not be considered," means merely the part of the street upon which the blacksmith's shop is to be located, which lies between two cross-streets, and does not mean the square surrounded by four streets. Patterson v. Johnson, 73 N. E. 761, 765, 214 Ill. 481.

BLOCK OF MARBLE

A block of marble, see A.

BLOCK SURVEY

Contiguity of tracts of land is essential to a "block survey." Knupp v. Barnard, 55 Atl. 981, 984, 206 Pa. 280.

BLOOD

See Bad Blood; Half Blood; Hot Blood; Mixed Blood; Spitting or Coughing Blood.

Privies in blood, see Privity—Privy.

BLOOD CHARCOAL

"Blood charcoal," a substance which, like bone char, is composed chiefly of carbon, and is used for decolorizing sugar, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 87, 30 Stat. 156, as an "article composed of carbon," but either under paragraph 10, Schedule A, 30 Stat. 152, as "bone char" by similitude, or at the similar rate provided in section 6, 30 Stat. 205, for unenumerated manufactured articles. United States v. George Leuders & Co., 148 Fed. 398.

BLOOD POISONING

"Blood poisoning" is not one of the primary or idiopathic diseases. It is a toxic condition of the blood caused either from or through a surface wound or some internal lesion, or from the breaking down of tissue incident to an existent or precedent disease and thereby producing suppuration. Jones v. Pennsylvania Casualty Co., 52 S. E. 578, 579, 140 N. C. 262, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843.

As disease

See Disease.

BLOOD RELATIONS

See Nearest Blood Relations.

Where a testator has no blood relations except through his mother, her descendants are his blood relatives, whether they are illegitimates or the descendants of illegitimates, and such persons are included within the term "blood relations" when used in a will by necessary implication. In re Sander's Estate, 105 N. W. 1064–1066, 126 Wis. 660, 5 Ann. Cas. 508.

A will, devising real estate to a sister of testatrix, and providing that any part of the property or the proceeds on hand at the sister's death not disposed of by her to her blood relatives shall descend under the statute of descent and distribution, does not vest in the sister an absolute title except in so far as she may dispose of the property during life or by will to blood relations, and a devise by her to her husband for life with remainder over to her nieces is void as to the husband, since he is not a "blood relation." Flippen v. Robinson (Tex.) 144 S. W. 707.

Under the charter of a beneficial association, authorizing a member to designate, as the recipient of the benefit payable on his death, a person of his "immediate family," or, in default of such family, one of his blood relatives, a daughter of insured living with him as a member of the same household, with him as its head, may be designated as beneficiary, as one of his immediate family, though she be of age, so that he is not legally bound to support her and she is not under his legal control. Though the daughter is more than 21 years of age before the death of her father, left his home, intending to make a living for herself and using her own earning for her own benefit, and though the father left a widow and minor children, who had been, and were at his death, a part of his household, dependent on him, such daughter had not necessarily ceased to be a member of the father's "immediate family," and so not entitled to take his death benefit as his designated beneficiary. The primary meaning of the word "family," as used in our language to specify a definite group of persons, is "the collective body of persons who form one household under one head and one domestic government, including parents, children and servants." Quoting and adopting definition in Cent. Dict. In construing a writing in which the word "family" is used, this primary meaning should be assumed in determining the expressed intention of the writer, unless there is something in the context to show that it is used in some other meaning. The same person may be either a member of the "immediate family" of the insured or one of his "blood relatives." Both groups are composed of persons of the same "family" with the member; in the former reference being had to the primary meaning of "family" as denoting members of one household, gathered around one head, and in the latter to "family" as denoting individuals related through descent from one stock. "Family" is frequently used to denote those connected by the tie of common descent as well as that of a common household. The words "immediate family" is used in this connection to indicate a group of persons, of which the insured is one, connected as

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one "family," and from which is excluded any member who has become separated from the group as constituting one household, and "immediate family" certainly includes all persons bound together by the ties of relationship and parents and children living together as members of one household under one head. Dalton v. Knights of Columbus, 67 Atl. 510, 511, 512, 80 Conn. 212, 125 Am. St. Rep. 116, 11 Ann. Cas. 568 (citing Town of Cheshire v. Town of Burlington, 31 Conn. 326, 329; Hart v. Goldsmith, 51 Conn. 479, 480; Wood v. Wood, 28 Atl. 520, 63 Conn. 324, 327; Crosgrove v. Crosgrove, 38 Atl. 219, 69 Conn. 416, 422; Knights of Columbus v. Rowe, 40 Atl. 451, 70 Conn. 545, 550; Hoadly v. Wood, 42 Atl. 667, 71 Conn. 452, 456, 71 Conn. 599, 44 L. R. A. 321; Knights of Columbus v. Rowe, 40 Atl. 451, 70 Conn. 545).

As heir

See Heirs.

BLOWER

A "blower" is a mechanical ventilator or fan. Venbuvr v. Lafayette Worsted Mills, 60 Atl. 770, 27 R. I. 89.

BLOWN GLASSWARE

Thermometers and lactoscopes, composed chiefly of blown glass, but in part of other materials, are not dutiable under the provisions in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, as "blown glassware," but under paragraph 112 of said act, as manufactures of which glass is the component material of chief value, not specially provided for. Eimer & Amend v. United States, 126 Fed. 439, 441.

"Bottles," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156, exclude blown glass flasks for chemical laboratories, dutiable under paragraph 100, 30 Stat. 157, as "blown glassware." Eimer & Amend v. United States, 168 Fed. 240, 241, 242, 93 C. C. A. 454.

Crude, incomplete articles of glass, known as "blanks," produced by blowing glass into a mold, which are suitable only to be placed in the hands of glass cutters for further manufacture into finished articles, are not within the provision for "blown glassware" in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, but are dutiable under the provision for "all glass or manufactures of glass," in paragraph 112 of said act, 30 Stat. 158. United States v. Durand, 137 Fed. 382, 383, 69 C. C. A. 566.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, the term "blown glassware" includes articles blown in a mold as well as freehanded. Articles in chief value of blown glass, but in part of other glass or other material, are not within the provision for "blown glassware" in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, but are dutiable as manufactures of glass under paragraph 112, 30 Stat. 158. In par. 99, the term "molded," as applied to glassware, is synonymous with "pressed." In par. 100, the provision for "articles of glass * * * ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers)," is not limited to articles in which the grinding is done for ornamental or decorative purposes, but includes plain goods ground for utility purposes only. United States v. Heil Chemical Co., 178 Fed. 537, 539, 102 C. C. A. 47.

BLUDGEON

"Bludgeon" is a short club commonly loaded at one end or bigger at one end than the other, used as a weapon. State v. Lett, 60 S. E. 782, 783, 63 W. Va. 665 (quoting Cent. Dict.).

BLUE

See Bleachers' Blue.

BLUE NOTES

"Blue notes" are notes accepted by an insurance company for unpaid premiums. A method of extending the time to pay premiums. New York Life Ins. Co. v. Board of Assessors for Parish of Orleans, 158 Fed. 462, 474.

BLUNT INSTRUMENT

In a prosecution of murder, a charge in the indictment that the striking was with a "blunt instrument" is sustained by testimony of the coroner's surgeon, who made the post mortem examination that the skull of the murdered person had been fractured, that the cracks in the skull were due to external violence, to a blow on the skull, and that it was with a blunt instrument, such as a stick, butt of a gun, gas pipe, hammer, or something like that. People v. Lukoszus, 89 N. E. 749, 751, 242 Ill. 101.

BOARD

See Brokers' Board; County Board; Entire Board; High School Board; Legislative Board; On Board; Steadying Board; Table Board; Town Board.
County board as court, see Court (of Justice).
Residence of board, see Residence.

Guest relationship

The word "board," in the ordinary acceptation of the term, covers both room rent and table board. If it has the narrower meaning, it is usually designated "table

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board." Heron v. Webber, 68 Atl. 744, 745, 103 Me. 178.

Official boards

Under Rev. Codes, § 262, authorizing the board of examiners to employ clerical help for any state officer or board, and prohibiting such officers or boards from employing clerks without the authority of the board of examiners, the Supreme Court is not an officer or board. State ex rel. Schneider v. Cunningham, 101 Pac. 962, 965, 39 Mont. 165.

The term "board" is defined to be "a number of persons organized to perform a trust or execute official or representative functions; * * * a number of persons who have the management of some private or public business." Wilson v. Bleloch, 109 N. Y. Supp. 340, 343, 125 App. Div. 191 (dissenting opinion of Woodward, J.).

The term "boards," as used in Const. Okl. art. 7, § 2, providing that the original jurisdiction of the Supreme Court shall extend to a general superintending control over all the inferior courts and over all commissions and boards created by law, is limited to such boards as are vested with judicial power by Const. art. 7, § 1, to hear and determine matters from which appeals may be taken or to wnich writs of certiorari and other like writs may lie. Homesteaders v. McCombs, 103 Pac. 691, 694, 24 Okl. 201, 38 L. R. A. (N. S.) 1000, 20 Ann. Cas. 181.

As semaphore

A "board," in railroad parlance, is a semaphore. Tillson v. Maine Cent. R. Co., 67 Atl. 407, 412, 102 Me. 463.

BOARD MEASURE

A provision in the charter of a vessel for the carriage of a cargo of lumber for the payment of freight at so much per thousand "superficial feet, board measure," is not to be taken as requiring the application, with mathematical exactness, of the unit of one foot in length, one foot in width, and one inch in thickness to the cubical contents, but only a substantial application of that unit to the lumber according to certain standard sizes by which an overrun in thickness of less than one-quarter of an inch, in width of not more than one-half inch, and in length of a fraction of a foot, is not to be taken account of. The Loch Rannoch, 192 Fed. 219, 221.

BOARD OF ALDERMEN

In the Austin City Charter, providing that the city council shall consist of a mayor and board of aldermen, and that a majority of the members of the "whole council" shall be necessary to pass any ordinance in any wise increasing or diminishing the city revenues, the term "council" is used synonymously with the "board of aldermen," and the "whole council" referred to means the whole board of aldermen, as distinct from a quorum thereof, so that, one of the aldermen having died prior to the passage of a tax levy ordinance passed by the vote of seven, such ordinance should be considered as having received a majority of the whole board or council. Nalle v. City of Austin, 93 S. W. 141, 145, 41 Tex. Civ. App. 423.

Where, by legislative act establishing boards of street and water commissioners in cities of the first class, control over streets for the purpose of passing an ordinance authorizing construction and maintenance therein of conduits and wires for supply and distribution of electricity was taken from the common council and lodged in the board of street and water commissioners, a subsequent act relating to electric light and power companies, containing a provision that "no public street shall be open for the purpose of laying any such pipes, conduits or wires without the consent of the board of aldermen or common council of such city," did not have the effect of restoring such control to the common council; the phrase "board of aldermen or common council" in such act being used in the general sense of "governing body," and points to the board of street and water commissioners as such governing body. United Electric Co. of New Jersey v. Mutual Benefit Electric Light & Power Co. (N. J.) 81 Atl. 754.

BOARD OF ARBITRATORS

As court, see Court (Of Justice).

BOARD OF AWARDS

As court, see Court (Of Justice).

BOARD OF THE CITY OF BOSTON

A janitor of a police station, who was removed by the police commissioners, was not protected from removal by St. 1885, c. 266, § 5, providing that officers and boards of the city of Boston may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," since the police commissioners were not "officers" and did not constitute a "board of the city of Boston," but were appointed by and were responsible to the Governor of the commonwealth. Sims v. O'Meara, 79 N. E. 824, 825, 193 Mass. 547 (citing Commonwealth v. Plaisted, 19 N. E. 224, 148 Mass. 375, 383, et seq., 2 L. R. A. 142, 12 Am. St. Rep. 566; Phillips v. City of Boston, 23 N. E. 202, 150 Mass. 491, 494).

BOARD OF CONTROL

Members as civil officers, see Civil Officer.

BOARD OF DIRECTORS

The words "board of directors," as used in Code 1906, § 2276, providing that the books of a corporation shall be subject to investigation by the board of directors, applies to the board, both as a unit and also to each individual member composing the board of

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directors; and each individual director is entitled to inspect the corporate books. State v. Grymes, 64 S. E. 728, 730, 65 W. Va. 451, Ann. Cas. 833.

BOARD OF EDUCATION

As county officers, see County Officer.
As municipal corporation, see Municipal Corporation.

A board of education is in fact a board of trustees, and the term "board of education" is simply another name for trustees; and Pen. Code, § 1575, authorizing the trustees to sue and be sued, and making the board responsible for judgment, must be construed to apply to and include city boards of education, as well as boards of county school districts. Hancock v. Board of Education of City of Santa Barbara, 74 Pac. 44, 46, 140 Cal. 554.

BOARD OF HEALTH

As association, see Association.
As corporation, see Corporation.
As individual, see Individual.
As judicial officers, see Judicial Officer.
Member as city officer, see City Officer.

BOARD OF IMMIGRATION INSPECTORS

As court, see Court (Of Justice).

BOARD OF PARDONS

The "board of pardons" belongs to the executive department of the state; its privilege and prerogative being that of granting clemency. It is a board of clemency rather than a punitive body, and, instead of pronouncing judgment and sentences and imposing punishment, its duty is that of forgiving offenses and removing penalties, wiping out judgments and sentences of conviction either in whole or in part. Whenever such board undertakes to increase or extend the penalty or punishment imposed on a convict by a decree of the court, it at once passes beyond the realm of its jurisdiction and authority and infringes on a judicial power. Ex parte Prout, 86 Pac. 275, 276, 12 Idaho, 494, 5 L. R. A. (N. S.) 1064, 10 Ann. Cas. 199.

BOARD OF POLICE COMMISSIONERS

As court, see Court (Of Justice).

BOARD OF REVENUE

The term "board of revenue" has a distinct meaning in the legislative history of Alabama from the fact that for many years there had existed in various counties of the state such boards as substitute for board of county commissioners with like powers and duties. This is further shown from the fact that the General Statutes provide for the elections of members of "boards of revenue and county commissioners," and such boards are mentioned in various other statutes. State ex rel. Leslie v. Brackin, 45 South. 841, 842, 154 Ala. 151.

BOARD OF SUPERVISORS

As county officers, see County Officer.
As inferior court, see Inferior Court.

The term "board of supervisors" means an aggregation of town officers. There is no method by which one supervisor can be legislated or construed in a board. People v. Maynard, 15 Mich. 463, 472.

BOARD OF TAX REVIEW

The words "other taxing officers" as used in the act abolishing the state board of taxation and creating in lieu thereof a board for equalization, revision, review, and enforcement of tax assessments, and providing in section 34 that, where complaint is made to the created board by any person or corporation aggrieved by the assessment of property, the board shall have the power to review and correct the action of the local assessors or "other taxing officers" and of all "boards of tax review" by reducing or increasing such assessment, refers only to local taxing officers, and the term "boards of tax review," referred to in the statute, means boards that exercise an appellate review of the acts of local assessors and other local taxing officers. Tuckerton R. Co. v. State Board of Assessors (N. J.) 67 Atl. 69, 70.

BOARD OF TRADE TRANSACTION

A "board of trade transaction," as the term is generally used, represents a form of contract for the purchase and sale of wheat or other commodity, which in truth and in fact is a mere bet or wager on the price of the commodity, without any intention that anything should be actually purchased or delivered thereunder. Merrill v. Garver, 96 N. W. 619, 4 Neb. (Unof.) 830.

BOARD OF TRUSTEES

The term "board of trustees," when used in relation to municipal corporations in Colorado, has practically the same meaning as "town council," and it is therefore immaterial which form is used as the style of the enacting clause of an ordinance. People ex rel. Town of Sterling v. Chipman, 71 Pac. 1108, 1109, 31 Colo. 90.

Persons invested with the management or control of a fund may be properly styled a "board of trustees" without holding any relation of trust to the fund other than such as exist in all cases where one person has the management or control of property belonging to another. Nicols v. Board of Police Pension Fund Com'rs, 82 Pac. 557, 558, 1 Cal. App. 494.

BOARD ROOF

Where a tornado policy provided that it covered all buildings of insured except those covered with "board roof," it covered a building the roof of which was in part board and in part shingle. Kennedy v. Agricultural Ins. Co., 110 N. W. 116, 118, 21 S. D. 145.

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BOARDER

See Table Board.

A "boarder" is ordinarily one who has food and lodging in another's house or family for a stipulated price. Heron v. Webber, 68 Atl. 744, 745, 103 Me. 178.

Guest distinguished

A "guest" is a transient person who resorts to and is received at an inn or hotel for the purpose of obtaining the accommodations which it purports to afford, as distinguished from a "boarder," who is one who abides at a place. It is said that the essential difference between a guest and a boarder lies in the character in which the party comes. If as a transient, he is a "guest"; while, if he seeks accommodation with a view to permanency so as to make the place his home for the time being, he is a "boarder." The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest so long as he remains in the transitory condition of that relation. Within this definition a person who came from another state to a summer resort and entered into a contract with the "proprietors of the Imperial Hotel," by which she was to stop there at a reduced rate, no definite time for her stay being fixed, was a "guest." Holstein v. Phillips & Sims, 59 S. E. 1037, 1039, 146 N. C. 366, 14 L. R. A. (N. S.) 475, 14 Ann. Cas. 323.

BOARDING AND LODGING

Under Laws 1903, c. 304, authorizing the sheriff to recover for boarding and lodging for each prisoner 50 cents per day, exclusive of light, fuel, furniture, and bedding, the term "boarding and lodging" does not include repairs on the jail or other property of the county nor disinfectants, toilet necessities, mops, brooms, and other articles necessary to keep the jail clean and fit for occupancy. Simms v. Norton, 118 Pac. 1071, 1072, 85 Kan. 822.

BOARDING BY J. B. W.

Where a signboard in a barroom contained the words, "boarding by J. B. W.," those words were prima facie proof that J. B. W. was the keeper of the barroom. State v. Wilson, 5 R. I. 291, 292.

BOARDING HOUSE

See Private Boarding House.

"It is clear that as a general rule a restaurant or boarding house where the meals are wholly cooked and served by the proprietor and members of his family must be a very small affair, hardly rising to the dignity of a 'restaurant' or 'boarding house.'" Ex parte Lemon, 77 Pac. 455, 456, 143 Cal. 558, 65 L. R. A. 946.

As dwelling

See Dwelling—Dwelling House.

Inn and hotel distinguished

See Hotel; Inn.

As public house

See Public House.

As public place

See Public Place.

BOAT

See House Boat; Wharfboat.

The word "boat," when used in its ordinary sense, means any water craft; while a "barge" is a flat-bottomed freight boat or lighter for harbors and inland waters. In an action by a servant for personal injuries alleged to have been caused by stepping upon a defective portion of a "barge," evidence that the injury occurred because defendant stepped upon a defective portion of a "boat" was not at variance, although the tow, which plaintiff was engaged in assisting to make up at the time he was injured, consisted of crafts some of which were technically known as "boats" and others as "barges." Monongahela River Consol. Coal & Coke Co. v. Hardsaw (Ind.) 77 N. E. 363–365; Id., 79 N. E. 1062, 1064.

Boating

When a party goes "boating," it is not usually understood that each member performs the physical act of rowing the boat. State v. Goodwin, 82 N. E. 459, 460, 169 Ind. 265.

BOCK BEER

As intoxicating liquor, see Intoxicating Liquor.

BODILY

BODILY DEFORMITY

Where an application for an accident policy warranted that insured had no bodily deformity, and it was conceded that he was born without fingers on his right hand, there was a sufficient breach of warranty to avoid the policy. Lynch v. Travelers' Ins. Co., 200 Fed. 193, 196, 118 C. C. A. 379.

BODILY HARM

See Great Bodily Harm; Serious Bodily Harm or Injury.

The term "violent injury," as defined by Pen. Code, § 240, to be "an unlawful attempt, coupled with a present ability to commit injury upon the person of another," is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another, even though only the feelings of such person are injured by the act. People v. Bradbury, 91 Pac. 497, 151 Cal. 675.

BODILY HEIRS

See Heirs of the Body.

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Ordinarily the words "bodily heirs" and "heirs of the body," when used in a deed, will be given their technical meaning, unless there is something in the instrument itself which shows that they were used in a contrary sense as children, or as words of purchase. Dotson v. Kentland Coal & Coke Co., 150 S. W. 6, 7, 150 Ky. 60.

The term "bodily heirs" may be used in a will contrary to its technical sense to designate children of a daughter or, if dead, their descendants in being at her death. Haggin v. Rogers (Ky.) 97 S. W. 362, 363.

A deed to a married woman and her "body heirs" vests a fee simple in the grantee. Bigham v. Weller, 81 S. W. 843, 845, 113 Tenn. 70, 69 L. R. A. 370, 106 Am. St. Rep. 803.

Where testator devised land to his daughter and her "bodily heirs" the words "bodily heirs" are synonymous with children and are the words of purchase and give the daughter a life estate with remainder to her heirs. Sims v. Skinner's Ex'r, 81 S. W. 703, 118 Ky. 573.

"As the word 'heirs' is necessary to create a fee, so, in further limitation of the strictness of the foedal donation, the word 'body,' or some other words of procreation, are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited." Tygard v. Hartwell, 102 S. W. 989, 990, 204 Mo. 200 (quoting and adopting the definitions in 2 Black. Com. p. 115).

A deed conveying land to the grantee and her "bodily heirs and assigns, forever," creates in the grantee at common law an estate tail, which is converted into a fee simple by statute. Handy v. Harris (Ky.) 105 S. W. 378.

If the words "bodily heirs" employed in a conveyance to N. and her bodily heirs are given their ordinary, legal significance, the estate is a fee simple in N.; that is, at common law it would have been an estate tail in her which our statute converts into a fee simple. Those words are to be taken in that sense—to mean the issue of the body of N. in all generations to the end of time, rather than as meaning her children, the first generation of issue of her body—unless it can be said to appear upon the face of the instrument that the grantor intended by their use to designate the children of the said N. Edins v. Murphree, 38 South. 639, 640, 142 Ala. 617.

The words "bodily heirs," as used generally in conveyances and devises, are technically and appropriately words of limitation, They were such as at common law created an estate tail. By section 2343, Ky. St. 1903, "all estates heretofore or hereafter created, which in former times would have been deemed estates entailed, shall henceforth be held to be estates in fee simple; and every limitation on such an estate shall be held valid if the same would be valid when limited upon an estate in fee simple." The effect of this statute is to convert estates tail into fee-simple estate. In construing devises and conveyances using such terms, the first rule observed is to arrive at the intention of the testator or grantor, resort being had to the whole document for the purpose; and, as the term "bodily heirs" is a term of art, it will be given its technical construction, unless there is something in the instrument evincing that it was used otherwise. Where testator gave to his widow all his property for life, and directed that after her death the same should be equally divided between his children, and provided that the portion that should go to his unmarried daughter should "descend to her bodily heirs," it was held to create an estate tail in the daughter, converted into an estate in fee by Ky. St. 1903, § 2343; the words quoted being words of inheritance and not of purchase. Edwards v. Walesby (Ky.) 98 S. W. 306.

While the words "bodily heirs" have been held to be both words of limitation and of purchase, a conveyance to one and her "bodily heirs" after her, where there is no remainder over and no showing that testator intended her to take only a life estate, vests a fee in the first grantee, under Ky. St. 1903. §§ 2342, 2343, declaring that, unless a different purpose appears by express words or inference, every estate in land created by deed or will with or without words of inheritance shall be deemed a fee simple, or such estate as the grantor or testator had the right to dispose of, and that all estates which formerly would have been deemed estates tail shall be estates in fee simple. Lawson v. Todd, 110 S. W. 412, 129 Ky. 132.

Where testator left his property to his wife and three children in equal proportions during their natural life, "and to the children and the heirs of their bodies" at the time of their death, and provided that, if they have no children or heirs of their bodies, it shall be again divided between his wife and children, "or such of them as shall survive, and to their heirs, share and share alike, * * * and all the children of my deceased children," the words "heirs" and "bodily heirs" mean children. Davenport v. Collins, 48 South. 733, 735, 95 Miss. 358.

Testator gave the remainder of his estate to his wife and two children, to be equally divided, and provided that on the death of either of the children leaving no bodily heirs the part should go to the remaining heir, or bodily heir or heirs, and declared that all heirs referred to were bodily heirs, unless bodily heirs became extinct. Held to create an estate tail in the children of two-thirds of the remainder, converted by Ky. St. 1909, § 2343 (Russell's St. § 2045), into a fee; the words "bodily heirs" not being used with reference to his children alone, but limited to his blood, no matter how far removed. Tag-

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gart's Ex'r v. Taggart (Ky.) 121 S. W. 693, 694.

Where a deed conveyed land to plaintiff's father during his life and at his death was to descend to his "bodily heirs," if he left any, or his nearest blood, plaintiff's father took only a life estate, remainder to his children surviving him under Ky. St. § 2345, providing that if any estate shall be given to a person for life and after his death to his heirs or the heirs of his body, or his issue or descendants, the same shall be construed to be an estate for life with remainder in fee to his heirs, etc. Clubb v. King (Ky.) 99 S. W. 935.

A deed conveying to a grantee certain described land to have and to hold the same during her lifetime, then to her "bodily heirs," conveys a life estate to the grantee and a fee simple to her "bodily heirs"; those words being used as the equivalent of children, for Ky. St. § 2343, provides that all estates which would have been deemed estates in tail shall henceforth be held to be estates in fee simple, and section 2345 provides that, if an estate shall be given any person for life and after death to his heirs or the heirs of his body, it shall be considered an estate for life with remainder in fee simple to his heirs. Eggner v. Hovekamp, 119 S. W. 818, 819, 134 Ky. 224.

Heirs of body synonymous

The words "bodily heirs" have the same meaning as "heirs of the body," and are words of limitation, and not words of purchase. Marsh v. Griffin, 48 S. E. 735, 736, 136 N. C. 333 (citing Donnell v. Mateer's Ex'rs, 40 N. C. 7; Worrel v. Vinson, 50 N. C. 91, 94; Leathers v. Gray, 7 S. E. 657, 101 N. C. 162, 9 Am. St. Rep. 30).

There is no distinction between the words "bodily heirs" and "heirs of the body" when used in a conveyance, and under Kirby's Dig. § 735, providing that a conveyance, which by common law would create an estate tail in lands, shall instead pass to the grantee an estate for his life only, with remainder in fee to the person to whom the estate tail would first pass according to the common law, a conveyance to the daughter of the grantor "and unto her bodily heirs and assigns forever" created a life estate in the grantee, with remainder in fee simple to her children that might survive her and the issue of such as might die during her life. Watson v. Wolff-Goldman Realty Co., 128 S. W. 581, 582, 95 Ark. 18, Ann. Cas. 1912A, 540.

"There is no substantial difference between the words 'heirs of his body' and 'bodily heirs.' They are all words of limitation, and not of purchase, and the latter have the same meaning as the former, unless there is something in the instrument to show that the donor used them in some other than their technical sense." A will, after making a gift to testatrix's daughter, gave to her son and his bodily heirs, forever, certain property, and provided that if either of testatrix's children should die without leaving a surviving bodily heir, before receiving its share of testatrix's estate, such share should descend to the surviving child and its bodily heirs, forever, thus devising to the son an estate in fee tail, which is by statute a life estate, with a remainder in fee to his children living at his death. Miller v. Ensminger, 81 S. W. 422, 424, 182 Mo. 195.

BODILY INFIRMITY

"Bodily infirmity" means a settled desease, an ailment that will probably result to some degree in the general impairment of physical health and vigor, and the words "bodily infirmity," as used in an accident policy exempting the insurer from liability, only includes an ailment of a somewhat established or settled character, and not merely a temporary disorder arising from a sudden and unexpected derangement of the system. French v. Fidelity & Casualty Co. of New York, 115 N. W. 869, 875, 135 Wis. 259, 17 L. R. A. (N. S.) 1011.

BODILY INJURY

See Great Bodily Injury; Serious Bodily Harm or Injury.
From external violent and accidental means, see Accident—Accidental.

Where a petition, in an action against a street railway company for personal injuries received by a passenger, specified some personal injuries, and charged permanent internal injury, "bodily injury" which is distinguishable from conditions and diseases resulting therefrom, may be shown under the general allegation. Price v. Metropolitan St. Ry. Co., 119 S. W. 932, 941, 220 Mo. 435, 132 Am. St. Rep. 584.

An allegation in an action for injuries that plaintiff sustained "bodily injuries" was sustained by proof of injury to her hands and wrists. City of Eureka v. Neville, 79 Pac. 162, 163, 70 Kan. 893.

The word "injuries" is a generic term, and it naturally includes injuries that are fatal and that are not fatal. Again, the word is known by its associates and by the sense in which it is used in other parts of the same contract or in similar agreements. An agreement to insure one against bodily "injuries," except injuries sustained while entering or leaving or trying to enter or leave any moving conveyance, and except injuries fatal or otherwise caused by intoxicants, anæsthetics, etc., excepts from the promised indemnity fatal injuries sustained while trying to enter a moving passenger car. Standard Life & Accident Ins. Co. of Detroit, Mich. v. McNulty, 157 Fed. 224, 225, 85 C. C. A. 22.

In an instruction on the measure of damages that, "if now you shall find for plaintiff, you will allow him for what he has paid or become liable for as medical bills on account

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of his 'injuries,' not to exceed a reasonable sum, and what you find and believe to be just pecuniary compensation for the bodily 'injuries' and disabilities and suffering and distress of mind caused by the fall in alighting from the train," the terms "injuries" and "disabilities" refer to the same thing, and the instruction is not subject to the objection that it allows a double recovery. St. Louis Southwestern R. Co. of Texas v. Highnote (Tex.) 84 S. W. 365, 368.

Where insured, in his application for accident insurance, warranted that he had never had "paralysis, fits of any kind, brain disorder, diabetes, hernia, varicose veins, or any bodily or mental infirmity, injuries or wounds," or suffered the loss of a limb or an eye, except as stated, and that he had never been ruptured or "otherwise injured," the words "injuries or wounds" and "otherwise injured" should be construed to refer only to such serious other wounds or injuries not specified as might affect the risk. Trenton v. North American Acc. Ins. Co., 89 S. W. 276, 277, 40 Tex. Civ. App. 296.

The words "'injuries or wounds' in an insurance policy were sufficiently broad and comprehensive to include every injury or wound, however trifling, such as the pricking of a hand by a pin, the slightest cutting of a finger, or any bruise or contusion produced by coming in contact with a hard substance. If literally and strictly construed, it would make it impossible for any man to obtain accident insurance, because no man, no matter how tenderly reared or well cared for, but that at some time in life has been injured or wounded. If during childhood a boy stubbed his toe or mashed his finger or bruised his head, he would, under the literal terms of the policy, be incapacitated to obtain insurance against accidents. To place that construction upon the policy would be to hold that accident insurance companies do not desire to insure; for not one man in 10,000, if any at all, could truthfully say that he had never received the slightest wound or injury. We must conclude that the insurance company was seeking to insure, rather than to make it impossible for any man to insure, and that a reasonable construction must be placed upon the words 'injuries or wounds,' or the words 'otherwise injured.' The only reasonable construction that can be placed upon the words is that the applicant had not received any such serious wound or injury as might affect the risk taken by the company in insuring the applicant against accidents." North American Accident Ins. Co. v. Trenton (Tex.) 99 S. W. 740, 741 (quoting Id., 89 S. W. 276).

BODY

See Containing Body; Corporate Body; Extremities of the Body; Governing Body; Independent Body; Legislative Body.

A complaint in an action for personal injuries, which alleges that plaintiff was injured and bruised on her right ankle, leg, hip, and body, is, in the absence of a special demurrer or demand for a bill of particulars, sufficient to authorize evidence of an internal injury, the word "body" comprehending all portions of the body, inside and outside, and advising defendant that plaintiff would prove injuries to portions of her body other than her ankle, leg, and hip. Jenkins v. Northern Pac. R. Co., 119 Pac. 794, 796, 44 Mont. 295.

Proof that one of plaintiff's legs was broken and an elbow injured is no variance from an allegation that divers bones of her body were broken. One definition given by Mr. Webster of the word "body" is the entire physical part of a man. This meaning is properly to be given the word as employed in the declaration, and it was not essential there should be greater particularization as to the bones that were broken. Elgin, A. & S. Traction Co. v. Wilson, 75 N. E. 436, 438, 217 Ill. 47.

BODY CORPORATE

See Corporate Body.

BODY EXECUTION

An "order for commitment" in contempt proceedings is in no sense such an "execution against the body" as the Legislature had in contemplation in the adoption of Burns' Rev. St. 1901, § 817, providing that no female shall be imprisoned on any order of arrest and bail or on an execution against the body. The order was not a prescribed writ or process nor in aid of a civil remedy. It proceeded directly and primarily from the court as a means of maintaining its authority. Joyce v. Everson, 69 N. E. 135, 136, 161 Ind. 440.

BODY OF THE OFFENSE

Where the court, in charging on the question of the corroboration of an accomplice's testimony, used the term "body of the offense," that expression is too vague to be interpreted as defendant's connection with the crime. State v. Hopper, 38 South. 452, 453, 114 La. 557.

BODY POLITIC OR CORPORATE

See Civil Bodies Politic.

"A 'body politic' is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." City of Durham v. Eno Cotton Mills, 54 S. E. 453, 463, 141 N. C. 615, 7 L. R. A. (N. S.) 321 (citing License Cases, 5 How. 504, 12 L. Ed. 256); Home Telephone & Telegraph Co. v. City of Los Angeles, 155 Fed. 554, 568 (quoting and adopting the definition in the preamble of the Constitution of Massachusetts).

Municipal corporation

See Municipal Corporations.

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BODY PORTION

The "body portion" of a turnbuckle is all of that portion of the turnbuckle save the ends. Thomson-Houston Electric Co. v. Ohio Brass Co., 129 Fed. 378, 381.

BOER

As african descent, see African Descent.

BOGUS

The word "bogus" is defined as spurious, fictitious, sham. Williams v. Territory, 108 Pac. 243, 245, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032.

BOGUS CHECK

A check is "false" within Pen. Code 1901, § 489, making it a felony to obtain money or property by a false or bogus check, when it is a willfully untrue written order directing a bank to pay money on demand. A check given by a person upon a bank in which he has no funds, and which he has no reason to suppose will be honored, is a "bogus check" within Pen. Code 1901, § 489, making it a felony to obtain, or attempt to obtain, with intent to cheat, any money or property by a false or bogus check. Williams v. Territory, 108 Pac. 243, 245, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032.

BOHEMIAN

The word "Bohemian," placed on bottles of beer, is a descriptive term, indicating a brand of beer in the manufacture of which Bohemian hops are used and cannot be monopolized as a trade-mark by a particular manufacturer. American Brewing Co. v. Bienville Brewery, 153 Fed. 615, 617.

BOILED OFF

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 387, 30 Stat. 186, providing for silk fabrics when "in the gum" and when "boiled off," held that fabrics which on boiling lost from 18 to 27 per cent. in weight were classible under the former, rather than the latter, clause. H. Mendelson & Co. v. United States, 154 Fed. 33, 34, 83 C. C. A. 145.

BOILER

See Sectional Steam Boiler; Steam Boiler; Water-Tube Boiler.

In the term "boilers," as used in paragraph "I" of section 4 of the Miner's Act relating to duty to keep boilers in repair, are included all pipes and connections between a boiler and a steam chest or engine. Sheppard v. Marquette Third Vein Coal Mining Co., 164 Ill. App. 495, 501.

As structure

See Structure.

BOILER OR OTHER PLATE

Steel plates cut in unusual shape at a slight variation from a right angle, for a special purpose, are provided for in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, enumerating "sheared * * * shapes" of steel and "plates and steel in all forms and shapes not specially provided for," rather than in paragraph 126, 30 Stat. 159, enumerating "boiler or other plate iron or steel, * * * sheared or unsheared." United States v. Vandegrift, 142 Fed. 448, 73 C. C. A. 564.

Thin steel plate cut into a specific shape according to a sketch and for a special purpose, while falling within the purview of Tariff Law (Act of July 24, 1897, c. 11, Schedule C, § 1, par. 126), imposing a duty on "boiler or other plate iron or steel, sheared or unsheared," is governed by the language of paragraph 135 of the same act imposing duty on pressed, sheared, or stamped shapes of such steel. In re F. B. Vandegrift & Co., 139 Fed. 790, 791.

BOILER TUBES OR FLUES

Held, that so-called arched Purves furnaces are not commercially known as furnaces, and that, therefore, they are not dutiable as such under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163, but under the provision in the same paragraph for boiler tubes or flues. Thomas v. F. B. Vandergrift & Co., 153 Fed. 591, 592.

BOISTEROUS

The word "boisterousness" has no special legal meaning as used in Acts 1905, p. 114, making it a misdemeanor to be intoxicated on any public street or highway when manifested by boisterousness but is used in its popular and ordinary signification to characterize the conduct of the intoxicated person. Coleman v. State, 59 S. E. 829, 830, 3 Ga. App. 298.

An order adjudging defendants guilty of contempt recited that an action was pending in court, that one of the defendants, an attorney, was applying to have an order of dismissal signed by the court, that, in the presence of the judge at chambers, such defendant used boisterous and angry language and gestures, and that in the clerk's office, in the immediate presence of the court, he engaged in a fight with codefendant. Held, that the facts recited show conduct constituting contempt; the word "boisterous" meaning loud, stormy and noisy. State v. Buddress, 114 Pac. 879, 881, 63 Wash. 26.

BOK ALE

"Bok ale" or barley brew base, which is an unfinished nonalcoholic beverage, but which is produced by processes and from materials similar to those employed in the manufacture of beer, is dutiable by similitude at

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the same rate of duty as beer, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 297, 30 Stat. 174. Wakem & McLaughlin v. United States, 180 Fed. 1021.

BOLACEK

"Bolacek" is a glass larger than those ordinarily used for serving strong drink. Young v. Beveridge, 15 N. W. 766–768, 81 Neb. 180.

BOLOGNA SAUSAGE

See Sausage.

BOLTING CLOTH

"Bolting cloth," especially for milling purposes but not suitable for the manufacture of wearing apparel, as used in Tariff Act Aug. 28, 1894, c. 349, § 2, 28 Stat. 538, is not limited to bolting cloth composed of silk but includes bolting cloth made of fine, copper-wire gauze. United States v. Markt, 124 Fed. 1012, 1013.

BOLTS

"Bolts," as known to the sawmill business, are slabs of wood about four ft. long 1½ inches wide and of variable thickness, from which laths are sawed. Callopy v. Atwood, 117 N. W. 238, 239, 105 Minn. 80, 18 L. R. A. (N. S.) 593.

BONA FIDE

See Good Faith.

"'Bona fide' is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of assembly of all the states, and signifies a thing done really, with a good faith, without fraud, or deceit, or collusion, or trust. The words 'bona fide' are restrictive, for a debt may be for a valuable consideration, and yet not bona fide. A debt must be bona fide at the time of its commencement, or it never can become so afterwards." Ware v. Hylton, 3 U. S. (3 Dall.) 199, 241, 1 L. Ed. 568.

"Bona fides" is sometimes used as an equivalent of the word "frankly." Crigler v. Commonwealth, 87 S. W. 276, 280, 120 Ky. 512.

The words "bona fide," as used in an instruction stating that, if an entry truly represented an actual bona fide transaction, then it would not constitute a false entry, means "real" and merely emphasizes the word "actual." Coffin v. United States, 16 Sup. Ct. 943, 952, 162 U. S. 664, 40 L. Ed. 1109.

"Bona fides" or good faith is a term used as a mere distinction from "mala fides" or bad faith; thus, if negotiable "paper is purchased without anything which the law can construe into notice, it is spoken of as being purchased in good faith. Where, on the contrary, the purchaser has what the law construes to be notice of defects or equities, then he is a purchaser in bad faith and can secure to himself none of the advantages given to the bona fide purchaser; but bad faith means nothing more than participation in the fraud and resolves itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith." Forbes v. First Nat. Bank, 95 Pac. 785, 788, 21 Okl. 206 (quoting Norton, Bills & N. p. 306).

BONA FIDE CLAIMANT

A "bona fide claimant," within section 3376 of the Revised Statutes, prescribing a penalty for demanding and receiving on sale of a ticket a greater sum for the transportation of the passenger than that allowed by law, is one claiming in good faith. Using the road of such company implies an intention to use it. It does not imply a contract personally to use it. Pennsylvania Co. v. O'Connell, 95 N. E. 773, 774, 84 Ohio St. 218, Ann. Cas. 1912C, 540.

BONA FIDE CREDITORS

"Real 'bona fide creditors' are rarely unwilling to receive their debts from any hand that will pay them." Thompkins v. Wheeler, 41 U. S. (16 Pet.) 118, 119, 10 L. Ed. 903.

BONA FIDE EMPLOYÉS

Where a contract for the shipment of cattle provided for the carriage of a person in charge of the stock, and on the back of the contract it was provided that agents would permit only the names of "bona fide employés" accompanying the stock to be entered on the waybill, so as to secure carriage for such person, the phrase "bona fide employés" meant persons actually in charge of the stock, and one came within such description, though he had never been employed before the occasion, and though there had been no agreement for his compensation in money by the shipper. Weaver v. Ann Arbor R. Co., 102 N. W. 1037, 1040, 139 Mich. 590, 5 Ann. Cas. 764.

BONA FIDE FREEHOLDER

"One made a freeholder for the sole purpose of qualifying him as a petitioner for a liquor license is not a 'bona fide freeholder.'" Cohn v. Welliver, 121 N. W. 107, 108, 84 Neb. 230 (quoting and adopting a statement in Dye v. Raser, 112 N. W. 332, 79 Neb. 149, 16 Ann. Cas. 274).

BONA FIDE HOLDER

See Holder for Value; Holder in Due Course; Innocent Holder for Value.

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A "bona fide holder" of commercial paper must be a purchaser in the usual course of business. Bettanier v. Smith, 105 N. W. 999, 1000, 129 Iowa, 597, 5 L. R. A. (N. S.) 628.

"A bona fide holder of a negotiable instrument" is one who takes it (1) bona fide; (2) for valuable consideration; (3) in the usual course of business; (4) before maturity; (5) without notice of any existing defense and of dishonor thereof. If the purchaser can be charged with notice of the defense or defect of title, he is not a bona fide holder of the instrument, but such notice must exist at the time the paper is transferred to him or before he has paid for it. Hogg v. Thurman, 117 S. W. 1070, 1072, 90 Ark. 93, 17 Ann. Cas. 383 (quoting Tiedeman, Commercial Paper, §§ 279–299; 1 Daniel, Neg. Inst. §§ 769a–789; Old National Bank of Ft. Wayne v. Marcy, 95 S. W. 145, 79 Ark. 149, 9 Ann. Cas. 339; Jones v. Jackson, 110 S. W. 215, 86 Ark. 191).

A "bona fide holder" of a negotiable paper, against whom the defense of fraud or mistake cannot be availed of, must take it in good faith, for a valuable consideration, in the usual course of business, before maturity, and without notice, at the time of the transfer or before payment therefor, of an existing defense. Bank of Monette v. Hale (Ark.) 149 S. W. 845, 847.

It is a principal of general recognition that a purchaser of commercial paper in the usual course of business before its maturity, for a valuable consideration, having no notice of defenses that existed between the parties or have subsequently arisen, is a "bona fide holder for value" and as such takes the instrument free from defenses which were available between the original parties. Woodall & Son v. People's Nat. Bank, 45 South. 194, 195, 153 Ala. 576 (quoting Randolph, Com. Paper, § 14; 2 Daniel, Neg. Inst. 769).

Before one can become a "bona fide" and innocent holder of commercial paper, it must appear that it was acquired without notice or knowledge of defenses or circumstances which would put him on inquiry. Simmons Nat. Bank v. Dilley Foundry Co., 130 S. W. 162, 164, 95 Ark. 368.

A "bona fide holder" is one who receives the instrument in the ordinary course of business in good faith and for a valuable consideration; but honest intention alone in the taking or putting off of negotiable instruments is not enough to prove one a bona fide holder, and to establish good faith there must not only be an absence of knowledge of any invalidity, but an absence of circumstances which would put an ordinarily prudent man upon inquiry. Pennington County Bank v. First State Bank of Moorhead, 125 N. W. 119, 121, 110 Minn. 263, 26 L. R. A. (N. S.) 849, 136 Am. St. Rep. 496.

A bank, which discounts paper for a depositor and gives him credit for the proceeds, is not a "bona fide holder" for value, so as to be protected against infirmities in the paper unless some other consideration passes, such transaction merely creating the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not withdrawn the bank is subject to the equities of the prior parties, though the paper is taken before maturity and without notice. Alabama Grocery Co. v. First Nat. Bank of Ensley, 48 South. 340, 341, 158 Ala. 143, 132 Am. St. Rep. 18.

Knowledge that a note was given in consideration of an executory agreement of the payee which has not been performed does not deprive the indorsee of the character of a "bona fide holder," unless he also has notice of the breach of the agreement. McNight v. Parsons, 113 N. W. 858, 860, 136 Iowa, 390, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665.

A "bona fide holder for value" of negotiable paper is one who has acquired title in the usual course of business for valuable consideration, in good faith, from one capable of transferring it or from one in possession of the paper with an apparent right to transfer it and without notice or knowledge of defects or circumstances which should put him on inquiry. 7 Cyc. 924. It is a well-established rule, both in England and America, that one who purchases, for a valuable consideration, commercial paper in the usual course of trade, transferrable by delivery and not due, which has been lost or stolen or fraudulently transferred, acquires complete title thereto. Peirson v. McNeal, 100 N. W. 458, 465, 137 Mich. 158 (citing 2 Parsons, Bills & N. 279; 7 Albany L. J. 385; Kuhns v. Gettysburg Nat. Bank, 68 Pa. 445; Davis v. Seeley, 38 N. W. 901, 71 Mich. 209; Chapman v. Remington, 46 N. W. 34, 80 Mich. 552; Goodrich v. McDonald, 43 N. W. 1019, 77 Mich. 486).

Under the law merchant, a "bona fide holder in due course" of a negotiable instrument payable to bearer, is one who gave a valuable consideration for it before maturity, and without notice of any infirmity in his grantor's title, and obtained it in due course of trade, which rests on an exchange of values. Parsons v. Utica Cement Co., 73 Atl. 785, 788, 82 Conn. 333, 135 Am. St. Rep. 278.

A transferee of notes secured by a mortgage fraudulently given upon property which the mortgagor had agreed should be sold for the benefit of creditors of his firm, was not a bona fide holder; he being the father-in-law of the mortgagor, and having knowledge of the latter's agreement authorizing the sale of the property for creditors. Union Garment Co. v. Newburger, 50 South. 740, 744, 745, 124 La. 820.

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BONA FIDE MORTGAGEE

A mortgagee of a grantee in a deed void on the ground of the incapacity of the grantor had notice that the premises were in the possession of a third person as tenant of the grantor. The grantor received no part of the money loaned by the mortgagee. Held, that the mortgagee was not a "bona fide mortgagee," and on setting aside the conveyance to the grantee a refunding of the money paid by him, except the taxes on the land, was not required. Peck v. Bartelme, 77 N. E. 216–218, 220 Ill. 199.

BONA FIDE OCCUPANT

A "bona fide possessor or occupant" is "one who not only supposes himself to be the true proprietor of the land but who is ignorant that his title is contested by some other person claiming a better right to it." Broumel v. White, 39 Atl. 1047–1049, 87 Md. 521 (quoting Green v. Biddle, 8 Wheat. 79, 5 L. Ed. 547; McLaughlin v. Barnum, 31 Md. 425); Brown v. Nelms, 112 S. W. 373, 386, 86 Ark. 368.

Where the deed to defendant's grantor was on record, and showed that such grantor only had a life estate, with remainder in her children, and defendant had often heard, while living on the land, that the children intended to claim the land as soon as their mother died, defendant was not a "bona fide occupant," within the meaning of the statute, so as to entitle him to claim for improvements made, in an action by the remaindermen to recover the land. Douglass v. Hunt, 136 S. W. 170, 171, 98 Ark. 320.

BONA FIDE PURCHASER

See Innocent Purchaser.
See, also, Good Faith.

The expression "bona fide purchasers" is to be understood as the equivalent of purchasers without notice. Wilkins v. McCorkle, 80 S. W. 834, 835, 112 Tenn. 688.

A "bona fide purchaser" is one who purchases, believing in good faith vendor has a right to sell, and who is without notice, actual or constructive, of adverse rights or claims by others, and who pays a new consideration at time of purchase. Foster v. Winstanley, 102 Pac. 574, 579, 39 Mont. 314.

The essential elements that make a bona fide purchase are a valuable consideration, the absence of notice, and the presence of good faith. Houston Oil Co. of Texas v. Wilhelm, 182 Fed. 474, 477, 104 C. C. A. 618.

The essential elements of a "bona fide purchaser" of land are, first, the payment of a valuable consideration; second, good faith and absence of purpose to take an unfair advantage of third persons; and, third, absense of notice, actual or constructive, of outstanding rights of others. Bergstrom v. Johnson, 126 N. W. 899, 900, 111 Minn. 247.

Under Ky. St. 1909, § 2087 (Russell's St. § 3863), providing that any estate aliened by the heir or devisee before suit brought shall not be liable to the creditors of decedent in the hands of a bona fide purchaser for a valuable consideration unless action is instituted within six months, a "bona fide purchaser for a valuable consideration" is one who in good faith buys the land and pays therefor. Buchanan v. Boyd's Ex'r, 121 S. W. 981, 982, 135 Ky. 94.

A grantee who pays the purchase money without notice, actual or constructive, of a third party's claim, and receives a deed which is more than a quitclaim deed and by which the parties intended to and did convey the premises in question, is an innocent purchaser, entitled to be protected as such. Allen v. Anderson & Anderson (Tex.) 96 S. W. 54, 55.

The doctrine of "bona fide purchase" without notice applies only in favor of the purchaser of a legal title and does not apply in favor of a bare equity. Deskins v. Big Sandy Co., 89 S. W. 695, 697, 121 Ky. 601.

To entitle a party to protection as a subsequent purchaser in good faith and for value against the title of a grantee under a prior unrecorded deed, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith and without notice, actual or constructive, prior to and down to the time of its payment, for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a "bona fide purchaser." Civ. Code, § 1214, provides that a conveyance of real property is void as against a subsequent purchaser in good faith for a valuable consideration whose conveyance is first duly recorded. Plaintiff rented land for the term of five years, with an option to purchase during the life of the lease. Defendant held a prior unrecorded deed from plaintiff's lessor, which deed was not recorded until after the recording of the lease and option. Plaintiff built a barn on the premises and paid the rent, but did not offer to exercise the option until after the recording of defendant's deed. Held, that plaintiff was not a subsequent purchaser in good faith for a valuable consideration within the meaning of the section. Lindley v. Blumberg, 93 Pac. 894, 897, 7 Cal. App. 140 (citing Eversdon v. Mayhew, 3 Pac. 641, 65 Cal. 163; Wilhoit v. Lyons, 33 Pac. 325, 98 Cal. 413; Beattie v. Crewdson, 57 Pac. 463, 124 Cal. 579; Kenniff v. Caulfield, 73 Pac. 803, 140 Cal. 45).

A widow taking from her children a deed for their interest in land of which their father had died seised, for the recited consideration of one dollar and other good and valuable considerations, subject to the lien of judgments, mortgages, and municipal liens,

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which aggregated more than the value of the land, was not a bona fide purchaser as against a judgment creditor who could revive his judgment, though more than five years had elapsed since its entry; a "bona fide purchaser" being one purchasing property without notice that another person is interested therein, and paying a full price therefor. Meyer v. Safe Deposit & Trust Co. of Pittsburg, 79 Atl. 249, 230 Pa. 106.

Consideration

Where the consideration paid is an antecedent debt, it is not such a consideration as will support the claim of "bona fide purchaser." Sparks v. Taylor (Tex.) 87 S. W. 740, 743.

To be a "bona fide purchaser without notice" the defendant must not only have agreed to purchase without notice of the complainant's previous agreement, but he must also have actually paid the purchase money and taken his deed without such notice. Cranwell v. Clinton Realty Co., 58 Atl. 1030, 1035, 67 N. J. Eq. 540.

One who takes a negotiable instrument before maturity in good faith, as collateral security for a pre-existing debt, is a bona fide purchaser. Walden v. Downing Co., 61 S. E. 1127, 4 Ga. App. 534.

Where a debtor obtained from his creditor a valid extension of the time of payment of a debt and gave a mortgage for the same, the creditor became a "bona fide purchaser," within the meaning of the recording act (Laws 1896, c. 547, § 241). O'Brien v. Fleckenstein, 73 N. E. 30, 31, 180 N. Y. 350, 105 Am. St. Rep. 768.

To entitle a defendant to protection as a "bona fide purchaser" for value and without notice of lands which had previously been conveyed by the grantor, he must allege and prove, not only want of notice, but also actual payment of the purchase money, independently of the recitals in his deed, which do not constitute proof of such payment. Johnson v. Georgia Loan & Trust Co., 141 Fed. 593, 597, 72 C. C. A. 639.

"A 'bona fide purchaser' is one who has bought property without notice of the claims of third parties thereto and upon the faith that no such claims exist and who has paid or parted with some valuable consideration or has in some way altered his legal condition for the worse." Where creditors levied on property which their debtor held, at least in part, as a resulting trustee for plaintiff, but neither of such creditors paid or parted with any valuable consideration or in any way altered their legal condition to their prejudice on the faith that there existed no claim of any third person to the property, they were not entitled to maintain their liens as against plaintiff as bona fide purchasers for value. Waterman v. Buckingham, 64 Atl. 212, 214, 79 Conn. 286.

One is not a "bona fide purchaser for value" unless he has actually paid the purchase price or become irrevocably bound for its payment; as, for instance, by giving his negotiable obligation, which has been or may be transferred to an innocent purchaser according to the law merchant, so as to cut off his defense to it. Nebraska Moline Plow Co. v. Blackburn, 104 N. W. 178, 179, 74 Neb. 246.

Sufficiency of notice

A person cannot be a "bona fide purchaser" who has brought to his attention facts which should have put him upon inquiry, an inquiry which, if pursued with due diligence, would have led to a knowledge of a lien on the property. Mangum v. Stadel, 92 Pac. 1093, 1094, 76 Kan. 764.

A bona fide purchaser is one who has in good faith paid a valuable consideration without notice of adverse rights, and, if he had knowledge of circumstances sufficient to put a prudent man on inquiry which, if prosecuted with ordinary diligence, would have led to actual notice, he was charged with knowledge of a prior conveyance. La Brie v. Cartwright, 118 S. W. 785, 787, 55 Tex. Civ. App. 144.

A receiver purchased machinery under a contract of conditional sale by which the seller retained title until full payment should be made therefor, but on receipt of the machinery the receiver turned it over to another corporation of which he was the principal stockholder, vice president, and general manager. Such corporation, after making partial payments through the receiver, became bankrupt. The seller, although having knowledge of the transfer of the machinery, did not recognize the transferee as a purchaser, nor did it record its contract until a short time before the bankruptcy, when it instituted an action in replevin for the machinery, but the same was not removed from the mill in which it had been placed and was sold by the bankrupt's trustee as a part of its plant. Held, that the bankrupt was not a "bona fide purchaser" of the property within the protection of the North Carolina statute which provides that contracts of conditional sale shall be invalid against creditors or innocent purchasers without notice until they shall be recorded, nor could it acquire any rights by attaching the machinery to its realty, but that the seller had a valid lien thereon for the unpaid portion of the purchase price. American Woodworking Mach. Co. v. Norment, 157 Fed. 801, 806, 85 C. C. A. 165.

Attaching creditor

An attaching creditor is not a "bona fide purchaser" for value as against a third person having a prior claim to the property. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co., 40 South. 503, 146 Ala. 691.

"An attaching creditor is not a 'bona fide purchaser' without notice. He stands

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simply in the shoes of his debtor and has no higher right than his debtor has." Monroe v. Mattox (Ky.) 85 S. W. 748, 749.

Quitclaim grantee

A grantee under a quitclaim deed is a bona fide purchaser within the recording acts. Eyanson v. Waidlich, 106 Pac. 746, 747, 57 Wash. 234.

Judicial sale

Where both the purchaser of land at a judicial sale and the person to whom he assigned the bid were parties to the proceeding under which the land was sold and had knowledge of the illegal method by which minor heirs were deprived of their interest in the land, they were not "bona fide purchasers," under Civ. Code Prac. § 391, authorizing an infant to show cause against a judgment, but providing that the vacation of the judgment shall not affect the title of a bona fide purchaser thereunder. Davidson v. Marcum (Ky.) 89 S. W. 703, 704.

Lien Law (Consol. Laws 1909, c. 33) § 231, providing that mortgages creating a lien on real and personal property, executed by a corporation as security for the payment of "bonds," need not be filed or refiled as chattel mortgages, applies in case of such a mortgage securing a single nonnegotiable bond, in view of General Construction Law (Consol. Laws 1909, c. 22) § 35, providing that words in the singular number include the plural, and in the plural include the singular. Clement v. Congress Hall, 132 N. Y. Supp. 16, 18, 72 Misc. Rep. 519.

The general rule that, when a judgment is reversed, the reversal does not affect the title or possession of the purchaser at a sale made thereunder before the reversal, though he may be the plaintiff or a party to the action, does not apply to the sale of infants' land to one not a bona fide purchaser. Turner v. City of Middlesboro (Ky.) 117 S. W. 422, 424.

Tax purchaser

A "bona fide purchaser" is one who buys an apparently good title without notice of anything calculated to impair or affect it, but a tax purchaser is always deemed to have such notice when the record shows defects. Minnesota Loan & Investment Co. v. Beadle County, 101 N. W. 29, 30, 18 S. D. 431.

Of public land

The term "bona fide purchaser" of Texas school lands does not necessarily exclude one who was acting in collusion with another in the purchase of the land, provided the applicant makes the required affidavit; that he was not buying the land for any other person or corporation. The title of the purchaser after such affidavit is filed not being subject to collateral attack on the ground that he purchased in collusion with another and was therefore not a "bona fide purchaser." Logan v. Curry, 69 S. W. 129-131, 95 Tex. 664.

Of railroad land

"Bona fide purchaser," as used in Act Cong. March 3, 1887, c. 376, 24 Stat. 556, granting land to railroad companies, section 5 declaring that where any said company shall have sold to a citizen of the United States, as a part of its grant, lands not conveyed to or for the use of the company, said lands being the numbered sections described in the grant and being coterminous with the constructive parts of the road, and if the land so sold are for any reason excepted from the operation of the grant to the company, it should be lawful for the bona fide purchaser to make payment to the United States and thereupon be entitled to patents, was not used in any technical sense but simply as demanding good faith in the transaction between the individual purchaser and the railroad company. Gertgens v. O'Connor, 24 Sup. Ct. 94, 97, 191 U. S. 237, 48 L. Ed. 163 (quoting United States v. Winona & St. P. R. Co., 17 Sup. Ct. 368, 165 U. S. 463, 480, 481, 41 L. Ed. 789, 797).

Subsequent purchaser

If a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a "bona fide purchaser" and is entitled to protection. Coombs v. Aborn, 68 Atl. 817, 29 R. I. 40, 14 L. R. A. (N. S.) 1248.

BONA FIDE RESIDENT

An allegation in a complaint that plaintiff is a "bona fide resident" of a certain state is not equivalent to one of his citizenship in such state, and is not sufficient to give a federal court jurisdiction on the ground of diversity of citizenship. Koike v. Atchison, T. & S. F. Ry. Co., 157 Fed. 623, 624.

The divorce and annulment act of 1907 (P. L. 1907, p. 474), provides that a decree of nullity may be rendered at the suit of the husband, when he was under 18 at the time of the marriage, unless such marriage be confirmed by him after arriving at such age. The act further provides, "for purposes of annulment of marriage, jurisdiction may be acquired by personal service of process upon the defendant within the state when either party is a bona fide resident of the state, at the time of the commencement of the action." Petitioner and defendant resided with their respective parents, who were domiciled in Philadelphia, Pa., and came to New Jersey and were married, returning at once to the homes of their parents in Philadelphia. When the marriage was disclosed a week later, the petitioner's parents would not permit him to receive defendant as his wife, and on March 9, 1910, sent him into the state to board with relatives; his earnings and some assistance from his father going to pay

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his board. His petition was filed March 26, 1910. Held, that the term "resident," as used in the act, included not only the factum of residence, but also the animus manendi, the residence required by the statute being equivalent to domicile; and that petitioner was not a "bona fide resident" of this state, and hence that the court had no jurisdiction. Hess v. Kimble, 81 Atl. 363, 364, 79 N. J. Eq. 454.

BONA FIDE STOCKHOLDER

In general the test of a stockholder's right to vote at corporate meetings is the ownership of shares as disclosed by the proper record books of the corporation. A "bona fide stockholder," within Civ. Code, § 312, providing that only bona fide stockholders shall be entitled to vote at corporate meetings, need not necessarily be the owner of the stock; it being sufficient that the stock stands in his name in good faith for a proper purpose and that he is holding the same either for himself or in trust for another. Royal Consol. Min. Co. v. Royal Consol. Mines Co., 110 Pac. 123, 132, 157 Cal. 737, 137 Am. St. Rep. 165.

BONA NOTABILIA

"Bona notabilia," as used in the English probate law, means notable goods, or property worthy of notice, or of sufficient value to be accounted for. Neal v. Boykin, 64 S. E. 480, 482, 132 Ga. 400.

Debts due decedent at the time of his death are called "bona notabilia," under the laws of England, and are assets to be administered upon under the American law. Saunders v. Weston, 74 Me. 85, 89.

BOND

See Bail Bond; Bottomry Bond; Common-Law Bond; Conditional Bond; Coupon Bond; For Bonds; Forthcoming Bond; Government Bond; Investment in Bonds; Municipal Bond; Official Bond; Penal Bond; Redelivery Bond; Requisite Bond; Simple Bond; Statutory Bond; Sufficient Bond; Title Bond.
Bond taken, see Taken.
Insufficient bond, see Insufficient.
Issue of bonds, see Issuance—Issue.
My moneys, bonds, etc., see My.
See, also, Negotiable Instruments; Simplex Obligatio; Statutory Undertaking.

A "bond" is an obligation in writing to pay. State ex rel. Louisiana Imp. Co. v. Board of Assessors, 36 South. 91, 93, 111 La. 982.

A "bond" is an obligation under seal by which the obligor acknowledges himself bound to the obligee, in a specified form. Ordinary of State v. Connolly, 72 Atl. 363, 364, 75 N. J. Eq. 521, 138 Am. St. Rep. 577.

"A 'bond' is the acknowledgment of a debt under seal; the debt being therein particularly specified. In every good 'bond' there must be an obligor and an obligee and a sum in which the former is bound. Shep. Touch. 56; Com. Dig. 'Obligation,' A; Hurleston, 2." Rollins v. Ebbs, 49 S. E. 341, 342, 137 N. C. 355, 2 Ann. Cas. 327 (quoting and adopting the definition in Graham v. Holt, 25 N. C. 300, 40 Am. Dec. 408).

"A 'bond' is an obligation in writing and under seal, binding the obligor to pay a sum of money to the obligee." Gutta Percha & Rubber Mfg. Co. v. City of Attalla (Ala.) 39 South. 719.

A "bond" is an obligation in writing to pay, evidencing a liability by the person executing it. State ex rel. Louisiana v. Board of Assessors, 36 South. 91, 93, 111 La. 982.

"Bonds" are obligations to pay money usually to the bearer and constitute evidence of indebtedness; the person or corporation issuing them being a borrower and the purchaser a lender. Sweetsir v. Chandler, 56 Atl. 584, 98 Me. 145, 151.

A "bond" is a simplex obligation; "any instrument in writing that legally binds a party to do a certain thing. 'Bond,' 'obligation,' 'an instrument in writing' are sometimes used in convertible terms;" an "obligation under seal;" a "sealed obligation to pay money on the happening of some future event." Walter Pratt & Co. v. S. J. Langston Mercantile Co., 85 S. W. 134, 136, 111 Mo. App. 96 (quoting and adopting definitions in Bouv. and Anderson Law Dicts. and in Commonwealth v. Smith, 92 Mass. [10 Allen] 448, 87 Am. Dec. 672, and in Rawson v. Taylor, 95 N. W. 1033, 69 Neb. 473).

"'Bonds' and negotiable instruments are more than mere evidences of debt; the debt is inseparable from the paper which declares and constitutes it by a tradition which comes down from more archaic conditions." Hall v. Miller (Tex.) 110 S. W. 165, 168 (quoting and adopting a statement in Blackstone v. Miller, 23 Sup. Ct. 277, 188 U. S. 189, 47 L. Ed. 439).

The term "bond" has a great variety of meanings and in law does not necessarily import a seal; Webster defining it to be an obligation or deed by which a man binds himself, his heirs, etc. The Maine act authorizing bona fide holders of coupons to maintain an action in their own names is not limited in its operation to bonds under seal but applies to scrip issued under an act authorizing certain cities and towns to grant aid to the construction of a railroad. Augusta Bank v. Augusta, 49 Me. 507, 525.

No precise form of words is necessary to create a "bond." Sharp v. Bates, 62 Atl. 747, 748, 102 Md. 344.

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"In its ordinary commercial sense, the term 'bond' signifies an obligation to pay money. Such a bond contains a promise to pay money usually to bearer, and hence is negotiable and is transferable by delivery." Sweetsir v. Chandler, 56 Atl. 584, 586, 98 Me. 145.

Ky. St. § 474, making "bonds" for money or property assignable, and Civ. Code Prac. § 19, providing that an action by an assignee of a thing in action is without prejudice to any defense or set-off, modify the common-law rule as to what is assignable, and a written guaranty to indemnify purchasers of corporate stock against loss is assignable as a bond within the statute. Rogers v. Harvey, 136 S. W. 128, 129, 143 Ky. 88.

As contract

See Contract.

Corporate securities

Ordinarily the words "bonds, securities, etc.," include shares of stock; and a form of report prepared by the comptroller of the currency, containing a subheading entitled "(8) Bonds, Securities, etc., including premium on same (see schedule)," followed by the schedule entitled "Bonds, Securities, etc. (bonds, claims, judgments, and similar items should be included under this head)," includes certificates of stock. Morse v. United States, 174 Fed. 539, 551, 98 C. C. A. 321, 20 Ann. Cas. 938.

Securities issued by a corporation, which were denominated "bonds," contained a promise to pay a certain sum at a fixed time with a stated interest, and further provided that, after the payment of specified dividends on the stock, the holders of the bonds were entitled to a proportionate share in the surplus income, if any. Held, that the securities were in effect a species of preferred stock, as "stock" confers upon the holder a part ownership of the assets with the right to share in the profits of the corporation, and on dissolution in the assets after payment of debts, but without a lien on the property, while a "bond" is an obligation to pay a fixed debt with interest, which debt, if secured, is not wiped out if the security proves insufficient. Cass v. Realty Securities Co., 132 N. Y. Supp. 1074, 1077, 1078, 148 App. Div. 96.

An ordinary street railroad bond represents a loan of money from the holder to the borrower, and, although completely executed in due form to be used as security, does not become a valid obligation until it is actually delivered for a valuable consideration. Zimmermann v. Timmermann, 86 N. E. 540, 541, 193 N. Y. 486.

As debt

See Debt.

As liability

See Liability.

As money

See Money.

Municipal obligations

"Any instrument under seal, whereby the party from whom the security is intended to be taken obliges himself to pay a certain sum of money at a date specified, will constitute a 'bond.'" A certificate of indebtedness issued by the mayor and city council of Baltimore, known as city stock, is a "bond" within Code 1878, art. 30, § 24, punishing the forgery of any bond. Bishop v. State, 55 Md. 138, 141 (quoting and adopting definition in 2 Black, Com. 340).

"A 'bond' is an obligation in writing to pay." A general law in terms directing that all property be taxed, including "bonds," does not include public securities due by the municipality by which they are issued. The state cannot, through her board of assessors, be recognized as entitled to a tax on public municipal bonds, unless it be made sufficiently evident that such a demand is made in accordance with the expressed intention of the lawmaking authority. State ex rel. Louisiana Imp. Co. v. Board of Assessors, 36 South. 91, 92, 111 La. 982.

Priv. Laws 1911, c. 251, amending Charlotte City Charter by giving the city power to tax the cost of street improvements against abutting property owners, and to issue street improvement bonds to be sold at not less than par, adds to the powers of the city to pave its streets at the cost of its general fund by authorizing the issuance of street improvement bonds, possessing the character of municipal bonds; and the provision in the act that the bonds shall contain recitals showing that they are chargeable to particular property does not affect the character of the bonds, but merely makes the property benefited specially liable to their payment—the word "bonds," when used in connection with municipal obligations, implying an obligation of a city, as obligor, bound to do what it has agreed shall be done. City of Charlotte v. American Trust Co., 74 S. E. 1054, 1055, 159 N. C. 388.

Bonds issued by a municipal corporation in pursuance of an act of the Legislature, approved April 17, 1908, to raise revenue or funds with which to make street improvements in a city, which are to be paid by special assessments levied against the property benefited by the improvements, are not "public securities or bonds," within the meaning of section 2 of an act of the Legislature, approved March 24, 1910, entitled "An act for the protection, validation and sale of bond issues of the state, counties, townships and municipalities and all other political organizations and subdivisions of the state of Oklahoma"; and such bonds are not required to be examined and certified to by the Attorney General as ex officio bond commissioner.

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City of Lawton v. West, 126 Pac. 574, 575, 33 Okl. 395.

Notes

Where testatrix by will devised to her husband her house and lot and contents, without disposing of the remainder of her estate, and by codicil gave to her sisters all her bank stock and "bonds," the notes of testatrix passed to the sisters as bonds; a "bond" being an obligatory instrument in writing whereby one binds himself to another to pay a specified sum, or do some specified act. Schoonmaker v. Mitchell's Adm'r, 139 S. W. 968, 969, 144 Ky. 794.

As personal property

See Personal Property.

As property

See Property.

As security

See Security.

As specialty

See Specialty.

BOND FOR DEED

A "bond for a deed" is a contract for the sale of real estate. Royce v. Carpenter, 66 Atl. 888, 890, 80 Vt. 37.

"A 'bond for a deed' is only an agreement to make title in the future, and so long as it remains executory the title is vested in the original owner." National Fire Ins. Co. v. Three States Lumber Co., 75 N. E. 450, 453, 217 Ill. 115, 108 Am. St. Rep. 239 (quoting and adopting definition in Langlois v. Stewart, 41 N. E. 177, 156 Ill. 609).

A bond for title to school lands, executed by the purchaser and the broker employed by the owner to procure a purchaser, stipulating that the purchaser will pay part of the price in cash and execute vendor's lien notes for the balance, and that the vendor will execute a bond for title binding the vendor to execute a deed of conveyance to the school sections when they have been lived out under his contract for purchase from the state, is an instrument evidencing a contract for the sale of land, and is substantially an agreement by the vendor to make to the vendee a title to the land purchased and on the payment of the purchase money it vests in the purchaser the equitable title. Johnson & Moran v. Buchanan, 116 S. W. 875, 878, 54 Tex. Civ. App. 328.

BOND FOR THE PAYMENT OF MONEY

A bond conditioned for the performance of an act or service is not within the statute which provides that all "bonds for the payment of money or other things" may be assigned by indorsement. Shackleford v. Franks, 25 Miss. 49, 52.

BOND INVESTMENT

Bond investment scheme as lottery, see Lottery.

BOND ISSUE

Rev. St. 1895, art. 877, as amended by Acts First Called Sess. 28th Leg. 1903, c. 4, and Acts 26th Leg. c. 149, § 4, authorizes the county commissioners' court to issue bonds for the construction of bridges for public purposes, provided that the act shall not be construed as authorizing an issue of bonds for such purpose without submitting it to a vote of the people. Article 918h makes it unlawful for the commissioners' court to issue the bonds for any purpose authorized by law unless the proposition for the issuance of such bonds shall have been first submitted to a vote of the qualified electors. Article 918k provides that the act shall not apply to any bond issue when for a sum less than $2,000 when issued for the purpose of repairing buildings, or structures for the building of which bonds are allowed to be issued. Held, that a commissioners' court may issue bonds for less than $2,000 for the repair of a bridge for public purposes, though the aggregate amount of former issues for such purpose exceed $2,000; the term "bond issue" being confined to a class or series of bonds emitted at one time. Bell County v. Lightfoot, 138 S. W. 381, 383, 104 Tex. 346.

BOND PROVIDED BY CODE

The phrase "a bond provided for by this Code," as used in a code provision authorizing the execution of a sufficient bond, in case a bond provided for by this Code be adjudged to be defective, refers to the bonds which the Code authorizes only, and has no application to an appeal bond given in an election contest. Galloway v. Bradburn, 82 S. W. 1013, 1015, 119 Ky. 49.

BONDS OF MATRIMONY

Gen. Laws 1896, c. 195, § 1, provides that divorces from the "bonds of matrimony" shall be decreed in case of any marriage originally void or voidable by law. Held, that a contention that a case where the marriage was invalid because the husband had another wife living was not within the statute on the ground that there were no bonds of matrimony to dissolve was untenable. "The words 'from the bonds of matrimony' have a well-known signification at common law, and it must be presumed that it was in this sense that they were used by the Legislature. At common law no divorce a vinculo matrimonii could be granted except for cause existing previous to the marriage and which rendered marriage unlawful ab initio. In such cases, says 2 Blackstone, 94, the law looks upon the marriage to have been always null and void and decrees not only a separation from bed and board but a vinculo matrimonii itself." Leckney v. Leckney, 59 Atl. 311, 312, 26 R. I. 441.

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BONDS TO BE ISSUED

The phrase "bonds to be issued," within a statute providing that any drainage district desiring to issue bonds in accordance with the act shall, before such bonds are offered for sale, forward to the Attorney General a copy of the "bonds to be issued," etc., means those to be offered for sale and not those to be prepared and executed. Hidalgo County Drainage Dist. No. 1 v. Davidson, 120 S. W. 849, 851, 102 Tex. 539.

BONE CHAR

Blood charcoal, a substance which, like bone char, is composed chiefly of carbon and is used for decolorizing sugar, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 87, 30 Stat. 156, as an article composed of carbon, but either under paragraph 10, schedule A, 30 Stat. 152, as "bone char" by similitude, or at the similar rate provided in section 6, 30 stat. 205, for unenumerated manufactured articles. United States v. George Lueders & Co., 148 Fed. 398.

BONED

See Fish Skinned or Boned.

BONUS

A provision of a contract of subscription to the preferred stock of a corporation that the subscriber shall receive as a "bonus" a certain amount of the common stock does not require an inference that the bonus stock was to be issued without consideration in violation of law. Skillin v. Magnus, 162 Fed. 689, 690.

A city granted two street railway franchises, one for 25 years, calling for a payment of $250 a year as bonus, and the other providing for an annual license tax on cars used. Subsequently it adopted an ordinance, accepted by a company owning both franchises, which required the company to pay an annual sum in installments in June and December, in lieu of its obligation to repair streets. Pending litigation by the company to determine its rights under the franchises, it contracted to pay the city $2,500 annually for five years, and additional sums annually for subsequent five-year periods, which payments should be in lieu of car license or bonus; and it also agreed to make specified improvements. Held, that the payments required by the last contract were in lieu of payments required under the original franchises or the ordinances; the word "bonus" being used as equivalent to "consideration." City of Covington v. South Covington & C. St. Ry. Co., 144 S. W. 17, 20, 147 Ky. 326.

Though an agreement to pay a "bonus" does not necessarily mean the payment of a bribe, but generally means a sum given or paid beyond what is legally required, the word may also be used to designate bribery; so that where, in a contract for services as salesman, there was no explanation of a provision for the reimbursement of sums to be paid by the salesman as "bonuses," evidence was admissible under a proper plea to explain that the payments were to be made as bribes to purchasing agents. Smith v. David B. Crockett Co., 82 Atl. 569, 571, 85 Conn. 282, 39 L. R. A. (N. S.) 1148.

Rev. St. 1909, § 3389, which directs, after providing for the making of loans by building and loan companies by competitive bidding for premiums, that the by-laws of the company may dispense with bids and provide for the making of loans to members at such a rate of interest and premium as may be provided in the by-law, "such premium to be paid in gross installments." Section 3390 provides that premiums shall consist of a percentage of the amount loaned. Held that, as "installment" means a part of a greater amount and is a word only fitly used in connection with an ascertained amount, especially when qualified by "gross," and as "interest" is a certain rate per cent. of the sum loaned for the time the money is detained by the borrower, while a "bonus" or "premium" is a definite sum agreed upon which is paid in addition to interest, either in advance or by installments, the statute means that the premium referred to should be in gross, payable in installments, and it does not therefore authorize the charging of a rate per cent. for the uncertain period for which the money may be kept, so that, though such a charge be called a "bonus" in by-law authorizing it, it is without statutory authority. Holmes v. Royal Loan Ass'n, 150 S. W. 1111, 1114, 166 Mo. App. 719.

BOODLING

In the slang of the day, corrupt legislative practices and corrupt influences affecting legislation are termed "boodling." Julian v. Kansas City Star, 107 S. W. 496, 501, 209 Mo. 35.

BOOK

See Betting Book; First Class Book; Judgment Book; Mileage Book; New Book; Scrapbooks; Sectarian Book; Spring Back Book; Tax books.
Keep books; see Keep.

The provision in paragraph 502, § 2, Free List, Tariff Act July 24, 1897, c. 11, 30 Stat. 196, for "books * * * printed exclusively in languages other than English," includes architectural portfolios containing 18 or 20 pages of illustrations and a preface of 15 lines in German. R. F. Downing & Co. v. United States, 140 Fed. 92.

As including bank deposit book

A bequest of all my "books" does not include the testator's bank books or books of

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deposit, even though the definition of "book," as given in dictionaries, is broad enough to include bank books. In re Jeffreys' Estate, 82 Pac. 549, 550, 1 Cal. App. 524.

Corporate stock book

Bal. Ann. Codes & St. § 4269, makes it the duty of a corporation to keep a book containing the names of stockholders, showing the number of their shares, which book during the usual business hours shall be open for inspection of stockholders and creditors, and provides that any stockholder or creditor of the company shall have the right to make extracts from such book, or demand from an officer a certified copy of any paper placed on file in the office of the company. Section 4270 (section 7071) provides that if the officer having charge of such book, or of any papers of the company shall refuse or neglect to exhibit them, or allow them to be inspected, he shall be guilty of a misdemeanor punishable by imprisonment in the county jail, or by fine, or by both. Held that the book referred to in section 4270 (section 7071) is the stock book mentioned in section 4269 (section 7070), and the papers referred to in such section are the papers placed on file, within the meaning of the preceding section, meaning some paper lodged with and kept by the corporation, and pertaining to its corporate business, and to subject an officer to the payment of the statutory penalty, there must be a demand for inspection of the book named in the statute, or a designated paper or papers lodged with and kept by the corporation and pertaining to its corporate business by a person having an interest in inspecting the paper, and there must be a refusal to comply with the demand, and a simple demand to inspect the books and papers is not sufficient to subject the officer refusing it to the penalty. Brown v. Kildea, 108 Pac. 452, 454, 58 Wash. 184.

Periodical distinguished

See Periodicals.

BOOK (In Copyright Law)

Rev. St. § 4956, as amended in 1891, after enumerating the things which may be copyrighted, provides that the person desiring a copyright shall deposit with the librarian of Congress "two copies of such copyright book, map, chart, dramatic or musical composition; * * * provided that in the case of a book, photograph, chromo or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States or from plates made therefrom. * * *" Held, that dramatic compositions, being enumerated in the body of the section separately from books, and not being specified in the proviso, are not included therein, and that such a composition, although printed in book form, need not be printed from type set or plates made in the United States to be entitled to copyright. Hervieu v. J. S. Ogilvie Pub. Co., 169 Fed. 978, 981.

Under the statute of 8 Anne, c. 19, in England, it was held that a musical composition was protected by a copyright within the words "books or other writings"; and now under the act of 5 & 6 Vict. c. 45, § 2, it is declared that in the construction of the act the word "book" shall be construed to mean and include "every volume, part, or division of a volume, pamphlet, sheet of letter press, sheet of music," etc. Under these acts, it has been determined in effect that the adaptation of a well-known air, either by changing it to a dance or by transferring it from one instrument to another, is not a work entitling an author to a copyright. Our own law (Act Cong. Aug. 10, 1846) provides that the author of any book, map, chart, musical composition may have the same copyrighted, and the court holds that a musical composition must be substantially new and original and not a copy with such additions or variations which an experienced writer of music might readily make. Jollie v. Jaques, 1 Blatch. 625, 13 Fed. Cas. 910, 913.

BOOK (In Gaming)

Duplicate copies of policy tickets copied by the owner running the game are called "books." State v. Wilkerson, 70 S. W. 478, 479, 170 Mo. 184.

While the word "book," in the vernacular of the race track, need not be a bound volume with printed matter therein, yet to make a book, as that term is understood by the gambling fraternity, there must be a sheet of paper on which is recorded the name of the horse, the odds to be given, and either the name of the bettor or a numbered card by which the holder of the card could be designated, and the name of the bettor printed on a card or ticket and the amount which the bookmaker bet against the same, and so a blackboard containing the names of entries and the odds is not a book. State v. Oldham, 98 S. W. 497, 503, 200 Mo. 538.

BOOK OF ACCOUNT

See Account.

The fly leaf of a book containing only one account is a sufficient "book of accounts" within the meaning of Rev. St. 1899, § 4653, to be admissible in evidence. Stephan v. Metzger, 69 S. W. 625, 628, 95 Mo. App. 609.

The term "books of account," in Civ. Code, § 4574 (Wilson's Rev. & Ann. St. 1903), authorizing the admission in evidence of entries in books of account, refers to books containing charges by one party against the other, or of dealings with him, and a written memorandum of subjects and events, made contemporaneously with their taking place, are not books of account. First Nat. Bank of Enid v. Yeoman, 78 Pac. 388, 389, 14 Okl. 626.

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BOOK OF AN ENTRY TAKER

The "book of an entry taker" is a record, and copies taken from it constitute record evidence. The entry taker must furnish the surveyor with a copy of his record on which he makes his survey. Reeve v. North Carolina Land & Timber Co., 141 Fed. 821, 824, 72 C. C. A. 287.

BOOK OF ORIGINAL ENTRIES

"A book of original entries is a book in which a merchant keeps his accounts generally and enters therein from day to day a record of his transactions." A book of a firm, which was not one of the firm's regular books, and which contained only the account of one person, and in which the entries were not made contemporaneously with the transaction, was not a book of original entries. McKnight v. Newell, 57 Atl. 39, 40, 207 Pa. 562.

The evidence discloses that modern wholesale houses have adopted modern methods of bookkeeping in which the daybook and journal once in common use have no place in the system. The order from a customer comes in, and when approved by a credit man is passed to shipping and bill clerks, who select and assemble the goods ordered from different departments of the house and check them out, and then the order, initialed or marked by those through whose hands it passes, is handed to the bookkeeper, who formally enters the items in a book designated as a "ledger." This book is the first complete and permanent record of the charges and credits in the dealings had between the house and the customer. It appears that in some instances, for safety and convenience, an impression of the order is taken in a book; but it is only a copy of the order itself and cannot be regarded as a book of original entries. All that precedes the entries in the so-called "ledger" are mere temporary memoranda, which are turned in to the bookkeeper, who makes the first and only formal entries of the transactions between the parties. Such ledgers are "books of original entry," within the rules of evidence, making such entries admissible. State v. Stephenson, 76 Pac. 905, 906, 69 Kan. 405, 105 Am. St. Rep. 171, 2 Ann. Cas. 841.

Mere order slips or shopbooks, in which orders for goods are entered as received, are not "books of original entry," within the rule under which shopbooks of original entry are admitted in evidence to prove the account, when the entries contained therein are properly proved or established. Ogden Packing & Provision Co. v. Tooele Meat & Storage Co. (Utah) 124 Pac. 333, 334.

A "ledger" is a book of accounts in which are collected and arranged, each under its appropriate head, the various transactions scattered throughout the journal or daybook, and is not a "book of original entries," within the rule making such books competent evidence. First Nat. Building Co. v. Vandenberg, 119 Pac. 224, 227, 29 Okl. 583.

BOOK OR OTHER PAPER

Plaintiff purchased of defendant a picture alleged to be the work of a celebrated artist, and thereafter, on discovering it to be only a copy, he returned it to defendant, and sued to recover the purchase price, and applied for an order for inspection of the picture. Held, that the picture not being a "book, document or other paper," within Code Civ. Proc. § 803, the motion will be denied, with leave to renew on affidavits showing that the picture bears the purported signature of the alleged artist, and that plaintiff expects to prove that the signature is spurious. Wilson v. Collins, 109 N. Y. Supp. 660, 661, 57 Misc. Rep. 363.

The defendant, as commissioner of accounts of the city of New York, was empowered by section 119 of the Greater New York Charter (Laws 1901, c. 466), to make special examinations of the accounts of the officers and departments of the city, and report to the mayor. The relator's petition set forth that defendant, as commissioner of accounts, had taken testimony in a matter relating to the accounts of the office of the president of the borough of Queens, and that the testimony had been typewritten and filed in the defendant's office, that a copy had been forwarded to the district attorney, who had obtained an indictment against the borough president, and that the petitioner desired a certified copy of the minutes and records of the proceedings had before the defendant. Greater New York Charter, § 1545, requires that the heads of departments and bureaus shall furnish to any taxpayer desiring the same a certified copy of any book, account, or paper kept by such department, and that all the books shall be open to inspection by taxpayers, who, if refused the right to inspection may petition for an order of the Supreme Court for an inspection; and section 51 of the general municipal law (Consol. Laws, c. 24) declares all books of minutes, entry of account, and the books, bills, vouchers, checks, contracts or other papers used by or filed with county officers to be public records subject to inspection. Held that, unless in cases where public interests clearly require a disclosure the minutes and record of the commissioner's investigation made for the purpose of determining a course of official action were not within any of the specified books, accounts, etc., as to which the taxpayer's right to copy or inspect was mandatory. People ex rel. Woodill v. Fosdick, 126 N. Y. Supp. 252, 256, 141 App. Div. 450.

BOOKS, RECORDS, AND PAPERS BELONGING THERETO

The phrase "books, records, and papers belonging thereto," used in a code section, authorizing clerks of the chancery courts to make allowances for the safe keeping of the

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same, means such books, records, and papers only as belong to a court of chancery and such as are needed by the clerk of court in matters pertaining to the procedure and business therein. County of Choctaw v. Hughes, 35 South. 424, 425, 83 Miss. 195.

BOOK VALUE

"Book value," as applied to the book value of corporate stock, means value as predicated on the market value of the assets of the corporation after deducting its liabilities. Steeg v. Leopold Weil Bldg. & Imp. Co., 52 South. 232, 235, 126 La. 101.

The "book value" of a capital stock of a corporation is reached by extending all the assets as they appear on the corporate books and deducting all the liabilities and other matters required to be deducted and taking the balance as the measure of value. Cabble v. Cabble, 97 N. Y. Supp. 773, 775, 111 App. Div. 426.

BOOKING COTTON

The term "booking cotton" means making specific arrangements for the transportation of cotton by a particular vessel in advance of its sailing day. Merchants' & Miners' Transp. Co. v. Granger & Lewis, 63 S. E. 700, 702, 132 Ga. 167.

BOOKINGS

The common-law obligation of a common carrier by sea to serve the public impartially in the receipt and transportation of goods does not inhibit a carrier from taking "bookings" of freight—that is, from making specific arrangements for the transportation of goods by a particular vessel in advance of its sailing day, provided this privilege is extended to all, or if the grant of this privilege to shippers of one commodity does not interfere with the carrier's duty to shippers of other commodities. Ocean S. S. Co. of Savannah v. Savannah Locomotive Works & Supply Co., 63 S. E. 577, 580, 131 Ga. 831, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044.

BOOKLETS

Under Tariff Act July 24, 1897, c. 11, § 1, schedule M, par. 400, 30 Stat. 188, relating respectively to lithographic prints and to "booklets," articles composed of several post cards folded together and ready to be detached, though with a paper cover pasted thereon, are not "booklets" but fall within the former designation. Downing & Co. v. United States, 172 Fed. 447, 448.

BOOKKEEPER

See Competent Bookkeeper.

"The term 'bookkeeper,' we think, implies mere servantcy to record or keep a record of the transactions of the master and under his direction and not official character or agency to deal with third persons." One employed by a corporation to serve as bookkeeper for a definite period is not ex vi termini an officer or agent of such corporation within the intendment of Code 1906, c. 53, § 53, holding his place during the pleasure of the board of directors and removable without cause by such board without liability upon the corporation for a breach of its contract of employment. Munn v. Wellsburg Banking & Trust Co., 66 S. E. 230, 231, 66 W. Va. 204, 135 Am. St. Rep. 1024.

Under a statute providing that all persons doing labor or service of whatever character in the regular employment of an insolvent company shall be entitled to two months' wages next preceding the institution of proceedings of insolvency, one acting as "bookkeeper of a corporation" is entitled to that exemption although general manager and a director. Buvinger v. Evening Union Printing Co., 65 Atl. 482, 484, 72 N. J. Eq. 321.

As clerk

See Clerk.

As laborer

See Laborer.

As officer of corporation

See Officer (of Corporation).

BOOKKEEPING

Double-entry bookkeeping, see Double Entry.

System of bookeeping, see System.

Under Rev. St. 1895, art. 4571 (Rev. Civ. St. 1911, art. 6667), giving the Railroad Commission "power to prescribe a system of bookkeeping," since "system" means "method" and "bookkeeping" is the art of recording in a systematic manner the transactions of merchants, traders, and other persons engaged in pursuits connected with money, the commission cannot order the apportionment of items of expense to be made upon a purely arbitrary basis of "car miles" in a certain ratio between passenger traffic and freight, and orders prescribing that certain conclusions and deductions be entered upon the books of the railroads are not authorized (citing 1 Words and Phrases, 842). Texas & P. Ry. Co. v. Railroad Commission of Texas (Tex.) 150 S. W. 878, 880.

An order of the state railroad commission requiring railroads to divide their expense accounts into five primary accounts, and requiring such primary accounts to be divided into 123 subaccounts, following the system of bookkeeping prescribed by the Interstate Commerce Commission, and requiring that a few of the subaccounts should again be subdivided so as to apportion expenses between freight and passenger traffic and between state and interstate traffic, was a compliance with Rev. St. 1895, art. 4571, authorizing the Railroad Commission to prescribe a system of bookkeeping for railroads.

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Railroad Commission of Texas v. Texas & P. Ry. Co. (Tex.) 140 S. W. 829, 832.

BOOKMAKING

"Bookmaking," as used with "pool selling" in Act March 21, 1905, prohibiting bookmaking and pool selling, is germane to "pool selling"; both terms having been always understood to refer to horse racing of some character. State ex inf. Hadley v. Delmar Jockey Club, 92 S. W. 185, 190, 200 Mo. 34.

"Bookmaking" is a species of betting on horse races, and Act 28th Leg. c. 50, entitled "An act to prohibit the buying and selling of pools or receiving or making bets on horse races," is not repugnant to Const. art. 3, § 35, prohibiting bills from containing more than one subject to be expressed in the title in that it prohibits "bookmaking" in the body thereof and does not mention it by that name in the title. Ex parte Hernan, 77 S. W. 225, 226, 45 Tex. Cr. R. 343.

The term "bookmaking" originally indicated the collection of sheets of paper or other substances on which entries could be made, either written or printed. People ex rel. Lichtenstein v. Langan, 89 N. E. 921, 922, 196 N. Y. 260, 25 L. R. A. (N. S.) 479, 17 Ann. Cas. 1081.

Under Code Cr. Proc. § 742, requiring the information to contain a brief description of a statutory crime, an information charging defendant with engaging in bookmaking, and stating that he did quote and lay odds, by publishing the terms on which he was willing to bet against horses on the result of races, etc., but failing to allege the writing or recording of anything, was insufficient to charge a violation of Pen. Code, § 351, making it a misdemeanor to engage in bookmaking, since there can be no bookmaking without writing or recording; the word "betting," as used in the Penal Code, implying the use of a book, or sheets of paper, or a bulletin board, or some such thing. People ex rel. Jones v. Langan, 116 N. Y. Supp. 718, 719, 132 App. Div. 393; Id., 116 N. Y. Supp. 720, 132 App. Div. 937.

An information insufficiently charges the commission of the crime of bookmaking "with or without writing," under section 986 of the Penal Law (Consol. Laws 1909, c. 40), as amended by Laws 1910, c. 488, which in substance alleges that the defendant unlawfully, willfully, and privately made several bets orally and without writing, but that a memorandum of each of the bets was prepared by the opposite party thereto and shown the defendant. Such an information fails to set forth the chief elements of the crime of "bookmaking," as defined by the courts, in that, among other things, it fails to charge the defendant with the public quoting and offering of odds, with the soliciting of bets, with inducing the public to take chances with him in any scheme of odds and with effecting through his methods any passing of money or property. People ex rel. Shane v. Gittens, 137 N. Y. Supp. 670, 672, 78 Misc. Rep. 7.

To "make a book," as that term is understood by the gambling fraternity, there must be a sheet of paper on which is recorded the name of the horse, the odds to be given, and either the name of the better or a numbered card, by which the holder of the card could be designated and the better furnished with a card or ticket, and the amount which the bookmaker bet against the same, which the player handed to the bookmaker, and when the race was won this sheet would indicate to the cashier or bookmaker the amount won by the player. A blackboard behind a betting booth on which the names of horses and the terms were written, and numbered tickets issued to betters, did not constitute a book for registering debts or selling pools on horse races within Laws 1905, p. 131, prohibiting the use of any room, etc., with a book for purpose of recording bets on horse races. State v. Oldham, 98 S. W. 497, 503, 200 Mo. 538.

BOOM

The word "booms" means the spars or logs and chains and other fixtures to keep them in place and extending wholly or partially across a river or other body of water to obstruct the floating of objects therein. A boom corporation leased some flats and lands and erected thereon a boom extending into the river for catching and securing lumber. Held, that a sale of the boom and tiers on execution against a corporation only affects the logs and chains from which the boom was made and not the leasehold. Rollins v. Clay, 33 Me. 132, 138.

The word "boom" in an instruction, in proceedings by a railroad to condemn land, that the law does not permit the fixing of speculative, boom, or fancy values upon the property in controversy, but the law requires the determination of the reasonable market salable value of the property, if the owner was offering to sell on the usual terms and the purchaser desired to buy, though not a word descriptive of values which should be considered in estimating values arising under the law of eminent domain, does not extend the ordinary meaning of the other words "speculative" and "fancy"; the court using the words "speculative," "fancy," and "boom" as nearly equivalents of each other. Blincoe v. Choctaw, O. & W. R. Co., 83 Pac. 903, 909, 16 Okl. 286, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689.

BOOM POLE

A long pole which is moved by a wire rope running over a drum and used to raise and lower stone in a quarry is called a

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"boom pole." Clear Creek Stone Co. v. Dearmin, 66 N. E. 609, 610, 160 Ind. 162.

BOOMAGE

"Boomage" is a fixed charge on logs, payable at the place of delivery. Moss Point Lumber Co. v. Thompson, 35 South. 828, 829, 83 Miss. 499.

BOOT-BLACKING STAND

As place of public accommodation, see Public Accommodation.

BOOTLEGGER

In suit to enjoin a liquor nuisance, injunction does not properly run on the theory defendant violated Code Supp. 1907, § 2461a, defining a "bootlegger" to be one who carries intoxicants around for unlawful sale, where the evidence showed defendant conducted a restaurant. Barr v. Neel, 131 N. W. 650, 651, 151 Iowa, 458.

BOOTLEGGING

"Bootlegging" is an unlawful selling of liquor. Lambert v. State, 114 N. W. 775, 776, 80 Neb. 562.

BOOTY

Movables taken from the enemy on land are generally called "booty" and on the high seas "prize." The "high seas" include coast waters without the boundaries of low-water mark, though within bays or roadsteads—waters on which a court of admiralty has jurisdiction. United States v. Dewey, 23 Sup. Ct. 415, 422, 188 U. S. 254, 47 L. Ed. 463 (citing United States v. Ross, 1 Gall. 624, 27 Fed. Cas. 899).

"Booty of war" is distinguished from a seizure for immediate use of the army, and neither the capitulation of San Diego, nor cessation of active military operations in the San Diego district, nor the President's proclamation of July 13, 1898, relative to the rights of private property, change the character of a Spanish merchant vessel lying in the harbor as enemy's property nor exempt it from liability to capture by the military authorities for military purposes. Herrera v. United States, 32 Sup. Ct. 179, 183, 222 U. S. 558, 56 L. Ed. 316.

BORACIC ACID

A dry, antiseptic preservative, consisting of an intimate mechanical mixture of boracic acid and borax, the former being the more valuable component, is an article not enumerated in Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 151, either as "boracic acid," under paragraph 1, Schedule A, 30 Stat. 151, as "chemical compounds," under paragraph 3, 30 Stat. 151, or as "borax" or "borate material," under paragraph 11, 30 Stat. 152, and is subject to an assessment at the same rate of duty as boracic acid, under said paragraph 1, by virtue of section 7 of said act (30 Stat. 205), which prescribes that on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable, if composed wholly of the component material thereof of chief value. Berth Levi & Co. v. United States, 126 Fed. 420–422.

BORATE MATERIAL

Other borate material, see Other.

"Borate material," as used in Tariff Act 1897, c. 11, § 1, Schedule A, par. 11, fixing a rate of three cents a pound ad valorem on importations of borates of lime or soda, or other borate material not otherwise provided for, containing not more than 6 per cent. of anhydrous boracic acid, was not limited to material from which borates might be produced but included as well borates of any other substance, as borate of magnesia, etc. O. G. Hempstead & Son v. United States, 123 Fed. 346.

The enumeration in Tariff Act July 24, 1897, c. 11, par. 11, 30 Stat. 152, of other borate material refers only to "borate materials" found in nature in a raw condition, such as the borates of lime or soda included in the same provision, and does not embrace borate of manganese, or bormangan, which is a manufactured article made from manganese and borates of lime or soda and which is held to be dutiable as a chemical compound or salt under paragraph 3. Hempstead v. Thomas, 129 Fed. 907, 908, 64 C. C. A. 339.

BORATE OF MANGANESE

"Borate of manganese" is a manufactured product containing from 4 to 20 per cent. of manganese and from 10 to 30 per cent. anhydrous boracic acid, taxable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 11, and not under section 1, Schedule A, par. 3. O. G. Hempstead & Son v. United States, 123 Fed. 346.

BORDER

A deed described lands as situated on the side of an unnavigable stream and as bounded by it on three sides, and gave the particular subdivisions of the section. Grantee in the deed conveyed by deed which fixed the starting point in a subdivision of a section; thence east, a specified distance, to the side of the stream; thence down the stream with the meanderings thereof—being the property conveyed by the first deed. Held, that under Civ. Code, §§ 830, 1069, providing that, when land borders on unnavigable water, the owner takes to the middle of the

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stream, and declaring that a grant must be interpreted in favor of grantee, one claiming under the deeds took to the middle of the stream; the word "border" being synonymous with "boundary." Drake v. Russian River Land Co., 103 Pac. 167, 169, 10 Cal. App. 654.

The word "border," in a statute authorizing the disconnection of territory from a town or city where the territory is, among other things, upon or contiguous to the "border," means the corporate limits, and not the area adjacent to that part in actual use for municipal purposes. Anaconda Min. Co. v. Town of Anaconda, 80 Pac. 144, 146, 33 Colo. 70.

BORINGS

In specifications for public work, the word "borings," as used in a statement, "probable surface of rock as shown by borings," was not the same as soundings, which meant that tests had been made at intervals by driving a bar into the earth, while "borings" indicated that a hole had been bored which would show the character of the soil and indicate clearly at what depth rock was encountered and the character of the rock. Kelly v. City of New York, 84 N. Y. Supp. 349, 350, 87 App. Div. 299.

BOROUGH

The term "boroughs," as used in Const. c. 2, § 9, authorizing the incorporation of towns and boroughs, includes villages. Atherton v. Village of Essex Junction, 74 Atl. 1118, 1119, 83 Vt. 218, 27 L. R. A. (N. S.) 695, Ann. Cas. 1912A, 339.

"Boroughs" cannot be formed out of territory already part of a city or town. State v. Stout, 33 Atl. 858, 58 N. J. Law, 598.

BORROW

The transaction between a member and the association called "borrowing" is simply allowing the member to receive money on his shares of stock in advance of their maturity, in pursuance of the plan and purpose of the association. Broch v. French, 116 Ill. App. 15, 18.

A national bank borrowing money to meet its obligations on it finding itself embarrassed with a large amount of assets much in excess of its obligations but without the cash to make payment of the balances which are due does not "borrow" money to engage in a new business but simply exchanges one creditor for others. Wyman v. Wallace, 26 Sup. Ct. 495, 497, 201 U. S. 230, 50 L. Ed. 738.

BORROW PITS

What is known as "borrow pits" in railroad construction work are pits dug along the side of the roadbed for the purpose of making embankments, where the material coming out of the cuts is insufficient for the construction of embankments. Choctaw & M. R. Co. v. Newton, 140 Fed. 225, 235, 71 C. C. A. 655.

Excavations made to secure material for fills are, in railroad parlance, called "borrow pits."—Arkansas Valley & W. R. Co. v. Witt, 91 Pac. 897, 898, 19 Okl. 262, 13 L. R. A. (N. S.) 237.

BORT

Industrial diamonds of the description known as bort, which have been pierced by a process of drilling or cutting, are not dutiable as diamonds advanced by cutting or other process, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192, but are free of duty as "bort," under paragraph 545, Free List, § 2, 30 Stat. 197. United States v. American Express Co., 140 Fed. 967, 968.

BOSH

"Bosh" is an erection above the hearth of a blasting furnace built of fire brick and extending upward about 20 feet, slanting outward, containing hollow cooling plates through which water circulates.—Illinois Steel Co. v. Saylor, 80 N. E. 783, 226 Ill. 283.

BOSS

See Mining Boss; Shift Boss; Straw Boss.

"Boss" means a master workman or superintendent, a director, or manager; one who oversees or gives direction. Johnson v. Butte & Superior Copper Co., 108 Pac. 1057, 1060, 41 Mont. 158.

In common parlance, the word "boss" is applied to a person who gives orders and who directs or controls. Ozogar v. Pierce, Butler & Pierce Mfg. Co., 105 N. Y. Supp. 1087, 1090, 55 Misc. Rep. 579.

A "boss" of a small gang of 10 or 15 men engaged in making repairs on a railroad wherever they might be necessary over a distance of three sections, aiding and assisting the regular gang of workmen on each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work as would be necessary to constitute him a superintendent or vice principal or make the railroad company liable to a fellow servant for his neglect. Wagner v. New York, C. & St. L. R. Co., 76 N. E. 1112, 1115, 183 N. Y. 523.

A "boss" in a quarry having under him 22 men and authorized to give directions for their employment, to discharge them, and accustomed to mark places where drilling was to be done, but who did no drilling,

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was a superintendent and vice principal. Mahoney v. Bay State Pink Granite Co., 68 N. E. 234, 235, 184 Mass. 287.

BOTH

Ky. St. 1903 ("Charter of Cities of the Second Class") § 3044, provides that a majority of members elect of both the board of aldermen and the general council shall constitute a quorum for the transaction of business in joint session. Held, that a majority of "both" boards means a majority of the members taken as a whole and not a majority of each board considered separately. The word "both" is not synonymous with the word "each."—Davis v. Claus, 100 S. W. 263, 264, 125 Ky. 4.

In a suit for an accounting for royalties under a contract for the sale of an invention of a bicycle brake and coaster, the bill charged that a large number of devices known as Farrow's were being manufactured and sold by the defendant, averred plaintiff's ignorance of details and want of means of learning them except by discovery, and prayed for disclosure of the number of "both" the devices manufactured, sold, and held by defendant. Held, that the word "both" meant in the context the Farrow brake and the Farrow coaster, and the disclosure was intended to include substitutes. Eclipse Bicycle Co. v. Farrow, 26 Sup. Ct. 150, 152, 199 U. S. 581, 50 L. Ed. 317.

BOTTLE

In tariff act

Bottle-like containers of glass used in chemical operations and known as Koch flasks and certain so-called Woulf flasks, shaped like bottles, but having two or three necks a piece, are "bottles" or jars within Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156. Eimer & Amend v. United States, 126 Fed. 439, 441.

"Bottles," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156, exclude blown glass flasks for chemical laboratories, dutiable under paragraph 100, 30 Stat. 157, as "blown glassware." Eimer & Amend v. United States, 168 Fed. 240, 241, 242, 93 C. C. A. 454.

In imposing the ad valorem duty provided by Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 99, 30 Stat. 156, on bottles filled with olive oil, there should be taken as the dutiable value of the bottles only the value of the bottles by themselves, exclusive of corks, capsules, labels, reed envelopes, wooden cases, cost of filling, etc., all of which should be attributed to the contents rather than to the bottles. James A. Hayes & Co. v. United States, 150 Fed. 63, 64, 80 C. C. A. 17.

BOTTLES, JARS, OR SIMILAR PACKAGES

Olives in jars holding ten gallons were olives in "bottles, jars, or similar packages" within Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 264, 30 Stat. 171, taxing olives in bottles, jars, or similar packages at 25 cents a gallon. United States v. Shing Shun & Co., 173 Fed. 844, 845.

BOTTOM

See Hopper Bottom.

BOTTOMRY

BOTTOMRY BOND

A "bottomry bond" is an obligation, executed generally in a foreign port by a master of a vessel for advances to supply the necessities of a ship, together with such interest as may be agreed on, which bond creates a lien on the ship which may be enforced in admiralty in case of her safe arrival in port of destination, but becomes void in case of her loss before arrival. Where the master of an English vessel lying in the port of New Orleans ready to sail with cargo was without funds and was unable to hear either from the owners or the charterers, a draft drawn by the master to raise money for supplies and to pay legal obligations in such port, which was duly discounted at the instance of the ship's agents, was in the nature of a bottomry bond, and created a lien on the vessel enforceable in admiralty. The Wyandotte, 145 Fed. 321, 324, 75 C. C. A. 117 (quoting The Grapshot Case, 9 Wall. 135, 19 L. Ed. 651).

A "bottomry bond" may be executed by the owner of a ship at a home port, its validity not depending on the application money to the purposes of the ship or the voyage, although it is the essence of a "bottomry bond" that it is for money taken up on a maritime risk. Greeley v. Waterhouse, 19 Me. 9, 13, 36 Am. Dec. 730.

BOUGHT

BOUGHT AND PAID FOR

Exchange bought and paid for, see Exchange (In Commercial Law).

BOUGHT AND SOLD

The use of the words "bought and sold" in a written contract of sale does not necessarily import a present sale, but are frequently used to express a mere agreement to sell. Walti v. Gaba, 116 Pac. 963, 964, 160 Cal. 324.

"Bought and sold notes" are written memoranda of a sale of goods delivered to the parties thereto by the broker employed to negotiate the sale. Generally the memorandum delivered to the buyer is the bought note, and that delivered to the seller

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is the sold note, but some authorities hold that the sold note is delivered to the buyer and the bought note to the seller. Eau Claire Canning Co. v. Western Brokerage Co., 73 N. E. 430, 438, 213 Ill. 561.

BOULEVARD

As street, see Street.

A parkway is essentially a "boulevard," giving to the term its modern meaning. Kleopfert v. City of Minneapolis, 95 N. W. 908, 909, 90 Minn. 158 (citing Cent. Dict.).

The term "boulevard," anciently used to designate the flat top of a bulwark or rampart around a city, now means a street constructed with parklike features, a wide street, or a street encircling a town, one with sides or center for shade trees, flowers, seats, etc., and not used for heavy teaming. City of St. Louis v. Handlan, 145 S. W. 421, 423, 242 Mo. 88.

"A 'boulevard' is a public street which is usually of greater width than ordinary business streets and is given a parklike appearance by reserving places at the sides or center for shade trees, flowers, seats, and the like, and ordinarily is not used for heavy teaming. It is usually set apart for pleasure driving rather than the general business purposes of an ordinary street." Laws 1909, p. 290, § 1, making it unlawful to erect a structure of any kind within 500 feet of any public park or boulevard within any city having a population of 100,000 or more for the purpose of placing advertisements thereon, is unconstitutional as an unreasonable attempt to limit the proper use of private property for æsthetic reasons, not being justified under the police power. Haller Sign Works v. Physical Culture Training School, 94 N. E. 920, 922, 249 Ill. 436, 34 L. R. A. (N. S.) 998.

26 Del. Laws, c. 189, authorizing the organization of boulevard corporations and the construction by them of boulevards 200 feet wide, part to be used as a road for vehicles and part to be ornamented by trees and other parking features, or to be utilized for railways, telegraphs, telephones, pipe lines, etc., and providing for the maintenance of the road for vehicles by the state, for a new state official with supervision over such road, and for a new item of public expense in maintaining it, is not invalid, under Const. art. 2, § 16, as containing more than one subject, part of which are not germane to its title, reciting that it is an act to amend the general corporation law, by authorizing the organization of boulevard corporations, or which are not germane to the title of the general corporation law, since the popular meaning of the word "boulevard" is a broad and attractive highway designed and used for the transportation of persons, and things by any of the means now commonly employed on city streets or country roads, and all the provisions of the act relate to the one subject of the construction, operation, regulation, and maintenance of boulevards and boulevard corporations. Clendaniel v. Conrad (Del.) 83 Atl. 1036, 1041.

BOUND

See Mutually Bound.

The term "bound," as use in Rev. St. 1899, § 4211, providing that in all suits under this article the parties to the contract shall, and all other persons interested in the matter in controversy or in the property charged with the lien may, be made parties, but such as are not made parties shall not be bound by any such proceedings, is used in a narrow sense, namely, as meaning concluded. McLaren v. International Real Estate & Improvement Co., 102 S. W. 1105, 1107, 126 Mo. App. 254.

A manifold book, in which the carbon sheets are attached to a card board stub having a notched edge, the teeth of which may be pressed between the staples which bind the edges of the leaves together to hold the sheets in place, although such sheets are removable does not escape infringement of a patent because the sheets are described therein as "bound" in the book. John Kitchen, Jr., Co. v. Levison, 188 Fed. 658, 662, 110 C. C. A. 424.

BOUND TO KNOW

"Bound to know," as applied to the duty of a tug to know the condition of the channels and other waters where she assumes to tow vessels, clearly means that the tug is at law "bound to know" and must be presumed to know the conditions of the waters where she assumes to take the tow. The Naos, 144 Fed. 292, 296.

The phrase "bound to know," as used in the statement of the obligation resting on a tug, means that she must use proper diligence in ascertaining the condition of the channels and other waters where she assumes to tow vessels. Winslow v. Thompson, 134 Fed. 546, 549, 67 C. C. A. 470.

BOUND WITH SURETY

A statutory requirement that one shall be "bound with surety" means that he shall be bound "by" surety or shall "find surety." If sufficient security is entered, it is unnecessary that the party himself be bound. Cavence v. Butler (Pa.) 6 Bin. 52, 53.

BOUNDARY

See Common Boundary; Exterior Boundaries; Intersecting Boundary; Natural Boundary; Title or Boundaries of Land; Well-Defined Boundary.
As stream, see Stream.
Interlocking boundaries, see Interlock.
Point in boundary, see Point.

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The word "boundary" has a well-defined meaning; it is "that which indicates and fixes a limit or extent or marks a bound, as of territory." Board of Com'rs of Crook County v. Board of Com'rs of Sheridan County, 100 Pac. 659, 673, 17 Wyo. 424 (quoting and adopting definition in Webster's Dict.).

A conveyance of that part of a certain lot west of the "boundaries of a railroad" is properly construed to mean that part outside and west of the railroad's right of way. Illinois Cent. R. Co. v. Hasenwinkle, 83 N. E. 815, 818, 232 Ill. 224, 15 L. R. A. (N. S.) 129.

In the absence of other controlling circumstances, there is a conclusive inference that a division line between adjoining tracts definitely marked by the erection and maintenance of a fence or other monuments recognized by the owners as such, and up to which they have occupied and cultivated land on either side more than ten years, the statutory period of limitations, is the true "boundary line." Lawrence v. Washburn, 93 N. W. 73, 74, 119 Iowa, 109.

Between states

The state of Louisiana may make it a criminal offense for a pilot not duly qualified under its laws to pilot a foreign vessel from the Gulf of Mexico to New Orleans, La., although he holds a license issued under the authority of the state of Mississippi; since New Orleans, although upon the Mississippi river, is not "situate upon waters which are the boundary between two states," within the meaning of Rev. St. U. S. § 4236, authorizing the master of any vessel coming into or going out of any port so situated to employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot a vessel to or from such port, the limit of the waters so referred to being the point at which they cease to be a boundary between the two states. Leech v. State of Louisiana, 29 Sup. Ct. 552, 553, 214 U. S. 175, 53 L. Ed. 956, affirming judgment State v. Leech, 44 South. 285, 119 La. 522, 129 Am. St. Rep. 336.

On river or street

"Bounded by street" or "bounded by river" is equivalent to bounding by the center of the river or to the center of the street, subject to public easements. Brown v. City of Baraboo, 74 N. W. 223, 226, 98 Wis. 273.

A state "boundary" formed by a river changes with the change of a bank by accretion or reliction, but is not affected by an avulsion. De Loney v. State, 115 S. W. 138, 140, 88 Ark. 311; Id., 115 S. W. 142, 88 Ark. 615.

The common-law rule that the boundary of land bordering on an unnavigable stream is along the center, unless there is something in the deed to show a contrary intention, is the rule adopted by Civ. Code, § 830. Drake v. Russian River Land Co., 103 Pac. 167, 168, 10 Cal. App. 654.

The western boundary line of Missouri, extended by Act Cong. June 7, 1836, c. 86, 5 Stat. 34, to the Missouri river, remains the center of that stream, even if, by erosion, the result may be to take from Missouri territory which lies east of the original boundary, defined as a meridian line running due north from the mouth of the Kansas river. State of Missouri v. State of Kansas, 29 Sup. Ct. 417, 418, 213 U. S. 78, 53 L. Ed. 706.

"The true 'boundary line of a navigable stream' or lake is the point to which the water usually rises in ordinary seasons of high water" (dissenting opinion of Sullivan, J.). Johnson v. Johnson, 95 Pac. 499, 512, 14 Idaho, 561, 24 L. R. A. (N. S.) 1240 (quoting Gould, Waters [3d Ed.] § 76).

Meander line

"It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary." Mitchell v. Smale, 11 Sup. Ct. 819, 840, 140 U. S. 414, 35 L. Ed. 442.

"The meander line is not a line of boundary, but one designed to point out the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser." "A patent for a tract of land bordering on a river conveys the land, not simply to the meander line, but to the water line." Horne v. Smith, 15 Sup. Ct. 988, 159 U. S. 42, 40 L. Ed. 68.

BOUNDING

"Bounding," as used in Rev. St. § 2264, providing that, where an improvement is made on an existing street, alley, or other public highway, the cost and expense shall be assessed on the abutting lots and lands in the corroboration by the front foot of the property "bounding" and abutting on the improvement, is synonymous with "abutting"; the word "front" indicating the extent to which the lot is bounded by the highway for the improvement of which the assessment is made (dissenting opinion of Shauck, J.). City of Toledo v. Sheill, 42 N. E. 323, 326, 53 Ohio St. 447, 30 L. R. A. 598.

BOUNTY

See Natural Object of His Bounty.

A gratuity of money, given as "a testimonial for meritorious service" and in recognition of services rendered and sacrifices made, and not as a bounty or in equalization of bounties, and which is not to be paid to a person who has received a bounty from the commonwealth or any town, by an act applying only to cases where a soldier enlisted in his own proper name from purely patriotic motives, without the payment of a bounty,

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and received an honorable discharge, is not a substantive provision for the payment of bounties in time of peace, serving no public purpose, but benefiting only individuals; "bounty" being properly used in the sense of a payment to encourage enlistments and to aid towns and cities in filling their quotas. In re Opinion of the Justices, 98 N. E. 338, 339, 211 Mass. 608.

"Bounty" is defined by Webster as "a premium offered or given to induce men to enlist into the public service, or to encourage any branch of industry, as husbandry or manufactures." And by Bouvier as "an additional benefit conferred upon or a compensation paid to a class of persons." In a conference of representatives of the principal European powers, specially convened at Brussels in 1898 for the purpose of considering the question of sugar bounties, the definition of "bounty" was examined by the conference sitting in committee, who made a report that it was of the opinion that bounties which should be abolished were understood to be all the advantages conceded to manufactures and refiners by the fiscal legislation of the states and that, directly or indirectly, were borne by the public treasury, classified: "(a) The direct advantages granted in case of exportation. (b) The direct advantages granted to production. (c) The total or partial exemptions from taxation granted to a portion of the manufactured products. (d) The indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates. (e) The profit that may be derived from an excessive drawback." A "bounty" may be direct, as where a certain amount is paid on the production or exportation of particular articles, of which Act Cong. 1895, allowing a bounty on the production of sugar, and Rev. St. §§ 3015-3027, allowing a drawback on certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which the law permitting distillers of spirits to export the same after payment of an internal revenue tax or other burden is an example. Downs v. United States, 23 Sup. Ct. 222, 223, 187 U. S. 496, 47 L. Ed. 275.

BOURBON WHISKY

As understood in the trade, "Bourbon whisky" is confined to a whisky made in Kentucky, distilled from a grain mash, of which corn forms the largest constituent. United States v. Fifty Barrels of Whisky, 165 Fed. 966, 972.

"Bourbon whisky" is a Kentucky product, made principally out of corn with sufficient rye and barley malt added to distinguish it from straight corn whisky. Levy v. Uri, 31 App. D. C. 441, 445.

BOVINE

A description of stolen property as "one female animal of the bovine species, nearly two years old," alleges with sufficient accuracy that the animal was a cow or heifer, and satisfies Gen. St. 1906, § 3299. Jones v. State, 59 South. 892, 64 Fla. 92.

BOWLING ALLEY

See, also, Tenpin Alley.

The term "bowling alley," being construed to connote pieces of wood so conjoined as to present a plane surface 42 inches wide and 72 feet long, and wooden pins and wooden balls used in the game of bowling, is not exempt from seizure and sale on execution as the tools or implements of a keeper's trade or business. Williams v. Vincent, 79 Pac. 121, 70 Kan. 595, 68 L. R. A. 634, 109 Am. St. Rep. 469.

The statutes use the terms "tenpin alley" and "bowling alley" interchangeably. In the act levying occupation taxes (Rev. St. 1895, art. 5049), every nine or ten pin alley, or any other alley used for profit, by whatever name called, constructed, or operated upon the principle of a bowling alley, etc., is amenable to the tax. Webster also defines "tenpin alley" and "bowling alley" as in effect synonymous. An indictment charging in the same count a violation of the occupation law, in that accused pursued the occupation of running a tenpin alley "and" bowling alley for profit without procuring a license, is not vitiated by the use of "and," even if the terms "tenpin alley" and "bowling alley" be not in effect synonymous. O'Neal v. State, 100 S. W. 919, 51 Tex. Cr. R. 100.

As implement

See Implement.

As tool

See Tools—Tools of Trade.

BOX

See Ballot Box; Cellular Box; Miter Box; Voting Boxes.

"By * * * 'boxes' * * * we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents." United States v. Nicholls, 22 Sup. Ct. 918, 186 U. S. 298, 300, 46 L. Ed. 1173.

In Florida where the production of spirits of turpentine and rosin, otherwise known as "naval stores," constitutes one of the leading industries, courts will take judicial notice that such naval stores are the manufactured products of the gum extracted from pine trees that constitute the chief timber growing on large areas of the state, and that the crude gum so extracted in its unmanu-

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factured state is popularly known as and called "Dip," from the fact of its being collected by being dipped up from receptacles called "boxes" cut into the growing pine trees near the ground. Knight v. Empire Land Co., 45 South. 1025, 1027, 55 Fla. 301.

As mechanical contrivance

See Mechanical Contrivance.

BOX CAR

As building, see Building.

BOX MATERIALS

See Logs and Box Materials.

BOY

The word "boy" is always applied to a male person under 21 years of age. Hartsell v. State, 116 S. W. 1159, 55 Tex Cr. R. 389; White v. State (Tex.) 151 S. W. 826.

BOYCOTT

See Primary Boycott; Secondary Boycott.

As using mails to defraud, see Defraud.

The term "boycott" ordinarily means a confederation, generally secret of many persons whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. My Maryland Lodge No. 186 of Machinists v. Adt., 59 Atl. 721, 723, 100 Md. 238, 68 L. R. A. 752 (quoting 8 Cyc. p. 639). Branson v. Industrial Workers of the World, 95 Pac. 354, 360, 30 Nev. 270.

Combinations formed for the purpose of interfering otherwise than by lawful complication with the business affairs of others and depriving them by threats and intimidation of the right to conduct the business in which they are engaged according to their own ideas are usually termed "boycotts." Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor, 156 Fed. 809, 818.

A conspiracy to "boycott" is a confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and avengence of the conspirators. Funck v. Farmers' Elevator Co. of Gowrie, 121 N. W. 53, 55, 142 Iowa, 621, 24 L. R. A. (N. S.) 108 (quoting and adopting the definition in 8 Cyc. p. 639).

A "boycott" may be defined to be a combination of several persons to cause a loss to a third person, by causing others against their will to withdraw from him their beneficial business intercourse, through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him, or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs. Gray v. Building Trades Council, 97 N. W. 663, 666, 91 Minn. 171, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172.

The word "boycott" was first used in an American case in State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23, where the court said that it originated from the efforts of certain Irish tenants to exclude Capt. Boycott from all intercourse with its neighbors because he endeavored lawfully to collect his rents. The court in that case observed: "It seems strange that in this day, and in this free country—a country in which law interferes so little with the liberty of the individual—it should be necessary to announce from the bench that every man may carry on his business as he pleases, may do what he will with his own, so long as he does nothing unlawful and acts with due regard to the rights of others, and that the occasion for such an announcement should not be an attempt by government to interfere with the rights of the citizen, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control, by means little, if any, better than force, the action of employers." Consolidated Steel & Wire Co. v. Murray, 80 Fed. 811, 819.

A "boycott" may adopt illegal means, and thus become a conspiracy and illegal, in which case injunction lies to restrain it, or a boycott may employ legal means and methods, and be merely a legitimate conbination by a number of men to accomplish a legal result, in which case equity will not restrain it. Pierce v. Stablemen's Union, Local No. 8760, 103 Pac. 324, 327, 156 Cal. 70.

Where, pending a labor controversy between complainant and its employés, defendants, as members of unincorporated labor organizations, published notices, viz.: "Organized Labor and Friends: Don't drink scab beer" — and then naming certain different kinds of beer and alleging the same to be "unfair," together with other signs directing organized labor and friends not to use "this beer," and advising that they should guard their health by refusing to drink "unfair beer," which was alleged to include beer manufactured by complainants, such notices amounted to a "boycott," which complainants were entitled to enjoin. Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011, 1012.

A "boycott" is an unlawful conspiracy consisting of a combination of several persons whose purpose is to cause a loss to another by causing third persons, through threats of injury to themselves, to cease doing business with him, or an organization formed to exclude one from business relations with others, and such a combination may be restrained by injunction. Baldwin v. Escanaba Liquor

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Dealers' Ass'n, 130 N. W. 214, 219, 165 Mich. 98.

"A 'boycott' means the confederation, generally secret, by many persons, whose intent is to injure another by preventing all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators." Where an association of retail druggists in a certain city and wholesale druggists formed a combination to maintain a maximun schedule of prices, and in pursuance of the plan refused to sell to plaintiff, a retailer who had refused to join the combination, and coerced and intimidated vendors of like commodities by means of threats to blacklist and boycott such vendors if they sold to plaintiff, whereby such vendors were deterred from selling to plaintiff, the parties to the combination were liable to plaintiff for resulting damages to his business. Klingel's Pharmacy of Baltimore City v. Sharp & Dohme, 64 Atl. 1029, 1032, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184 (citing 8 Cyc. p. 639.)

"The word 'boycott,' by reason of the circumstances under which it originated, and the extent to which the means used to accomplish the purpose of the parties engaged in it were carried, is commonly supposed to involve unlawful means. The word is defined in Black's Law Dict. p. 150, as follows: 'In criminal law. A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those who would be customers from buying anything from or employing the representatives of said business by threats, intimidation, or other forcible means.' In Brace v. Evans, 3 Ry. & Corp. Law J. 561, it is said: 'The word in itself implies a threat in popular acceptation. It is an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence and have coerced him, through fear of his own injury, to submit to dictation in the management of his affairs.' In Matthews v. Shankland, 56 N. Y. Supp. 123, 25 Misc. Rep. 604, the term is held to come within the statutory definition of an 'unlawful conspiracy.' For history of the word and definition as adopted by many courts, see Words and Phrases, p. 855." State v. Van Pelt, 49 S. E. 177, 188, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495.

A combination of carpenters, joiners, and others doing carpenter work and labor in the construction of buildings, existing as a labor union, to injure the business of an individual, by intimidating contractors and builders from purchasing and using building materials manufactured by the individual in any building to be constructed by them, by prohibiting their members from working on all buildings in which the materials of the individual are used, is an unlawful combination and conspiracy, and a boycott defined as a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons will cause loss or injury to him, authorizing the individual to seek relief by injunction, his remedy at law being inadequate. Lohse Patent Door Co. v. Fuelle, 114 S. W. 997, 1003, 215 Mo. 421, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; Charles A. Olcott Planing Mill Co. v. Same (Mo.) 114 S. W. 1013.

The employés of a railroad company, without having any complaint against a Pullman car company or any relation to that company in handling the Pullman cars on railroad trains, for the purpose of compelling the railroad companies to withdraw custom from the Pullman company made threats of quitting the railroad company's service and actually did so. Held, that the acts of the railroad employés constituted a "boycott." Loewe v. California State Federation of Labor, 139 Fed, 71, 82 (quoting and adopting the definition in Thomas v. Cincinnati, N. O. & T. P. R. Co., 62 Fed. 803).

"While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract, yet they have generally condemned those combinations usually termed 'boycotts,' which are formed for the purpose of interfering otherwise than by lawful competition with the business affairs of others and depriving them by means of threats and intimidation of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgment." Union Pac. R. Co. v. Ruef, 120 Fed. 102, 111 (quoting and adopting Hopkins v. Oxley Stave Co., 23 Fed. 912, 28 C. C. A. 99).

An organized attempt to induce the public to refrain from purchasing the products of a manufacturer and deprive him of a part of his trade, commonly called "boycotting," the object being to compel the manufacturer to unionize his business and to submit its conduct to the regulation of a labor union, is an irreparable injury to his property which equity will enjoin. George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n of United States & Canada, 66 Atl. 953, 958, 72 N. J. Eq. 653.

A newspaper article asserting that a citizen and resident of France, who by virtue of a contract with an opera company of New York to secure engagements for opera singers had an absolute monopoly of the engagement

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of French artists for the company, that no one could be engaged unless he acted as intermediary; that he was an autocrat, and held up contracts and boycotted the best singers, and commenting unfavorably on such a method of doing business, was not libelous; the word "boycott," not referring to the offense denounced by Penal Law (Consol. Laws N. Y. 1909, c. 40) § 580, but only referring to his failure to submit for engagement artists whom he did not approve. Astruc v. Star Co., 193 Fed. 631, 632, 113 C. C. A. 499, 40 L. R. A. (N. S.) 79.

A "boycott" is a combination to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, by threats that unless they do so the combination will cause similar loss to them, or by the use of such means as will inflict bodily harm on them, or such intimidation as will put them in fear of bodily harm. Intimidation and coercion are essential elements of a boycott, and the means used must be threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done. Meier v. Speer, 132 S. W. 988, 991, 96 Ark. 618, 32 L. R. A. (N. S.) 792.

The verb "to boycott" does not necessarily signify that the doers employ violence, intimidation, or other unlawful coercive means, but it may be correctly used in the sense of the act of a combination in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination, or some of them, or grants concessions, which are deemed to be made for that purpose. Butterick Pub. Co. v. Typographical Union No. 6, 100 N. Y. Supp. 292, 298, 50 Misc. Rep. 1 (quoting Mills v. United States Printing Co., 91 N. Y. Supp. 189, 99 App. Div. 605); Lindsay & Co. v. Montana Federation of Labor, 96 Pac. 127, 130, 37 Mont. 264, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722.

"A 'boycott' is not unlawful unless attended by some act which in itself is illegal." To "boycott" does not necessarily signify that the doers employed violence, intimidation, or other unlawful coercive means, but it may be correctly used in the sense of the act of a combination, in refusing to have business dealings with another until he removes or ameliorates the conditions which are deemed inimical to the welfare of the members of the combination or some of them, or grants concessions which are deemed to make for that purpose, and as such a combination may be formed and held together by argument, persuasion, or by entreaty, or by the "touch of nature," and may accomplish its purpose without violence or other means, it cannot be said that to "boycott" is to offend the law. An injunction against boycotting without qualification is therefore too broad, as, in so far as boycotting is mere abstention, it is not unlawful per se. Mills v. United States Printing Co., 91 N. Y. Supp. 185, 189, 99 App. Div. 605 (quoting and adopting definition of Bouvier, citing Bohn Mfg. Co. v. Hollis, 55 N. W. 1119, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319; Sinsheimer v. United Garment Workers of America, 28 N. Y. Supp. 321, 77 Hun, 215; Cook, Trade & Labor Comb. § 9; Tiedemann, State & Federal Control of Persons & Property, p. 440; Bowen v. Matheson [Mass.] 14 Allen, 499).

The object of a "boycott" being to inflict injury upon another, a strike called by union workmen to compel the employer to discharge nonunion men is not a "boycott"; the purpose of the strike being not to injure nonunion employés but to protect the union. Kemp v. Division No. 241, Amalgamated Ass'n of Street & Electric Ry. Employés of America, 99 N. E. 389, 397, 255 Ill. 213.

BRACE

In the excavation of a trench, that portion of the earth left undisturbed so as to form a "brace" or support for the sides. Finegan v. Moore, 46 N. J. Law, 602, 603.

The word "braces" in common parlance, applied to men's wear, is synonymous with suspenders. Charles R. De Bevoise Co. v. H. & W. Co., 60 Atl. 407, 408, 69 N. J. Eq. 114.

BRAID

See Silk Braid.

"Braid" is defined in the Standard Dictionary as "a narrow, flat tape or woven strip, for binding the edges of fabrics, or for ornamenting them." A. Steinhardt & Bro. v. United States, 121 Fed. 442, 443.

Featherstitch braids, so called, which are not producing by braiding, but by a process of weaving, but which are known commercially as braids, are within the provision for "braids" in paragraph 339, Schedule J, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 181. Vom Baur v. United States, 141 Fed. 439, 444.

Under Tariff Act July 24, 1897, c. 11, 30 Stat. 151, 181, enacted when cotton featherstitched braids were generally known to the wholesale trade of the United States as "feather braids" and assessed as braids, such goods are properly assessed at 60 per centum as "braids" under the trimming schedule, par. 339, including embroideries, and all trimmings, composed wholly or in chief value of cotton, flax or other vegetable fiber, and not elsewhere provided for in this act; and not at 45 per centum as bindings under the notions schedule, par. 320. United States v. Baruch, 32 Sup. Ct. 306, 223 U. S. 191, 194, 56 L. Ed. 399; Baruch v. United States, 159 Fed. 294, 295.

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Braids composed of straw

Braids composed in chief value, but not wholly of straw, were "braids * * * composed of straw," within the meaning of Tariff Act Oct. 1, 1890, c. 1244, § 2, Free List, par. 518, 26 Stat. 604. United States v. Rheims, 154 Fed. 865, 866.

BRAKE

See Emergency Brake; Service Brake.

A request to charge that defendant's servants, at the time they moved the car that injured plaintiff, were entitled to presume that the car was properly equipped with a brake, unless the jury believed that defendant knew to the contrary, and that by a "brake" was meant such a brake as is usually and customarily supplied as a part of the equipment of an ordinary freight car of the kind and character disclosed by the evidence, was substantially covered by an instruction given that defendant could presume that the car was properly equipped with a brake unless the jury believed that defendant actually knew the contrary, or by the exercise of ordinary care would have known the contrary, and that by "brake" was meant such a brake as was usually and customarily supplied as a part of the equipment of an ordinary freight car of the kind and character disclosed by the evidence. Moudy v. St. Louis Dressed Beef & Provision Co., 130 S. W. 476, 480, 149 Mo. App. 413.

Though the evidence in an action for injury to a passenger from the slipping of a work train against a passenger train was that the work train was equipped with a Westinghouse brake and machinery, as well as with a steam brake, the instruction as to defendant being negligent if the train could not be held on the track by its "brakes" is not open to the criticism that with "brakes" should be included "braking appliances and machinery"; the term "brakes," as ordinarily understood, including all the mechanism employed to control the motion of the train, and the jury undoubtedly having so understood it. Valenti v. Sierra R. Co., 111 Pac. 95, 97, 158 Cal. 412.

Brake rod

A "brake rod" is an iron rod connecting the brakes of a railroad car with the air apparatus on the car; such rod being about twelve feet long and three-fourths of an inch in diameter. Kentucky & I. Bridge & R. Co. v. Moran, 80 N. E. 536, 169 Ind. 18.

BRAKEMAN

See Extra Brakeman; Railway Freight Brakeman or Switchman.

BRAN

As provisions, see Provisions.
Grain as including bran, see Grain.

"Bran" is a product from grinding wheat. German Fire Ins. Co. of Peoria v. Walker (Tex.) 146 S. W. 606, 607.

BRANCH

See Connecting Branch.

The term "branch," as used in a statute providing that every person in the employ of a railroad company having charge or control of employés in any separate "branch or department" shall be held to be the superior and not fellow servants of employés in any other branch or department, etc., evidently refers to the small divisions which separate the employés from one another while at work, and in this sense a train is a separate branch or department. Kane v. Erie R. Co., 142 Fed. 682, 685, 73 C. C. A. 672.

Branch bank

Sess. Laws 1907, p. 519, c. 225, § 6, defining the term "bank," as used in that act, to mean every corporation, domestic or foreign, except national banks and foreign banks not authorized to receive deposits, transacting a banking business in the state, makes it apparent, by including foreign banks transacting business in the state in the definition of the term "bank," that the term "branch bank" defined in the same section means a branch established in a town or city other than that in which the principal office is located, and refers to branches of domestic banking corporations only, and not to branches of foreign banking corporations. State ex rel. Flumerfelt v. Engle, 96 Pac. 1045, 1046, 50 Wash. 207.

Branch of state government

The state board of agriculture created by Laws 1899, p. 208, and consisting of five citizens of the state named by the Governor with power to organize by electing officers, and charged with the exclusive management and control of the state agricultural society and having possession and care of its property and intrusted with the direction of its entire business and financial affairs, and being required to provide for an annual fair, the state not to be liable for premiums awarded or debts created beyond the amount actually appropriated, is a corporation, but not a "branch of the state government." Tongue v. State Board of Agriculture, 105 Pac. 250, 251, 55 Or. 61.

BRANCH OFFICE MANAGER

As workman, see Workman.

BRANCH RAILROAD

"A 'branch road,' as applied to railroads, denotes a road, connected, indeed, with the main line, but not a mere incident of it, or constructed simply to facilitate the business of the chief railway, but designed to have a business of its own, for the transportation of persons and property to and from places

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not reached by the principal road." Norfolk & W. R. Co. v. Lynchburg Cotton Mill Co., 56 S. E. 146, 147, 106 Va. 376.

An approach to the Ohio River bridge of the Illinois Central Railroad, consisting of the tracks leading to the bridge and the embankment and steel structure upon which they rest, used in connection with its charter lines to connect with the Mobile & Ohio Railroad, is not a "branch or lateral line," but a switch or side track which it is empowered to acquire by section 1 of its charter (Acts Feb. 10, 1851, § 1 [Priv. Laws 1851, p. 61]), as needful to carry into effect its purposes, and falls within sections 18 and 22, imposing a tax on gross receipts and exempting its charter lines from other taxation. State Board of Equalization v. People, 82 N. E. 324, 334, 229 Ill. 430.

BRAND

See Misbrand—Misbranding.

The word "brand" derivatively has reference to burning, and in many cases signifies a distinctive mark placed on objects by a hot iron. The verb has been judicially defined as meaning to stamp or to mark, as by a stencil, plat, or chisel, and the noun as indicating some figure or device burned on an animal by a hot iron (citing 1 Words and Phrases Judicially Defined, 858). Pollock v. Kansas City, 123 Pac. 985, 986, 87 Kan. 205, 42 L. R. A. (N. S.) 465.

"Branding" has become a recognized mode of marking animals so that the owners may recognize them, and consists of indelible marks on the hide of the animals. State v. Wolfley, 89 Pac. 1046, 1047, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412.

BRANDISHING

The act of decedent in "brandishing" an ax does not necessarily show that he was about to use it on defendant, or that defendant was in imminent peril or had reason to believe that he was in great peril so as to render the killing an act of self-defense. Patterson v. State, 41 South. 157, 159, 146 Ala. 39.

BRANDY

As intoxicating liquor, see Intoxicating Liquor.

Cider is not "brandy" or any mixture thereof. Donithan v. Commonwealth, 64 S. E. 1050, 109 Va. 845.

BRASS

See Old Brass.

BRASSIERE

The French word "brassiere," which means simply "brace," as applied to an article of women's wear, but includes the idea of "restraint" and "to be under constraint," is not subject to exclusive appropriation as a trade-mark for a combined corset cover and bust supporter, even by a manufacturer first so using it in the United States. Charles R. De Bevoise Co. v. H. & W. Co., 60 Atl. 407, 408, 69 N. J. Eq. 114.

BREACH

See Prison Breach.

BREACH OF CONTRACT

Expenses on breach of contract, see Expenses.

Dissolution of a contractual relation by an adjudication in bankruptcy, is a "breach of the contract" for which a claim for damages may be allowed in bankruptcy. Watson v. Merrill, 136 Fed. 359, 360, 69 C. C. A. 185, 69 L. R. A. 719.

Technical violations of a building contract, which the contractor corrects on his attention being called thereto, are not "breaches," within the contractor's bond requiring notice to the surety of breaches of the building contract. Lazelle v. Empire State Surety Co., 109 Pac. 195, 196, 58 Wash. 589.

Where a proviso in a bond limits the right to bring suit thereon to a period of six months after the first breach of the contract secured, the breach of the contract referred to is a breach creating liability on the bond. Fitger Brewing Co. v. American Bonding Co. of Baltimore, 131 N. W. 1067, 1069, 115 Minn. 78.

Where defendant obtained the confidence of prosecutor by representing that he would engage in a contemplated real estate business with prosecutor as his partner in another city, and by reason of the confidence so inspired induced prosecutor to pay money to M. for the purchase of certain city lots, and defendant had not intended to engage in the business at all, but falsely pretended he would do so to induce prosecutor to pay his money for the lots, which were of little or no value, defendant was guilty of obtaining money by the "confidence game," and not of a mere "breach of a civil contract." Chilson v. People, 79 N. E. 934, 936, 224 Ill. 535 (citing Maxwell v. People, 41 N. E. 995, 158 Ill. 248; Du Bois v. People, 65 N. E. 658, 200 Ill. 157, 93 Am. St. Rep. 183; Hughes v. People, 79 N. E. 137, 223 Ill. 417).

Tort distinguished

The dividing line between "breaches of contract" and "torts" is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or acceptable. In a general way, a "tort" is distinguished for a "breach of contract" in that the latter arises under an agreement of the parties; whereas, the tort ordinarily is a violation of a duty fixed by

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law independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of or coincident with the contract, and frequently the same facts will sustain either class of action. A complaint alleging that plaintiff became a passenger of defendant, to be carried on one of its cars, and, in consideration of five cents paid, defendant agreed "safely to carry" plaintiff, and "to treat him properly and carefully," and that, after he had passed onto a platform at a station to take a train, defendant, through its employés, in violation "of the terms of said contract," assaulted him, states a cause of action for "breach of contract," and not in "tort." Busch v. Interborough Rapid Transit Co., 80 N. E. 197, 198, 187 N. Y. 388, 10 Ann. Cas. 460 (citing Rich v. New York Cent. & H. R. R. Co., 87 N. Y. 382, 390).

BREACH OF COVENANT

A judgment in partition against covenantee is a sufficient eviction to constitute a breach of the covenant of seisin, and the purchase of the outstanding title by covenantee, after resistance in good faith, in no wise affects the sufficiency of the eviction. Brooks v. Mohl, 116 N. W. 931, 104 Minn. 404, 17 L. R. A. (N. S.) 1195, 124 Am. St. Rep. 629.

BREACH OF DUTY

In an action arising out of the alleged negligence of a street railway company in a collision with plaintiff's milk wagon, a "breach of duty" is a failure to exercise, in conduct liable to be dangerous to others, that care which a man of ordinary prudence would exercise under the particular circumstances. The state regards certain acts as so liable to injure others as to justify their absolute prohibition. In such cases the doing of the forbidden act is a breach of duty in respect to those who may be injured thereby. The cause of action which arises on an injury resulting from a breach of duty in respect to the party injured in neglecting to use that care which the law requires, under the particular circumstances of the case, for the protection of those liable to be injured by such neglect, is the same as the cause of action arising upon an injury resulting from a breach of duty in respect to the person injured in doing an act forbidden by statute for the protection of those liable to be injured by such act. The main distinction lies only in the method of proof. In the former case the breach of duty must be established by showing a want of care under all the circumstances, while in the latter it may be established by showing the commission of the illegal act. In both two questions are presented: (1) Was there a breach of duty to any one liable to be injured by the conduct proved? and (2) was this breach of duty a proximate cause of the injury alleged? Munroe v. Hartford St. Ry. Co., 56 Atl. 498, 500, 76 Conn. 201.

BREACH OF MARRIAGE PROMISE

As personal injury, see Personal Injury.

BREACH OF PENAL LAWS

Const. art, 9, pt. 2, § 4, providing for the application of fines collected for any breach of the penal laws to the support of the common schools, has no application to a fine imposed for violation of an injunction; such fine not being imposed for a "breach of the penal laws." Gunn v. Mahaska County (Iowa) 136 N. W. 929, 931.

BREACH OF THE PEACE

See Tending to a Breach of the Peace; Treason, Felony, and Breach of the Peace.

A "breach of the peace" is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. People v. Most, 64 N. E. 175, 177, 171 N. Y. 423, 58 L. R. A. 509 (citing Barb. Crim. Law, 219; Archb. Crim. Prac. 91; Bish. Crim. Law, § 533; Clark & M. Crimes, 983; McLean, Crim. Law, § 1012).

By "peace" is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right among all persons in a political society, and any intentional violation of that right is a "breach of the peace." Town of Neola v. Reichart, 109 N. W. 5, 6, 131 Iowa, 492.

The term "breach of the peace" is generic, and includes all violations of public peace or order, or acts tending to the disturbance thereof, a definition broad enough to include the statutory offense "the disturbance of the peace." State v. Clark, 63 S. E. 402, 408, 64 W. Va. 625.

A breach of the peace is a violation of public order or decorum; the offense of disturbing the public peace. By "peace" is meant the tranquillity enjoyed by the citizens of a municipality or community, where good order reigns among its members. Under Snyder's Comp. Laws, § 2782, providing for the punishment of any one who grossly disturbs the public peace, whooping and yelling and uttering loud language are acts prohibited if they disturb the public peace. Stewart v. State, 109 Pac. 243, 245, 4 Okl. Cr. 564, 32 L. R. A. (N. S.) 505.

A "breach of the peace" is a common-law offense. The term is generic and includes all violations of public peace or order or acts tending to the disturbance thereof. The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet or an invasion of the security and protection which the law affords every citizen, or of acts such as tend to excite violent resentment. Actual person-

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al violence is not an element in the offense; but, where the incitement of terror or fear of personal violence is a necessary element, the conduct or language of the wrongdoer must be of a character to induce such condition in a person of ordinary firmness. The "breach of the peace" may therefore consist of one act or of several acts, and the fact that accused are charged with having violated several express statutes, for any one of which violations they might have been punished, affords them no relief from prosecution for a breach of the peace. King v. Commonwealth (Ky.) 105 S. W. 419 (quoting 5 Cyc. 102).

The unlawful striking of one with a hard substance is an assault and battery, but not a disturbance of his peace and quiet within Mansfield's Dig. § 1800, providing punishment for a breach of the peace. Miles v. United States, 103 S. W. 598, 599, 7 Ind. T. 11.

The firing of pistol shots in a public street of a town at night near to private residences is an "offense against the public peace," within Pen. Code 1895, art. 334, providing that, if any person shall go into any public place and rudely display a pistol or any deadly weapon in a manner calculated to disturb the inhabitants of such public place or private house, he shall be fined, etc. King v. Brown, 94 S. W. 328, 329, 100 Tex. 109.

"An offense against the public peace may consist either of an actual 'breach of the peace,' or doing that which tends to provoke or excite others to do it. Within the latter fall all acts and attempts to produce disorder by written or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual." This doctrine justifies an act punishing the desecration of the national flag as a valid exercise of the police power of the state. Halter v. State, 105 N. W. 298, 300, 74 Neb. 757, 7 L. R. A. (N. S.) 1079, 121 Am. St. Rep. 754 (quoting and adopting definition in Updegraph v. Commonwealth [Pa.] 11 Serg. & R. 406).

A charivari at a house occupied by a newly wedded couple, consisting of the ringing of bells, blowing of horns, and shouting, was not a "breach of the peace," where it was not shown that citizens not participating were in fact disturbed, and where the bridegroom regarded it as a compliment, and paid money to the performers on their agreeing to give more of the "music." City of St. Charles v. Meyer, 58 Mo. 86, 89.

A large number of persons, many of them newspaper reporters, gathered in front of defendant's house, under the belief that a certain person was concealed therein, and, although told that such person was not there, continued conversing in loud tones, and, on defendant approaching his residence, surrounded his cab, while efforts were made to snap a camera at him, so that it was impossible for him to alight; the conditions became worse, until it was necessary for a policeman to drive persons off the sidewalk, and later, on defendant leaving his house, with others, attempts were made to take his photograph, a crowd gathering around, who, when told that the person sought was not in the house and that they must disperse, jeered; plaintiff, one of the reporters, laughing with the rest. Held, that these acts constituted conduct tending to a breach of the peace, within Consolidation Act (Laws 1882, p. 366, c. 410) § 1458, preserved by Greater New York Charter, providing that every person shall be deemed guilty of disorderly conduct "who shall use any threatening, abusive or insulting behavior with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned"; and an action for malicious prosecution would not lie against defendant for procuring plaintiff's arrest under such circumstances, as being without probable cause. Deering v. Gebhard, 108 N. Y. Supp. 715, 718, 57 Misc. Rep. 451.

BREACH OF TRUST

In Pom. Eq. Juris. § 1079, it is said: "It might be supposed that the term 'breach of trust' was confined to willful and fraudulent acts which have a quasi criminal character, even if they have not been made actual crimes by statute. The term has, however, a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent or done through negligence or arising through mere oversight or forgetfulness, is a breach of duty. Comingor v. Louisville Trust Co., 108 S. W. 950, 954, 128 Ky. 697, 129 Am. St. Rep. 322.

BREAK

Green-stick break, see Green-stick Break or Fracture.

BREAK AND DESTROY

Under an act which makes it an offense to maliciously break, destroy, or injure the door of any shop or building, the property of another, the words "break" or "destroy" mean to destroy the completeness of anything; and defendant who forced open a back door fastened by a bolt upon the door and a socket which held the bolt in the casing of the door frame, the socket coming out and the door opening without injury to it, was guilty of no offense under the statute. State v. McBeth, 31 Pac. 145, 49 Kan. 584.

BREAK GROUND

"Break ground," as applied to a contract of affreightment, means that the vessel shall enter on the voyage named and begin

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the carriage of goods shipped as a condition of the vessel's right to claim freight money, unless the shipper undertakes to reclaim the goods; the vessel remaining ready to enter on the voyage. The Norman Prince, 185 Fed. 169, 171 (quoting The Tornado, 2 Sup. Ct. 746, 108 U. S. 342, 27 L. Ed. 747).

BREAKAGE

"Breakage" covers damage to glass. Hecht v. Grand Trunk R. Co., 113 N. W. 68, 132 Wis. 605.

BREAKER

A "breaker," used with reference to the operation of a street car, means that part where the power is cut off, or a separation between the channel works. O'Donnell v. Interurban St. Ry. Co., 88 N. Y. Supp. 1016, 1017.

BREAKING

The breaking of plaintiff's close was complete so as to support trespass, when defendant, making an unlawful entry, stepped across the imaginary line which divided the lot on which plaintiff's house stood from the street. Moore v. Duke, 80 Atl. 194, 196, 84 Vt. 401.

BREAKING (In Criminal Law)

See Housebreaking; Jail Breaking.

The verb to "break," as used in an accusation of burglary, implies force. Parnell v. State, 110 S. W. 1036, 1037, 86 Ark. 241 (adopting a statement in Shotwell v. State, 43 Ark. 345).

As used in a statute defining burglary, the word "breaking" has a well-known and definite meaning at common law; and in order to constitute it the action of the person accused must have been such as would, without additional effort, have made an entry possible. Gaddie v. Commonwealth, 78 S. W. 162, 163, 117 Ky. 468, 111 Am. St. Rep. 259.

In a trial for burglary that the court in defining burglary gave the statutory definition was not error, where, in a charge applicable to defendant, it instructed that by the term "breaking" was meant that the entry must be made with actual force, and that, as the burglary was alleged to have taken place in the daytime, the jury must be satisfied beyond a reasonable doubt that the entry was made by force in the daytime, or they could not convict. Kinkead v. State, 135 S. W. 573, 574, 61 Tex. Cr. R. 651.

A person may be convicted of breaking with attempt to commit larceny, where it appears that he broke a transom window of a store in the nighttime with attempt to feloniously enter the store, but before he succeeded in making the entry was discovered and fled. Commonwealth v. Flaherty, 25 Pa. Super. Ct. 490, 491.

White's Ann. Pen. Code, art. 838, provides that burglary is committed by entering a house by force, threats, or fraud at night, or in like manner by entering a house during the day and remaining concealed there till night, with the intent of committing a felony or the crime of theft. Article 841 declares that the entry is not confined to the entrance of the whole body, but may consist of the entry of any part for the purpose of committing a felony, and article 842 defines the term "breaking" to mean an entry by actual force, such as the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. Held, that where defendant broke a glass of a store window in which certain shoes were displayed, but he was arrested before he abstracted any of the shoes therefrom, he was guilty of an attempt to commit burglary, regardless of the value of the property in the store. Mason v. State (Tex.) 100 S. W. 383.

One who attempts to secretly enter a store which is still open for business, by the regular door but with the intention to commit a felony therein, is guilty of "breaking and entering," within the purview of Rev. St. c. 155, § 11, providing that if any person, with intent to commit a felony, shall attempt to break and enter into a shop, he shall be punished by imprisonment in the state prison. State v. Newbegin, 25 Me. 500, 502.

The offense of "breaking" into a dwelling house is akin to the crime of burglary, having most of the elements of the latter except that it need not be in the nighttime. It is held without exception that any force applied to effect the entry is sufficient to constitute that part of the offense. Both burglary and housebreaking are offenses against the security of the habitation, and it is the possession that must be invaded to constitute a breach of the statute. Where a laborer occupying a house with the owner while on leave of absence obtained the key ostensibly to take away some of his clothing, but with intent to steal property therefrom, and did so enter and steal, he was guilty of "housebreaking" under Ky. St. 1903, § 1162, providing that, if any person shall break any dwelling house and take anything of value, though the owner or any person may not be there, he shall be punished, etc. Young v. Commonwealth, 104 S. W. 266, 267, 126 Ky. 474, 128 Am. St. Rep. 326, 15 Ann. Cas. 1022.

The prying off of a window shutter over a window of a store without opening or breaking the window, and the cutting of an inch-square hole through the door of the store too far from the latch to permit the use of an instrument to unfasten the door, did not constitute a "breaking and entering" sufficient to sustain a charge of burglary under Kirby's Dig. § 1605, providing that a burglary is committed by breaking or entering the house of another in the nighttime, with intent to commit a felony, and section 1604, declaring that the manner of breaking or en-

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tering is not material further than to show intent. This section does not change the rule of the common law that such breaking was any disrupting or separating of material substances in any inclosing part of a dwelling house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished. Anderson v. State, 104 S. W. 1096, 1097, 84 Ark. 54.

Where one opens from the outside a bolted window of a dwelling house and enters the house, except as to his legs, and is then prevented from further entering, there is a "breaking and entering," within the statute defining burglary. White v. State, 67 S. E. 705, 7 Ga. App. 596.

Entering open door or window

Entering a house by crawling through an open window is not a "breaking" so as to constitute house breaking. Smith v. Commonwealth (Ky.) 128 S. W. 68, 27 L. R. A. (N. S.) 1023 (quoting and adopting definition in Bishop, Statutory Crimes, § 312; 2 Bish. New Crim. Law, § 92; Rose v. Commonwealth [Ky.] 40 S. W. 245).

The term "breaking" required by Pen. Code, art. 839, to constitute burglary, refers to breaking in the daytime, so that the removal of money from a house in the daytime through a window found open is not burglary. Winkler v. State, 126 S. W. 1134, 1137, 58 Tex. Cr. R. 564.

Where one of the windows in the house which defendant entered in the nighttime had been left up from the bottom, leaving an aperture which was not large enough for a man to enter, and defendant increased the same by raising the window and thereby effecting an entrance, such act constituted a sufficient "breaking" to sustain a conviction of burglary. Claiborne v. State, 83 S. W. 352, 353, 113 Tenn. 261, 68 L. R. A. 859, 106 Am. St. Rep. 833 (citing State v. Conners, 64 N. W. 295, 95 Iowa, 485; Webb v. Commonwealth [Ky.] 35 S. W. 1038; Knotts v. State [Tex.] 32 S. W. 532; Miller v. State, 77 Ala. 41; Donohoo v. State, 36 Ala. 281; State v. Willis, 52 N. C. 190; State v. Powell, 58 Pac. 968, 61 Kan. 81; Rex v. Russell, 2 Eng. Cr. Cas. 377; King v. Hymans, 7 Car. & P. 441; King v. Hall, Russ. & R. 451; People v. Dupree, 56 N. W. 1046, 98 Mich. 26; Bass v. State 69 Tenn. [1 Lea] 444); People v. White, 117 N. W. 161, 162, 153 Mich. 617, 17 L. R. A. (N. S.) 1102, 15 Ann. Cas. 927.

Penal Law (Consol. Laws 1909, c. 40) § 400, defines the word "break" as breaking or violently detaching any part, internal or external, of a building, opening any outer door of a building, or any window, shutter, scuttle, or other thing closing an opening, or obtaining an entrance by or through any pipe, chimney, or other opening. Held, that the admission that accused in the nighttime without invitation, right, or lawful occasion entered the dwelling of another and therein committed an offense was sufficient to sustain a conviction of burglary in the first degree, notwithstanding he testified that he entered by a basement gate, ash hoist, and cellar door, all of which he found open. People ex rel. Hubert v. Kaiser, 135 N. Y. Supp. 274, 280, 150 App. Div. 541.

Where any force at all is necessary to effect an entrance into a building through any place of ingress, usual or unusual, whether open, partly open, or closed, such entrance is a "breaking," sufficient in law to constitute burglary, if the other elements of the offense are present. People v. White, 117 N. W. 161, 162, 153 Mich. 617, 17 L. R. A. (N. S.) 1102, 15 Ann. Cas. 927.

Under an indictment based upon Act Gen. Assem. March 20, 1905 (23 Del. Laws, c. 206), the "breaking" which must be proved does not necessarily mean the breaking of a lock or fastening, as there would be a breaking if the car, while not locked, was pushed open and entered; but where the door of the car is already open, and there is an entrance without interfering with the door, there is no breaking. State v. Davenport (Del.) 77 Atl. 967, 968.

Pen. Code 1895, art. 838, defines burglary as "entering a house by force, threats or fraud at night * * * with the intent * * * of committing a felony or the crime of theft." Article 841 declares that the entry is not confined to the entrance of the whole body, but may consist of the entry of any part for the purpose of committing a felony. Article 842 declares that the slightest force is sufficient to constitute breaking, such as the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. Held that, under article 842, if the glass in a door through which accused thrust his arm was already broken, he would not commit burglary by inserting his hand or arm, even for the purpose of committing theft. Jones v. State, 87 S. W. 1157, 48 Tex. Cr. R. 336.

Opening door or window

Under Code Civ. Proc. § 1159, subd. 1, making every person guilty of forcible entry who by "breaking open" doors, windows, or other parts of a house, enters upon or into any real property, the meaning of the provision is that opening of a closed door or window, involving the use of force, is to be regarded as "breaking open" the door or window or house, as this was the construction given to the term "break" as entering into the common-law definition of burglary. Winchester v. Becker, 88 Pac. 296, 297, 4 Cal. App. 382 (citing Abbott's Law Dict. and Webster's Dict., and Pen. Code, § 461, as originally enacted, and Act Feb. 27, 1864, Stat. 1863–64, p. 104, c. 114).

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Entering a house by moving the bolt of the door, or raising the latch, is a "breaking" within the definition of burglary. State v. Woods, 38 S. W. 722, 723, 137 Mo. 6 (citing State v. Tutt, 63 Mo. 595; State v. Moore, 22 S. W. 1086, 117 Mo. 395).

Where a door of a building is so nearly closed that one may not enter through the opening into the building without pushing the door further open, such pushing constitutes a breaking within the law of burglary, State v. Sorenson (Iowa) 138 N. W. 411, 414.

The opening of a door, though it may not be latched or fastened, and effecting an entrance therein, is a "breaking," within the law relating to burglary. Bloodworth v. State, 70 S. E. 892, 9 Ga. App. 161.

Unbuttoning the outside door of a chicken house and removing the slat fastening the inner door constitute a "breaking," within the meaning of the term as used in a statute defining burglary. State v. Helms, 78 S. W. 592, 594, 179 Mo. 280.

A "breaking," to constitute burglary, may consist in anything by which any obstruction to entering the building by the body is removed. So, if a person unlocks or unlatches a door and walks in, or if a door has no latch or lock on it and the door is pushed open and a person goes in, that is a sufficient breaking in the law. State v. Vierck, 120 N. W. 1098, 1101, 23 S. D. 166, 139 Am. St. Rep. 1040.

Under Pen. Code, §§ 498, 499, making one who with intent to commit a crime therein breaks and enters a building guilty of burglary, and defining the word "break" as opening for the purpose of entering by any means whatever any door of a building, or to any apartment therein, persons who opened an unlocked door to a store and who assaulted the clerks in the store and threatened them with violence and tied them, and who carried away merchandise, are guilty of burglary. Rosenteal v. American Bonding Co. of Baltimore, 128 N. Y. Supp. 553, 555, 143 App. Div. 362.

Where a door of a house which is fully closed or a window which is completely closed is pulled open with no greater degree of force than is necessary to accomplish the opening, it is a sufficient breaking within the statute as to burglary. Scott v. State, 50 S. E. 49, 122 Ga. 138.

Raising the latch of the door of a chicken house, and opening the door, thereby effecting an entrance, is a sufficient "breaking," if done with a felonious intent, and accompanied by the taking of chickens. Abrams v. Commonwealth (Ky.) 85 S. W. 173, 174.

On a trial for burglary, the court charged that under the evidence there was a breaking by some one of the four parties mentioned; that the word "breaking" had a technical meaning, that "unfastening" anything constituted a "breaking"; that, where anything was shut up, if opened by another person, that constituted a breaking; and so, "under the evidence in this case," etc. The court further charged that if one, who was with defendant at the time, had the charge of the premises, and a right to enter the corncrib and chicken coop, there was no burglary; and that, if defendant had good reason to believe that such one had charge of the property and could dispose of it as he pleased, defendant would not be guilty of burglary. Held, that the charge must have been understood by the jury to mean that proof of the opening of the doors, which was undisputed, was sufficient to constitute an actual breaking, and, so understood, the charge was not subject to criticism. People v. Evans, 114 N. W. 223, 224, 150 Mich. 443.

Under an act which provides that any person convicted of "breaking" and entering in the nighttime any warehouse or other building, in which any merchandise shall be kept, with intent to steal or commit any felony therein, shall be guilty of burglary in the second degree, the lifting of a latch of a closed door of a granary, and the pushing open of the door with the intent expressed in the statute, is a sufficient "breaking" to constitute burglary. State v. Groning, 5 Pac. 446, 447, 33 Kan. 18.

The term "breaking," as used in statutes providing that every person breaking into and entering in the nighttime the building or house of another, in which there shall be some human being, with intent to commit a felony, or any larceny therein, by forcibly bursting or breaking the wall or any outer door, etc., shall be guilty of burglary in the first degree, and providing that the same offense if committed in the daytime is burglary in the second degree, does not require that there be a greater degree of force in the "breaking" of an outer door than is ordinarily necessary to constitute a "breaking" in the crime of burglary; "the addition of the term 'forcible' only expressing what was implied by the term 'breaking' at common law. Pushing open a closed door constitutes an actual 'breaking.' To break a door it is not necessary to injure the door or its fastenings." An information, in a prosecution for burglary with intent to commit rape, that defendant in the daytime did break into a dwelling house "by forcibly pulling open a closed outer door" sufficiently charges the offense of burglary in the second degree. State v. Moon, 64 Pac. 609, 611, 62 Kan. 801 (citing and adopting Ducher v. State, 18 Ohio, 308, 316, 317; State v. Conners, 95 Iowa, 485, 64 N. W. 295).

A charge that to constitute burglary, where the indictment, as in the present case, does not specifically allege the offense was committed either in the day or night time, the evidence must show to the jury's satisfaction

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beyond a reasonable doubt that entry was effected by breaking—that is, by actual force applied to the building itself—the slightest force, however, applied to the building, being sufficient to constitute a breaking, such as lifting or unfastening the latch of a door shut and fastened by means of such lock, or by any other actual force applied to the building, was simply a definition of a "breaking," in view of a charge, immediately afterwards given, that, "bearing in mind the foregoing definition, if" the jury believe accused by force in the nighttime, and by breaking, did enter the house as charged in the indictment, etc., and was not on weight of evidence. Montgomery v. State, 116 S. W. 1160, 1162, 55 Tex. Cr. R. 502.

Opening screen or curtain

If a screen door is kept closed by means of hinges and springs in such manner that some force is necessary to open the door, an opening by using such force is a sufficient "breaking" to constitute burglary. State v. Henderson, 110 S. W. 1078, 1079, 212 Mo. 208, 17 L. R. A. (N. S.) 1100, 15 Ann. Cas. 930 (citing State v. Tutt, 63 Mo. loc. cit. 600; State v. Hecox, 83 Mo. loc. cit. 538; Dennis v. People, 27 Mich. 151).

Entering a room through a transom by tearing away a curtain is a sufficient breaking to justify a conviction of burglary. Hofland v. State, 85 S. W. 798, 47 Tex. Cr. R. 623.

One who entered a store by opening an unfastened screen door, so securely fitted that the use of some strength was required to open it, and who stole goods therein, is guilty of breaking into a store, within Ky. St. § 1164, punishing the felonious "breaking" into any store with intent to steal. Collins v. Commonwealth, 143 S. W. 35, 36, 146 Ky. 698, 38 L. R. A. (N. S.) 769.

BREAKING OF A LEG

An insurance certificate entitling the insured to a certain benefit in case of the "breaking of a leg," and defining the breaking of a leg as "the breaking of the shaft of the thigh bone between the hip and knee joints, or the breaking of the shafts of both bones between the knee and ankle joints," does not cover what is known to the medical profession as a Pott's fracture. Peterson v. Modern Brotherhood of America, 101 N. W. 289, 125 Iowa, 562, 67 L. R. A. 631.

BREAST OF THE COURT

Until the end of the term at which rendered, judgments are "in the breast of the court," and may be set aside or modified at the judge's discretion; but to set aside a final judgment based on a verdict, except for defects appearing on the face of the record, the verdict must also be set aside, and the verdict is not "within the breast of the court" in the sense that the judgment is. Georgia R. & Electric Co. v. Hamer, 58 S. E. 54, 1 Ga. App. 673 (citing Ayer v. James, 48 S. E. 154, 120 Ga. 379; Clark's Cove Guano Co. v. Steed, 17 S. E. 967, 92 Ga. 440; Regopoulas v. State, 42 S. E. 1014, 116 Ga. 596; Tietjen v. Merchants' Nat. Bank, 43 S. E. 730, 117 Ga. 502).

BREVET CAPTAIN

A "brevet captain" is one who—unless specially assigned command by the President—is not a captain, but merely has the title. Reed v. Schon, 83 Pac. 77, 79, 2 Cal. App. 55.

BREW

See Small Brew.

BRIBE

A "bribe" may be defined as any gift, advantage, or emolument offered, given, or promised to an elector to influence his conduct or vote. Tinkle v. Wallace, 79 N. E. 355, 356, 167 Ind. 382.

Rev. Codes N. D. 1905, § 9526, gives the word "bribe" a specific meaning, and whenever used in the Code it signifies anything of value or advantage which is asked, given, or accepted with the corrupt attempt to influence unlawfully, the person to whom it is given in any public or official capacity, and so an information charging that accused unlawfully and feloniously offered a bribe with intent to influence the action of a road overseer is sufficiently specific. State v. Johnson, 118 N. W. 230, 231, 17 N. D. 554.

"By the term 'bribe' * * * is meant any gift, emolument, money, or thing of value, or the promise of either, bestowed or promised for the purpose of inducing a peace officer in the performance of any duty, public or official, or as an inducement to favor the person offering the same. * * * The actual tender of the bribe is not necessary to perfect the offense of offering a bribe as contemplated by statute. Any expression of an ability to produce a bribe as a gift to the officer to induce him to release the person is all that is necessary to perfect the crime." Lee v. State, 85 S. W. 804, 805, 47 Tex. Cr. R. 620.

"A promise by a candidate to discharge the duties of the office for less than the legal salary or compensation is contrary to public policy as in the nature of a 'bribe,'" A promise by the successful candidate, in effect, that the duties of the office should not be performed and there would be no expense in connection with it, was a promise of a valuable consideration to a voter to induce him to vote for such candidate. Bush v. Head, 97 Pac. 512, 515, 154 Cal. 277.

Pen. Code, § 7, subd. 6, defines the word "bribe" as anything of value or advantage, etc., given with a corrupt intent to influence

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"unlawfully" the person to whom it is given in his action, vote, etc., in any public or official capacity. Section 165 punishes one giving a bribe to any member of any board of supervisors with intent to "corruptly" influence such member in his action on any matters, etc. Held, that the use of the word "unlawfully" as qualifying "to influence" in section 7, adds nothing to the meaning of section 165, and hence an indictment for bribery charging an intent to "corruptly" influence, etc., by giving money, etc., was sufficient, though the word "unlawfully" was not used. People v. Glass, 112 Pac. 281, 286, 158 Cal. 650.

A publication alleged that a piano had been sold to a certain miners' union, which required great financiering, and that the agent thought it a great thing to bribe a committee or officers so as to sell the piano, and that such was the case. Held, that the word "bribe" would be understood as charging that the committee had received a bribe, gift, or reward which had influenced its action. Barron v. Smith, 101 N. W. 1105, 1108, 19 S. D. 50.

The word "bribe," as used in Ky. St. § 1586 (Russell's St. § 3416), imposing a penalty therefor, is defined by subsection 1 to mean any reward, benefit, or advantage, present or future, to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit, or advantage; and thereunder it is as much an offense to accept a bribe not to vote, or to forfeit the right to vote, as it is to accept a bribe to vote. It is the act of receiving a bribe for his vote that the statute was primarily intended to punish, and not the act of voting that might follow the bribe-taking. Commonwealth v. Roberts, 140 S. W. 313, 314, 145 Ky. 290.

BRIBERY

"Bribery," within V. S. 5086, is the receiving or offering any undue reward, by or to any person whomsoever whose ordinary business or profession relates to the administration of public justice, in order to influence his behavior in office, to incline him to act contrary to his duty and the known rules of honesty and integrity. State v. Smith, 48 Atl. 647, 650, 72 Vt. 366.

At common law, "bribery" was the voluntary giving or receiving of anything of value in unlawful payment of an official act done or to be done. The acceptance by an officer of a gift after an official act is consummated without any prior corrupt understanding does not constitute bribery. People v. Coffey, 119 Pac. 901, 907, 161 Cal. 433, 39 L. R. A. (N. S.) 704.

Bribery in elections involves moral turpitude, and falls within the class of crimes deemed infamous, within Const. art. 4, § 4, declaring that no person who has been or shall hereafter be convicted of bribery, perjury, or other infamous crime, shall be eligible to the General Assembly, or to any office of profit or trust in the state. Christie v. People, 69 N. E. 33, 35, 206 Ill. 337.

"Bribery," technically speaking, is the giving of something of value to a public official to influence his official act. Pen. Code, § 384R, has extended it to jurors and witnesses and makes it a misdemeanor to give, or offer, or promise, to an agent, employé, or servant, any gift, or gratuity with intent to influence his action in relation to his employer's business. Proper understanding of the word "bribery" or "to bribe" includes the debauching and corrupting of any individual by inducing him through money or its equivalent to do something contrary to his duty, either as trustee, agent, or servant, and, popularly speaking, has long included the matters specified in the section of the Penal Code referred to. Kemble & Mills of Pittsburgh v. Kaighn, 115 N. Y. Supp. 809, 812, 813, 131 App. Div. 63.

A newspaper article averring that a member of the General Assembly had been induced by the hospitable attentions of a candidate for United States Senator to declare himself as a supporter of the candidate, and had announced that he would vote for him, though the public had previously been informed that he could not reconcile his conscience to vote for him, does not charge the member with bribery and is not libelous, in view of the evidence of the candidate's campaign for the office of Senator and the member's position towards the different candidates. Branch v. Publishers: George Knapp & Co., 121 S. W. 93, 98, 222 Mo. 580.

Attempt or offer

The offense of bribery embraces any attempt to bribe. Commonwealth v. Bailey (Ky.) 82 S. W. 299.

An "attempt to bribe" is the same as an "offer to bribe." Johnson v. State, 92 S. W. 257, 49 Tex. Cr. R. 250.

Under Rev. St. § 1781, the act of "agreeing" to receive a bribe is a substantive offense, and the act of "agreeing" to give a bribe another. Concert of action is therefore essential to a violation of the section. Chadwick v. United States, 141 Fed. 225, 236, 72 C. C. A. 343.

Under Pen. Code, § 7, subd. 6, defining a bribe to be anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully the person to whom it is given, in his action, vote, or opinion, in any public or official capacity, a promise to give a public officer anything which may have a future existence and value, with intent to unlawfully influence him in his official action, constitutes bribery. People v. Vincilione, 120 Pac. 438, 439, 17 Cal. App. 513.

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"Bribery" was an indictable offense at common law, and, although in the early days it was limited to judicial officers and those engaged in the administration of justice, it was later extended to all public offices. It was variously defined as taking or offering an undue reward or a reward to influence official action. 4 Blackstone's Com. 139; 3 Coke's Inst. 145; Hawkins' Pleas of Crown (Carwood's Ed.) pp. 414, 415; 2 Bishop's New Crim. Law, § 85, note; Barbour's Crim. Law [3d Ed.] 346; 2 Wharton's Crim. Law, § 1858; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; Curran v. Taylor, 18 S. W. 232, 92 Ky. 537; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707. Where an alderman wrote the commissioner of street cleaning that, if he would reinstate a certain employé, the writer would help the commissioner to obtain the money needed for a new plant in Brooklyn, there being then pending a bill to authorize issue of stock for a plant for the department of street cleaning, held to show a violation of Pen. Code, § 72, imposing a punishment for offering to receive, etc., a bribe. People ex rel. Dickinson v. Van De Carr, 84 N. Y. Supp. 461, 463, 87 App. Div. 386.

"Bribery" or the attempt to bribe was an offense at common law, and constituted the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done. The tendering by a person of his personal check, drawn on a bank and payable to an officer of the United States, to such officer, with intent thereby to affect his official action, does not constitute the crime of "bribery," under Rev. St. § 4451, since a check made and delivered for such illegal purpose is void, and not within any of the classes of instruments enumerated in the statute. United States v. Green, 136 Fed. 618, 651 (citing 1 Bishop, New Crim. Law, p. 288, § 468, subd. 3, and 2 Bishop, New Crim. Law, p. 51, § 85).

As felony

See Felony.

Nature of office or official act

The asking of money by a public officer to influence his action, which is not official, and which he has no authority at law to perform, is not "bribery." Hence a coroner for a borough in New York does not commit "bribery" by agreeing to receive money with the understanding that his official action will be influenced in the matter of the death of a person in New Jersey, unless the body has been brought into the borough. People v. Jackson, 95 N. Y. Supp. 286, 290, 47 Misc. Rep. 60.

Though, according to the old writers, the crime of "bribery" is said to be perpetrated "where any man in judicial place takes any fee or pension, robe or livery, gift, reward or brocage, from any person that hath to do before him in any way, for doing his office, or by color of his office but of the king only, unless it be meat or drink and that of small value," or "when a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in his office" (Blackstone's Com. vol. 4, p. 139), the crime may be committed at common law as to other than judicial officers, and therefore the definition in Blackstone is too narrow. See 2 Bishop's Crim. Law, § 85, note 1. And Blackstone in another place states that "bribery" was an offense in other officers punishable by fine and imprisonment, and that a statute of Henry IV included "other officers with the king" with judges as punishable for bribery. It is therefore apparent that it was an offense at common law to bribe or attempt to bribe other than judicial officers, and hence the offense could have been committed in respect to a legislative officer. State v. Sullivan, 84 S. W. 105, 108, 110 Mo. App. 75 (citing Commonwealth v. Flagg, 135 Mass. 545; Commonwealth v. Randolph, 23 Atl. 388, 146 Pa. 83, 28 Am. St. Rep. 782, State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; Wharton's Crim. Law, §§ 179, 1857, 1858).

It is not necessary, in order to constitute bribery, that the vote of a public official bribed should be in a measure valid and enforceable. State v. Lehman, 81 S. W. 1118, 1129, 182 Mo. 424, 66 L. R. A. 490, 103 Am. St. Rep. 670.

Act April 9, 1872 (Laws 1871–72, p. 671), amending Rev. St. 1845, c. 30, § 86, and making municipal officers punishable, was repealed by Cities and Villages Act (Hurd's Rev. St. 1909, c. 24, § 79) § 8, making it bribery for municipal officers to accept any gift, etc., to influence official conduct, and the latter section was superseded by Cr. Code, § 31 (Hurd's Rev. St. 1909, c. 38), under which such officers are now punishable. People v. McCann, 93 N. E. 100, 104, 247 Ill. 130, 20 Ann. Cas. 496.

White's Ann. Pen. Code, art. 44, states that "bribe," as used throughout the Code, means any gift, emolument, money, or thing of value, testimonial, privilege, appointment, or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing an officer or other persons such as named in the performance of any duty, public or official, or as an inducement to favor the person offering the same or some other person, and so, in order to bribe an officer, he must be in the discharge of a legal and official duty, and one could not be convicted for offering money to an officer who illegally held him under arrest. Moore v. State, 69 S. W. 521, 522, 44 Tex. Cr. R. 159.

Of voter

Since under Ky. St. § 1488, a voter cannot vote unless he presents to the election officers his certificate of registration, the buying of certificates to prevent voters from voting is the buying of persons not to vote, and is "bribery" under section 1596A, subsec.

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12, prohibiting bribery. Skain v. Milward, 127 S. W. 773, 778, 138 Ky. 200.

Purchase of a voter's certificate of registration to prevent him from voting at an election constitutes bribery under Ky. St. § 1586 (Russell's St. § 3416), declaring that any person guilty of receiving a bribe for his vote at an election or for services or influence in procuring a vote shall be fined, etc. Commonwealth v. Glass, 131 S. W. 494, 140 Ky. 589.

The word "bribery," as used in Ky. St. § 1586, imposing a penalty therefor, is defined by subsection 1 to mean any reward, benefit, or advantage, present or future, to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit, or advantage; and thereunder it is as much an offense to accept a bribe not to vote, or to forfeit the right to vote, as it is to accept a bribe to vote. It is the act of receiving a bribe for his vote that the statute was primarily intended to punish, and not the act of voting that might follow the bribe taking. Commonwealth v. Roberts, 140 S. W. 313, 314, 145 Ky. 290.

Of witness

To constitute the offense of bribing a witness to avoid a process, there must have been a process either issued or served. Harrison v. State (Tex.) 151 S. W. 552, 553.

BRICK

See Fire Brick.
As deadly weapon, see Deadly Weapon.

A city ordinance, prohibiting the erection of any building within fire limits, except buildings constructed of "brick" does not prohibit the construction of a concrete building, since "concrete" is a species of brick; and the ordinance is not in conflict with Rev. St. 1895, art. 523, authorizing cities to establish fire limits, and to prohibit the construction of buildings therein, except buildings of fireproof materials. Ex parte Morris, 120 S. W. 1007, 1008, 56 Tex. Cr. R. 533.

Certain magnesic brick, glazed, known in commerce as "fire brick," are not within the provisions in Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule B, par. 77, 28 Stat. 512, for "magnesic fire brick," but are dutiable as "brick * * * glazed," under paragraph 76 of said act. Fleming v. United States, 124 Fed. 1014, 1015.

BRICKWORK

See Rub Down Brickwork.

The term "brickwork," in a contract to complete the brickwork as prescribed in the specifications of a house, included a pressed brick fireplace mentioned in the specifications. Daly v. Kingston, 58 N. E. 1019, 1020, 177 Mass. 312.

BRIDGE

See County Bridges; Low Bridge; Necessary Bridge; Public Bridge; Railroad Bridge; Toll Bridge; Town Bridge; Village Bridge.
Approaches of bridge, see Approaches.
Control of bridge, see Control.

A "bridge" is defined to be "any structure which spans a body of water, or a valley, road, or the like, and affords passage or conveyance." Wilson v. Town of Barnstead, 65 Atl. 298, 299, 74 N. H. 78 (citing Cent. Dict.; 5 Cyc. p. 1052).

"The simple term 'bridge' means a viaduct in a road dedicated to common use, and the qualified term 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation." Diebold v. Kentucky Traction Co., 77 S. W. 674, 676, 117 Ky. 146, 63 L. R. A. 637, 111 Am. St. Rep. 230, 4 Ann. Cas. 445.

A "bridge" is an instrument of commerce in the same sense as a ferry. New York Cent. & H. R. R. Co. v. Board of Chosen Freeholders of Hudson County, 65 Atl. 860, 862, 74 N. J. Law, 367 (citing Covington & C. Bridge Co. v. Kentucky, 14 Sup. Ct. 1087, 154 U. S. 204, 38 L. Ed. 962).

An elevated roadway constructed in a street, partly on posts resting on mudsills and partly on piles, the posts and piles being surmounted by capping or stringers and the whole overlaid with planks, does not constitute a "bridge," which is properly defined as a structure erected over a river or other water course or over a chasm to make a passageway from one bank to the other, anything supported at the ends which serves to keep some other thing from resting upon the object spanned or which forms a platform or staging over which something passes or is conveyed. Knickerbocker Co. v. City of Seattle, 124 Pac. 920, 922, 69 Wash. 336.

A structure of masonry having perpendicular walls on either side, arising 12 to 15 feet from the ground, with five arches of 12 feet span, and at the top a roadway of dirt and gravel, about 41 feet in width, 479 feet in length, and having on either side a railing, the structure occupying a place between a bridge crossing a river and one crossing a canal, thereby making a continuous roadway, being built across low lands, covered with running water when the river overflows its banks, and at nearly, if not quite, all other times, with pools of greater or less depth and number, is a bridge. Schell v. Town of German Flats, 104 N. Y. Supp. 116, 118, 54 Misc. Rep. 445.

An appropriation of money for "bridges" does not import or suggest any costly improvement of an unusual and extraordinary character, such as the purchase of an entire addition embracing 14 city lots. City of

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Fargo v. Keeney, 92 N. W. 836, 840, 11 N. D. 484.

An objection that a county board should have subdivided a levy for bridges, under Hurd's Rev. St. 1908, c. 121, § 19, by showing how much of the money was to be used for building new bridges, how much for repairing bridges, and how much for the approaches, was without merit; the term "bridges" fairly including building new bridges, repairing old ones, etc. People ex rel. v. Chicago & N. W. R. Co., 94 N. E. 57, 249 Ill. 170.

Abutments, approaches, and piers as part of

A "bridge structure" consists of all the abutments, spans, and all other parts of the structure not movable. Middletown & Portland Bridge Co. v. Town of Middletown, 59 Atl. 34, 35, 77 Conn. 314.

The term "bridge" includes all the appurtenances necessary to its proper use, and embraces its abutments and approaches. Howington v. Madison County, 55 S. E. 941, 942, 126 Ga. 699.

The right of a railroad company to build a "bridge" across a stream includes the right to place necessary piers on its banks and in its bed. Braine v. Northern Cent. Ry. Co., 66 Atl. 985, 986, 218 Pa. 43.

Under the common law, and usually under the statutes in this country, a "bridge" includes abutments and approaches, which make it accessible and convenient for public travel. State v. Illinois Cent. R. Co., 92 N. E. 814, 853, 246 Ill. 188.

The term "bridge" includes, not only the structure spanning the chasm over which it is located, but also the approaches by which access to the bridge is obtained. Schell v. Town of German Flats, 104 N. Y. Supp. 116, 118, 54 Misc. Rep. 445.

The term "bridges," in Cobbey's Ann. St. 1903, § 8756, pertaining to the liability of counties and cities for the construction and repair of bridges, does not include approaches thereto. Central City v. Morquis, 106 N. W. 221, 222, 75 Neb. 233.

Under Const. art. 13, § 5, prohibiting a county from incurring any indebtedness for any single purpose in excess of $10,000, and Rev. Codes, § 1416, defining the word "bridges" to include approaches thereto, a contract by a county for the construction of a bridge without approaches is invalid when the cost of the bridge with approaches will exceed $10,000. Jenkins v. Newman, 101 Pac. 625, 626, 39 Mont. 77.

Within the meaning of that part of Comp. St. 1909, c. 78, § 88, defining the duties of county boards in relation to bridges, approaches are parts of bridges and grading, and riprapping may be essential parts thereof. Brown County v. Keya Paha County, 129 N. W. 250, 252, 88 Neb. 117, Ann. Cas. 1912B, 790.

A roadway intersected a river and a canal, and at each crossing was a bridge. The distance between the two bridges was 479 feet, and consisted of low lying land which in time of flood was overflowed. The two bridges were connected by a structure of masonry having perpendicular walls on either side rising 12 or 15 feet from the ground below with five arches of 12-foot span. At the top the roadway was of dirt and gravel, the surface of which was slightly above the coping of the walls on either side and practically on a level with the floors of the canal and river bridges. The width of the structure over all was 41 feet, and on each side was a railing about 3 feet from the outer edge leaving a space within the railing for travel of 35 feet. Held, that the structure was a "bridge" within the meaning of a statute conferring jurisdiction of bridges on the highway commissioner of the town. The term "bridge" includes not only the structure spanning the chasm over which it is located, but also the approaches by which access is obtained. Schell v. Town of German Flats, 104 N. Y. Supp. 116, 118, 54 Misc. Rep. 445.

Under the common law, and generally under the statutes in this country, a "bridge" includes the abutments and such approaches as will make it accessible and convenient to public travel. Ordinarily an "approach," as the term is used, is considered a part of a viaduct or bridge. The question what is a viaduct proper and what is an approach, where one begins and the other ends, and what is street or highway, as distinguished from an approach to a viaduct or bridge, are more questions of fact than law. City of Chicago v. Pittsburgh, Ft. W. & C. R. Co., 93 N. E. 307, 308, 247 Ill. 319; Id., 93 N. E. 309, 248 Ill. 100.

A city vacated an avenue between designated streets for the construction, by a corporation, of a union station, under an agreement that, should the city provide for the building of a "bridge" over the avenue between the designated streets, the corporation would pay into the city treasury a specified sum as part payment for the construction of the bridge. Held, that the city could, in building the bridge over the avenue, build the approaches on the designated streets; and the approaches need not be on the avenue, the words "bridge" and "approach" conveying different meanings, though for certain purposes the approaches may be considered a part of the bridge, as where one, under obligation to keep a bridge in repair, is liable on his failure to keep the approaches in repair. City of St. Louis v. Terminal R. Ass'n, 109 S. W. 641, 645, 211 Mo. 364.

The word, "bridge," as used in Act Cong. April 2, 1888, c. 53, 25 Stat. 74, authorizing the construction of railroad bridges across the Ohio river, comprehended not only the span or roadway, but also the abutments and piers on which it was supported, and hence

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the replacing of a wooden superstructure of a bridge, which had become unsafe from decay and long use, by a new superstructure of iron, did not constitute the erection of a new bridge. City of Buffalo v. Delaware, L. & W. R. Co., 110 N. Y. Supp. 488, 493, 126 App. Div. 125 (quoting and adopting definition given in syllabus to United States v. Cincinnati & M. V. R. Co., 134 Fed. 353, 67 C. C. A. 335); United States v. Cincinnati & M. V. R. Co., 134 Fed. 353, 357, 67 C. C. A. 335.

Laws 1893, p. 47, c. 59, § 1, provides that towns are liable for damages happening to any person, team, or carriage traveling on a bridge on any highway, by reason of any obstruction, defect, or want of repair of such bridge which renders it unsuitable for travel thereon. Held, that a person is "traveling upon a bridge" within such section when he is traveling over that part of the way which is above the abutments and other essential portions of the structure as well as when he is traveling over the part spanning the stream or depression, and, if he is injured by a defect or want of repair there existing, he is entitled to the benefit of the act. Wilson v. Town of Barnstead, 65 Atl. 298, 299, 74 N. H. 78.

As city purpose

See City Purpose.

Culvert distinguished

The words "bridge" and "culvert" as used in the statute giving an action for damages caused by reason of the insufficiency of "any bridge or culvert" are not synonymous. Cleveland v. Town of Washington, 79 Vt. 498, 65 Atl. 584, 585.

As highway

See Highway.

As part of street

See Street.

As place of work

See Place.

Pontoon bridge

Authority in a town to build a "bridge" did not warrant the building of what is known as a pontoon bridge. Clay City v. Roberts, 99 S. W. 651, 652, 124 Ky. 594.

As public road

See Public Road.

As railroad

See Railroad—Railway.

As real estate

See Real Property.

As street improvement

See Street Improvement.

BRIDLE ROAD

As road, see Road.

BRIDLE RODS

"Bridle rods" are rods used to hold together the rails of a movable railroad track. Burke v. St. Louis Southwestern Ry. Co., 97 S. W. 981, 120 Mo. App. 683.

BRIDLING THE HOOK

"Bridling a hook" means fitting a piece of iron over the mouth of the hook to keep it from spreading or straightening out under a strain. Louisville & E. Packet Co. v. Hazzard (Ky.) 107 S. W. 270, 271.

BRIEF

A "brief" is a written presentation of the matters of fact and of law which demand investigation. Ferguson v. Union Nat. Bank of Columbus, Ohio, 99 Pac. 641, 642, 23 Okl. 37; Stewart v. Territory, 102 Pac. 649, 650, 2 Okl. Cr. 63.

A "brief" is the vehicle of counsel to convey to the appellate court the essential facts of his client's case, a statement of the questions of law involved, the law he would have applied, and the application he desires made of it by the court. Bell v. Germain, 107 Pac. 630, 631, 12 Cal. App. 375.

A "brief" is a written presentation of the questions involved in a forensic controversy and of the matters of fact and of law which demand investigation. The primary object is to convey information to the court, and this cannot be done without clearly stating the manner in which the controverted points arise, the facts which constitute the groundwork of the legal dispute, and the governing propositions of law. Brunson v. Emerson, 124 Pac. 979, 34 Okl. 211.

As pleading

See Pleading.

BRIEF OF EVIDENCE

An alleged brief of evidence, spread over 54 typewritten pages, when it could easily be condensed into 10 pages, is not a brief of evidence, within Civ. Code 1895, § 5488; and where the materiality of the exceptions depends on the testimony they cannot be considered. Southern R. Co. v. Wafford, 67 S. E. 831, 7 Ga. App. 652.

Documentary evidence, set out in the pleadings or attached as an exhibit, should not be included in the brief of evidence otherwise than by reference. Slappey v. Charles, 68 S. E. 308, 7 Ga. App. 796.

"Brief of evidence," which contains 82 pages of copies of letters and orders for goods, and which shows that no effort was made to brief or abstract them, and containing the oral evidence and colloquies between counsel and rulings and remarks of the judge, is not such a "brief of evidence" as the law requires on appeal. Farmers' Alliance Ex-

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change v. Crown Cotton Mills, 16 S. E. 985, 91 Ga. 178.

Where there is no legal brief of evidence, alleged errors requiring a review of the evidence cannot be considered. General Accident, Fire & Life Assur. Corp. v. Turner, 67 S. E. 832, 7 Ga. App. 679.

There being no legal brief of evidence, as required by Civ. Code 1895, § 5488, the errors cannot be considered. Lanham v. Presley, 68 S. E. 448, 7 Ga. App. 839.

BRIEF STATEMENT

The phrase, "brief statement of the cause of action," within the meaning of the requirement embodied in Rev. St. 1895, art. 1235, that a citation to nonresidents and persons whose residence is unknown shall contain a "brief statement of the cause of action," means the substance of the cause of action as stated in the petition, but briefly stated, instead of fully and clearly stated, as in the petition. Humphrey v. Beaumont Irrigating Co., 93 S. W. 180, 182, 41 Tex. Civ. App. 308.

BRIEFLY

Const. art. 3, § 16, requiring the subject of an act to be briefly expressed in its title, does not warrant the courts in passing on the brevity of such expression, where the title is not misleading, and violates no principle of the organic law. State v. Bethea, 55 South. 550, 551, 61 Fla. 60.

BRIGADIER GENERAL

The title of an officer commanding a brigade is that of "Brigadier General," and when the field officers of a brigade elect a "Brigadier General" the brigade becomes his brigade within Const. art. 7, relating to militia officers, and he becomes its commander, and the commission which is thereafter issued to him by the Governor is plenary evidence of his right to hold his office, which is a public office, and the supplement of Act March 2, 1909, to the act concerning the militia (P. L. 1909, p. 13), which provides that when any commissioned officer shall reach the age of 64 years he shall be retired from active service, so far as it applies to the incumbents of offices created by the Constitution, and who were commissioned before the passage of the supplement, is in violation of the Constitution, providing that no commissioned officer shall be removed from office but by the sentence of a court-martial. Campbell v. Gilkyson, 75 Atl. 160, 161, 78 N. J. Law, 327.

BRIGHT'S DISEASE

A disease which, in its progress, tends to weaken and impair the mental faculties and physical action and to break down the nervous system, and which causes a degeneration and hardening of the arteries. Allen's Adm'rs v. Allen's Adm'rs, 64 Atl. 1110, 1113, 79 Vt. 173.

BRINE

The word "brine" means water that is highly impregnated with salt, consequently a solution which contains only from .0118 to .0402 per cent. of salt is not "brine." A. L. Causse Mfg. Co. v. United States, 143 Fed. 690.

Cherries immersed in a solution containing not more than .402 per cent. of salt are not fruits in "brine," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 559, 30 Stat. 198. Causse Mfg. Co. v. United States, 151 Fed. 4, 5, 80 C. C. A. 461.

BRING

See, also, Brought.

As import or introduce

The term "bring," as used in Rev. St. § 3082, which imposes a penalty on any person who shall fraudulently or knowingly import or bring into the United States any merchandise contrary to law, is not synonymous with "import," and comprehends the whole act of bringing into this country dutiable articles, and extends to cases within section 2802, which provides a forfeiture and penalty of treble the value of any dutiable articles found in the baggage of any person arriving within the United States, which were not mentioned to the collector at the time of making entry thereof. United States v. Chesbrough, 176 Fed. 778, 782.

An indictment for smuggling, charging that defendant did "bring into the country clandestinely" certain dutiable goods, was synonymous with the provision of Rev. St. § 2865, making it an offense to "clandestinely introduce" dutiable goods into the country with intent to avoid payment of duty. Rogers v. United States, 180 Fed. 54, 58, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264.

In reference to actions

The filing of the petition with the clerk of the court before limitations have run is the bringing of a suit within the Code, though summons be not issued until after that time. State ex rel. Brown v. Wilson, 115 S. W. 549, 573, 216 Mo. 215.

Const. art. 7, § 34, vests the probate court with original jurisdiction of the estates of persons of unsound mind, and section 35 provides that "appeals may be taken from judgments and orders of the probate court to the circuit court, under such regulations and restrictions as may be prescribed by law." Held, that the Constitution contemplated that an existing controversy should be an essential requisite to appellate jurisdiction, and that an appeal should be a continuation of the suit below and not the bringing of a new

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action, and hence an appeal from a judgment of confirmation of a settlement of the account of a guardian of an insane ward is not the bringing of an action within the meaning of Kirby's Dig. § 5075, authorizing an insane person at the time of the accrual of the cause of action to bring the action within three years after his disability is removed, but is subject to section 1348, restricting appeals in probate cases to 12 months after judgment. Nelson v. Cowling, 116 S. W. 890, 892, 89 Ark. 334.

Bringing seller and purchaser together

"Bringing the seller and purchaser together," to entitle a broker to his commissions, does not mean introduction, but, if his efforts result in bringing the minds of the two to an agreement resulting in the sale and purchase of the land, he has then brought them together. Lewis v. McDonald, 120 N. W. 207, 209, 83 Neb. 694.

BRING IN

Section 9 of Act March 3, 1903 (32 Stat. 1215), makes it unlawful for any person, transportation company, etc., to "bring" into the United States any alien afflicted with a loathsome or with a dangerous contagious disease, and provides that, if it shall appear that any alien so brought was afflicted with such a disease at the time of foreign embarkation, and that the existence of the disease might have been detected by competent examination, the person so bringing shall pay a fine, etc. Held, that the word "bring" is used in the sense of import, and the vessel owner cannot be subjected to the penalty for bringing into port an alien who has stolen his passage, and whose presence on the vessel was not discovered before her sailing. Cunard S. S. Co. v. Stranahan, 134 Fed. 318, 319.

Chinese Exclusion Act Sept. 3, 1888, c. 1015, § 9, 25 Stat. 478, provides that the master of any vessel who shall knowingly bring into the United States on such vessel and land, or permit to be landed, any Chinese laborer or Chinese person, in contravention of the act, shall be deemed guilty of a misdemeanor, etc. Held, that the words "bringing into the United States" mean "bringing with the intention to leave"; and hence an indictment charging the master of a vessel with bringing a Chinese laborer into the United States, failing to allege that his act was with the specific intent to leave such person in the United States contrary to law, was insufficient. United States v. Jamieson, 185 Fed. 165, 168.

The phrase "bringing to the United States," in Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, means literally transporting with intent to leave in the United States and for the sake of transport, not transporting with intent to carry back and merely as incident to employment on the instrument of transport. Taylor v. United States, 28 Sup. Ct. 53, 54, 207 U. S. 120, 52 L. Ed. 130.

Seamen who, upon arrival, leave the ship and enter into the general body of the population, are within Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217, making it the duty of the owners and officers of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers. Taylor v. United States, 152 Fed. 1, 5, 81 C. C. A. 197.

BRIOLETTES

Diamonds and other precious stones cut in drop shape and faceted are known in trade as "brioletts." Though in many instances they are drilled through, they are not beads within the meaning of the Tariff Act. United States v. American Gem & Pearl Co., 142 Fed. 283, 284.

BRISTLES BUNCHED OR PREPARED

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 411, 30 Stat. 190, relating to "bristles, sorted, bunched, or prepared," and in section 2, Free List, par. 509, 30 Stat. 196, relating to "bristles, crude, not sorted, bunched, or prepared," the distinction made is between absolute crudeness and advancement one or more steps in preparation for the arts; and bristles that have been tied in separate bundles, with their butt ends together, in preparation for brushmakers, are subject to duty under the former provision. J. C. Pushee & Sons v. United States, 155 Fed. 265, 266.

BROADSIDE EXCEPTIONS

Exceptions which are not specific are sometimes termed "broadside exceptions." Dressel v. North State Lumber Co., 119 Fed. 531, 532.

BROKER

See Floor Broker; Grain Broker; Insurance Broker; Merchandise Broker; Real Estate Broker; Stockbroker.
See, also, Middleman.

A "broker" is defined by Story as an agent employed to make bargains. Alt v. Doscher, 92 N. Y. Supp. 439, 441, 102 App. Div. 344.

"The 'broker' is he who is employed to negotiate a matter between two parties, etc."

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Luckett Land & Emigration Co. v. Brown, 43 South. 628, 629, 118 La. 943.

A "broker" is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, etc., for a compensation commonly called brokerage. Turner v. Crumpton & Crumpton, 130 N. W. 937, 939, 21 N. D. 294, Ann. Cas. 1913C, 1015; New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co., 154 Fed. 296, 302, 83 C. C. A. 1 (citing Mechem, Agency, § 13); Stevens v. Bailey & Howard, 42 South. 740, 741, 149 Ala. 256.

A "broker" is an agent employed to make bargains and contracts between other persons in matters of trade for a compensation commonly called "brokerage," and is a mere negotiator between other parties who does not act in his own name, and is not intrusted with the custody or possession when employed to buy or sell goods. Eau Claire Canning Co. v. Western Brokerage Co., 73 N. E. 430, 439, 213 Ill. 561.

"A 'broker' is one who acts as agent, middleman, or negotiator between other persons." State v. Mitchell, 51 South. 4, 7, 96 Miss. 259, 26 L. R. A. (N. S.) 1072, Ann. Cas. 1912B, 309 (quoting and adopting the definition in Baker v. State, 12 N. W. 16, 54 Wis. 376).

A "broker" is a special agent who derives his power and authority to bind his principal from instructions given him by the latter. W. O. Brackett & Co. v. Americus Grocery Co., 56 S. E. 762, 763, 127 Ga. 672 (citing Clark v. Cumming, 77 Ga. 64, 4 Am. St. Rep. 72).

A "broker" is an agent employed to effect bargains, and contracts as a middleman between other persons for a compensation called brokerage. He takes no possession, as broker, of the subject-matter of the negotiations. French v. City of Toledo, 90 N. E. 160, 161, 81 Ohio St. 160, 25 L. R. A. (N. S.) 748 (quoting and adopting the definition in Webster's International Dict.).

" 'Brokers' are persons whose business it is to bring buyer and seller together; they need have nothing to do with the negotiation of the bargain. A broker becomes entitled to his commissions whenever he procures for his principal a party with whom he is satisfied and who actually contracts for the purchase of the property at a price acceptable to the owner." Pierce v. Nichols, 110 S. W. 206, 208, 50 Tex. Civ. App. 443 (citing Keys v. Johnson, 68 Pa. 42).

A "broker" is one who negotiates contracts relative to property, and makes sales of the same when he has no custody of the property. "Broker" is an intermediate agent between buyer and seller, and as broker he is not entitled to the possession of the property which is the subject of sale or purchase, nor does he receive or share the price unless he is authorized to do so. An agent employed to sell machinery by procuring orders or purchasers therefor is a commercial broker when the contract of agency neither gives nor contemplates any possession or right of possession in the agent to the machinery to be sold. Southwestern Port Huron Co. v. Wilber, 88 Pac. 892, 893, 75 Kan. 175 (quoting 1 Words and Phrases, p. 882).

A dealer in stocks took verbal orders from an employer for the purchase and sale of stocks. After the deals were made it was his custom to give the employer unsigned tickets as evidence of the transaction. Held, that he was acting in the capacity of a "broker," and could not set off payments of profits to the employer against an action by the latter for sums advanced as margins. Picard v. Beers, 81 N. E. 246, 248, 195 Mass. 419.

A municipal ordinance making it unlawful for one to do business as a broker without first obtaining a license therefor, and defining a broker as one engaged for others in negotiating contracts relative to property, with the custody of which he has no concern, does not impose a license on a stockbroker, for, though stocks, bonds, and securities are technically only evidence of property, they are in the usual form of speech regarded as property and the broker having custody of them is not within the ordinance. Hately v. Kiser, 97 N. E. 651, 253 Ill. 288.

Agent distinguished

Parties ceased to be "brokers" and became "agents" the moment they bound themselves to solicit business for one principal in particular to the exclusion of all others. City of Lake Charles v. Equitable Life Assur. Soc. of United States, 38 South. 578, 579, 114 La. 836.

One who acts as a middleman between the insured and insurer, and who solicits insurance under no employment for any particular company, is a "broker" as distinguished from an "agent," who represents the insurance company, which well-understood distinction is recognized by Rev. Laws 1905, § 1620, defining a "broker" as one not an appointed agent of the insuring company and who acts for or aids another in any manner in effecting insurance. Fredman v. Consolidated Fire & Marine Ins. Co. of Albert Lea, 116 N. W. 221, 223, 104 Minn. 76, 124 Am. St. Rep. 608.

A "broker" is one engaged in making contracts for others relating to property not in his custody, he acting in a sense as agent for both parties, and a salaried agent not acting for a fee or commission is not a broker. Rodman v. Manning, 99 Pac. 657, 53 Or. 336, 20 L. R. A. (N. S.) 1158.

Factor or commission merchant distinguished

"A factor is generally defined to be an agent to sell goods or merchandise consigned

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or delivered to him by or for his principal for a compensation, commonly called factorage or commission," while a "broker," as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold. Goesling v. Gross, Kelly & Co., 113 Pac. 608, 15 N. M. 721 (quoting definition in 3 Words and Phrases, p. 2640, citing Slack v. Tucker, 23 Wall. 330, 23 L. Ed. 143).

A "broker" is one whose occupation it is to bring parties to a bargain or to bargain for them in a matter of trade or commerce, and differs from a factor in that ordinarily he does not have possession of the goods, and his contracts are always made in the name of his employer. Younker v. Western Union Telegraph Co., 125 N. W. 577, 581, 146 Iowa, 499.

"The law makes a very wide distinction between merchandise brokers and 'factors,' or, as they are most frequently called, 'commission merchants.' A factor or commission merchant is one who has the actual or technical possession of goods or wares of another for sale. Thus the property may be in his own warerooms, or he may have a warehouse receipt or bill of lading. The possession of the property is prima facie evidence of ownership. Being thus intrusted with possession of it by the owner for the purpose of its sale, a factor may sell it in his own name, without disclosing the name of his principal, and he may collect the proceeds and give the purchaser a complete acquittance. * * * Whether the selling agent has possession of the wares determines the characters of his agency." Where a buyer of cotton cloth ordered the mill operator to ship it to a certain place, which was done by billing it in his own name and forwarding the bills of lading to the buyer wth a draft for the purchase money attached, thus reserving possession of the property until the purchase price was paid, and the buyer wrote the merchant that it was a lot of goods owned by a mill which he was selling for it, the buyer was not a factor, not having had possession of the goods of which the merchant had knowledge from his letter so that payment to the buyer was not payment to the mill. Robinson, Norton & Co. v. Corsicana Cotton Factory, 99 S. W. 305, 306, 124 Ky. 435, 8 L. R. A. (N. S.) 474, 14 Ann. Cas. 802.

A "factor" is one who receives and sells the goods of another on commission, and, in order to be held as a factor, and not a mere "agent" or "broker," must be in actual or constructive possession of the property sold. A factor has no implied authority to sell or transfer his principal's property in payment of his own debts, nor has he any lien upon property the possession of which he acquired by wrongful methods or in bad faith. People's Bank of Pratt, Kan., v. Frick Co., 73 Pac. 949, 951, 13 Okl. 179.

A "commission merchant" is an intermediary who sells on commission accounting to the manufacturer for the purchase money, and such a person is liable to the government for the revenue tax as a dealer under the statute. The difference between a commission merchant and a broker is this: A commission merchant may buy and sell in his own name, and he has the goods in his possession, while a "broker" as such cannot ordinarily buy or sell in his own name and has no possession of the goods sold. The local agents of an express company in a prohibition state took orders from persons desiring beer and forwarded the same to breweries in another state. The breweries delivered the beer to the company for shipment to the agent, who sent the order charging the price to the company, and having no knowledge of the local customer. On its receipt the agent stored the beer in the company's warehouse until it was called for, and then delivered it to the customer, collecting the price and the express charges, and accounting to the company for the same. He sometimes also sent orders which had not been requested and delivered the beer to persons who thereafter applied for it. No receipts were taken from persons to whom beer was delivered, and their names did not appear on the company's books. When beer was not called for it was returned to the breweries and the company given credit therefor. The company received nothing except the usual charges for transportation. The company was not merely a carrier nor a commercial broker in the transaction, but was, in effect, a "commission merchant," and as such was subject to special tax under Rev. St. § 3244, as a dealer in malt liquors at each of the agencies where such business was carried on. Western Express Co. v. United States, 141 Fed. 28, 32, 72 C. C. A. 516 (citing in support of definition Slack v. Tucker & Co., 23 Wall. 321-330, 23 L. Ed. 143).

BROKERS' BOARD

Where a pledge agreement provided that the pledgee upon default might sell the pledged property, and if the sale was made at brokers' board, or public auction, the pledgees might themselves become the purchaser, the pledgees had no right to purchase the property themselves at a sale on the curb, made at a place in the street where street or curbstone brokers were accustomed to congregate and trade with each other on their own account or for others; this not constituting a "brokers' board." Manning v. Heldelbach, 138 N. Y. Supp. 750, 753, 153 App. Div. 790.

BROKERS' MEMORANDUM

As contract, see Contract.

BROKERS' SERVICES

A contract for plaintiff's services in the discovery and pointing out of public timber lands to defendant's timber inspector, who was to estimate the timber on such lands, and

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procure title thereto in defendant by exchanging forest reserve lands therefor, and pay plaintiff a certain sum per 1,000 feet of timber on the land, less the cost of reservation scrip necessary to acquire the lands, was not a contract for brokers' services in purchasing land within the Montana Code, requiring contracts for brokers' services to be in writing. Western Lumber Co. v. Willis, 160 Fed. 27, 32, 87 C. C. A. 183.

BROKERAGE

See Marriage Brokerage.

The compensation of a broker is commonly called "brokerage." Eau Claire Canning Co. v. Western Brokerage Co., 73 N. E. 430, 439, 213 Ill. 561.

BROKERAGE BUSINESS

A "brokerage business," as known to insurance, is business brought to agents by outsiders who share in the agent's commission. Weidenaar v. New York Life Ins. Co., 94 Pac. 1, 7, 36 Mont. 592.

BROKERAGE COMPANY

As trading corporation, see Trading Corporation.

BROKERAGE CONTRACT

A contract whereby defendant agreed to sell plaintiff or his assigns certain land for $150 per acre, plaintiff to plat the land and sell it, and to pay all proceeds to defendant until the latter had received $150 per acre, was a contract for the sale of land, not a mere brokerage contract, which defendant had a right to forfeit by reason of nonperformance. Whipple v. Lee, 89 Pac. 712, 714, 46 Wash. 266.

BROMO

BROMOFLUORESCIC ACID

"Bromofluorescic acid" is a color or dye having no long-continued commercial designation. With the trade it seems to have gone largely as "bromo." At one stage of chemical development from coal tar it is fluorescein, which is a color, and the completed product is obtained by adding bromine. It contains all the essential elements and determining characteristics of a color or dye, and is dutiable as a coal-tar color or dye under Tariff Act July 24, 1897, schedule A. United States v. Kuttroff, Pickhardt & Co., 147 Fed. 758, 759, 760.

BRONCHITIS

A warranty in an accident policy that insured had not had and was not suffering from bronchitis must be given a reasonable interpretation in arriving at the intention of the parties; and, though bronchitis as a medical term is defined as inflammation, acute or chronic, of the bronchial tubes, or any part of them, it must be used in its limited sense as meaning a chronic disease which will not yield readily to treatment, and which tends to impair the health and strength of insured, and does not include an acute attack from which he had fully recovered at the time the policy was accepted. French v. Fidelity & Casualty Co. of New York, 115 N. W. 869, 875, 135 Wis. 259, 17 L. R. A. (N. S.) 1011.

BROOKLYN BRIDGE

As public way, see Public Way.

BROTHEL

A "bawdyhouse" is a house kept for the purpose of prostitution; that is, for men and women to have unlawful, illicit sexual intercourse together therein. The statute uses the words "bawdyhouse or brothel, or house of assignation." A "bawdyhouse" is a house of ill fame. An "assignation house" is a house resorted to for purposes of prostitution, and is synonymous with "bawdyhouse" or "brothel." State v. Keithley, 127 S. W. 406, 408, 142 Mo. App. 417.

BROTHER

An applicant for fraternal insurance declared that his personal and family history were clearly and truthfully set forth in the questions and answers in the application. It contained the following questions: "Brothers?" "Age of living?" "Age at death?" "Year of death?" "Specific cause of death?" "Duration of last illness?" The applicant answered only the first question, his answer being in the negative. He had a brother who had died prior to the application and the cause of his death was diabetes, and the applicant knew such fact. *Held*, that the question "Brothers?" applied to brothers living or dead, and was also applicable to one brother as well as several brothers, and his answer was a fraudulent concealment, misleading the insurer. Keatley v. Grand Fraternity, 198 Fed. 272, 274.

Brother of the half blood

The word "brothers" includes brothers of the half blood. Watkins v. Blount, 94 S. W. 1116, 1117, 43 Tex. Civ. App. 460 (quoting and adopting the definition in 4 Encly. of Law, 990; 2 Redf. Wills, p. 30).

The half-brothers and half-sisters of an ancestor are included in the words "brothers and sisters of such ancestors" in Rev. St. § 4158, subd. 5, providing that, if an ancestor from whom an estate came is deceased, the estate shall under certain circumstances vest in the brothers and sisters of such ancestor. Stockton v. Frazier, 90 N. E. 168, 169, 81 Ohio St. 227, 26 L. R. A. (N. S.) 603.

Under Gen. St. 1902, § 296, providing that where a legatee being a brother of the testator shall die before him, the issue of the

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legatee shall take the estate bequeathed, the issue of a half-brother, designated as a beneficiary in a will, who predeceased the testatrix, are entitled to the legacy, the word "brother" in the statute including half-brother. Seery v. Fitzpatrick, 65 Atl. 964, 965, 79 Conn. 562, 9 Ann. Cas. 139.

Illegitimate

The words "child," "children," "brother," or "sister," in Burns' Ann. St. 1908, §§ 2992, 2993, 2996, relating to descent, mean legitimates only, so that on the death of an intestate leaving neither children nor other descendants, nor husband, father, or mother, but a brother of the full blood, and the descendants of two illegitimate half-brothers, the surviving brother took the entire estate. Truelove v. Truelove, 86 N. E. 1018, 1020, 88 N. E. 516, 172 Ind. 441, 27 L. R. A. (N. S.) 220, 139 Am. St. Rep. 404.

Nephews and nieces

The word "brothers," as used in a will, refers to a class existing at testator's death, and hence does not include nephews and nieces, the children of a deceased brother. In re Tallmadge's Estate, 113 N. Y. Supp. 621, 623, 60 Misc. Rep. 394.

BROTHER-IN-LAW

A "brother-in-law" is a relative within the meaning of a by-law of a fraternal benefit order permitting certificate to be taken out in favor of relatives. Hadley v. W. O. W. Lodge, 1 Tenn. Ch. App. 413, 430.

The husbands of two sisters are "brothers-in-law" within the meaning of the law providing for the recusation of judges. State ex rel. Ribbeck v. Foster, 36 South. 554, 556, 112 La. 533 (citing Webster's International and Stand. Dict.).

BROUGHT

See, also, Bring.

Under Rev. St. § 730, providing that the trial of all offenses committed upon the high seas shall be in the district where the offender is found or into which he is first brought, an offender is to be tried in the district where he is apprehended, unless he is taken into custody while at sea, in which case he is to be tried in the district into which he is first brought. But to be "brought" into a district, within the meaning of the statute, one must be first apprehended, and it is not enough that he merely "arrive" in the district. Thus, where an offense was committed on the high seas, and the offender was not taken into custody until he was found and apprehended in one of the districts of California, he must be tried in that district, although the vessel on which the offense was committed had previously touched at Hawaii, and a complaint was filed and a warrant of arrest—which was returned unexecuted because of the offender's departure from the district of Hawaii before its attempted service—was issued there. Kerr v. Shine, 136 Fed. 61, 63, 69 C. C. A. 69.

Act No. 49 of 1906, as amended by Act No. 198 of 1912, § 25, provides for primary election contests, declaring however, that no contest should be entertained, unless "brought" within two days after the official promulgation of the result of the election, declaring that, on the filing of the petition, the judge of the court, or, in his absence, the clerk shall issue an order directing the contestee to answer within five days. Held, that the contest was "brought," within such section, when the contest petition was duly presented to the court within the time specified, and that a failure to issue the order within the two days, requiring the contestee to answer, was not a fatal defect. Thornhill v. Wear, 59 South. 901, 902, 131 La. 458.

Action

"The act of 1875 provides that in a suit now pending or hereafter 'brought' in any state court, where the matter in dispute exceeds * * * $500 and * * * in which there shall be a controversy between citizens of different states, etc., either party may remove." Held, that there is no distinction between the words "commenced" and "brought." Rawle v. Phelps, 2 Flip. 473, 20 Fed. Cas. 320, 321.

The phrase "any suit commenced," as used in one statute, has precisely the same meaning as the phrase "any suit brought," in another statute. Kaeiser v. Illinois Cent. R. Co., 6 Fed. 1, 4.

While commonly speaking an action is said to be "brought" when the complaint is filed, the general rule in United States, except where otherwise provided by statute is, that the action is deemed in law to be "brought" so far as the defendant is concerned from the time the summons or other process is issued and delivered or put in course of delivery to the officer with a bona fide intent to have the same served. United States v. American Lumber Co., 80 Fed. 309, 315.

The bringing of a suit is the issuing of a summons or other process to bring the defendant into court, and where the assignee of a bankrupt was substituted as plaintiff in a suit it could not be said that the suit was "brought" by the assignee within the meaning of the United States statute limiting such an action to two years after the assignee's appointment. Chicago & N. W. R. Co. v. Jenkins, 103 Ill. 588, 595.

Proceedings for review

A petition for a writ of certiorari was "brought" the day it was filed in the clerk's office. Barrett v. Devine, 60 Ga. 632, 633.

A writ of error is not "brought" within the meaning of Rev. St. § 1008, until the writ is actually filed or lodged with the clerk

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of the court which rendered the judgment sought to be reviewed. Kentucky Coal, Timber, Oil & Land Co. v. Howes, 153 Fed. 163, 82 C. C. A. 337.

The word "brought," in the statute providing that no action of review shall be brought after the expiration of three years from judgment, means the procurement of the writ with a view to service upon the opposite party. "The word 'brought' means obtained or gotten, and signifies the same as 'sued out.' * * * By the procurement of a blank form from the clerk or an attorney, an action is not brought, because such form is not a writ, though by the procurement of such a form, suitably filled up and intended to be served, the writ or action may well be called commenced, sued out, or, in the language of the statute, 'brought.'" Society for Propagating the Gospel v. Whitcomb, 2 N. H. 227, 229.

BROUGHT IN

The expression "brought in," used in Code, § 389, providing that the court may determine any controversy between the parties before it, but, when a complete determination cannot be had without the presence of other parties, the court must order them "brought in," refers to one actually before the court either by service of process or appearance, and means more than one merely named as a party to an action. San Francisco Protestant Orphan Asylum v. Superior Court of Santa Clara County, 48 Pac. 379, 381, 116 Cal. 443.

BROUGHT ON THE DIFFICULTY

In a prosecution for assault with a pistol, a requested instruction that if defendant did nothing more than was necessary to protect himself against an assault by prosecutor, if he made an assault, defendant was not guilty "unless he brought on the difficulty" was properly refused for failure to require that defendant must have been "free from fault"; the phrases not being equivalent. Johnson v. State, 34 South. 209, 210, 136 Ala. 76.

BROW

A movable platform placed between cars and forming a bridge from one car to the other over which freight may be wheeled in trucks. Murphy v. New York, N. H. & H. R. Co., 72 N. E. 330, 331, 137 Mass. 18.

BRUNOING

In working a mine on the stope, "brunoing" means throwing the dirt down to a platform from whence it is taken away or disposed of. Abbott v. Marion Min. Co., 87 S. W. 110, 111, 112 Mo. App. 550.

BRUSH

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 410, 30 Stat. 190, the provision for "brushes" does not include so-called powder puffs, which are composed of flat circular pieces of woolen cloth with a fuzzy surface and are useful in applying toilet powder, and which, though resembling brushes in use, do not resemble them in construction. United States v. George Borgfeldt & Co., 153 Fed. 480, 481.

BRUSH DISCHARGE

A discharge of electricity received by one coming in close proximity to a highly charged wire, though there be no actual contact therewith. Sneed v. Marysville Gas & Electric Co., 87 Pac. 376, 377, 149 Cal. 704.

BUCKET SHOP

"A 'bucket shop' is an establishment nominally for the transaction of the stock exchange business or business of similar character, but really for the registration of bets or wagers, usually for small amounts, on the rise or fall in prices of stocks, grain, oil, etc.; there being no transfer or delivery of the stock or commodities nominally dealt in." Gatewood v. North Carolina, 27 Sup. Ct. 167, 168, 203 U. S. 531, 536, 51 L. Ed. 305 (quoting Cent. Dict.); State v. McGinnis, 51 S. E. 50, 51, 138 N. C. 724 (quoting and adopting Cent. Dict.); Western Union Telegraph Co. v. State ex rel. Hammond Elevator Co., 76 N. E. 100, 107, 165 Ind. 492, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.

A "bucket shop" uses the terms and outward forms of exchanges, but differs from "exchanges" in that there is no delivery or expectation of intention to deliver or receive securities or commodities delivered to be sold or purchased. Western Union Telegraph Co. v. State ex rel. Hammond Elevator Co., 76 N. E. 100, 107, 165 Ind. 492, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880 (citing Stand. Dict. and Cent. Dict.).

"Bucket shop" is a place where contracts for the purchase and sale of stocks or commodities are made which are entirely fictitious; the person conducting the business taking the opposite side of the market to that of the customer, and there being no intention to actually deliver the property so bought or sold. Joslyn v. Downing, Hopkins & Co., 150 Fed. 317, 318, 80 C. C. A. 205.

The business of a "bucket shop" is defined as "while purporting to be actual transactions, in fact merely wagers on the market price of some commodity at some specified time in the future," and, in the absence of a statutory provision, such business was held "a species of gambling as well defined and reprehensible as that of keeping a faro bank or a dice machine, and is therefore illegal

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and contrary to public policy." State v. McGinnis, 51 S. E. 50, 51, 138 N. C. 724 (quoting and adopting definition in Smith v. Western Union Telegraph Co., 2 S. W. 483, 84 Ky. 664).

As Rev. St. §§ 4772, 4773, making it an offense to carry on a "bucket shop," defined as a place wherein pretended sales and purchases in certain commodities are made, applies to all pretended trades therein, it is unnecessary that a definition be given therein of a pretended sale or purchase. State v. Miner, 135 S. W. 483, 487, 233 Mo. 312.

The gravamen of the offense of keeping a bucket shop, as defined in Lan. Rev. St. § 10,578, is in keeping a place wherein is conducted or permitted the pretended buying and selling of stock, etc., on margin or otherwise, without intention on the part of the customers to receive or deliver the stocks. Gill v. State, 30 Ohio Cir. Ct. R. 278, 279.

Where, in an action to recover money lost in dealings in stock, it appeared that defendant never owned any of the stock dealt in by plaintiff, or had any under his control; that he always made settlements with his customers on the difference in the market price of the article at the time of making and closing the deal; that it made no difference whether customers bought or sold, settlements were always made in the same way—the transaction was a well-recognized species of gambling, known as "bucket shop." Boyd Commission Co. v. Coates (Ky.) 69 S. W. 1090, 1092.

An agreement for the sale of stocks or other commodity is a gambling contract, where the parties do not intend an actual delivery, but agree that at the time fixed for delivery they shall settle by one of them paying the other the difference between the agreed price and the market price at the time of delivery. This is a mere bet or speculation and illegal not only under the statutes, but in most states independently even of any statute, and such brokerage establishments known as "bucket shops" are expressly denounced by statute law. Bailey & Graham v. Phillips, 159 Fed. 535, 537.

An alleged libel consisted of a magazine article entitled "Bucket Shop Sharks," and stated that the business of bucket shop keeping was followed by persons calling themselves "bankers and brokers" who fleeced their customers by pretended sales and purchases of stock; that H. was one of the members of plaintiff firm of "bankers and brokers"; that his picture was in the rogues' gallery; and that these were but specimens of the thieves who plied their trade as keepers of bucket shops while posing as "bankers and brokers." The complaint denied that H. was ever a member of their firm, or that they were brokers, or had ever done business as "bankers or brokers" or as brokers, or advertised themselves as such. The answer alleged that H. became "associated with the plaintiffs in their business" without stating in what capacity, and that plaintiffs held themselves out as "bankers"; their principal business being the promotion of corporate enterprises and marketing the capital stock of mining enterprises, which stocks plaintiffs and H. knew were practically worthless. Held, that a justification must be as broad as the alleged libel and justify the exact words of the libel, and the facts alleged in the answer did not amount to a justification of the libel alleged, which was keeping a "bucket shop"; that term meaning a place where wagers are made on the fluctuations of the market value of commodities. Bergstrom v. Ridgeway Co., 123 N. Y. Supp. 29, 32, 138 App. Div. 178.

Exchange distinguished

According to the common understanding, the "'bucket shop' uses the terms and outward forms of the exchanges, but differs from the 'exchanges' in that there is no delivery, and no expectation or intention to deliver, or receive securities or commodities said to be sold or purchased." The probability that an intelligent and experienced business man who enters upon a course of speculative dealings with a "bucket shop" does so with the understanding that the purchases or sales are to be merely colorable is so strong as to amount to a presumption of fact, which is not overcome by his testimony to the contrary given in his own interest, nor by a recital in confirmation slips given on receipt of the orders that actual delivery was in all cases understood, which in itself indicated that it was inserted for some ulterior purpose. In re A. B. Baxter & Co., 152 Fed. 137, 140, 81 C. C. A. 355, 11 Ann. Cas. 437 (quoting and adopting definition in Stand. Dict.).

BUCKEYE AUTOMATIC COUPLER

The "Buckeye automatic coupler" is operated by a rod running across the end of the car at right angles to the track. On the end of the rod a crank is attached. A brakeman standing outside of the track may pull the crank, and thereby move the rod, which in turn draws a chain attached to an iron pin, which is raised by the use of the crank, and when so raised the only remaining duty is to bend the knuckles on a plane with the earth's surface. If the coupler is in order, all this may be done in a moment, and the stationary car is thus made ready to grasp an approaching car. Murphy v. Baltimore & O. S. W. R. Co., Ky., 71 S. W. 886, 887, 114 Ky. 696.

BUCKING UP

"Bucking up" consists in holding a rivet on the inside of a tank while a man on the outside strikes it. A "bucking-up bench" is a bench used by one "bucking up" to stand

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on. Petroleum Iron Works Co. v. Wantland, 114 Pac. 717, 720, 28 Okl. 481.

BUCKLES

Not dutiable as articles commonly known as jewelry, see Articles Within Tariff Act.

BUDDY

Name applied to a miner's helper. "Evidently used for brother or partner." Big Hill Coal Co. v. Abney's Adm'r, 101 S. W. 394, 395, 125 Ky. 355.

BUFFALO

As cattle, see Cattle.

BUFFET

Permission in a lease to use the premises as a "buffet" may be sufficient to authorize the selling of intoxicating liquors on the premises, and whether or not the parties so intended may be shown by parol evidence. Pine Beach Inv. Corp. v. Columbia Amusement Co., 56 S. E. 822, 823, 106 Va. 810.

BUGGERY

"Sodomy" is derived from Sodom, where the crime was prevalent, and is carnal copulation by human beings against nature with penetration, but penetration of the mouth is not sufficient, and consent does not affect its criminality, but makes the consenting party an accomplice; and buggery is the same offense between a man and a beast. Commonwealth v. Poindexter, 118 S. W. 943, 944, 133 Ky. 720.

BUGGY

As mechanical contrivance, see Mechanical Contrivance.

As necessaries, see Necessaries (For Infants).

As tool, see Tools—Tools of Trade.

A contrivance, consisting of a tongue with two wheels at its rear end, connected by an axle, and used to raise beams from the ground and hold them suspended under the axle, is a "buggy." Pluckham v. American Bridge Co., 93 N. Y. Supp. 748, 749, 104 App. Div. 404.

BUGGY THE WHEELS

In the manufacture of car wheels, the wheels when cast were carried by running pulleys suspended from an overhead rail to an annealing pit, where they were covered for cooling purposes, the work of molding the wheels requiring the services of 40 or 50 men, amongst whom were two whose duty it was to "buggy the wheels" after they were raised by derricks from the molds. "This process of buggying was employed by an employé in this way: He caught a wheel after it had been taken from the mold and placed it in the proper position with an apparatus like ice tongs which had a shaft four or five feet long with a short crossbar at the end for a handle and pulled it along behind him under the overhanging rail from which it was suspended to its place of destination. The work of raising the hot wheel from the mold and taking it to the annealing pit required rapid action to prevent spoiling it from hasty or improper cooling. Portas v. Griffin Wheel Co., 160 Fed. 648, 649, 87 C. C. A. 544.

BUGGY TRACE

As deadly weapon, see Deadly Weapon.

BUILD

See Building Contractor; Person Who Builds; Rebuild.

"One of the definitions of 'build' found in the Century dictionary is 'to form by uniting materials into a regular structure.'" In re Rutland Realty Co., 157 Fed. 296, 297.

Const. art. 10, § 6, provides that the General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose, "except for educational purposes, to build and repair roads, buildings and bridges, etc." Act Feb. 20, 1908 (25 St. at Large, p. 1431), providing for free bridges across certain rivers between counties named, the purchase thereof by a township, and the issue of bonds, if approved by the electors for the purposes of such purchase, conferred authority to "build" or purchase and to maintain such bridge, etc. Held, that the purpose of the Constitution was to leave the Legislature free to authorize counties and townships to establish and maintain public roads, buildings, and bridges, and that the word "build" might be employed in the sense of obtain, secure, or acquire, as well as in the ordinary meaning, and that hence the purchase of standing bridges was not in violation of the Constitution (citing 1 Words and Phrases). Verner v. Muller, 72 S. E. 393, 89 S. C. 545.

As repair

To "build" is to construct and raise anew, and not simply to amend or repair something previously constructed. Attorney General ex rel. Gibson v. Board of Sup'rs of Montcalm County, 104 N. W. 792, 794, 141 Mich. 590 (quoting and adopting definition in State v. White, 18 Atl. 179, 1038, 16 R. I. 591).

BUILDER

A "builder" is one whose occupation is to build or erect buildings and structures, and he is not in the same class as an architect, who makes plans and specifications for others. People ex rel. v. Lower, 96 N. E. 346, 347, 251 Ill. 527, 36 L. R. A. 1203.

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A "builder," in both its literary and legal signification means, one whose occupation it is to build, who controls and directs the work of construction, and as used in Laws Wash. 1899–90, p. 128, entitled "an act for the protection of builders," it is synonymous with the word "contractor." State v. Clark, 86 Pac. 1067, 43 Wash. 664.

BUILDER'S LIEN

The term "builder's lien," in a contract providing that the contractor shall have a builder's lien, has reference to the lien described in the Constitution and the statutes, and extends, not only to the house or building erected, but also to the lot or lots of land necessarily connected therewith. June & Co. v. Doke, 80 S. W. 402, 406, 35 Tex. Civ. App. 240.

Sand. & H. Dig. § 6251, giving a lien to every mechanic, "builder," artisan, workman, or laborer, or other person who shall do or perform any work or labor, does not apply to a contractor who furnishes a place for labor and appliances necessary for the building of a railroad, but personally does no labor or work. Little Rock, etc., R. Co. v. Spencer, 47 S. W. 196, 197, 65 Ark. 183, 42 L. R. A. 334.

BUILDING

See Building (In Criminal Law); Building (In Insurance); Building (In Lien Laws); Commencement of Building; During Occupancy of Building; Exposing Buildings; Fireproof Building; From Building; Needful Buildings; New Building; One Building; Outbuilding; Planing Mill Building; Principal Buildings; Public Building.

Any building, see Any.

Any other building, see Any Other.

Control of building, see Control.

Frame building, see Frame.

Improvement of building, see Improvement.

Other buildings, see Other.

Theater building, see Theater.

Whether or not a covenant that "not more than one building shall be erected upon a single lot" is violated by the erection of a structure whose exterior walls, foundation, and roof constitute it one building, but whose interior arrangement and entrances show that it is to constitute two residences, is not so clear that a court of equity will aid in its enforcement. Fortesque v. Carroll, 75 Atl. 923, 76 N. J. Eq. 583, Ann. Cas. 1912A, 79.

Laws 1897, p. 467, c. 415, § 18, provides that one employing another to furnish labor in the erection, repairing, etc., of a house, building, or structure, shall not furnish or erect for performance of such labor unsafe scaffolding, ladders, or other mechanical contrivances, and section 19 requires all scaffolding to be constructed so as to bear four times the maximum weight to be placed thereon. Plaintiff, while repairing a car 47 feet long, 8½ feet wide, and 16 feet high, jacked up about 6 feet above the floor of the shops, and around which was erected a staging of "painter's horses," like ladders with rungs about 12 inches apart, and planks placed on them about 8 feet above the floor, was injured by breaking of a plank. Held, that "house," in common speech, embraced every structure designed for human habitation, but in a legal sense was even more comprehensive, and "building" included every form of artificial house, as well as many other structures, and "structure," in its broadest sense, included any artifical production composed of parts joined together in a definite manner, and, in view ofthe meaning of the terms, and of the language of the statute, the word "structure" used therein did not include merely structures similar to those mentioned, and included the car on which he worked when injured. Caddy v. Interborough Rapid Transit Co., 88 N. E. 747, 195 N. Y. 415, 30 L. R. A. (N. S.) 30.

"All permanent structures intended to shelter human beings or domestic animals, or to receive, retain, or confine the goods in which a person deals, or to house the tools or machinery he uses, or the persons he employs in his business, are commonly called 'buildings.'" An ordinance providing that no person shall use any "engine in any building" in a fire precinct without the written consent of the city engineer includes a structure erected for an engine and consisting of a roof made of boards and roofing paper and supported by rows of posts and fire walls composed of boards and piles of wood. City of Concord v. Morgan, 64 Atl. 725, 726, 74 N. H. 32.

Where a plant for the manufacture of caustic soda and other by-products of salt by electricity was erected on leased land, and the lease provided that if it was terminated before November 15, 1909, the buildings could not be removed, not only the building materials that went into the construction of the buildings, but also such fixtures and attachments as were built into and constituted a part of the plant which could be utilized for no other purpose, were a part of the "buildings," and, were not removable either under the contract or as trade fixtures. Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn, 111 N. Y. Supp. 576, 585, 60 Misc. Rep. 209.

A lease of the top loft of a building provided that if the premises leased should be injured by fire, but not rendered untenantable, they should be speedily repaired at the lessor's expense; but, if the damage should be so extensive as to render the premises untenantable, the rent should be proportionately paid to the time of such damage, and should thereafter cease till they should be put in good repair; but, in case of such destruction of the "building" as to make it necessary to

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rebuild it, the rent should be paid up to the time of the destruction. Held, that the word "building," having its ordinary meaning, and referring to the whole building, and not merely to the leased premises, there was, in case of the destruction of the loft only, an express agreement that the rent should cease only till such premises were put in good repair, so that the provision of Real Property Law (Consol. Laws, c. 50) § 227, for surrender without liability for subsequent rent, in the absence of express agreement to the contrary, in case of the leased premises being made untenantable, is inapplicable. Friedlander v. Citron, 125 N. Y. Supp. 510, 512, 140 App. Div. 489.

Basement

In computing the value of a wooden building upon a concrete basement, to determine whether it has been damaged to the extent of 30 per cent. of its value within the contemplation of the ordinance only the value of the wooden superstructure is to be considered; the basement not being a part of the "building" for such purpose. Davison v. City of Walla Walla, 100 Pac. 981, 982, 52 Wash. 453, 21 L. R. A. (N. S.) 454, 132 Am. St. Rep 983.

Box car or railroad car

The act known as Senate File 150, Laws 1905, c. 184, examined, and held, that the enumeration of buildings contained within section 1 of the act, which includes "railroad car," comes fairly within, and is not broader than, the title, which mentions buildings of all character. Hardin v. State, 138 N. W. 146, 147, 92 Neb. 298.

A box car is not a "building," which implies a permanent structure, and not a part of the rolling stock of a railroad company which may be moved at will along the line of the railroad. St. Louis, I. M. & S. R. Co. v. Berry, 110 S. W. 1049, 1051, 86 Ark. 309.

Bulkhead

A "bulkhead," which is a necessary feature of water front property, was not prohibited by an ordinance enacting that no "'building' of any kind or description whatsoever than said piers and bridges shall hereafter be erected on said streets." Timpson v. Mayor, 39 N. Y. Supp. 248, 250, 5 App. Div. 424.

Fence

Whether in any particular case the word "buildings" includes fences depends upon the circumstances of the case. John T. Moore Planting Co. v. Morgan's Louisiana & T. R. & S. S. Co., 53 South. 22, 25, 126 La. 840.

A fence maintained across land acquired by a city for street purposes is a "building," within Greater New York Charter, Laws 1901, p. 406, c. 466, § 971, authorizing the board of estimate and apportionment to permit any building wholly or partially within the limits of an unopened street to remain unremoved for such time or times as they shall think proper. Parsons Bros. v. City of New York, 77 N. E. 1192, 184 N. Y. 604.

A deed to plaintiff's grantor, whereby it was provided that no dwelling or other house or "building," or any part thereof or projection therefrom, should be built on defendant's remaining land within a certain distance of the premises conveyed, restricted defendant only in reference to the house to be built on the land, and did not prevent the building of a wall by him, even though it should extend from the house into the restricted space. "The word 'building' cannot be held to include every species of erection on land, such as fences, gates, or other like structure. Taken in its broadest sense, it can mean only an erection intended only for use and occupation as a habitation or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed." Clark v. Lee, 70 N. E. 47, 185 Mass. 223 (citing Truesdell v. Gay, 79 Mass. [13 Gray] 311; Nowell v. Boston Academy of Notre Dame, 130 Mass. 209).

There is no well-established legal definition of the word "building," which absolutely and under all circumstances either includes or excludes a "fence," and the question greatly depends on the connection in which the word "building" is used, and the evident purpose of the statute and contract in which it is found. Under St. 1897, p. 459, § 25, subd. 8, providing that the county supervisor shall have power under such limitations as may be provided by law to provide such public buildings as may be necessary, and that none shall be constructed until plans and specifications shall have been made therefore and adopted by the board, and that all such "buildings" must be erected by contract let to the lowest responsible bidder, after notice by publication in a newspaper, the board cannot let a contract to build a fence around the courthouse without such notice and compliance with other provisions of the statute. Swasey v. Shasta County, 74 Pac. 1031, 1032, 141 Cal. 392.

Flat

See Flat.

As improvement of land

See Improvement.

As interest in land

See Interest (In Property).

Jail cells

Cells in a jail, consisting of steel tanks or cages erected in but independent of the jail building, are not within Pol. Code, § 4041, subd. 8 (St. 1907, p. 368, c. 282), requiring a county board to award contracts for public "buildings" to the lowest bidder based on plans and specifications previously adopted, but are "furnishings," as to which there is

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no such requirement. Sarver v. Los Angeles County, 103 Pac. 917, 918, 156 Cal. 187.

As land

See Land.

Loft of barn

Under an accident policy providing for double indemnity for injuries caused by the "burning of a building," recovery may be had for death resulting from injuries received in the burning of the contents of the loft of a barn. Wilkinson v. Ætna Life Ins. Co., 88 N. E. 550, 553, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269.

Overhanging windows, eaves, and other projections

Where defendants covenanted that no building should be erected on a lot adjoining the property sold nearer than three feet from the party line, the term "building" was not limited to the main body of the structure erected on such adjoining lot, but included overhanging bay windows and eaves. Supplee v. Cohen, 83 Atl. 373, 374, 80 N. J. Eq. 83.

The term "building," as used in a restriction in a deed that no "building" shall be placed at a less distance than 20 feet from the easterly line of a street, included a piazza about eight feet wide encircled by a railing and having a roof supported by posts attached to the house and extending along the entire front within the restricted limits. Reardon v. Murphy, 40 N. E. 854, 163 Mass. 501.

Portable structure

A portable schoolhouse of a city, movable from place to place as the exigencies require, is not a "building" within Laws 1898, c. 123, art. 4, § 828, providing for the filing of a map which in case of opening streets shall show the course of the proposed street and the lots and buildings thereon which shall be "taken or destroyed," especially where the schoolhouse was placed within the limits of a proposed street after the filing of the map, and was simply to be moved by the school authorities, and they could not claim compensation for moving the house, they having notice of the proposed street in consequence of the filing of the map. Whiteley v. City of Baltimore, 77 Atl. 882, 883, 113 Md. 541.

A lunch wagon moved from without to within the fire limits, placed on a city lot, and there connected with gas, telephone, and electric light wires for business purposes, is a "building or structure," as used in an ordinance prohibiting the erection of any frame building within certain fire limits, and prohibiting the removal of any wooden building from without to within the fire limits. Town of Montclair v. Amend, 68 Atl. 1067, 1068.

As personal property

See Personal Property.

As premises

See Premises.

As private residence

See Private Residence.

Real estate

As real property, see Real Property.

The term "buildings" includes the real estate on which they are situated, unless the general meaning of the terms is modified by the language of the context. A devise of all the rents of a building carries the property itself; there being nothing in the statutes to prevent the operation of such rule. Gidley v. Lovenberg, 79 S. W. 831, 832, 835, 35 Tex. Civ. App. 203 (citing Cassino v. Ursuline Academy, 64 Tex. 675).

Repairing or remodeling distinguished

The words "repairing" and "remodeling" are not synonymous or included within the meaning of the word "building," within an ordinance prohibiting the erection of a wooden building within the fire limits. City of Mayville v. Rosing, 123 N. W. 393, 395, 19 N. D. 98, 26 L. R. A. (N. S.) 120.

As residence

See Residence.

Room

An accident policy, insuring against accidents "caused by the burning of a building" while the insured is therein, insures against accidents caused by fire in a building; and hence a death caused by the burning of the contents of a room in a building was "caused by the burning of a building," within the terms of such policy, and it is immaterial whether more or less of the building itself was actually consumed. Houlihan v. Preferred Acc. Ins. Co., 111 N. Y. Supp. 1048, 1049, 127 App. Div. 630.

Stable

In a restriction in a deed that no building shall be erected upon the granted premises to cost less than a certain sum, and that but one building, a private stable excepted, shall be erected, the word "building" includes a stable. Peck v. Hartshorn, 75 N. E. 133, 134, 189 Mass. 110.

Steps

Stone steps, designed and fitted to provide the only entrance from a street to a building, so as to make the building accessible, are a part of the "building," though the steps are not in actual contact with the building; and where they have been maintained within the limits of a street for over 40 years they may not be removed by the public authorities. Smith v. Adams, 92 N. E. 760, 761, 206 Mass. 513.

As structure

See Structure.

As superstructure

See Superstructure.

Wall

A wall cannot be held to come within the term "building." Clark v. Lee, 70 N. E.

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47, 185 Mass. 223 (citing Truesdell v. Gay, 79 Mass. [13 Gray] 311).

BUILDING (In Criminal Law)

Box car

Pen. Code, § 542, defines arson as the burning of a building; and section 543 defines a building as "any house, edifice, structure, vessel or other erection, capable of affording shelter for human beings, or appurtenant thereto, or connected with an erection so adapted." Section 720 makes it an offense to burn stacks of hay, grain, fences, etc. Held, that an ordinary box car, in use as a freight car, is a building, within section 542. State v. Lintner, 104 N. W. 205, 19 S. D. 447.

One who breaks and enters a freight car resting on timbers on railroad ground after the removal of the trucks, and occupied by section hands as a lodging place, and who commits larceny therein, violates Code, § 4791, punishing the burglary of any office, shop, store, warehouse, railroad car, or any building in which goods are kept, though the structure is not a railroad car as alleged, but is a building within the statute. State v. Anderson, 135 N. W. 405, 406, 154 Iowa, 701.

Cellar, or basement, and garret

The word "building" includes the cellar or basement as completely as it does the garret. State v. Brower, 104 N. W. 284, 285, 127 Iowa, 687 (citing Mitchell v. Commonwealth, 11 S. W. 209, 88 Ky. 349).

Dugout or cave

A dugout or cave 13 feet long, 10 feet wide, and 7 feet deep, mostly below the surface, covered with a roof, and entered through a door fastened to the structure, and used for the preservation of vegetables and the like, is a building within Crimes Act, § 107 (Gen. St. 1901, § 2100), punishing every person who shall injure maliciously the door or window of any dwelling or building being the property of another. State v. Sanders, 106 Pac. 1029, 1030, 81 Kan. 836.

Hotel

A hotel is a "building" within Cr. Code, § 36, defining burglary as the breaking or entering of a dwelling house or other building. "In Orrell v. People, 94 Ill. 456, 34 Am. Rep. 241, it was held that a stable is the equivalent of a building. In Gillock v. People, 49 N. E. 712, 171 Ill. 307, it was held that a chicken house was a building within the meaning of such statute. * * * A building has been defined to be a fabric or edifice constructed for use or convenience." It must be permanent and designed for the habitation of men or animals or the shelter of property. Bruen v. People, 69 N. E. 24, 26, 206 Ill. 417.

Portable structure

A small chicken coop which may be moved about from place to place is not a building within Rev. St. § 6835, declaring it burglary to maliciously and forcibly break and enter any dwelling house, kitchen, smoke house, etc., or any other building. Bailey v. State, 26 Ohio Cir. Ct. R. 375, 376.

Residence distinguished

An indictment charging larceny from the "residence" of M. under Comp. Laws 1897, § 11551, prohibiting larceny from any "building" on fire, was not objectionable on the ground that the term "residence" was not synonymous with "building." People v. Klammer, 100 N. W. 600, 137 Mich. 399.

Wharf

A house or "building" within the meaning of Pen. Code 1895, §§ 178, 179, defining larceny from the house, is a structure having a roof and lateral inclosure of some sort in which persons live or work, animals are confined, or property is stored or contained. A wharf or landing place where vessels are brought to discharge or take on cargoes, and where freight is placed awaiting removal, covered by a roof but otherwise wholly unclosed, it is not a house or "building" within the statute. A "building" is defined as an edifice for any use; that which is built as a dwelling house, barn, etc. McCabe v. State, 58 S. E. 277, 1 Ga. App. 719.

BUILDING (In Insurance)

The words "building" and "premises" are sometimes used interchangeably in prohibitive clauses of insurance policies. These words were so used in the clause of a policy prohibiting the keeping of explosives. Kenefick v. Norwich Union Fire Ins. Society, 103 S. W. 957, 959, 205 Mo. 294.

Barn

Under an accident policy providing for double indemnity for injuries caused by the burning of a "building," recovery may be had for death resulting from injuries received in the burning of the contents of the loft of a barn. Wilkinson v. Ætna Life Ins. Co., 88 N. E. 550, 558, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269.

Wall

Rev. St. § 3691, providing that the foundation walls shall not be considered as part of a building in settling losses, does not prohibit the insurance of the foundation walls, but does provide that they shall not be considered a part of the building or structure in settling the loss; and where the building is also insured the cellar and foundation walls must be insured for a specific sum, and described separately. German-American Ins. Co. v. McBee, 97 N. E. 378, 379, 85 Ohio St. 161.

BUILDING (In Lien Laws)

Where the claimant of a mechanic's lien agreed to do work upon three structures, which stood on one lot and were connected on the street line by a framework attached

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to each, and there was a door placed therein for the use of occupants of both structures, and in each there were cellar windows opening upon the passway, the certificate of lien claiming a lien on a certain "building" and upon the lot was a sufficient description notwithstanding the adaptation of the structures to separate use. Cronan v. Corbett, 62 Atl. 662, 663, 78 Conn. 475.

Sidewalk

A mechanic laying a sidewalk in the street in front of real estate of his employer is not entitled to a lien thereon, under Mills' Ann. St. § 2867, giving a lien for "building, repairs, and improvements" on real estate. Fleming v. Prudential Ins. Co., 73 Pac. 752, 753, 19 Colo. App. 126.

BUILDING AND LOAN ASSOCIATION

As engaged in mercantile pursuit, see Mercantile.

Insolvency, see Insolvency—Insolvent.

See, also, Premium.

"Building and loan associations," as used in the statute regulating such associations (Rev. St. 1892, §§ 2205–2213), are corporations, societies, organizations, or associations doing a saving and loan investment business on the building society plan, to wit, loaning their funds to members only, whether issuing certificates of stock which mature at a fixed time or not. Skinner v. Southern Home Bldg. & Loan Ass'n, 35 South. 67, 68, 46 Fla. 547.

Building and loan associations are a peculiar kind of corporation usually composed of aggregations of people dealing exclusively among themselves in accumulating a savings fund for investment in homes, more in the nature of limited co-operative home building copartnerships than commercial bodies. Commonwealth v. Home & Savings Fund Co. Bldg. Ass'n, 106 S. W. 221, 222, 127 Ky. 537, 32 Ky. Law Rep. 435.

A "building and loan association" is "a private corporation, designed for the accumulation by the members of their money by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest and a premium as a preference in securing loans over other members and continuing their fixed periodical installments in addition, all of which payments together with the nonborrower's payments, including fines for failure to pay such fixed installments, forfeitures for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the installment, payments, and profits aggregate the face value of all the shares in the association, when the assets, after payment of expenses and losses, are prorated among all members, which in legal effect cancels the borrower's debt and gives the nonborrower the amount of his stock." A foreign corporation issuing contracts which provide for small monthly payments by contract holders, which produce the home maturity fund from which loans are made to these contributors for the purpose of building homes, making improvements and discharging incumbrances on real estate, is a building, loan, and saving association, within the meaning of Laws 1890, p. 62, c. 4, § 22, which declares that the name "building and loan association" shall include all corporations doing a saving and loan or investment business on the building society plan, whether neutral or otherwise, and whether issuing certificates of stock which mature at a time fixed in advance or not, though the persons with whom it contracts and to whom loans are made are not members of the corporation; the statute imposing no penalty for noncompliance therewith, and Laws 1903, p. 219, c. 116, § 5, permitting building and loan associations to loan to nonmembers. State ex rel. Atkinson v. Co-Operative Homebuilders, 91 Pac. 953, 47 Wash. 235 (quoting and adopting definition in Thompson, Bldg. Ass'ns, p. 2).

The general purpose of "building associations" is the accumulation of funds to be loaned to their members and to be repaid in small periodical payments. They are authorized by statute to borrow money for temporary use when applications for loans exceed the accumulations in the treasury and when a series of stock has matured. The issuing by them of full-paid stock to serve the same purpose as borrowing is an enlargement of their scope of operations not inconsistent with their original design if properly restricted. Folk v. State Capital Savings & Loan Ass'n, 63 Atl. 1013, 1019, 214 Pa. 529.

Laws 1895, c. 114, entitled "An act to provide for the examination and supervision of building and loan associations," in section 2 provided that "building and loan associations," as used in the statute, should include all corporations, societies, organizations, or associations doing business under a building and loan charter, or engaging in a building and loan business. Laws 1897, c. 126, amended section 2, so that the name "building and loan association" should include all corporations, etc., doing business under a building and loan charter, or engaged in a building and loan business, "but which need not necessarily be mutual." Held, that the amendment introduced into the original act a new subject of legislation, rendering the amendatory act invalid, as violative of Const. art. 2, § 17, declaring that no law shall embrace more than one subject, which must be embraced in the title. State v. Folk, 135 S. W. 776, 777, 124 Tenn. 119.

A corporation which made loans and required payment of an entrance fee after a certain number of payments, a person being able to obtain a loan to be secured by mort-

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gage, held a "building and loan association," within Acts 1907, c. 79, § 78, subd. V—c (Code Supp. 1909, c. 54, § 78, subd. V—c), requiring such associations to procure a certificate authorizing doing of business in the state. Standard Home Co. v. Reed, 74 S. E. 877, 70 W. Va. 636.

Building society plan

By the use of the term "building society plan" in section 4 of Laws 1893, c. 4158, relating to foreign building and loan associations, providing "that the name 'building and loan associations,' as used in this act, shall include all corporations, organizations, or associations doing a saving and loan investment business on the building society plan, viz., loaning its funds to its members only, whether issuing certificates of stock which mature at a fixed time or not," the Legislature must have had reference to some definite plan and not to whatever scheme under a like name might be devised in the various states or foreign country, and hence it is not improper to assume the legislators, in the use of such term, must have had in mind the auction plan with which they were familiar. Skinner v. Southern Home Bldg. & Loan Ass'n, 35 South. 67, 69, 46 Fla. 547.

As membership corporation

See Membership Corporation.

As trading corporation

See Trading Corporation.

BUILDING CONTRACTOR

See Builder.

One who carries on his trade of bricklaying by contracting with builders and other contractors to lay a part, or all, of the brick required in their work of construction, either at a stated sum per thousand, or at a fixed price for the part of the job undertaken, but who does not contract with the owner, or even furnish the brick laid, is not a "building contractor," within Act Congress July 1, 1902, § 46, imposing an annual license tax of $25 upon "building and other contractors." Wilson v. District of Columbia, 26 App. D. C. 110, 113.

BUILDING FOR RELIGIOUS WORSHIP

The residence of a person or clergyman is not exempt from taxation as a "building for religious worship" under Public Laws, cap. 533, No. 141876; because it contains one room set apart for a chapel for religious worship. St. Joseph's Church v. Assessor of Taxes, 12 R. I. 19–20, 34 Am. Rep. 597.

BUILDING FOR TRADE OR MANUFACTURE

A farm building, commonly called a tobacco shed, used by a farmer to dry, cure, and fit for market tobacco grown on the farm, is not a "building for trade or manufacture," within St. 1898, § 1263, providing that no public highway shall be laid out through any building other than a building used for purposes of trade or manufacture, etc. Sharpe v. Hasey, 114 N. W. 1118, 134 Wis. 618.

BUILDING INSPECTOR

As officer, see Officer.

BUILDING INTENDED FOR OCCUPATION

The term "building intended for the occupation of human beings," in Wilson's Rev. & Ann. St. 1903, §§ 863, 864, providing that the lessor of a "building intended for the occupation of human beings" must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, etc., does not include a building occupied for the purpose of business or trade; and a lessor, renting the second story of a store building in a block for printing and publishing a newspaper therein, is not bound to put the building in a condition fit for such occupation, in the absence of an agreement to that effect. Tucker v. Bennett, 81 Pac. 423, 425, 15 Okl. 187.

BUILDING LINE

A building line, see A.

The term "building line" is not of doubtful or obscure meaning but is a well-understood term when used upon town or city plats. The reservation is an easement for the benefit of the public and especially of the property abutting on that street in the subdivision. The space between the building and the street belongs absolutely to the owner of the lot subject to this easement, and the owners of this and the other lots in the subdivision are guaranteed whatever benefit may result from an unobstructed view across the entire reservation. Eckhart v. Irons, 20 N. E. 687, 689, 690, 128 Ill. 568; Simpson v. Nikkelsen, 63 N. E. 1036, 1037, 196 Ill. 575.

The St. Louis city charter, which authorizes the assembly to establish a "building line" along boulevards, does not prevent the assembly from establishing different building lines along the same boulevard; the word "line," as used in the charter, meaning a mark of division or demarkation, an outline or contour, a limit or boundary, and not a straight line. City of St. Louis v. Handlan, 145 S. W. 421, 422, 423, 242 Mo. 88.

BUILDING LOT

Authority given in a will to sell certain "building lots" does not include the right to sell a lot on which a building then stood. Cheney's Ex'r v. Stafford, 56 Atl. 88, 89, 76 Vt. 16.

BUILDING MATERIAL

The words "building material," as used in an ordinance providing that any person may use the streets in the construction of any new building or in the removal, repair,

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or alteration of any building to pile "building material" thereon, should be liberally construed to cover materials for the construction of any kind of improvement of the premises. Christman v. Meierhoffer, 92 S. W. 141, 144, 116 Mo. App. 46.

BUILDING OR MONUMENTAL STONE

Japanese garden lanterns of granite, completely manufactured articles, imported in separated pieces merely for convenience of shipment, are not "building or monumental stone" within the Tariff Act. United States v. A. A. Vantine & Co., 166 Fed. 751, 752, 92 C. C. A. 431.

"Building stone" is one which enters structurally into the composition of a building, not something added as pure ornament to a structure complete without it. So-called "Mexican Onyx" not being a chalcedony or onyx proper, as defined in mineralogy, but being a carbonate of lime, containing a small proportion of carbonate of magnesia and ferrous oxides, and having the other characteristics of marble in respect of texture, hardness, and capacity for being worked and polished, is not building stone other than "marble," within the provision of paragraph 467, Tariff Ind. (new), Schedule N, Tariff Act March 3, 1883. Batterson v. Magone, 48 Fed. 289–291.

BUILDING, PREMISES, OR LAND

Liquor Tax Law (Laws 1896, p. 66, c. 112) § 24, subd. 1, prohibiting liquor traffic within one-half mile of any "building, premises, or land" occupied as a state hospital, must be liberally construed, and the quoted clause is not confined to the grounds upon which the buildings stand but includes contiguous premises belonging to a state hospital and used by it for garden purposes. In re Brady, 106 N. Y. Supp. 921.

BUILDING RESTRICTIONS

See Restriction.
As incumbrance, see Incumbrance.
As private property, see Private Property.

BUILDINGS USED FOR PUBLIC CHARITY

Buildings and grounds used by a sisterhood solely as a public hospital, the members receiving no compensation, and their earnings and lives being devoted to charity, are exempt from taxation under the constitutional provision exempting buildings and grounds and materials used exclusively for public charity, though pay patients are received; the proceeds being used to maintain the institution. Hot Springs School Dist. v. Sisters of Mercy of Female Academy of Little Rock, Ark., 106 S. W. 954, 955, 84 Ark. 497.

Vacant lots owned by the Young Women's Christian Association, purchased with money provided and to be used for acquiring a site, and erecting thereon a building suitable for the purposes of the organization, are not within the meaning of Rev. St. § 2732, which provides that all buildings belonging to, and lands actually occupied by, charitable institutions, shall be exempt from taxation. Young Women's Christian Ass'n v. Spencer, 29 Ohio Cir. Ct. R. 249, 250.

BUILDING USED FOR SCHOOL PURPOSES

A building used as a private military boarding school is not deprived of its exemption from taxation, under Const. art. 10, § 6, and Rev. St. 1899, § 9119, as a building used exclusively for school purposes, by the fact that the proprietor with his family resides in the building, he having no avocation but conducting the school, in which the family participates. State ex rel. Spillers v. Johnston, 113 S. W. 1083, 1086, 214 Mo. 656, 21 L. R. A. (N. S.) 171.

BUILT

See Foreign Built.

Anything which is "built" is formed "by uniting materials into a regular structure," and that which is "rebuilt" is constructed "after having been demolished." United States v. Blair, 190 Fed. 372, 374.

Pub. Laws 1911, c. 702, § 2, provides that every theater "hereafter erected" shall be built to comply with the regulations of such section, etc. Held, that the word "erected," as so used, was synonymous with "built," and hence the act was not restricted to subsequent erection of a new building, but applied as well to the alteration of a stable into a theater, consisting of a demolition of a large part of the stable, and using only such parts of the walls, etc., as were suitable for the new construction. Greenough v. Allen Theater & Realty Co., 80 Atl. 260, 264, 33 R. I. 120.

BUILT UP

See Closely Built Up.

BULK

See In Bulk; Stored in Bulk.
See, also, Laden.

"Bulk" is said to be that which is neither counted, weighed, nor measured. Riggs v. State, 121 N. W. 588, 589, 590, 84 Neb. 335 (quoting 1 Words and Phrases, p. 903).

Bulk of my property

The phrase "bulk of my property," when used in a will, is vague, uncertain, and indefinite. It may vary from a little over half to nearly the whole estate and is not susceptible of being rendered certain by any proceedings within the power of a court. Smullin v. Wharton, 103 N. W. 288, 295, 73 Neb. 667.

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BULKHEAD

As building, see Building.

BULL SET

A "bull set" is a steel implement five or six inches long; one end of it suitably shaped and tempered for breaking stone, the other end left with the steel unhardened and to be hammered upon. Golden v. Ellis, 71 Atl. 649, 650, 104 Me. 177.

BULLETS

"Bullets" is a technical term for steel wire plugs inserted in the points of umbrella sticks. Evans v. Newark Rivet Works, 121 Fed. 133, 134.

BUMMER

"Bum" is a contraction in common use for "bummer," signifying a worthless fellow without any visible means of support. State v. Gartrell, 71 S. W. 1045, 1051, 171 Mo. 489.

BUMPER

The extensions of the floors of street cars at either end which constitute the platforms are not "bumpers" in the sense in which that term is applied to freight and passenger cars operated in trains on steam railroad lines. Durkee v. Hudson Valley R. Co., 86 N. E. 537, 538, 193 N. Y. 555.

A petition in an action for personal injuries to a sawmill employé by the breaking of a piston rod, which threw a piece of the piston head against plaintiff, alleged negligence in keeping a worn-out and unsafe bracket pin, piston, and threads, and in failing to remedy such defects, and in undertaking to use the "short side" of the saw in the sawing of logs over 20 feet long, and in negligently striking with great force the "bumper," which defendant knew or should have known would tear up the machinery. The "bumper" is a wooden block, securely placed within four or six inches of the cylinder head of the engine to prevent the piston from flying out and doing damage, in case the piston rod should break. Held, that an instruction, submitting negligence in the construction or maintenance of the bumper, was reversible error; such negligence not being alleged. Thompson Bros. Lumber Co. v. Bryant (Tex.) 144 S. W. 290, 292.

BUNCHED

"Bunched," in its ordinary sense, signifies collection, cluster, or tuft, particularly of things of the same kind growing or fastened together. Arrangements of hog bristles carefully put up with the roots all placed together at one end were subject to duty under Tariff Act July 24, 1907, c. 11, § 1, Schedule N, par. 411, 30 Stat. 190, relating to bunched bristles. J. C. Pushee & Sons v. United States, 155 Fed. 265, 266.

BUNCO MEN

Two or more confederates, who, by gaining the confidence of a stranger on the ground of alleged professed acquaintance with him or his friends, lure him to a place where he is afterwards fleeced at some game, or robbed of his money, or otherwise victimized, are "bunco men," and "confidence men." People v. Simmons, 109 N. Y. Supp. 190, 193, 125 App. Div. 234.

BUNCO OR BUNKO STEERING

Burns' Ann. St. 1901, § 2178, provides that whoever lures, entices, or persuades another to any place, upon any pretense, and then by duress or fraud compels such person to win or lose, or advance or loan money, or execute or give his note or other obligation, either for money or anything of value, or to part with anything of value upon any game or wager, or by means of any trick, device, or artifice, is guilty of "bunco steering." Cruthers v. State, 67 N. E. 930–932, 161 Ind. 139.

An information which charges that defendant, by means of the fraudulent manner in which he threw playing cards, induced prosecutor to part with a specified sum of money on his ability to correctly describe one of the cards so thrown does not charge the offense of "bunko steering," as defined by Burns' Ann. St. 1901, § 2178, as by fraud inducing another to part with anything of value on any game, as it fails to charge that a wager was laid by the prosecutor or that he participated in the game. Clark v. State, 77 N. E. 52, 166 Ind. 288.

Accused, conspiring with other persons, induced the prosecuting witness to advance money to be used in betting on a wrestling match, and the same was lost, the wrestling match being fraudulent. Held that while accused was properly convicted of grand larceny under an indictment charging him with grand larceny, he might have been convicted under the same indictment of "bunko steering," defined by Burns' Ann. St. 1908, § 2471, as enticing, persuading, or compelling another to lose, advance or loan money or anything of value, as the state may elect under which statute it will proceed. Fleming v. State, 91 N. E. 1085, 1086, 174 Ind. 264.

BUNDLE

"Bundle," as used in the testimony of a witness that he and others had picked up a man who had a "bundle," was used in the slang of the period to indicate a man who was intoxicated. Hartje v. Moxley, 85 N. E. 216–218, 235 Ill. 164.

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Package synonymous

Generally the words "package" and "bundle," two words about as synonymous as can be, apply if they do not directly convey the exclusive idea of union or gathering together of several things attached or put up together; to put goods in a box or clothing in a trunk or bundle suggest the meaning of pack, and its derivative "package" is including several things. Henderson v. Ortte, 38 South. 440, 441, 114 La. 523.

BUNGALO OR RANCH BUILDING

A "bungalo or ranch building," all on one floor, has never been properly termed a flat or the building a flat house. In this country flats or flat houses have usually been built of many stories one on each other, of which buildings there has been one or more suites of rooms fitted up for housekeeping purposes, and the bungalo is not within the term "flat," as used in a deed restricting the grantee from erecting on the premises any building which shall be used or occupied as a flat. Lignot v. Jaekle, 65 Atl. 221–223, 72 N. J. Eq. 233.

BURDEN

See Excessively Burdened.

The "burden," as used in an instruction that the burden is upon the plaintiff to show by a preponderance of the testimony his right to recover, could mean nothing less than the burden of proof. Goodwin v. Mortsen (Tex.) 128 S. W. 1182, 1184.

BURDEN OF PROOF

See Additional Burden.

"By 'onus probandi' is meant the obligation imposed upon a party who alleges the existence of a fact or thing necessary in the prosecution or defense of an action to establish it by proof." State v. Pressler, 92 Pac. 806, 808, 16 Wyo. 214, 15 Ann. Cas. 93.

The phrase "burden of proof," like the phrase "ordinary care," is a relative term, and must be considered, not only in the light of the conflict of evidence, but also with reference to the subject-matter to which the burden of proof relates. Liberty v. Haines, 68 Atl. 738, 741, 103 Me. 182.

The "burden of proof" is on the party who substantially asserts the affirmative of the issue, whether he is nominally plaintiff or defendant. Walker v. Carpenter, 57 S. E. 461, 144 N. C. 674.

The "burden" is upon the plaintiff to prove all the facts necessary to entitle him to recover. Metropolitan St. Ry. Co. v. Wishert (Tex.) 89 S. W. 460, 461.

"To say that a party has the 'burden of proof,' is exactly the same thing as saying that the 'burden of proving' the facts in dispute rests upon him." New Castle Bridge Co. v. Doty, 76 N. E. 557, 558, 37 Ind. App. 84.

Under Kirby's Dig. § 6196, declaring that in the argument the party having the burden of proof shall have the opening and conclusion and section 3107 declaring that the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side, where, in an action on a note by the assignee, defendant admitted its execution, pleaded failure of consideration, and denied that the note was transferred before maturity, or that the assignee was a bona fide purchaser for value, defendant had the "burden of proof" and was entitled to open and close. Roberts v. Padgett, 101 S. W. 753, 82 Ark. 331.

The phrase "burden of proof" is often used in two different senses, as to indicate the burden resting upon the party holding the affirmative, to make out a prima facie case, in the first instance, and the burden resting upon a party to overcome a prima facie showing, by a preponderance of the testimony. Farnsworth v. Fraser, 100 N. W. 400, 402, 137 Mich. 296.

An instruction that "the burden" is on plaintiff to show by a "preponderance of the testimony" his right to recover is not objectionable for failure to use the term "the burden of proof," "the burden" being equivalent thereto; nor for use of the expression "preponderance of the testimony," instead of "preponderance of the evidence," there being nothing in the case to make a distinction between "testimony" and "evidence." Goodwin v. Mortsen (Tex.) 128 S. W. 1182, 1184.

"Burden," as used in an instruction, in an action for injuries to a passenger, that the company has the burden of proving, in order to refute the presumption of negligence, that the accident could not have been avoided by exercising the highest degree of care and diligence, was used in the sense of duty or obligation, and when so read the instruction is not subject to criticism. Cleveland, C., C. & St. L. R. Co. v. Hadley, 82 N. E. 1025–1028, 40 Ind. App. 731, 16 L. R. A. (N. S.) 527.

The "burden of proof" is a technical legal phrase and means that the burden is coextensive with the legal proposition sought to be proved and applies to every fact which is essential to or necessarily involved in the proposition. It means an obligation imposed on the party who alleges the existence of the fact or thing necessary in the prosecution or defense of an action to establish it by proof. Laurence L. Prince & Co. v. St. Louis Cotton Compress Co., 86 S. W. 873, 878, 112 Mo. App. 268 (quoting and adopting the definitions in Wilder v. Cowles, 100 Mass. 487, and Siefke v. Siefke, 22 N. Y. Supp. 546, 3 Misc. Rep. 81, and citing People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642).

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Burden of evidence distinguished

"Burden of proof" and "burden of evidence" are often confused. The phrase "burden of proof" is in fact more philosophical than practical. It means generally that a plaintiff, however often the evidence shifts, must, upon the whole, persuade the jury that his contention is right. The risk of nonpersuasion is all the time upon him. Foss v. McRae, 73 Atl. 827, 829, 105 Me. 140.

Under Rev. St. 1909, § 10,029, providing that every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he acquired title as holder in due course, the "burden of proof" is used in its strict sense as distinguished from "burden of evidence." Plaintiff by showing that he received the note before maturity in good faith and for valuable consideration did not shift the burden of proof on defendant; the "burden of proof" is the burden of producing a preponderance of evidence, while the "burden of evidence" means the burden that rests on a party to meet a prima facie case of fraud in the inception of a note. Link v. Jackson, 139 S. W. 588, 594, 158 Mo. App. 63.

Preponderance of evidence

The term "burden" or "burden of proof" is frequently used to signify simply the burden of meeting a prima facie case rather than the burden of producing a preponderance of evidence. Bonneau v. North Shore R. Co., 93 Pac. 106, 109, 152 Cal. 406, 125 Am. St. Rep. 68; Alabama & V. R. Co. v. Groome, 52 South. 703, 704, 97 Miss. 201.

When the subject-matter of a negative averment in an indictment or information relied on by accused as a justification or excuse lies peculiarly within his knowledge, the burden of proof as to such justification or excuse is on him; but the "burden of proof," in this connection, does not mean the quantum of evidence necessary to establish the truth of a proposition or issue, but merely the duty of producing some evidence to meet a prima facie case. State v. Carlisle (S. D.) 139 N. W. 127, 132.

The term "burden of proof" does not mean merely that it is incumbent on the party affirmatively asserting an allegation to establish it by a fair preponderance of the credible evidence, but the party on whom rests the burden of proof must, in order to entitle himself to a finding in his favor, give evidence not only of greater convincing power, but such as to convince the jury of the truth of his contention. Anderson v. Chicago Brass Works, 106 N. W. 1077, 1079, 127 Wis. 273.

Preponderance of evidence and "burden of proof" are not the same thing, although they run into each other. By preponderance of evidence is meant the evidence which possesses greater weight or convincing power; by "burden of proof" is meant the duty resting on the party having the affirmative of the issue to satisfy or convince the minds of the jury, by the preponderance of the evidence, of the truth of his contention. It is not enough that his evidence is of slightly greater weight or convincing power; it must go further and satisfy the minds of the jury before the "burden of proof" is discharged. Eichmann v. Buchheit, 107 N. W. 325, 326, 128 Wis. 385, 8 Ann. Cas. 435 (citing Anderson v. Chicago Brass Co., 106 N. W. 1077, 127 Wis. 273).

"By * * * 'burden of proof' is meant the greater weight of the testimony in the case." State v. Paulsgrove, 101 S. W. 27, 30, 203 Mo. 193.

By "burden of proof" is meant that the evidence to sustain a proposition thus to be proved is greater in weight and credibility than the evidence to the contrary. Sanitary Dairy Co. v. St. Louis Transit Co., 71 S. W. 726, 727, 98 Mo. App. 20.

The phrase "burden of proof" means the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to the legally required extent, and in this sense the burden of proof is on the party maintaining the affirmative of the issue; but the phrase also means the necessity which rests on the party at any particular time during a trial to create a prima facie case in his own favor, or to overthrow one when created against him. Ruth v. Krone, 103 Pac. 960, 961, 10 Cal. App. 770.

An instruction that the happening of an accident did not show negligence, but that the burden was on plaintiff to prove negligence by a preponderance of the evidence, that if he failed to do so, or if the scale was evenly balanced, the verdict should be for defendant, sufficiently defined the burden of proof. Hale v. Crown Columbia Pulp & Paper Co., 105 Pac. 480, 482, 56 Wash. 236.

"The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of evidence. These burdens are often on the same party. But this is not necessarily or always the case. And it is by no means safe to infer that, because a party has the burden of meeting a prima facie case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence adduced against him." Klunk v. Hocking Valley Ry. Co., 77 N. E. 752–754, 74 Ohio St. 125 (quoting and adopting Scott v. Wood, 22 Pac. 871, 81 Cal. 398); Valente v. Sierra R. Co. of California, 91 Pac. 481, 483, 151 Cal. 534 (quoting and adopting the definition in Scott v. Wood, 22 Pac. 871, 81 Cal. 398).

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The term "burden" or "burden of proof" is frequently used to signify simply the burden of meeting a prima facie case rather than the burden of producing a preponderance of evidence, and as used in an instruction, in an action for injuries to a passenger, that the carrier is required to exercise the highest degree of care in the transportation of passengers, and that a showing that the injury was caused by the carrier's act in operating the instrumentalities employed in its business raises a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without its negligence, imported nothing more and was therefore not erroneous as requiring defendant to overcome plaintiff's showing by a preponderance of the evidence, where the court charged that the plaintiff was required to prove her case by a preponderance of the evidence. Cody v. Market St. R. Co., 82 Pac. 666, 667, 148 Cal. 90 (citing Scott v. Wood, 22 Pac. 871, 81 Cal. 398, 400; Patterson v. S. F. & S. M. R. Co., 81 Pac. 531, 533, 147 Cal. 178; Kahn v. Triest-Rosenberg Cap Co., 73 Pac. 164, 139 Cal. 340, 344).

The court, in explaining the term "burden of proof," charged that the jury could not find in accordance with a particular contention unless it was "proved it was so," and defined the quoted words to mean a balance of proof in favor of that theory, and that plaintiff was required to make his side heavier, stronger in favor of the proposition in the minds of the jury, than that of the defendant. It was also charged that such damages as were proved by a preponderance of the evidence plaintiff was entitled to recover, and for those which had not been so proved there could be no recovery. Held, that such instructions were not erroneous. Soebel v. Boston Elevated R. Co., 83 N. E. 3, 197 Mass. 46, 14 Ann. Cas. 421.

An instruction defined the burden of proof as the duty of proving a fact by the preponderance of evidence. Preponderance of evidence was then defined to mean the greater convincing power of evidence, and was illustrated by saying that that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side. The instruction then stated that the party having the burden of proof might meet such burden by producing a preponderance of the evidence, and yet not lift the burden, because, although such evidence might be of slightly greater convincing power than that produced by his opponent, still his evidence might be weak, and that, to entitle him to a finding, his evidence must be such as to satisfy the minds of the jury of the truth of his contention. Held, that the instruction was not objectionable as self-contradictory, illogical, or misleading. Logeman Bros. Co. v. R. J. Preuss Co., 111 N. W. 64, 68, 131 Wis. 122.

Shifting of burden

"Burden of proof," in the sense of the duty of producing evidence, may be passed from one party to another as the case progresses, while in the sense of obligation to establish the proof of the claim on which plaintiff's case rests is upon him throughout the trial. Colston v. Bean, 62 Atl. 1015, 1016, 78 Vt. 283 (citing 9 Thayer, Ev.; 3 Greenl. Ev. 5).

The phrase "burden of proof" properly signifies the duty to establish the entire case by preponderance of evidence, in which sense it never shifts, and the duty to proceed to adduce evidence, in which sense it shifts when either party makes a prima facie case. Toube v. Rubin-Blankfort Co., 116 N. Y. Supp. 673, 674, 63 Misc. Rep. 298.

"Burden of proof" means the burden of establishing the case, and remains unchangeable throughout the entire case where the pleadings originally placed it, and is on him alone who has the affirmative, though the burden of the evidence may, during the trial, be shifted. Dorrell v. Sparks, 127 S. W. 103, 104, 142 Mo. App. 460.

The "burden of proof" is the duty resting on a party asserting the affirmative of an issue to establish it by a preponderance of evidence, which duty remains with him until the end of the trial, but, where such party makes a prima facie case, the duty of coming forward with evidence of sufficient weight to rebut it is shifted to the adverse party. Berger v. St. Louis Storage & Commission Co., 116 S. W. 444, 446, 136 Mo. App. 36.

In the sense of the burden of the evidence, the "burden of proof" may change from one side to the other as the trial proceeds; but in the sense of maintaining the issue involved in the action, it constantly remains on the party alleging the fact which constitutes the issue, and when all the evidence has been introduced the jury must determine whether it has been maintained. Carroll v. Boston Elevated R. Co., 86 N. E. 793, 797, 200 Mass. 527.

"Where the party having the 'burden of proof' establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such prima facie case, must produce evidence of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate." Klunk v. Hocking Valley Ry. Co., 77 N. E. 752, 755, 74 Ohio St. 125 (quoting and adopting Powers v. Russell, 30 Mass. [13 Pick.] 76).

The term "burden of proof" is used in different senses. In one sense the term

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marks or expresses the duty of the actor or party who has the risk or affirmative of the issue and will lose the case if he does not in the end establish such issue. In another sense the term means or expresses the burden or duty of the actor or party, in order to succeed, of going forward at any particular stage with the evidence, and really means that the burden is upon him to establish the particular claim, while the burden of the issue (that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence) never shifts, but the burden or duty of going forward often does shift from one party to the other and sometimes back again. In general, the party who seeks to move a court in his favor, whether as an original plaintiff or as a defendant, who, by admitting plaintiff's contention and setting up an affirmative defense, becomes the real actor, must establish his claim. United States Wringer Co. v. Cooney, 73 N. E. 803, 805, 214 Ill. 520 (citing 1 Elliott on Evidence, §§ 129–139).

The term "burden of proof" has two distinct meanings. "It is used to refer: First, to the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case, whether civil or criminal, in which the issue arises; and, second, to the duty of producing evidence at the beginning, or at any subsequent stage of the trial, in order to make or meet a prima facie case." This burden of proof never shifts during the course of a trial, but remains to the end with the party asserting the affirmative of the issue. Here the burden of proof was on plaintiff to show that defendants were guilty of negligence, and it was not upon defendants to show that they were not guilty of negligence, and this burden of proof did not shift during the trial but remained with plaintiff to the end. In some of the text-books and decisions it is said that, by reason of the introduction of rebutting testimony by defendant in the case, the "burden of proof" is shifted, but "all that is meant by this is that there is a necessity of evidence to answer the prima facie case, or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue; and this burden remains throughout the trial." Chicago Union Traction Co. v. Mee, 75 N. E. 800–802, 218 Ill. 9, 2 L. R. A. (N. S.) 725, 4 Ann. Cas. 7 (citing Egbers v. Egbers, 52 N. E. 285, 177 Ill. 82; Jones on the Law of Evidence, § 175).

On the substantive issue between the parties the burden of proof never shifts. The words "burden of proof" are sometimes used in a secondary sense. In many cases the party having the burden of proof is assisted by presumptions. In some cases the presumptions are so strong that his adversary is required first to introduce some proof. To say, under such circumstances, that his adversary has the burden of proof means only that he has the burden only to introduce a certain quantum of proof, and when he has done so the issue is tried and the evidence weighed as upon any other issue; the party making the allegation having the burden of proof upon that issue. This is the logical use of the words "burden of proof." The party making the allegation of fact, whether it be an affirmative or negative, must, when the evidence is all in, have furnished more proof upon that fact than his adversary has, or he fails to establish his case. It is in this sense that, when the allegation of a negative fact is necessary to the statement of plaintiff's case, the burden of proof is upon him who alleges it to establish his case. So where a plaintiff, in an action to restrain a railroad company from entering upon his land and constructing a railroad, pleads that the defendant company has instituted condemnation proceedings and deposited the damages as required by law, and that the road is being constructed across his land pursuant to such proceedings, and that the proceedings are void because the road is in fact being constructed by and for another company, the burden is upon him to prove the latter allegation. Beckman v. Lincoln & N. W. R. Co., 112 N. W. 348, 351, 79 Neb. 89.

Weight of evidence distinguished

The burden of the proof and the weight of the evidence are two entirely distinct and separate things. The former does not change, but the latter may, according to the nature and strength of the proofs offered on the trial. Even when the plaintiff has made out a prima facie case, the burden of the proof does not shift to the defendant in any proper sense. All that is meant by such an expression is that the other party must go forward with his proofs, if he would not have a judgment against him. Gibbs v. Farmers' & Merchants' State Bank, 99 N. W. 703, 705, 123 Iowa, 736.

The term "burden of proof," stands for what is ordinarily meant by the use of the words. In pleading, the party who assumes the affirmative or proposition has thereby, under a rule of law, laid upon him the necessity of maintaining the issue or proposition to the end by being able at the conclusion of the evidence to point to a greater weight of evidence in support of the issue or proposition than appears against it; and this is all that the term "burden of proof" implies. When applied to the question of contributory negligence, the rule operates in precisely the same way as in the determination of any other fact, whether the affirmative is held by the plaintiff or by the defendant. "Bur-

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den of proof" and weight of evidence should not be confounded, as they have radically different meanings. The former is a question of law for the court, and the latter a question of fact for the jury. Where, in an action against a bridge company for the injury of an employé, contributory negligence was an issue, it was not error to instruct that the "burden" was cast upon the defendant to prove, by a "fair preponderance of the evidence," that plaintiff was guilty of contributory negligence; the instruction not having the effect of requiring defendant to prove such negligence by its own evidence. New Castle Bridge Co. v. Doty, 79 N. E. 485, 488, 168 Ind. 259 (citing Indianapolis St. R. Co. v. Taylor, 63 N. E. 456, 158 Ind. 274; Fay v. Burdett, 81 Ind. 433, 443, 42 Am. Rep. 142; Carver v. Carver, 97 Ind. 497, 511).

BUREAU

See Head of a Bureau.

Webster's International Dictionary defines the verb "to establish" as "to appoint or constitute for permanence, as officers, laws, regulations," etc. The same authority defines or gives as the equivalent of "bureau" "a department of public business requiring a force of clerks; the body of officials in a department who labor under the direction of a chief." Bouvier says of the word "bureau": "In the classification of the ministerial officers of government, and in the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet." A fair deduction from these definitions is that the word "bureau" in the connection and sense in which it is used in Const. art. 12, § 155, providing that the state corporation commission shall elect one of its members chairman of the same and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law and that the general assembly may establish subordinate divisions or bureaus of insurance, banking or other special branches of the business of that department, implies not merely a division where business is to be conducted under certain rules and regulations but includes the operating force as well, and hence Act March 9, 1906 (Laws 1906, c. 112), establishing a bureau of insurance, in providing that the commissioner of insurance shall be elected by the general assembly, does not contravene Const. art. 12, § 155, as the power of appointing the insurance commissioner was not given by the Constitution to the commission, but his election was intrusted to the general assembly by the provisions authorizing it to establish the bureau of insurance. Button v. State Corporation Commission of Virginia, 54 S. E. 769, 770, 105 Va. 634.

BURGLARY

Larceny as element, see Larceny.

See, also, Force; Forcible and Violent Entrance; House; Housebreaking; Valuable Thing.

"Burglary" consists in entering a house with intent to commit grand or petit larceny or any felony. People v. Hower, 91 Pac. 507, 511, 151 Cal. 638 (citing People v. Phelan, 28 Pac. 855, 93 Cal. 111).

" 'Burglary' is the breaking and entering into a mansion house by night with intent to commit a felony." Claiborne v. State, 83 S. W. 352, 353, 113 Tenn. 261, 68 L. R. A. 859, 106 Am. St. Rep. 833.

Kirby's Dig. § 1603, defines "burglary" as the unlawful entering of a house or other building in the nighttime with the intent to commit a felony. McCarthy v. State, 119 S. W. 647, 648, 90 Ark. 384.

At common law "burglary" was the breaking and entering the dwelling house of another in the nighttime with intent to commit a felony therein. State v. Wilson, 125 S. W. 479, 480, 225 Mo. 503.

The opening of a closed door and entrance therein for the purpose of larceny is "burglary." State v. Brower, 104 N. W. 284, 127 Iowa, 687.

Under a statute providing that any person who enters any house, room, or store with intent to commit larceny or any felony is guilty of burglary, where defendants entered a store with intent to commit larceny therein, the fact that the act of entering was not of itself a trespass, but was during business hours, and while the store entered was open to the public, did not prevent the entry from constituting "burglary." People v. Brittain, 75 Pac. 314, 142 Cal. 8, 100 Am. St. Rep. 95 (citing People v. Barry, 94 Cal. 481, 29 Pac. 1026).

Under Pen. Code, §§ 498, 499, making one who with intent to commit a crime therein breaks and enters a building guilty of burglary, and defining the word "break" as opening for the purpose of entering by any means whatever any door of a building, or to any apartment therein, persons who opened an unlocked door to a store, and who assaulted the clerks in the store and threatened them with violence and tied them, and who carried away merchandise, are guilty of burglary. Rosenthal v. American Bonding Co. of Baltimore, 128 N. Y. Supp. 553, 555, 143 App. Div. 362.

"Burglary" is the breaking into a house in the night season with intent to commit a felony, and if a house be so entered it is burglary, whether the felony be executed or not, and regardless of the kind of felony intended or the manner in which the felony may be frustrated, or the value of the property taken, or any other circumstance which

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is not intrinsic. On the other hand, while the circumstances which differentiate the crime may be a small part of the transaction and must always be the same, the things which occur in the perpetration of a crime change with every case and may be numerous. For example, when a burglary has been planned, in order to carry it out, or, in other words, to perpetrate it, the burglar must go to the building; he must break and enter it; he may effect his purpose or attempt it; and he must come away, for the very nature of the transaction implies that the burglar will not remain in the building. An infinite variety of things may happen in carrying out the crime. The perpetrator may kill a man while going to or trying to enter the building; he may kill a man after he has broken and entered the house; and he may kill a man while trying to escape either in the house or outside of it. Thus, where two, in furtherance of a common design, entered upon the perpetration of the burglary armed and prepared to kill if opposed, and while so engaged were discovered and one of the burglars, at a short distance from the building and on another lot, shot and killed a police officer who had commanded him to halt, the killing was "in the perpetration of the burglary" and was murder in the first degree. Conrad v. State, 78 N. E. 957, 959, 75 Ohio St. 52, 6 L. R. A. (N. S.) 1154, 8 Ann. Cas. 966.

The offense of "burglary," which at common law consists in the unlawful breaking and entering of another's dwelling in the nighttime with intent to commit a felony, was enlarged by Kirby's Dig. §§ 1603–1605, defining burglary as the unlawful entering of a building at night with intent to commit a felony, and providing that the manner of breaking or entering is not material except to show intent, and that one with force entering a building in the nighttime with intent to commit a felony is guilty of burglary, so that an unlawful entry of a building in the nighttime without breaking, but with intent to commit a felony, is "burglary." One entering a saloon through the open door in the nighttime, but during business hours, with intent, formed before or at the moment he entered to commit a felony, is guilty of "burglary," though no fraud or deception was practiced on the owner in making the entry. Pinson v. State, 121 S. W. 751, 753, 91 Ark. 434.

Where, on a trial for burglary, the prosecutor positively testified that accused was inside the house, and that he could not have entered without opening a door, and accused denied entering the house and testified that he only went on its steps, a charge that a burglary is committed by entering a house by force with intent to commit theft, and that the entry must be made with actual force, but that the slightest force is sufficient to constitute a breaking, such as the opening of a door that is shut, was not objectionable as on the weight of the testimony, but was a correct definition of the offense. Snodgrass v. State (Tex.) 148 S. W. 1095, 1096.

Consummation of intent

"The offense of 'burglary' is complete without any larceny being committed." Sturges v. State, 102 Pac. 57, 61, 2 Okl. Cr. 362 (quoting and adopting definition in People v. Garnett, 29 Cal. 628).

Where there is a breaking and entry to commit theft, the offense of "burglary" is complete, notwithstanding an abandonment of the undertaking after the breaking and entry. Schwartz v. State, 114 S. W. 809, 810, 55 Tex. Cr. R. 36.

"Burglary" is "the breaking and entering the dwelling house of another in the nighttime with the intent to commit a felony therein, whether the felony be actually committed or not." Commonwealth v. Woolfolk, 89 S. W. 110–112, 121 Ky. 164 (quoting and adopting definition in Bouv. Dict. 227).

Burglary is defined as "the breaking and entering in the night of another's dwelling house with intent to commit a felony therein," and "if a man in the nighttime breaks into a dwelling house, intending to commit therein some act which in law is felony, he is guilty of burglary, whether he succeeds in doing what he meant or not." Mann v. Commonwealth, 80 S. W. 438, 118 Ky. 67, 111 Am. St. Rep. 289 (citing 1 Bish. Cr. Law, §§ 437, 559).

As defined in Cobb's Dig. p. 790, § 92, "burglary" is the breaking and entering into the mansion house of another with the intent to commit a felony. The offense may be committed within the terms of the statute where there is no intention to steal. A breaking followed by a proved theft establishes the intention of that particular breaking, but if nothing were stolen it would not follow that burglary had not been committed. Hutchins v. State, 59 S. E. 848, 3 Ga. App. 300.

Nature of building

Section 146, Pen. Code 1910, defines "burglary" as follows: "'Burglary' is the breaking and entering into the dwelling, mansion, or storehouse, or other place of business of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny." This statute enlarges the common-law definition of burglary, for burglary at common law was the breaking and entering a mansion or dwelling house with intent to commit a felony or larceny therein. Keenan v. State, 74 S. E. 297, 10 Ga. App. 792.

An indictment under Acts 26th Leg. c. 178, making it a separate and distinct offense to burglarize a private residence at night,

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and defining a private residence as any building or room occupied and actually used at the time of the offense as a place of residence, must allege that the building or room was occupied and actually used at the time of the offense as a place of residence, and an allegation that the house was a private residence is insufficient. Jones v. State, 96 S. W. 44, 45, 50 Tex. Cr. R. 100.

A chicken house is within Kirby's Dig. §§ 1603–1605, making it "burglary" to enter a house or other building with intent to commit a felony. Evidence that defendant took chickens from a "coop" by cutting a hole in the wire around it did not sustain a charge of "burglary," under Kirby's Dig. §§ 1603–1605, making it burglary to enter any house or building, as a chicken coop is not necessarily a house. Gunter v. State, 96 S. W. 181, 182, 79 Ark. 432, 116 Am. St. Rep. 85.

Pen. Code 1895, art. 839, provides that one who with intent to commit a felony breaks and enters a house in the daytime is guilty of burglary. Laws 1899, p. 318, c. 178 (Pen. Code 1895, art. 839a), provides that the offense of burglary of a private residence is constituted by entering a private residence, etc. Article 845b makes burglary of a private residence a distinct offense. One count of an indictment charged that defendant by force, etc., in the daytime, did burglariously and fraudulently break and enter a house then and there at the time of the commission of the offense occupied by W. as a private residence, etc. *Held*, that the use of the words "private residence" in that count did not bring the charge within the purview of article 839a. Martinez v. State, 103 S. W. 930, 931, 51 Tex. Cr. R. 584.

A conviction cannot be had under Pen. Code 1895, art. 839a, relating to burglary of a private dwelling, where the burglarized house is not alleged to be a private dwelling; that section and article 845a, relating to burglary in private residences, covering a distinct offense from that defined by article 838, defining "burglary" as the entry into a house by force or fraud at night, or in the daytime and remaining until night, with intent to commit a felony, and article 839, making it burglary to enter a house in the daytime with intent to commit a felony or theft—article 845b providing that nothing in sections 839a or 845a shall repeal articles 838 and 839. Malloy v. State, 126 S. W. 598, 599, 58 Tex. Cr. R. 425.

Pen. Code 1895, art. 838, defines burglary as the entering of a house by force, etc., at night, or entering either in the day or night and remaining concealed therein with intent to commit a felony or a theft, and article 839a, as added by Acts 26th Leg. c. 178, provides that the offense of burglary in a private residence is committed by entering a private residence by force at night, or in any manner by entering a private residence either by day or night, and remaining concealed until night with intent to commit a felony or theft therein. *Held*, that the offenses described in the two articles were distinct offenses, and a conviction cannot be had under article 838, if the house burglarized was a private residence. Alinis v. State, 139 S. W. 980, 981, 63 Tex. Cr. R. 272.

One may be guilty of "burglary" as to a room or apartment in a house, portions of which are open to the public, where such force, however slight, as may be sufficient to effect an entrance, is used in entering either a room or any other division of such public house. Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238. But as to a private dwelling house a breaking into the house is necessary to be shown in order to constitute a "burglary." The breaking and entering of one of the rooms of such private dwelling house, where the entrance into the house is accomplished without breaking, is not "burglary." Lockhart v. State, 60 S. E. 215, 216, 3 Ga. App. 480.

Technically "burglary" is the breaking and entering into a mansion house by night, with intent to commit a felony. Under Shannon's Code, § 6537, providing that whoever shall break and enter the business house, outhouse, or any other house of another, other than a mansion house, with intent to commit a felony, shall be imprisoned, etc., and section 6540 providing that a person indicted for burglary may be convicted under the section quoted, a defendant may be found guilty of burglary under an indictment alleging that he burglariously entered a "camp house" not shown to be a mansion house. Cronan v. State, 82 S. W. 477, 478, 113 Tenn. 539.

Pen. Code, 1895, art. 838, provides that the offense of burglary is constituted by entering a house by force, threats, or fraud at night, or, in like manner, by entering a house during the day and remaining concealed therein until night, with intent in either case of committing felony or the crime of theft. Article 839 provides that he is also guilty of burglary who, with intent to commit a felony or theft, enters a house in the daytime. Article 938a (Laws 1899, p. 318, c. 178) provides that the burglary of a private residence is constituted by entering a private residence by force, threats, or fraud at night, or in any manner by entering a private residence at any time either day or night and remaining concealed therein until night with intent in either case of committing a felony or the crime of theft. Article 845a provides the punishment at a term of years not less than five for burglary of a private residence, and article 845b provides that nothing in articles 839a and 845a of the chapter shall be construed to alter or in any manner repeal articles 838 and 839, but shall be construed to make burglary of a private residence at night a separate and distinct offense from burglary

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as defined in said articles 838 and 839. Article 845c defines a private residence as mentioned in the preceding article to mean any building or room occupied and actually used at the time of the offense by any person or persons as a place of residence. Held, that the burglary of a private residence in the daytime is not within the terms of article 839a, and hence the indictment need not allege that the house was a private residence. Reyes v. State, 102 S. W. 421, 422, 51 Tex. Cr. R. 420.

Rev. St. c. 44, div. 4, art. 2, § 1, defines burglary to be the unlawful entering of a house, tenement, or other building, boat, vessel, or water craft, in the nighttime with intent to commit a felony, and provides that the manner of breaking or entering is not material further than to show the intent. Section 2 provides that if any person shall, in the nighttime, willfully and maliciously and with force break or enter any house, etc., with intent to commit a felony, he shall be guilty of burglary. Section 3 provides that if any person shall, in the nighttime, willfully and with or without force break or enter any house, etc., with intent to commit a felony, and shall commit a felony or larceny, he shall be adjudged guilty of burglary and also of felony or larceny. This statute was digested in Gantt's Digest as sections 1346–1349, inclusive. Acts 1874, p. 77, amended Gantt's Dig. § 1346, by making a railway car also the subject of burglary. These sections with the amendment appear as Kirby's Dig. §§ 1603–1606, inclusive. Held, that the contention that a railway car not being inserted in Gantt's Dig. § 1348 (Kirby's Dig. § 1605), as a subject of burglary, nothing was added to the crime, and that the insertion in Gantt's Dig. § 1646 (Kirby's Dig. § 1603), was in the declaratory part of the statute, and not the substantive part, was not maintainable, and that a railway car was the subject of burglary. Parnell v. State, 110 S. W. 1036, 1037, 86 Ark. 241.

Larceny distinguished

See Larceny.

Larceny included

"Larceny" is not necessarily included in "burglary," like manslaughter in murder. The offense of "burglary" is complete without any larceny being committed. Sturgis v. State, 102 Pac. 57, 61, 2 Okl. Cr. 362 (quoting and adopting People v. Garnett, 29 Cal. 628).

Necessity of breaking and entering

Under Sand. & H. Dig. § 1492, if one either break or enter the house of another with intent to commit a felony, he is guilty of "burglary." Both a breaking and entering is not necessary. Minter v. State, 71 S. W. 944, 945, 71 Ark. 178.

In a trial for "burglary with intent to commit larceny," the state must show that accused broke and entered with a felonious intent to carry away property kept there and to convert it to his own use without the owner's consent. State v. Wright, 66 Atl. 364, 365, 6 Pennewill, 251.

On a trial for "burglary," the court charged that under the evidence there was a breaking by some one of the four parties mentioned; that the word "breaking" had a technical meaning; that "unfastening" anything constituted a "breaking"; that where anything was shut up, if opened by another person, that constituted a breaking; and so, "under the evidence in this case," etc. The court further charged that if one, who was with defendant at the time, had the charge of the premises, and a right to enter the corncrib and chicken coop, there was no burglary; and that, if defendant had good reason to believe that such one had charge of the property and could dispose of it as he pleased, defendant would not be guilty of burglary. Held, that the charge must have been understood by the jury to mean that proof of opening of the doors, which was undisputed, was sufficient to constitute an actual breaking, and, so understood, the charge was not subject to criticism. People v. Evans, 114 N. W. 223, 224, 150 Mich. 443.

Under Pen. Code 1895, art. 838, defining burglary as entering a house by force, threats, or fraud at night, with the intent of committing a felony or the crime of theft, and article 841 declaring that the entry is not confined to the entrance of the whole body but may consist of the entry of any part for the purpose of committing a felony, and article 842 declaring that the slightest force is sufficient to constitute breaking, such as the introduction of the land or any instrument to draw out the property through an aperture made by the offender for that purpose, an accused would not commit "burglary" by inserting his hand or arm, even for the purpose of committing theft, if the glass in the door through which his arm was thrust was already broken, or even if he broke the glass, unless the theft he intended to commit was a felony; hence, if accused broke the glass in a door with the intent to steal articles of less than $50 in value, there would be no "burglary," even though he inserted his arm in the opening with the intent to consummate the intended crime, for under article 841 there would be no entry. Jones v. State, 87 S. W. 1157, 1158, 48 Tex. Cr. R. 336.

Kirby's Dig. § 1605, providing that a burglary is committed by breaking or entering the house of another is the nighttime, with intent to commit a felony, and section 1604, declaring that the manner of breaking or entering is not material further than to show intent, do not change the rule of the common law that such breaking was any disrupting or separating of material substances in any inclosing part of a dwelling house, whereby

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the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished; and hence the prying off of a wooden shutter over a window of a store without opening or breaking the window, and the cutting of an inch square hole through the door of the store too far from the latch to permit the use of an instrument to unfasten the door, did not constitute a breaking and entering sufficient to sustain a charge of burglary. Anderson v. State, 104 S. W. 1096, 1097, 84 Ark. 54.

Under a statute providing that every person who enters any house or building, with the intent to commit larceny or other felony is guilty of burglary," in order to constitute a burglarious entry the act of entering must be itself a trespass. State v. Mish, 92 Pac. 459, 460, 36 Mont. 168, 122 Am. St. Rep. 343.

Breaking out is not "burglary." Lockhart v. State, 60 S. E. 215, 216, 3 Ga. App. 480.

Night or daytime

It is an essential element of "burglary" that the offense be committed between sunset and sunrise. Hence such crime was not proved by evidence that a building was robbed between 9:30 p. m. and 6:30 a. m., where the sun rose at 4:38 a. m. State v. Miller, 67 Pac. 790, 24 Utah, 312 (citing Rev. St. §§ 4334, 4338).

Nighttime "burglary" is properly defined as entering a house by force at nighttime with the intent of committing the crime of theft. Griffith v. State, 138 S. W. 1016, 1017, 62 Tex. Cr. R. 642.

Under Rev. St. 1898, § 4334, defining "burglary" as entering "in the nighttime," etc., and section 4338, defining "nighttime" as the period between sunset and sunrise, a larceny, to constitute burglary, must be committed in the nighttime, and affirmative proof that it was so committed must be adduced; but such proof need not be direct, but may be circumstantial, in character. State v. Richards, 81 Pac. 142, 29 Utah, 310.

Purpose of entry

The gist of the crime is a breaking and entering with an intent to commit a felony or misdemeanor. State v. Beeman, 99 Pac. 756, 757, 51 Wash. 557.

The essential ingredient of burglary is the felonious entry, and the intent may be to commit any felony or the crime of theft. Polk v. State, 132 S. W. 134, 135, 60 Tex. Cr. R. 462.

Entering a house for the purpose of committing murder is "burglary," under Pen. Code, § 459, providing that every person who enters any house with intent to commit grand or petit larceny or any felony is guilty of burglary. People v. Miller, 53 Pac. 816, 818, 121 Cal. 343.

To constitute "burglary" there must not only be a breaking and entering in the nighttime but either a felony must be committed in the house or be intended to be committed. State v. Neddo, 42 Atl. 253, 255, 92 Me. 71 (quoting and adopting 1 Hale, P. C. 547).

"Burglary" may be committed under certain circumstances by a person breaking in and taking property of which he is the owner, or qualified owner, as where a livery stable keeper had a lien on horses kept by him and the owner broke in with the intention of taking them. This was "burglary" by unlawfully breaking and entering with intent to commit a crime. State v. Nelson, 78 Pac. 790, 791, 36 Wash. 126, 68 L. R. A. 283, 104 Am. St. Rep. 945.

Pen. Code 1895, art. 838, provides that burglary is constituted by the entrance of a house by force, threats, or fraud, with intent to commit a felony or theft. Article 839 provides that one is guilty of burglary who, with intent to commit a felony or theft, by breaking enters the house in the daytime. Article 841 provides that the entry may consist of the entry of any part of the body, or that the offense may be constituted by the discharge of firearms into the house with the intent to injure the person therein. Held, that article 841 is but an addition to articles 838 and 839, and under the three articles, burglary may consist of entering a house by force, etc., or in entering a house and remaining therein with the intent to commit a felony, or by the discharge of firearms into a house with the intent to injure the person therein, and the intention need not be to commit a felony. Railey v. State, 121 S. W. 1120, 1121, 58 Tex. Cr. R. 1.

Value of property

"Burglary" is established by proving a breaking and theft of property; the value of the property taken being immaterial. Mason v. State (Tex.) 98 S. W. 854.

White's Ann. Pen. Code, art. 838, provides that burglary is committed by entering a house by force, threats, or fraud at night, or in like manner by entering a house during the day and remaining concealed there till night, with the intent of committing a felony or the crime of theft. Article 841 declares that the entry is not confined to the entrance of the whole body, but may consist of the entry of any part for the purpose of committing a fellony, and article 842 defines the term "breaking" to mean an entry by actual force, such as the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose. Held, that where defendant broke a glass of a store window in which certain shoes were displayed, but he was arrested before he abstracted any of the shoes therefrom, he was guilty of an attempt to commit burglary, regardless of the value

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of the property in the store. Mason v. State (Tex.) 100 S. W. 383.

BURGLARY IN THE FIRST DEGREE

Under Rev. St. 1898, § 4334, as amended by Sess. Laws 1905, p. 16, c. 19, making it "burglary" for any person to break and enter a building with intent to commit a larceny or any other felony, an information charging a breaking and entering a building at night with intent to steal goods, without stating their value, sufficiently charges a "burglary" in the first degree, as larceny within such section includes both a misdemeanor and a felony, and the words "or any other felony" are equivalent to "or any felony other than that embraced within the larceny." State v. Hows, 87 Pac. 163, 31 Utah, 168.

Rev. St. 1899, § 1880, makes one guilty of burglary in the first degree who breaks and enters the dwelling house of another in which there is then a human being, with intent to commit a felony or larceny therein, either by forcibly breaking the wall or outer door or window shutter of such house, or the door lock or bolt, or the fastening of the shutter or window; or, second, by breaking in any other manner, armed with a dangerous weapon, or with the assistance of confederates actually present; or, third, by unlocking an outer door by false keys, or picking the lock. Section 1881 makes one guilty of burglary in the second degree who breaks into a dwelling house with intent to commit a felony or larceny under circumstances not amounting to burglary in the first degree. Held, that the statute changed the elements of burglary at common law, and to constitute first-degree burglary under section 1880, the breaking and entering must be accomplished by some of the methods stated therein, and an information merely alleging the entering of a dwelling house by forcibly removing a wire screen from an outer window only charged burglary in the second degree. State v. Wilson, 125 S. W. 479, 480, 225 Mo. 503.

Pen. Code, § 820, provides that every person who enters any house, room, apartment, etc., with intent to commit grand or petit larceny, or any felony, is guilty of burglary. Section 821 provides that every burglary committed in the nighttime is burglary in the first degree, and every burglary committed in the daytime is burglary in the second degree. Held that, when the indictment charges the offense in the first degree, it in effect charges a burglary in the nighttime. State v. Copenhaver, 89 Pac. 61, 35 Mont. 342.

BURGLARY IN THE SECOND DEGREE

Rem. & Bal. Code, § 2578, declares that every person who with intent to commit some crime therein shall enter in the nighttime the dwelling house of another in which there shall be at the time a human being, etc., shall be guilty of burglary in the first degree. Section 2579 provides that every person who with intent to commit some crime therein shall under circumstances not amounting to burglary in the first degree enter the dwelling house of another, or break and enter, or, having committed a crime therein, shall break out of any building or part thereof wherein any property is kept for use, sale, or deposit, shall be guilty of burglary in the second degree. Held, that it is not essential to a conviction of burglary in the second degree that it shall have been committed in the nighttime. State v. Leroy, 112 Pac. 635, 639, 61 Wash. 405.

Pen. Code, § 820, provides that every person who enters any house, room, apartment, etc., with intent to commit grand or petit larceny, or any felony, is guilty of burglary. Section 821 provides that every burglary committed in the nighttime is burglary in the first degree, and every burglary committed in the daytime is burglary in the second degree. Held, that an indictment under section 820 need not allege the time of the day on which the entry was made; but, when the indictment charges the offense in the first degree, it in effect charges a burglary in the nighttime, and a conviction of burglary in the second degree cannot be had thereon, since the second degree is not included within the first, so as to authorize a conviction under Pen. Code, § 2147, providing that a defendant may be convicted of any offense necessarily included in that charged. State v. Copenhaver, 89 Pac. 61, 35 Mont. 342.

BURGLARY IN THE THIRD DEGREE

"Every person who breaks or enters in the day or in the nighttime any building, or any part of any building, booth, train, railroad car, vessel, or other structure or erection in which any property is kept, with intent to steal therein or to commit any felony, is guilty of 'burglary in the third degree,'" and entering alone is sufficient to constitute the crime. State v. Vierck, 120 N. W. 1098, 1101, 23 S. D. 166, 139 Am. St. Rep. 1040.

BURGLARY WITH EXPLOSIVES

In a prosecution for "burglary with explosives," an indictment charging that accused feloniously and burglariously broke and entered a depot, and attempted to open and opened a certain vault, safe, and other secure place in the depot, by the use of nitroglycerin, dynamite, gunpowder, and other explosives, with intent certain moneys, goods, and chattels in said vault, safe, and other secure place in said depot, then and there being, then and there feloniously to steal, take, and carry away, substantially charged the offense in the words of the statute and was sufficient. Smith v. State, 66 Atl. 678, 679, 106 Md. 39.

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BURGLARY INSURANCE

A policy insuring against loss by burglary of any merchandise in premises situated in the state of New York insures against burglary as defined by the statutes of New York, and the policy is not limited to common-law burglary. The stipulation in a policy insuring against direct loss by burglary of merchandise that insurer shall not be liable, unless there are visible marks on the premises of the actual force and violence used in making entry into the premises, or exit therefrom, is not a limitation of liability, but is a mere evidentiary provision to prevent fraudulent claims, to provide for cases, where, in the absence of witnesses, a burglary is sought to be established by the mere loss of goods, with no evidence direct or circumstantial, of a breaking and entering and cases of pilfering by employés and the like, and a burglary committed in the presence of clerks of insured is within the policy. Rosenthal v. American Bonding Co. of Baltimore, 128 N. Y. Supp. 553, 556, 143 App. Div. 362.

BURIAL

See Decent Burial; Proper Burial.
Respectable burial, see Respectable.

BURLAPS

The provision for "burlaps," in Tariff Act Aug. 27, 1894, c. 349, § 2, Free List, par. 424½, 28 Stat. 539, does not include so-called doublewarp Dundee bagging. Corbitt & Macleay Co. v. United States, 153 Fed. 648, 649.

BURN

An indictment charging that defendant burned, and caused to be burned, a barn was not defective, although the statute said "burned or caused to be burned"; the expressions "to burn" and "to cause to be burned" not being incongruous nor inconsistent. State v. Price, 11 N. J. Law, 203, 204.

As blacken, scorch, or char

To constitute the offense punishable by Ky. St. § 1168, punishing the willful burning of any public prison, it is not necessary that the fire set by accused should consume the building or materially injure it, and a prisoner confined in a public prison in a city to await trial, who threatened to burn up the prison, and who set fire to a mattress in his cell and then pushed it through the bars and communicated fire to a wall of the prison, charring to some extent the wall made of wood, was guilty of burning the prison. Kehoe v. Commonwealth, 149 S. W. 818, 149 Ky. 400.

BURNS OF THE THIRD DEGREE

"Burns of the third degree" are burns where the tissue is destroyed and nature reproduces a new fibrous tissue. Such burns affect the nerves, the superficial vessels supplying the skin, and the vessels that feed the skin, which are bound down and strangulated in this new reproduced fibrous tissue, causing constant irritation for which there is no cure according to some of the expert testimony. Strand v. Great Northern R. Co., 111 N. W. 958, 961, 101 Minn. 85.

BURNT

A marine policy contained a clause, "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire." The libel alleged that on November 18th, while the ship was lying in port and before discharge, a fire broke out in the after 'tween-decks of the ship and burned the bulkhead forward of the lazarette, the door thereof, and a considerable portion of dunnage and other parts of the ship. An exhibit, quoting from the ship's protest, recited that the master, on the alarm being given, went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette, which were then full of cargo, and that after considerable trouble the fire was extinguished, with considerable damage. Held, that the words "on fire," as used in the particular average clause, were not synonymous with the word "burnt," contained in former policies, but were indicative of a happening whereby the ship was endangered by actual fire burning some part of it, necessitating extraordinary efforts to prevent serious damage, and that under such definition the libel was not subject to exception as stating a loss from which the insurer was exempted by the particular average clause as matter of law. Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co., 184 Fed. 947, 949.

BURSTING TEST

A hydrostatic test applied to boilers is sometimes called the "bursting test." In this case a 300-pound pressure was applied. Shea v. Pacific Power Co., 79 Pac. 373, 145 Cal. 680.

BUSHEL

In passing Tariff Act July 42, 1897, c. 11, § 1, Schedule G, par. 249, 30 Stat. 170, where onions are made dutiable "per bushel," Congress must be assumed to have known the practice of the Treasury Department to consider 57 pounds as a bushel and to have intended to accept that as a standard. Hills Bros. Co. v. United States, 151 Fed. 476, 81 C. C. A. 14.

BUSHELING SCRAP

"Busheling scraps" has a definite signification and consists of small pieces of

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wrought iron and steel. Where, on a sale of iron scrap, the seller guaranteed the goods to be good, clean busheling scrap, the fact that they were found to contain dirt and small pieces of malleable iron, cast iron, tin, etc., impairing the value of the whole, rendered the seller liable as for a breach of collateral warranty, though the buyer had opportunity to examine the goods but did not do so. Lichtenstein v. Rabolinsky, 90 N. Y. Supp. 247, 98 App. Div. 516.

BUSINESS

See At Their Place of Business; Brokerage Business; Butchering Business; Carry on Business; Chamber Business; Commercial Business; Continuing the Business; County Business; Doing Business; Due Course of Business; Duty and Business; Enlarging Business; Established Business; Established Place of Business; Express Business; Furtherance of Business; General Business; Going Business or Concern; Insurance Business; Interstate Business; Judicial Business; Lawful Business; Legislative Business; Local Business; Losses of Business; Manufacturing and Mechanical Business; Marine Insurance Business; Moneyed Business; New Business; Open for Business; Ordinary Business; Ordinary Course of Business; Ordinary State Business; Place of Business; Plumbing Business; Public Business; Railroad Business; Regular Business; Regular Course of Business; Same Business; Secular Business; Seeking to do Business; Shipping Business; Telephone Business; Trade and Business; Trading Stamp Business; Transacting Business; United in Business; Visible Business; Wild-Cat Business; Worldly Business or Employment.

Any and every kind of business, see Any.

Any business, see Any.

Any trade, manufacture, or business, see Any.

Banking business, see Banking.

Change of business, see Change.

Discontinuance of business, see Discontinuance.

Engaged in business, see Engaged.

Interested in business, see Interest.

Kind of business, see Kind.

Other value in business, see Other.

Resume business, see Resume—Resumption.

The word "business" is of large significance and "denotes the employment or occupation in which a person is engaged to procure a living." Allen v. Commonwealth, 74 N. E. 287, 288, 188 Mass. 59, 69 L. R. A. 599 (quoting and adopting definition in Goddard v. Chaffee, 84 Mass. [2 Allen] 395, 79 Am. Dec. 796).

The term "business" as used in a law imposing a license tax on businesses, trades, etc., ordinarily means business in the trade or commercial sense, only carried on with a view to profit or livelihood. Cuzner v. California Club, 100 P. 868, 871, 155 Cal. 303, 20 L. R. A. (N. S.) 1095.

The word "business," as used in Rev. Code, § 4380, subd. 3, disqualifying a person from acting as a juror where he is united in business with either party, is employed in a general sense, and refers generally to the commercial, industrial, and professional engagements into which men jointly enter, either for a brief or considerable length of time. Hall v. Chattin, 106 Pac. 1132, 1133, 17 Idaho, 664.

The word "business" in its broad sense embraces everything about which one can be employed, and in its narrower sense it signifies a calling for the purpose of livelihood or profit. Easterbrook v. Hebrew Ladies' Orphan Society, 82 Atl. 561, 563, 85 Conn. 289, 41 L. R. A. (N. S.) 615.

Business in the sense in which occupation tax is applied does not, generally speaking, mean property. It means the activity, the energy, the capacity, the opportunities by which results are reached, a condition rather than fixed tangible objects for which conditions arise, the occupation, the engaging, the doing of the varied commercial acts, and the taking of the requisite steps from which result conclusions and conditions. Atlantic Postal Telegraph-Cable Co. v. City of Savannah, 65 S. E. 184, 188, 133 Ga. 66.

As action or other proceeding

The term "business," as used in Const. art. 8, § 5, providing that all civil and criminal "business" arising in any county must be brought in such county, unless a change of venue be taken in such cases as may be provided by law, is equivalent to "cause of action." Fields v. Daisy Gold Min. Co., 73 Pac. 521, 522, 26 Utah, 373.

The word "business," as used in Const. art. 8, § 5, does not refer to the acts or breach which gave rise to the cause of action, nor is it synonymous with causes of action, but it refers to those things which are required of the court to be done, or that it should do and which have arisen to engage its time and attention. Sanipoli v. Pleasant Valley Coal Co., 86 Pac. 865, 867, 31 Utah, 114, 10 Ann. Cas. 1142.

The word "business," in Const. art. 8, § 5, means causes of action, including probate and other civil proceedings. Sherman v. Droubay, 74 Pac. 348, 349, 27 Utah, 47.

Under Rev. St. § 581, which provides that special terms of any district court may be ordered by the district judge, and that "any

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'business' may be transacted at such special term which might be transacted at a regular term," a district court has jurisdiction at a special term to try a defendant on an indictment returned at a previous regular term. Goll v. United States, 151 Fed. 412, 417, 80 C. C. A. 642.

As established or continuing enterprise

The word "business" implies an employment or occupation that is continuing. State v. Scampini, 59 Atl. 201, 209, 77 Vt. 92.

A farm laborer who sells soda water and lemonade on only one Sunday is not guilty of violating the Sabbath Day within Pen. Code 1895, § 422, such selling not being his "business or ordinary calling," though, if he sells on more than one occasion, it may become such. Ellis v. State, 63 S. E. 588, 589, 5 Ga. App. 615.

The phrase "business or calling," in a contract of employment providing that the employé will not become interested in other business or calling contrary to the business of the employer, does not include a single specific act of the employé in using the employer's men for the purpose of lowering a pump into the basement of a hotel on which the employé and the other men were working; such act being done to assist another contractor on the work. Batchelder v. Standard Plunger Elevator Co., 75 Atl. 1090, 1091, 227 Pa. 201, 19 Ann. Cas. 875.

By individual corporation

"There are many things which in common colloquial language would not be called a 'business,' even when carried on by a single person, which would be so called when carried on by a number of persons. This is a distinction not to be forgotten even if we were trying the question by the ordinary use of the English language. For instance, a man who is the owner of offices (that is, of a house divided into several floors and used for commercial purposes) would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purpose or object of building or leasing a house to be divided into offices, and to be let out, should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices, or was an office-letting company, tried by the use of ordinary colloquial language? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may make it a business; and then it is a question of continuity. A man occasionally buys and sells land, as many landowners do, and nobody would say he was a landjobber or dealer in lands; but, if a man made a particular business of buying and selling land to obtain profit, he would be designated as a landjobber or dealer in land. When you go to an association or company formed for a purpose, you say at once that it is a 'business,' because there you have that from which you would infer continuity; it is formed to do that and nothing else, and therefore at once you say that the company carried on a business; so, in the ordinary case of investments, the man who has money to invest invests his money, and he may occasionally sell the investments and buy others, but he is not carrying on a business, but when you have an association formed, or where an individual makes it his continuous occupation (the business of his life) to buy and sell securities, he is called a stockjobber or sharejobber, and nobody doubts for a moment that he is carrying on 'business.' So, if a company is formed for doing the very same thing (that is, for investing money belonging to persons in the purchase of stocks and shares, and change them from time to time, either with limited or unlimited powers), I should say there can be no question that they are carrying on a 'business,' whether you call it a business of investments, or a business of dealing in securities, or, as the case before me, both the business of investment and the business of dealing in securities." Vanderbilt University v. Cheney, 94 S. W. 90, 92, 116 Tenn. 259.

Care and management of real estate

"Business" is a word commonly used to describe every occupation in which men engage, including the occupation of those engaged in the care and management of real property. Bennett v. Hebbard, 68 Atl. 537, 74 N. H. 411.

Carriers

The operation and management of railroads in carrying passengers is a "business," and part of trade and commerce. Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945, 957.

The term "business" is synonymous with calling, occupation, or trade and may be defined as "any particular occupation or employment engaged in for a livelihood or gain" (Webster's International Dict.); hence one conducting an express agency within the limits of a city is in a "business," within an ordinance providing for a license on the business of express companies, corporations, or agencies carried on in the city. City of Topeka v. Jones, 86 Pac. 162, 163, 74 Kan. 164.

The word "business," as used in a will reciting that, in consideration of the fact that the testator had during his lifetime given a son the "business" of an express company and other interests of much value, etc., must be regarded as meaning the establishment of the enterprise, its good will, its connection with transportation lines so established, which were valuable adjuncts, and almost a necessity for the culmination of final success to the son. Solley v. Westcott, 88 N. Y. Supp. 297, 301, 43 Misc. Rep. 188.

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Under the rule, as affected by the express terms of Rev. St. 1899, § 1105, that a railroad company need not fence its track at a station where it transacts business with the public, the "business" to be considered is the company's business with the public generally and with itself, connected with the station; but the maintenance of a passing track merely does not have any connection with a station within the rule, since it belongs to the general operation of the road, and it must be fenced when lying outside the limits of cities, etc., or outside necessary grounds of stations not located in towns, etc., though inconvenience result to the company through being required to maintain an additional telegraph office. Bridges v. Missouri, K. & T. Ry. Co., 112 S. W. 37, 38, 132 Mo. App. 576.

"The mere delivery of goods of a particular class at the point of destination by a common carrier to the consignee of such goods is not a 'business' engaged in by the carrier within a city's power to tax a 'business,' but is a mere incident to the carrier's 'business.' In and of itself it is no more a business than is the measuring of calico, homespun, or silk by a retail dry goods merchant when he sells the same to his customers or the delivery by such a merchant of the cloth to the purchaser thereof. It is no more a calling or vocation than is the mere delivery of shoes by a shoemaker or plows by a blacksmith to the customer for whom the shoemaker or the blacksmith has made them. It is but a fragmentary part of the business of a carrier. In a commercial or legal sense, the word means something done or carried on for a livelihood, profit, or the like." Southern Express Co. v. R. M. Rose Co., 53 S. E. 185, 189, 124 Ga. 581, 5 L. R. A. (N. S.) 619, 2 Ann. Cas. 296 (citing Hewin v. Atlanta, 49 S. E. 765, 121 Ga. 723, 67 L. R. A. 795).

Commerce

As commerce, see Commerce.

"Commerce" is "business," within the definition of "business," as given in Webster's International Dictionary defining that word as "financial dealings, buying, and selling; traffic in general; mercantile transactions." City of Topeka v. Jones, 86 Pac. 162, 163, 74 Kan. 164.

Corporations

The word "business," in Comp. Laws, § 3834, making corporate property taxable where the office of the corporation is located, provided its "business" is actually transacted at the office, otherwise at the place where the principal "business" is transacted, means something more than the annual meeting of stockholders and newly chosen directors; and, where the only "business" of a navigation company transacted at the place named in the articles of incorporation as its office is the annual meeting of stockholders, the residence of the corporation for purpose of taxation is the place where the principal "business" is conducted, such as receiving and disbursing the funds of the corporation. Teagan Transp. Co. v. Board of Assessors, 102 N. W. 273, 274, 139 Mich. 1, 69 L. R. A. 431, 111 Am. St. Rep. 391.

Act May 10, 1901 (Laws 1901, p. 124), providing that corporations, other than railroad, banking, building, and loan, and insurance companies, shall annually report to the Secretary of State the location of their principal offices, whether or not the corporation is pursuing an active business, and the kind of business engaged in, the word "business" does not restrict the operation of the act to corporations for pecuniary profits. People v. Rose, 69 N. E. 762, 764, 207 Ill. 352.

"Business" is a mere comprehensive term and comprises everything about which a person can be employed. Corporations organized for the purpose of doing business and actually engaged in such activities, as leasing property, collecting rents, renting office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of Act Aug. 5, 1909, § 38, imposing an excise on the doing or carrying on of business in a corporate or a quasi corporate capacity. A corporation owning and leasing taxicabs and collecting rents therefrom is engaged in business within the meaning of such act, as is also a public service corporation, such as a street railway created under the state laws, and also corporations acting as trustees, guardians, etc., under authority of the laws or courts of the state. Flint v. Stone Tracy Co., 31 Sup. Ct. 342, 357, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (quoting and adopting Black's Law Dict.; People ex rel. Hoyt v. Tax Com'rs, 23 N. Y. 242–244).

A resolution of the board of directors of a corporation engaged in mining coal, appointing one of their number general manager to have the control and management of the business of the corporation, subject to the approval and direction of the president or vice president, with the right to employ and discharge employés, and transact all kinds of business for the corporation, does not authorize such director, while acting as general manager, to employ a broker to procure a purchaser of the property of the corporation; the word "business" being confined to such business as the corporation may find necessary to transact in carrying on the coal mining business. Elk Valley Coal Co. v. Thompson, 150 S. W. 817, 820, 150 Ky. 614.

Same—Foreign corporation

The term "business," as used in Act May 23, 1901 (Acts 1901, p. 386), regulating the

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business of foreign corporations, providing that before a foreign corporation shall be authorized to establish a business in the state, or to continue business therein, it shall file a copy of its articles of incorporation with the Secretary of State, etc., and that no foreign corporation may make any contract in the state, nor sue thereon, until it has complied with the provision of the preceding section, means an established, continuing business rather than mere single, isolated acts done in the state, either in connection with, or apart from, some business that has its domicile in another state. Simmons-Burks Clothing Co. v. Linton, 117 S. W. 775, 777, 90 Ark. 73.

"Business" means: (1) "That which busies" or "that which occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time." (2) "Any particular occupation or employment engaged in for a livelihood or gain, as agriculture, trade, art, or a profession." (3) "Mercantile transactions or traffic in general." (Webster.) All these definitions imply, if not express, the idea of some permanency or durability; something more than a single temporary or spasmodic undertaking. Under Act Feb. 18, 1901, c. 379, 31 Stat. 794, which provides that, "before any foreign corporation shall begin to carry on business in the Indian Territory," it shall file a certificate designating a resident agent on whom process may be served, and also stating its principal place of business in the territory, and that if it fails to comply with such provisions all of its contracts with citizens and residents of the territory shall be void and shall not be enforced in its favor by any of the courts therein, proof that a foreign corporation, having no place of business in the territory, in a single instance completed an executory contract of sale therein by delivery of the property and taking notes and a mortgage for the purchase price through a local bank acting as its agent is not sufficient to subject it to the penalty for "carrying on business" by rendering its notes and mortgage nonenforceable, though it never filed the statutory certificate. Ammons v. Brunswick-Balke-Collender Co., 141 Fed. 570, 575, 72 C. C. A. 614.

St. 1898, § 2637, subd. 13, provides for service of process on a foreign corporation by service of summons and notice of object of action, by delivering copies thereof to any agent having charge of or conducting any business thereof in the state. Held, that a return showing the leaving of summons and notice of object of action at the office of the company maintained at a specified city with the person in charge of such office sufficiently showed legal service, the natural inferences therefrom being that the corporation did maintain an office at the specified city, which constituted "business" within the meaning of the statute, and that the person declared to have charge of the office had charge of the business, in the absence of contradiction of the facts and natural inferences therefrom by the corporation with knowledge of the facts. Minneapolis Threshing Mach. Co. v. Ashauer, 126 N. W. 113, 114, 142 Wis. 646.

Const. art. 10, § 5, provides that no foreign corporation shall be permitted to transact business in this state until it shall have accepted the Constitution of the state and filed such acceptance. Rev. St. 1899, § 3058 (Sess. Laws 1890–91, p. 174, c. 42, § 1), provides that the acceptance shall be filed in the office of the Secretary of State. A foreign corporation that had not complied with these requirements sued a telephone company for failure to transmit a message correctly. Held, that these provisions are mandatory, that the word "business," as used in the Constitution and in the statute, includes the contract in question, and that such contracts cannot be enforced, if that defense is raised. Gould Land & Cattle Co. v. Rocky Mountain Bell Telephone Co., 101 Pac. 939, 940, 17 Wyo. 507.

Holding lands

The mere holding of lands interminably by a "holding" company is not a "business" within Ky. St. § 567. Commonwealth v. Louisville Property Co., 132 S. W. 413, 414, 139 Ky. 689.

Horseshoeing

The word "business" in Freeholders' Charter (St. 1903, p. 697, c. 31), authorizing a municipal corporation governed by the freeholders' charter to license, for purposes of regulation and revenue, "all and every kind of business transacted or carried on" in the municipality, includes, with a few exceptions, all manner of occupations or means by which persons earn a livelihood, and includes the business of horseshoeing carried on within the limits of the city, and an ordinance imposing a license tax on such business is valid. Ex parte Diehl, 96 Pac. 98, 100, 8 Cal. App. 51.

Insurance

When a statute speaks of the right to transact the "business" of insurance in the state, it means the right to do a general business, and has no reference to the restricted right that a mutual insurance company has to insure the property of its own membership. Farmers' Mut. Fire Ins. Co. of Mississippi v. Cole, 43 South. 949, 950, 90 Miss. 508.

Keeping of dogs

The keeping of dogs may be licensed under Pol. Code, § 3366, authorizing cities to license any kind of "business" not prohibited by law. In re Ackerman, 91 Pac. 429, 435, 6 Cal. App. 5.

Practice of law

Practicing law is not a "business," within a statutory provision authorizing the car-

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rying on of a business under an assumed name. In re Kaffenburgh, 101 N. Y. Supp. 507, 509, 115 App. Div. 346.

Practice of medicine

A covenant in a deed conveying a lot that but one building shall be erected thereon for the exclusive use of a private residence, and that the lot shall not be "used or occupied for trade or business of any kind whatever," prohibits, during the life of the covenant, the owner from maintaining a physician's office on the premises and there receiving and treating patients, since the word "business," defined as that which busies one, or that which engages his time, attention, or labor, as his principal concern or any particular occupation or employment engaged in for livelihood or gain, as trade, art, or profession, includes the practice of medicine. Semple v. Schwarz, 109 S. W. 633, 636, 130 Mo. App. 65; Wood v. Same (Mo.) 109 S. W. 638.

As property

See Property.

Renting rooms

The Constitution protects a homestead consisting of lots not exceeding $5,000 in value, provided the same shall be used for the purposes of a home, or as a place to exercise the "calling" or "business" of the head of the family. A debtor purchased land worth $3,000, on which a two-story dwelling stood. He moved and remained away two years, although he intended to return. He returned when the dwelling was occupied by a tenant, and he built a one-story house on a part of the land. On the two-story house being vacated, he moved into it and rented the small house. He also rented out rooms in the two-story house. He had no income except from his rents. Held, that the renting of the rooms of the house and of the small house was not the pursuit of a calling or business within the Constitution, though the words "calling" and "business" taken together embrace every legitimate avocation of life by which an honest support for a family may be obtained. Lyon v. Files, 110 S. W. 999, 1001, 50 Tex. Civ. App. 630.

Selling liquor

An instruction that it was not necessary that a party should make a profit in his business in order to be guilty of pursuing the occupation of selling intoxicating liquors was not an improper limitation on the meaning of the words, "occupation" or "business," as used in the statute, and was proper where the evidence showed that accused would order whisky for his store customers, and charge it in their store account at cost to be paid when the rest of the account was paid, since each of these transactions constituted a sale. Dickson v. State (Tex.) 146 S. W. 914, 918.

Where the words are not otherwise limited by the context, the phrase "place of business" means a place where a person carries on some regular commercial occupation, not where he makes some single bargain, or even where he engages in sporadic transactions. A person might set up a regular establishment for the illegal sale of liquor and go regularly into that business, in which event the place he should so set up would be a place of business. In some contexts "business" means lawful business. There is nothing, however, in the prohibition statute of Georgia to indicate such a contextual restriction. It would not be a fair construction of the language of the law to say that one who, in the privacy of his home, made a single sale thereby ipso facto converted his home into a place of business. The buying of a single vessel containing whisky cannot be regarded as an occupation or "business." Bashinski v. State, 62 S. E. 577, 578, 5 Ga. App. 3 (citing Henderson v. Heyward, 34 S. E. 590, 190 Ga. 373, 47 L. R. A. 366, 77 Am. St. Rep. 384; Walsch v. Call, 32 Wis. 159, 161).

The terms "business" and "occupation," as used in Acts 29th Leg. c. 64, providing for the punishment of any one, or the agent or employé of any one, engaged in the "business or occupation" of keeping or storing intoxicants, or others, in any county in which the sale of intoxicating liquors has been prohibited, mean a calling, trade, or vocation in which one engages to make a living or obtain wealth. Cohen v. State, 110 S. W. 66, 67, 53 Tex. Cr. App. 426 (quoting and adopting definitions in Stanford v. State, 16 Tex. App. 331; Love v. State, 20 S. W. 978, 31 Tex. Cr. R. 469; Koenig v. State, 26 S. W. 835, 33 Tex. Cr. R. 367, 47 Am. St. Rep. 35; State v. Austin Club, 33 S. W. 113, 89 Tex. 20, 30 L. R. A. 500; Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 24 S. W. 16, 86 Tex. 153, 22 L. R. A. 802; 6 Cyc. p. 259; Waggener v. Haskell, 35 S. W. 1, 89 Tex. 435).

The power to legislate for the enforcement of local option laws is not taken away from the Legislature by the adoption of local option, except as to those offenses defined and punishment attached which were in existence when local option was adopted; and, if new offenses grow out of the violation of the local option law, not covered by existing laws, it is the duty of the Legislature to pass efficient laws to meet such emergencies, under Const. art. 16, § 20, directing the Legislature to pass laws whereby the people from time to time may determine whether the sale of intoxicating liquor shall be prohibited within prescribed limits, and hence Laws 31st Leg. 1st Ex. Sess. c. 15, making it a penitentiary offense to engage in or pursue the occupation or business of selling intoxicating liquors except as permitted by law, in any county, precinct, or subdivision in which the sale of such liquors has been or shall hereafter be prohibited by law, the sale only being

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prohibited when local option was adopted, is valid. Fitch v. State (Tex.) 127 S. W. 1040, 1043; Payne v. Same (Tex.) 129 S. W. 1197 (quoting 1 Words and Phrases, pp. 915–926; 8 Words and Phrases, pp. 7593, 7594).

Use of trading stamps

As to whether the use of trading stamps is a business, the court quotes: "'In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade. In the strict commercial sense of the term "business," it is not a business at all. It is simply a mode or manner of business—an instrumentality or incident of a business. When resorted to for the purpose of increasing the business to which it is annexed, it occupies the same relation to that business as newspaper advertising, circulars, dodgers, and the like'—and I adopt this view of the effect of the acts for which the petitioner is held. These acts do not constitute a 'business,' in the proper use of that word. They are a mere means of advertising, an incident of a business, 'a demium,' as stated in the petition, 'of a co-operation and exchange for value.'" Ex parte Hutchinson, 137 Fed. 950, 951.

"While the word 'business,' as used colloquially, carries with it a very broad meaning, still, as used in its legal and commercial sense, it applies only to that in which one engages for the purpose of livelihood, profit, or the like. This idea of 'business' runs through all of the definitions contained in the dictionaries." An agreement between a number of merchants and a corporation provided that the latter should print the names of the former in its subscribers' directory and circulate a number of copies of the book in a named city, and that the merchants should purchase of the corporation a number of so-called trading stamps, to be delivered to customers with their purchases (and not to be otherwise disposed of), and by them preserved and pasted in the books furnished by the corporation until a certain number had been secured, when they should be presented to the corporation in exchange for the customers' choice of certain articles kept in stock by the corporation. Held, that the furnishing of the trading stamps by a merchant to his customers did not constitute a "business" separate and distinct from that of selling merchandise but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute of itself a "business" in either a commercial or a legal sense. That whether the furnishing of the trading stamps be treated as a gift, or as a part of the contract of sale of the merchandise, which is delivered at the time the stamps are furnished, the furnishing of the stamps does not constitute a "business" subject to be taxed under charter authority to classify and tax "business." Hewin v. City of Atlanta, 49 S. E. 765, 768, 121 Ga. 723, 67 L. R. A. 795, 2 Ann. Cas. 296 (citing Brush Electric Light Co. v. Wells, 35 S. E. 365, 110 Ga. 192).

Work synonymous

Acts 1902, c. 160, which provides by section 8 that, before any person should engage in the business of undertaking or any assistant or employé of such person whose duties engaged him in the care, preservation, disposition, or burial of the dead should perform such duties, he should apply to the state board of undertakers for a license to practice such business and employment, and which as amended by Acts 1904, c. 389, requires the board to find that the applicant "has been employed at least two years prior to said application by some person or firm actively engaged in the work of practical embalming and undertaking * * * is possessed of skill and knowledge of the said business," must be construed to mean that the applicant has been so employed in the work of embalming and undertaking, and that he possesses the skill and knowledge of embalming as well as undertaking, and that the word "work" in the amending clause is synonymous with the word "business." State v. Rice, 80 Atl. 1026, 1029, 115 Md. 317, 36 L. R. A. (N. S.) 344, Ann. Cas. 1913A, 1247.

BUSINESS AGENT

"The term 'business agent,' as used in the statute, providing for service of summons in a civil action against a foreign corporation having a business agent in the state by delivering a copy to such agent, does not mean every man who is intrusted with a commission or an employment by a foreign corporation. It does not mean any man who does any kind of business for a corporation. The statute was never intended to include under the terms 'business agent' every person who might incidentally or occasionally transact some business for a foreign corporation. Its meaning must be drawn from the general context of the language used. The business agent mentioned in the statute means one bearing a close relation to the duties of managing agent, cashier, or secretary of the corporation. It must be an agent who is appointed, designated, or authorized to transact and manage one or more distinct branches of business which may be and is conducted and carried on by the corporation within the state where the service is made; one who stands in the shoes of the corporation in relation to the particular business managed, conducted, and controlled by him for his corporation. To constitute a managing or business agent upon whom service of summons could be made, the agent must be one having in fact a representative capacity and derivative authority, and not one created, by construction or implication, contrary to the intention of the parties. Jameson v. Simonds Saw Co., 84 Pac. 289–292, 2 Cal. App. 582

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(quoting and adopting Doe v. Springfield Boiler & Mfg. Co., 104 Fed. 684, 44 C. C. A. 128).

BUSINESS AND FACTORY USE

The schedule of rates attached to a contract to furnish water to a town contained an item "special rates," including hydrants in yards, hotels, stables, and "business and factory use." Held, that the phrase "business and factory use" related to domestic uses as found in factories and places of business, such as drinking, washing, etc., and did not authorize the sale of water to such factories to furnish power. Mayor, etc., of Town of Boonton v. Boonton Water Co., 61 Atl. 390, 394, 69 N. J. Eq. 23.

BUSINESS BELONGING TO THE ESTATE

In Rev. St. 1895, art. 1984, providing that if there be a plantation, manufactory, or "business belonging to the estate," and the disposition thereof is not specially directed by will, and it is not required to be sold to pay debts, it shall be the duty of the executor or administrator to carry on the plantation, manufactory, or business, or to rent the same, as shall appear to him to be most for the interest of the estate, "if it be granted that this language 'business belonging to the estate' is broad enough to include a partnership business, it is not true that it necessarily includes such business, and the general language should be restricted to the individual property, because the administration of partnership estate was differently provided for in article 1867 by referring it to the common law." Altgelt v. Alamo Nat. Bank, 83 S. W. 6, 10, 98 Tex. 252.

BUSINESS CONSUMPTION

Water used in operating a café, billiard room, bar, barber shop, and garage in connection with apartment houses, is used for "business consumption," within New York City waterworks regulations, permitting a commissioner to require installation of meters. Johnson-Kahn Co. v. Thompson, 130 N. Y. Supp. 216, 220, 73 Misc. Rep. 103.

Where the owner of an apartment house furnished water to the former owner living in an adjoining private dwelling house, pending establishment by him of a separate plant, such act did not make the apartment house a place in which water was furnished for "business consumption," within the meaning of a statute, subjecting places where water is furnished for business consumption to the discretionary authority of the commissioner in the matter of the installation and maintenance of meters. Foster v. Monroe, 82 N. Y. Supp. 653, 654, 40 Misc. Rep. 449.

BUSINESS CORPORATION

The term "business corporation" means a corporation engaged in financial dealings, buying and selling, traffic, and mercantile transactions in general, and includes a corporation organized to manufacture, distill, buy, sell, import, export, exchange, and otherwise acquire, hold, own, deal in, or dispose of wines, spirits, liquors, ales, and beers at wholesale or retail or otherwise. Greenough v. Board of Police Com'rs of Town of Tiverton, 74 Atl. 785, 789, 30 R. I. 212, 136 Am. St. Rep. 953.

An association organized, as shown by its certificate of incorporation, for social fellowship, with the privilege of providing for its members refreshment, etc., is a "social club," within Acts 1902–04, c. 270, subc. 4 (Code 1904, § 1105d), authorizing the incorporation of societies without capital stock, etc., and is not a "business corporation," within chapter 1, p. 437, of the act providing for the incorporation of corporations for the transaction of any lawful business. Hanger v. Commonwealth, 60 S. E. 67, 68, 107 Va. 872.

A cemetery association, organized without capital stock under Acts June 17, 1852 (1 Rev. St. 1852, p. 461, §§ 17–22), to provide a place for the burial of the dead, with authority to sell burial lots and engaged in selling burial lots and maintaining a cemetery, is conducting a "business," and is not a "charitable" organization, and is liable for the negligence of its officers or agents, though it has maintained the cemetery without profit, and its officers have received no compensation; there being nothing in the charter precluding the association from selling lots for profit or from paying salaries to its officers or dividends to its members. East Hill Cemetery Co. of Rushville v. Thompson (Ind.) 97 N. E. 1036, 1037.

Bankruptcy Act, § 37, providing that its provisions shall apply to all money, business, or commercial corporations, the terms would seem to have been intended to embrace all those classes of corporations that deal in or with money or property in the transactions of money, business, or commerce for pecuniary gain and not for religious, charitable, or educational purposes, and a railroad corporation is a "business corporation" within the meaning of that section as against the objection that it is a public corporation. Adams v. Boston, H. & E. R. Co., 1 Holmes, 30, 1 Fed. Cas. 90, 91.

BUSINESS DAY

See Secular or Business Day.

BUSINESS DONE

Where a license tax was imposed on an insurance company on premiums on "business done" in a given locality, the term means policies issued in the locality mentioned. Mutual Benefit Life Ins. Co. v. Commonwealth, 107 S. W. 802, 804, 128 Ky. 174 (citing and adopting the definition in Metropolitan Life Ins. Co. v. Darenkemp, 66 S. W. 1125, 23 Ky. Law Rep. 2249).

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"Business done within the state" cannot be made to mean between that state and other states. Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 72 Pac. 982, 984, 28 Mont. 484, 98 Am. St. Rep. 572.

"Business done within the state," within the meaning of the Political Code relating to licenses for express companies and carriers, relates to business begun and ended within the state and was evidently intended to exclude the idea that the tax was to be imposed on interstate business. "Business done within the state" cannot be made to mean business done between the state and other states. State v. Northern Pac. Exp. Co., 71 Pac. 404, 406, 27 Mont. 419, 94 Am. St. Rep. 824.

Laws 1896, c. 908, § 187, as amended by Laws 1901, c. 118, § 1, imposes an annual tax on the gross amount of the premiums received by domestic insurance companies for "business done" in the state. The premium which represents the business done is the amount that the company has the benefit of and furnishes an equivalent for. The business done through a canceled policy is the insurance made or indemnity furnished during the period that the policy is in force. That is the only business that a fire insurance company can do. People ex rel. Continental Ins. Co. v. Miller, 70 N. E. 10, 177 N. Y. 515.

BUSINESS ESTABLISHMENT

A tugboat used in dredging operations is not a "factory" or "business establishment," within the Labor Law (Consol. Laws 1909, c. 31), regulating the employment of minors in factories, providing that the term "factory" shall include mills, workshops, and other manufacturing or business establishments, and requiring that shafting, set screws, etc., in factories be properly guarded; the term "factory" being used to designate a structure or plant where something is made or manufactured from raw or partly wrought materials into forms suitable for use, and the term "business establishment" meaning an establishment resembling a mill, workshop, or other manufacturing establishment. Shannahan v. Empire Engineering Corp., 98 N. E. 9, 10, 204 N. Y. 543.

BUSINESS HOMESTEAD

Under Const. art. 16, § 51, providing that the homestead shall consist of lots used for a home or as a place for the business of the head of a family, the homestead embraces the family residence and the place of business, and the lots constituting the homestead may be connected or not, provided they are used for a home, and one or more lots may be devoted to business; but the portion devoted to the business must constitute one place at which the business is transacted. The head of a family claimed a business homestead of four lots; two being separated from the other two by an intervening lot. He was a dealer in implements, and his business houses were located on two of the lots, and the other two were used for storing the implements and exposing them for sale. Held, that the lots on which the business houses were located constituted the business homestead, but the other lots were not a part of it. Rock Island Plow Co. v. Alten, 116 S. W. 1144, 1145, 102 Tex. 366.

BUSINESS HOURS

Under Rev. St. 1895, art. 1222, authorizing the service of citation upon a corporation by leaving a copy of the same at the principal office of the company during "office" hours, a return showing service during "business" hours is sufficient. El Paso & S. W. Ry. Co. v. Kelly (Tex.) 83 S. W. 855, 860.

What constitutes business hours of a bank within the meaning of the negotiable instrument law (Laws 1899, p. 715, c. 356, § 1678—2), providing that presentment for payment to be sufficient must be made at a reasonable hour on a business day, has reference to the general custom of the place of the particular transaction. Hence, where presentment was made to a Chicago bank between 3 and 6 o'clock, and it appeared that the business day of the bank continued after the closing of the clearing house transactions, so as to enable banks holding commercial paper for collection to present such as had been refused recognition in the clearings, the presentment satisfies the statute. Columbian Banking Co. v. Bowen, 114 N. W. 451, 453, 134 Wis. 218.

BUSINESS IN THIS STATE

The phrase "business in this state," as used in an act creating a charter board, to which application must be made for permission to organize a domestic corporation and to do business in the state as a foreign corporation, means, when applied to commerce, domestic business only—business which originates, is carried on, and is completed within the jurisdiction of the state. State ex rel. Coleman v. Western Union Tel. Co., 90 Pac. 299, 302, 304, 75 Kan. 609.

BUSINESS MEN

"Business men" may be taken as meaning men engaged in business as the modifying word "business" is defined, and to include all who as their chief concern give their time and attention to any particular livelihood, occupation, or employment. Mooreland Rural Telephone Co. v. Mouch, 96 N. E. 193, 195, 48 Ind. App. 521.

BUSINESS METHODS

"Business methods" of a mutual benefit society, as to which it is authorized to adopt new by-laws binding on existing members, includes the fixing of proper assessment rates to enable it to meet its obligations. Supreme

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Ruling of Fraternal Mystic Circle v. Ericson (Tex.) 131 S. W. 92, 97.

BUSINESS OF AN INTERSTATE CHARACTER

Tax Law, Laws 1896, c. 908, § 184, provides for a franchise tax to be assessed on the gross earnings of a transportation corporation within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within the state, but shall not include earnings derived from "business of an interstate character." Where it appeared that a domestic railway company's assessment under the section included receipts from express business beginning in the state and transferred within the state for delivery in another state, or shipped outside the state for delivery within the state, such business was interstate commerce, and not taxable. People ex rel. New York Cent. & H. R. R. Co. v. Miller, 88 N. Y. Supp. 373, 375, 94 App. Div. 587.

BUSINESS OF CORPORATION

Control of, see Control.

BUSINESS OF THE SAME KIND

The amended certificate of incorporation of a leather company set forth the objects as the manufacture and sale of leather, lumber, and belting, including the acquisition of lands and other property necessary in that manufacture, and in general the engagement in any business necessary in the manufacture, and to the extent necessary to purchase stock in any other company. The certificate of incorporation of another company with which it was proposed to consolidate set forth its objects to be to manufacture not only leather, lumber, and belting, but any other merchandise or article, to engage in any other manufacturing, warehousing, trading, or selling business, to acquire lands and other property necessary to purchase the stock or bonds of any other corporation, to acquire trade-marks, patents, and inventions, to build and operate railroads, tramways, etc., and to carry on any other lawful business, proper or convenient, to be carried on in connection with the foregoing purposes. Held, that the companies were not organized for carrying on business of the same or a similar kind within Act March 8, 1893 (P. L. p. 121), authorizing consolidation. Colgate v. United States Leather Co., 72 Atl. 126, 129, 75 N. J. Eq. 229, 19 Ann. Cas. 1262.

BUSINESS OFFICE

Comp. Laws, § 3831, subd. 16, provides that all the personal property of a street railroad shall be assessed in the township, village, or city where its principal office is situated, and section 6436, subd. 5, requires the articles of association of a street railroad to state the city or village in which the office for the transaction of its business is located. Held, that the place in which the stockholders and directors of the corporation occasionally met was not the principal "business office" of the corporation, but that that was in a city where its president, secretary, and treasurer had their offices and where they performed the duties pertaining thereto. Detroit, Y. A. A. & J. Ry. v. City of Detroit, 104 N. W. 327, 329, 141 Mich. 5.

A switchman's "shanty" is not a "business office," within the meaning of Rev. St. 1899, § 995, providing that, "when any such summons shall be issued against any incorporated company, service on the president or other chief officer of such company, or, in his absence, by leaving a copy thereof at any 'business office' of said company with the person having charge thereof, shall be admitted a sufficient service." State v. Myers, 104 S. W. 1146, 1147, 126 Mo. App. 544.

BUSINESS PHONE

"Business phone" may mean a phone used exclusively or mainly by persons in conducting mercantile, manufacturing, or trade pursuits only, or may mean a phone maintained chiefly for use in carrying on the business in which the patron was engaged. Mooreland Rural Telephone Co. v. Mouch, 96 N. E. 193, 195, 48 Ind. App. 521.

BUSINESS PORTION

Pub. Acts 1903, No. 196, § 12, provides that in cities and villages motor cars shall not be run at a greater speed than eight miles an hour in the "business portion," nor at a greater rate than 15 miles an hour in other portions. Section 1 defines "business portion" as the territory contiguous to a public highway which is wholly or partially built up with structures devoted to business. Held, that the regulation as to business districts is not limited to a single central business area in a city, but applies to all business districts where there are more than one. People v. Dow, 118 N. W. 745, 746, 155 Mich. 115.

BUSINESS POWERS

Municipal corporations have two classes of powers—the one, governmental, in the exercise of which their officers may not bind the municipality beyond their terms of office; the other, business powers, in the exercise of which they are governed by the same rules as individuals or private corporations. Tuttle Bros. & Bruce v. City of Cedar Rapids, Iowa, 176 Fed. 86, 88, 99 C. C. A. 606.

BUSINESS REQUIRED BY LAW

The duty imposed on towns to establish and maintain public schools, keep highways and bridges safe and convenient, relieve and support the poor, and pay the town's proportion of the state tax, does not involve "business required by law" to be transacted at the annual town meeting, within the meaning of

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Gen. Laws 1896, c. 37, § 8, now Gen. Laws 1909, c. 47, § 8, requiring a notice of town meetings to contain a statement of the business required by law to be transacted therein, since Gen. Laws 1909, c. 36, §§ 3, 4, now Gen. Laws 1909, c. 46, §§ 3, 4, expressly permit such business to be transacted at any legal meeting of the qualified electors. Lonsdale Co. v. Taft, 84 Atl. 795, 797, 34 R. I. 496.

BUSINESS SERVICE

See Entire Business Service.

The words "business service," in a telephone company's franchise fixing the maximum rate for such service, means the ordinary service between business men and other citizens within the radius specified, and do not include service by which a person would receive telephone messages to be by him retelephoned to a telegraph company for transmission by it, thereby enabling the telegraph company to evade a joint traffic agreement between it and the telephone company. East Tennessee Tel. Co. v. City of Harrodsburg, 122 S. W. 126, 128, 135 Ky. 216.

BUSINESS SITUS

"Notes, mortgages, tax sale certificates, and the like, might be brought into the state for something more than a temporary purpose and be devoted to some business use here, and thus become incorporated with the property of this state for revenue purposes. Such situs has been aptly termed 'business situs.'" Board of Com'rs v. Hewitt, 93 Pac. 181, 184, 76 Kan. 816, 14 L. R. A. (N. S.) 493.

A line of cases hold that wherever a money lender has a local agent in another state, and permits that agent to control the evidences of debt and the mortgages securing them and to continue, for a long course of dealing, the business of lending money, collecting and relending money, in the state of the agent's residence, the evidences of debt and the mortgages securing them have what has come to be known as a "business situs" for purposes of taxation and for other purposes. Adams v. Colonial & U. S. Mortgage Co., 34 South. 482, 528, 82 Miss. 263, 17 L. R. A. (N. S.) 138, 100 Am. St. Rep. 633 (citing Jahier v. Rascoe, 62 Miss. 699).

BUSINESS TAX

A tax upon agents of packing houses and dealers in packing house goods or products having a place of business or stock of merchandise in a city and selling to customers therein is a tax upon business, not upon labor or the right to work. City of Savannah v. Cooper, 63 S. E. 138, 139, 131 Ga. 670.

A "business tax" is a tax on the privilege of carrying on a business or employment, and is commonly imposed in the form of an excise tax on the license to pursue the employment. It is usually a specific sum, or sum whose amount is regulated by the business done, or the income or profits earned. Central Granaries Co. v. Lancaster County, 109 N. W. 385, 387, 77 Neb. 311.

BUSINESS TENDERED

The expression "the business tendered such railroads," in Laws 1903, p. 93, c. 68, § 1, declaring that all railroads in Texas shall be required to build sidings and spur tracks sufficient to handle the business tendered such railroads, when ordered to do so by the railroad commission, refers to freight and passengers which come to the railroad from the public for transportation as a public highway; and the Legislature's intention was to require all railroad companies to provide all necessary means for accommodating such business. Railroad Commission of Texas v. St. Louis Southwestern R. Co. of Texas, 80 S. W. 1141, 98 Tex. 67.

BUSINESS TRANSACTED

Kirby's Dig. § 3095, authorizing a husband or wife to testify for the other respecting any "business transacted" by the one for the other in the capacity of agent, did not authorize the husband of a will contestant to testify concerning a copy of a letter written by contestant to testator; the term "business transacted" referring to business transactions with third persons, and not with each other, and the statute being designed to enable a husband or wife who had transacted business with a third person through the other as agent to prove such business by the agent who transacted it, the principal not having personal knowledge thereof. Taylor v. McClintock, 112 S. W. 405, 417, 87 Ark. 243.

BUSY

"Busy" means "actively or attentively engaged; closely occupied, mentally or physically; opposed to idle; in constant or energetic action; filled with active duties or employment." Graves v. Knights of Maccabees of the World, 112 N. Y. Supp. 948, 950, 128 App. Div. 660.

BUSY SEASON

The terms "busy season" and "dull season," unexplained, in a contract for the employment of a fur cutter, in which the employer agrees to give a certain weekly salary for the "busy season" and a certain other sum per week for the "dull season," are ambiguous to those unacquainted with the fur trade, and oral testimony is admissible to show their meaning. Schultz v. Simmons Fur Co., 90 Pac. 917, 919, 46 Wash. 555.

BUT

The word "but" is defined as "except"; "on the contrary"; "yet" or "still," as a word of limitation. E. H. Rollins & Sons v. Board of Com'rs of Grand County, 199 Fed.

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71, 78, 117 C. C. A. 583 (citing 1 Words and Phrases, p. 926).

The word "but" is commonly used in the sense of "except." In re Sullivan County R. R., 81 Atl. 473, 474, 76 N. H. 185.

The meaning of the word "but" varies according to the context. It is used to mean "except," and also to mean "on the contrary," or "on the other hand." Board of Trustees of Park College v. Attorney General, 129 S. W. 27, 30, 228 Mo. 514.

Under the statute requiring a party demanding an appeal to file an affidavit that the appeal is not intended for purpose of delay and that affiant fairly believes he has a just and legal defense, an affidavit that it was not intended for delay "but" affiant believed, etc., was sufficient. Tomlin v. Morris, 16 N. J. Law, 179, 180.

B. & C. Comp. § 226, provides that the homestead shall be exempt from sale on any judicial process after the death of the person entitled thereto for the collection of any debts for which the same could not have been sold during his lifetime, but such homestead shall descend as if death [exemptions] did not exist. Held, that the word "but" is an adversative conjunction used in the sense of "on the other hand" or "yet," and is not intended as a prohibition against the owner's power to dispose of the homestead by will, nor was the statute intended to prescribe the sole mode by which the title might pass from the owner, but only that the descent should not be affected by the exemption clause. Mansfield v. Hill, 108 Pac. 1007, 1008, 56 Or. 400.

Testator devised all his real estate to his widow so long as she should remain such, and then provided that certain of his real estate should not be sold or incumbered, and, on the death of the widow, should be owned and used by his children as equal co-owners, "but in case of the death of any one leaving heirs, then the share of such deceased child," in equal portions, should descend to his or her heirs, and, on the death of the children or any of them, the property should descend to their respective heirs in fee simple absolute. Held, that since the word "but" following the creation of the life estate in testator's children, marked the beginning of an exception, and was used in the sense of "except," "unless," "save," "yet," "still," "however," "nevertheless," the clause relating to the death of any of the children referred to their death during the lifetime of the widow, and that, as to children surviving her, no contingency longer existed, the word "heirs," in the last clause not being limited to heirs of the body but referring to testator's heirs generally. Winter v. Dibble, 95 N. E. 1093, 1099, 251 Ill. 200.

Under Public Service Commission Law (Consol. Laws 1910, c. 48) § 38, which provides that a carrier shall be liable for loss or injury to property carried as baggage up to its full value regardless of the character thereof, but that the value in excess of $150 should be stated upon delivery to the carrier, who may make a reasonable charge for the assumption of liability in excess of $150, the word "but," which ordinarily indicates an intention to limit or restrict the effect of what precedes it, may be given that effect by qualifying the extension of the liability of the carrier as insurer to property carried as baggage, though in fact it be merchandise, without operating to limit the carrier's liability to the sum of $150, where no excess value is stated. Robinson v. New York Cent. & H. R. R. Co., 129 N. Y. Supp. 1030, 1032, 145 App. Div. 391.

The word "but," as used in Kirby's Dig. § 5057, providing that unimproved and uninclosed land shall be deemed to be in the possession of the person who pays taxes thereon, if he have color of title thereto, "but" no person shall be deemed to invoke the benefit of that act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession, introduces an exception or proviso or limiting clause to the general provision, which precedes it, and, according to a well-settled rule of construction, where the enacting clause of a statute is general in its language and objects and a proviso is afterwards introduced, the proviso is considered strictly and takes no case out of the enacting clause which does not fall fairly within its terms. Towson v. Denson, 86 S. W. 661, 662, 74 Ark. 302 (citing 1 Words and Phrases, p. 926; 6 Cyc. p. 261; Leggett v. Firth, 29 N. E. 950, 132 N. Y. 11).

BUT ALSO

The term "but also," when connecting two parts of a sentence, implies that what follows is in addition to what precedes it, carrying the idea "not only that but this." Hence a newspaper publication that "Julian is remembered here as a member of the Legislature who did well in a legislative way, but also as a chief of police whom a Democratic senate committee said was not a proper man," is so connected in all of its parts that the meaning of the entire publication is properly submitted to the jury for construction in a libel action. Julian v. Kansas City Star Co., 107 S. W. 496, 504, 209 Mo. 35.

BUTCHERING BUSINESS

A bequest of "all horses, harnesses, wagons, machinery, and all other personal property used in my butchering business, including all choses in action," does not pass a bank deposit, it appearing that the account was resorted to in connection with testator's general business; that accounts were paid out of it in no wise connected with his

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"butchering business"; that it was not at all necessary to the conduct of that business, which was an established and profitable one; that there were motives for opening the account growing out of a contemplated visit abroad; and that there were accounts due by customers to the butcher business satisfying the provision as to choses in action. Koss v. Kastelberg, 36 S. E. 377, 378, 98 Va. 278.

BUTTER

See Cocoa Butter; Cocoa Butterine; Imitation Butter; Yellow Butter.
See, also, Oleomargarine.

Act Cong. May 9, 1902, c. 784, § 4, 32 Stat. 194, 195, defines "butter" to mean "the food product usually known as butter and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter." United States v. 11,150 Pounds of Butter, 195 Fed. 657, 658, 659, 115 C. C. A. 463.

Encyclopedia Britannica (9th Ed.) vol. 4, p. 590, describes "butter" as "the fatty portion of the milk of mammalian animals. The milk of all mammals contains such fatty constituents; and butter from the milk of goats, sheep, and other animals has been and may be used; but that yielded by cows' milk is the most savory, and it alone really constitutes the butter of commerce." "Ghee" is defined by the Standard Dictionary as follows: "Butter clarified by boiling or heating and skimming or straining until it becomes a liquid or semisolid oil, capable of being kept for many years; largely used in India, in cookery and medicines, and in religious rites." "Ghee" is within the provisions for "butter and substitutes therefor" in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 236, 30 Stat. 170. Sahadi Bros. v. United States, 152 Fed. 486, 487.

"The food product usually known as 'butter' * * * is made exclusively from milk or cream, or both, with or without any salt, and with or without additional coloring matter." McCray v. United States, 24 Sup. Ct. 769, 771, 195 U. S. 27, 49 L. Ed. 78, 1 Ann. Cas. 561 (quoting and considering 24 Stat. 209, c. 840).

BUTTER AND SUBSTITUTES THEREFOR

See Butter.

BUTTER OF A SHADE OR TINT OF YELLOW

Chapter 183, Laws 1911, construed, and held to prohibit the manufacture or sale of oleomargarine purposely made of a shade or tint of yellow, though no artificial coloring matter is used, and that the words "butter of a shade or tint of yellow" mean not only "yellow butter," but all butter which has any shade or tint of yellow. State v. Hanson, 136 N. W. 412, 413, 118 Minn. 85, 40 L. R. A. (N. S.) 865.

BUTTERINE

See Cocoa Butterine.

BUTTING IN

"Butting in" consists in intermeddling with other people's business. In re Riggsbee, 151 Fed. 701, 702.

BUTTONS AND BUTTON MOLDS

Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 414, 30 Stat. 190, provides that "buttons * * * and button molds * * * shall pay duty at the following rates," and the schedule of rates then prescribed mentions only "buttons." Held, that this provision for "buttons" should be construed, as though reading "buttons and button molds," and that metal button molds should pay the rate assigned to metal buttons. Hormann, Schutte & Co. v. United States, 153 Fed. 868, 869, 83 C. C. A. 50.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 414, 30 Stat. 190, for "button molds," includes articles commercially known as button shanks, consisting of pairs of metal disks so constructed that when a piece of cloth is placed on top of one of the disks, and they are subjected to pressure, a cloth-covered button is produced. Hormann, Schutte & Co. v. United States, 153 Fed. 868, 869, 83 C. C. A. 50.

BUTTONS OF GLASS

So-called rhinestone buttons, composed of paste, are not embraced within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 414, 30 Stat. 190, for "buttons of glass," because, though paste is a kind of glass, it is distinguished from glass elsewhere in the tariff under its own peculiar name. B. Blumenthal & Co. v. United States, 144 Fed. 384, 385, 75 C. C. A. 322.

BUY

Where a mortgagee agreed, in consideration of his mortgagor conveying the property to him by a deed absolute on its face, that the latter might "buy" it back within a certain time at a certain price, it amounted to an agreement for a redemption. Day v. Davis, 61 Atl. 576, 578, 101 Md. 259.

To "buy and to sell" means to purchase one thing and to sell another. "To purchase," in the title of Laws 1903, p. 736, entitled "An act to authorize cities of this state to purchase lands," etc., means "to buy," and hence does not express the right to condemn, nor is it broad enough to embrace such right. Griffith v. City of Trenton, 69 Atl. 29, 30, 76 N. J. Law, 23.

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Under the act of 1885 (Laws 1885, p. 229), relative to the consolidation of railroad corporations, section 1, providing that any railroad company organized under the laws of this state operating in connection with their own lines any other railroads in this or any other state may purchase and hold in fee simple or otherwise, and use and enjoy the property rights and franchises of the companies owning such other roads, it is not necessary that the transaction should take the form of a technical sale, but it is sufficient if the contract or agreement merges the properties, franchises, and corporate rights of the merging company into the merger corporation, as a result of which one corporation disposes of its property and franchises and the other acquires them in a lawful manner, since "purchase" is not used in its popular and commercial meaning as equivalent to "buy," but in its enlarged and legal signification meaning the acquisition of real property by any voluntary act of the parties, as distinguished from title by descent which results from operation of law (citing 7 Words and Phrases). Chicago & E. I. R. Co. v. Doyle, 100 N. E. 278, 280, 256 Ill. 514.

BUYER'S NEEDS

Plaintiff owned and operated a cannery for the manufacture of canned goods in which beef was used, having previously for four or five years purchased beef from defendant, a packer. It had not been plaintiff's custom to run its factory at full capacity, which was about 10,000 pounds a day, without regard to orders received, but rather to manufacture goods to fill orders received or sales made, and to keep on hand a sufficient supply to fill orders that would probably be received. Under these circumstances plaintiff agreed to purchase, and defendant agreed to sell to plaintiff, 175,000 to 225,000 pounds of beef trimmings, to be delivered at the seller's option during the year; defendant agreeing to "take care of the buyer's needs this year." Held, that the clause quoted did not obligate defendant to furnish a sufficient quantity to operate plaintiff's plant at full capacity for the year, but only obligated it to furnish a sufficient quantity to operate the factory in accordance with plaintiff's customary operation, and to cover the amount that plaintiff's sales might exceed the maximum quantity as named in the contract, etc. T. B. Walker Mfg. Co. v. Swift & Co., 200 Fed. 529, 532.

BUYER'S OPTION

Where meat was bought "buyer's option," which was explained to mean for the buyer to give shipping orders, when he desired the meat to be actually delivered, and the parties in subsequent correspondence recognized that interpretation of the phrase, and the buyer admitted that the meat was being held for his account, and acquiesced in the arrangement, it was not incumbent upon the seller to have the meat transported to the buyer's place of business and tender it to him after he had evidenced his intention of not receiving it, in order to hold him liable therefor. Bonds v. Thomas J. Lipton Co., 37 South. 805, 807, 85 Miss. 209.

BUYER'S TANK BASIS

Where a contract was for the sale of four cars of oil "buyers' tank basis," the term "car" meaning in the trade 60 barrels and "buyers' tank basis" meaning that the buyer shall furnish the tanks, and the buyer under the contract had the option to require shipment made in barrels or tanks and chose shipment in barrels, it could not demand that in loading the car the seller should place 125 barrels of oil therein, but was bound by the custom of the trade to place 60 barrels in the car, and by the rules of carriers not permitting more to be shipped in a car. Paris Oil & Cotton Co. v. Carstens Packing Co. (Tex.) 126 S. W. 1182, 1183.

BUYING OF A BILL

Where a corporation, organized under Act April 21, 1896 (P. L. p. 277), loaned the owner of a majority of the stock of another corporation a large sum of money, and took from him a pledge of such stock, it was a violation of the third section of such act, providing that no corporation created under the act should possess the power to carry on the business of discounting bills or notes, or of buying and selling bills of exchange, the loan, while not strictly a discounting of the note, was the "buying of a bill." Earle v. American Sugar Refining Co., 71 Atl. 391, 395, 74 N. J. Eq. 751.

BY

See Abide By; Stand By; Whereby.

A verdict finding defendant guilty of embezzlement "by" bailee, instead of "as" bailee, is defective, if not bad. State v. Jones, 89 S. W. 366, 367, 114 Mo. App. 343.

As on or before

"By," as indicating a terminal point of time, means "not later than; as early as." Goldman v. Broyles (Tex.) 141 S. W. 283, 285 (citing 1 Words and Phrases, p. 930).

A contract to complete work "by" the ensuing month of November excludes that month and requires it to be completed before that time. Rankin v. Woodworth (Pa.) 3 Pen. & W. 48.

It is not a material alteration of an order for goods made subject to countermand "by" a certain time to write the word "before" over the word "by"; the legal effect of the instrument not being changed. Express Pub. Co. v. Aldine Press, 17 Atl. 608, 609, 126 Pa. 347.

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A provision of a charter party giving the option to cancel if the vessel was not "ready for loading by November 20, 1903, at Yokahoma," required her to be ready on or before that date, and the charterer was not entitled to cancel because she was not ready at the beginning of the day, where she was a few hours later. Ruprecht v. Delacamp, 165 Fed. 381, 382.

Where a defendant was granted a continuance on condition that if she failed to pay the costs by the next term of the court judgment should be rendered against her, the word "by" did not mean before, but meant not later than, or as soon as, and so payment of costs on the day of the next term when the case was called is sufficient. Weir v. S. & J. T. Clark, 58 South. 793, 794, 4 Ala. App. 302.

Where the declaration, in an action by a buyer against a seller for failure to deliver the property sold, alleged that by the terms of the contract it was to be delivered on or before the 1st day of November, while the contract in evidence showed that it was to be delivered "by the first day of November," there was no variance. Coonley v. Anderson (N. Y.) 1 Hill, 519–522.

A telegram, "If can get peanuts out by Friday, ship; answer," and response, "Order confirmed; will ship by Friday night of this week," to which no reply was made until the Friday referred to, when the buyer telegraphed a cancellation of the order, constituted a completed contract; the word "Friday" including 24 hours, until 12 o'clock Friday night, and the word "by" being equivalent to "not later than." Dukes v. D. L. Gore & Co., 76 S. E. 365, 11 Ga. App. 743 (citing 1 Words and Phrases, p. 930).

As to

See To.

As used in conveyance

As used in a conveyance, "by" is a term of exclusion unless by necessary implication it is manifestly used in a different sense. Bradley v. Rice, 13 Me. 198, 201, 29 Am. Dec. 501.

By lake or stream

"To, from, or 'by' are terms of exclusion, unless by necessary implication they are manifestly used in a different sense." So that, where land is conveyed bounded by a pond or lake, it is limited to the margin of the pond or lake. Bradley v. Rice, 13 Me. 198, 201, 29 Am. Dec. 501.

In a conveyance the words "to," "on," "by," "at," "along," a nontidal stream presumptively carry title as far into the stream as the grantor possesses. Leary v. Jersey City, 189 Fed. 419, 428.

With synonymous

The word "with," in an information for robbery charging that defendant then and there willfully, etc., and "with" force and fear committed the offense, is used as synonomous with "by" and equivalent to the expression "by means of"; the meaning of the word not being limited to accompaniment, association, or proximity, though such is its primary meaning. State v. Pemberton, 104 Pac. 556, 557, 39 Mont. 530.

BY AND WITH ADVICE

Where the Constitution declares that a power to act is in the Governor "by and with the advice of council" or "by and with the advice and consent of the council," the responsibility rests primarily on the Governor to determine as the supreme executive magistrate whether any action is called for, and what action, if any, is desirable; and the provision for advice of the council is a requirement that their approval and concurrence shall accompany the affirmative act and enter into it before it becomes complete and effective. The Governor is not required as a matter of law, on the presentation of a petition for pardon or for commutation of sentence, to refer such petition to the executive council or to submit the same to the council unless the Governor consider it his duty to exercise the pardoning power. In re Opinion of Justices, 78 N. E. 311, 312, 190 Mass. 616.

BY ANY DEVICE WHATEVER

The meaning of the clause "by any device whatever," in Act Feb. 19, 1903, c. 708, 32 Stat. 847, prohibiting rebates, is directly or indirectly in any way whatever. Armour Packing Co. v. United States, 153 Fed. 1, 16, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400.

BY AUTHORITY

See Authority—Authorize.

BY BALLOT

The phrase "by ballot," as used in Const. art. 2, § 1, providing that all elections by the people shall be by ballot, implies that the voting shall be secret and not viva voce. Where the officers at a local adoption election provided boxes which were labeled "For Sale" and "Against Sale," respectively, into which the voters were required to cast ballots as they voted for or against the sale of liquor respectively, the election was void as destroying the secrecy of the ballot. State ex rel. Birchmore v. State Board of Canvassers, 59 S. E. 145, 147, 78 S. C. 461, 14 L. R. A. (N. S.) 850, 13 Ann. Cas. 1133.

BY CHANCE

Where prizes were offered to those sending bands of certain makes of cigars for the closest estimates of the number of cigars on which $3 tax per thousand would be paid in a certain month, the number on which the tax was paid in each month for three years being published in connection with the offer, the distribution of prizes was not "by

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chance," within Pen. Code, § 323, defining lotteries as a distribution of money by chance. People ex rel. Ellison v. Lavin, 87 N. Y. Supp. 776, 778, 93 App. Div. 292.

BY CONFESSION

See Decree Pro Confesso.

BY DESCENT

See Indians by Descent.

BY FORCE OF THE EXECUTION

A demand by an execution plaintiff is not a demand "by force of the execution" within the meaning of Rev. Laws, c. 189, § 40, providing that, if goods in the hands of one adjudged a trustee in trustee process are not demanded of him "by force of the execution" within 30 days after final judgment, they shall be liable to another attachment; such demand, to be effective, must be made by an officer in whose hands the execution has been placed. Barnes v. Shelburne Falls Sav. Bank, 72 N. E. 85, 86, 186 Mass. 574.

BY HAND

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194, relating to "such statuary as is cut, carved, or otherwise wrought by hand * * * and as is the professional production of a statuary or sculptor only," it is not necessary that the entire work on a statue shall be "by hand," nor that the entire handiwork must be that of the statuary or sculptor personally. United States v. Tiffany & Co., 160 Fed. 408, 412, 87 C. C. A. 360.

BY HER OWN LABOR

The phrase "by her own labor," in Hill's Ann. Laws Or. 1892, § 2993, providing that the property acquired by a married woman during coverture "by her own labor" shall not be liable for the debts of her husband, is not limited to manual labor, but includes the proceeds of a mining claim which a married woman worked through her employé under a contract. Elliott v. Hawley, 76 Pac. 93, 95, 34 Wash. 585, 101 Am. St. Rep. 1016.

BY LAW

See Prescribed by Law or Ordinance.

BY MAIL

The words "by mail," used in Laws 28th Leg., Reg. Sess., c. 77, requiring the levying officer in the foreclosure of tax liens under execution or order of sale to give defendant or his attorney written notice of the sale, either in person or by mail, mean that the notice is to be in fact mailed; the officer being given the choice of two methods, one by serving personal notice and the other by mail. Rogers v. Moore, 97 S. W. 685, 100 Tex. 220.

BY NATURE OF HIS EMPLOYMENT

The expression "by nature of his employment" means through the character of his employment, or by reason of, or on account of, his employment. So, in a prosecution for embezzlement, it is sufficient for the indictment to charge that the property embezzled came into the defendant's possession, and was under his care, "by nature of" his employment, although the statute makes it a crime to embezzle property which came into his possession and was under his care "by reason of" his said employment. Strobhar v. State, 47 South. 4, 6, 55 Fla. 167.

BY ORDER OF THE COURT

The phrase "by order of the court," in a petition in an action by an infant by next friend, alleging that the next friend was appointed by order of the court, meant that his appointment was a matter of record in the court where the case was pending. Wegeschiede v. St. Louis Transit Co., 94 S. W. 774, 775, 118 Mo. App. 295.

Where a mechanic's lien does not sufficiently describe the property, and leave to amend a complaint to foreclose the lien is granted upon sustaining a demurrer thereto, the filing of a new notice or amendment of the old one is not "by order of the court," within Ballinger's Ann. Codes & St. § 5904, providing that a claim of lien may be amended in an action to foreclose same by order of court, as pleadings may be, etc., so that the filing of a new lien notice after the time for filing had expired would be of no force. Brown v. Trimble, 93 Pac. 317, 48 Wash. 270.

BY OR THROUGH

A policy insuring the owner of property "against all direct loss or damage by fire except as hereinafter provided" contained a provision that the company should "not be liable for loss caused directly or indirectly by invasion, * * * or for loss or damage occasioned by or through any * * * earthquakes." Held, that the words "directly or indirectly" did not apply to the provision respecting earthquakes; that, construing such provision most strongly against the insurer in accordance with the settled rule, and giving the words their common, ordinary meaning, the word "occasioned" was equivalent to "caused," and the phrase "by or through" was but a repetition of words meaning the same thing, so that the provision excepted only loss or damage caused directly by earthquake, and that a loss indirectly caused by the progress of a fire from a distance, although originally started by an earthquake, was not within the exemption. Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard, 164 Fed. 404, 406, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

BY REASON OF

The term "by reason of" in a release of debts, etc., for or "by reason of" or on account of the construction of a battleship, is equivalent to "by virtue of." United States v. Wm. Cramp & Sons Ship & Engine Bldg.

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Co., 27 Sup. Ct. 676, 678, 206 U. S. 118, 51 L. Ed. 983.

In an action for personal injuries, the use in an instruction of the words "by reason of," instead of "as the direct and proximate result of," is not misleading, since the terms are equivalent. Houston & T. C. R. Co. v. Anglin, 99 S. W. 897, 898, 45 Tex. Civ. App. 41.

Kirby's Dig. § 2684, declares that, in every final judgment for divorce granted a husband, an order shall be made that all property be restored to either party which either party obtained from or through the other during the marriage and in consideration and by reason thereof. Held, that on divorce granted a husband he was not entitled to have restored to him property conveyed by him to the wife under a separation agreement and that conveyed to her by him in consideration of her again living with him. The Supreme Court of Kentucky, in construing the word "consideration" in this act, held it to mean "the act of marriage, or some agreement or contract touching or relating to the act of marriage," and the expression "by reason thereof," as relating to such property as either party may have obtained from or through the other, by operation of the laws regulating the property rights of husband and wife. McNutt v. McNutt, 95 S. W. 778, 780, 78 Ark. 346 (quoting Phillips v. Phillips, 72 Ky. [9 Bush] 183; Flood v. Flood, 68 Ky. [5 Bush] 167).

By reason of any memorandum

Where testator devised the residue of his property to his executors, to be distributed by them, and directed that they should not be under any legal accountability or subject to any trust or liable to any person or corporation by reason of any memorandum which the testator might leave, the words "by reason of any memorandum," etc., should be construed to refer to antecedent clauses of the will, and to confer full discretionary powers on the executors, not limited by any express trust which otherwise might be claimed to have been created in favor of those named in a subsequent memorandum. Minot v. Attorney General, 75 N. E. 149, 189 Mass. 176.

By reason of intoxication

Rev. St. 1883, c. 27, § 49, gives a right of action to every wife, etc., injured by any intoxicated person against any one who by selling or giving any intoxicating liquor has caused such intoxication. Held, that the statute does not require that the furnishing of the liquor by defendant in an action under the statute should be the proximate cause of plaintiff's injuries, but only that it should have contributed to the intoxication, and that the intoxication should have been the proximate cause, and so where defendants sold intoxicating liquor to plaintiff's son upon whom she was in part dependent for support, and the liquor caused him to make an assault upon one B., by whom in defense he was struck and his jaw broken, resulting in decreased ability to labor, defendant was liable. Currier v. McKee, 59 Atl. 442, 443, 99 Me. 364, 3 Ann. Cas. 57.

BY RIGHT, DEVISE OR BEQUEST

The phrase "by right, devise or bequest," as used in a deed of marriage settlement, conveying to a trustee all the estate that the wife may hereafter receive or be entitled to "by right, devise, or bequest," means by right of inheritance, devise, or bequest, and refers to land descending on the wife by operation of law, and not to land acquired by purchase. Land conveyed by deed to the wife during coverture is not within the deed of settlement and may be mortgaged by her without the trustee's consent. Dunlap v. Hill, 59 S. E. 112, 114, 145 N. C. 316.

BY RIGHT OF REPRESENTATION

The phrase, "which his, her, or their parent would have taken if living," is often employed as a conventional phrase, meaning that children or issue of a decedent are to take by representation. Rasquin v. Hamersley, 137 N. Y. Supp. 578, 583, 152 App. Div. 522.

The expression "by right of representation" means in the right of the ancestor through whom the heir takes. Hemenway v. Draper, 97 N. W. 874, 875, 91 Minn. 235.

"The words 'by right of representation' * * * apply to lineal descendents only." Blodgett v. Stowell, 75 N. E. 138, 139, 189 Mass. 142.

BY THE ACT

See Constituted by the Act.

BY THE COURT

See Entertained by the Court.

A decree purporting on its face to have been made "by the court" would be deemed to have been on a hearing of all the judges and not by an individual judge. Zerbey v. Allan, 64 Atl. 587, 588, 215 Pa. 383.

BY THE WRITTEN DIRECTION OF THE COURT

The words "by the written direction of the court," as used in Acts 29th Leg. c. 112, § 5, providing that any original documentary evidence, etc., if embraced in the stenographer's report, may be made a part of the record "by the written direction of the court," construed with Rev. St. 1895, arts. 1379, 1380, 1414, by the provisions of which the approval of the trial judge is full verification of the sufficiency and accuracy of a statement of facts, mean that the direction may be made by the judge either within term time or within 20 days thereafter. Colorado & S. R. Co. v. Hamm, 103 S. W. 1125, 1127, 47 Tex. Civ. App. 196.

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BY, THROUGH, OR UNDER

An independent title in land is acquired by condemnation of an easement, so that the covenant of the prior owner of the premises to warrant and defend them against the lawful claims and demands of all persons claiming "'by, through, or under' me" is not broken thereby. Weeks v. Grace, 80 N. E. 220, 223, 194 Mass. 296, 9 L. R. A. (N. S.) 1092, 10 Ann. Cas. 1077.

BY VIRTUE OF

The phrase "by virtue of" is defined as meaning by or through the authority of, so that, as used in the saving clause of article 5, § 54, Constitution of Oklahoma, providing that the repeal of a statute shall not affect any "proceedings begun by virtue of such repealed statute," means by or through the authority of, and in full compliance with, that statute. State ex rel. West v. McCafferty, 105 Pac. 992, 996, 25 Okl. 2.

BY VIRTUE OF AN EXECUTION

See Seized by Virtue of an Execution.

BY VIRTUE OF HIS OFFICE

Acts done "virtute officii" are within the authority of an officer, but which are accomplished by the improper exercise of that authority and in violation of the confidence which the law reposes in him, and his sureties are liable for such acts whereas acts "colore officii" are unauthorized by the office and do not amount to a breach of the bond. Stephens v. Hendee, 115 N. W. 283, 284, 80 Neb. 754 (quoting and adopting definition in Mechem, Public Officers, § 284; State, to Use of Goodin v. McDonough, 9 Mo. App. 63; citing State v. Porter, 95 N. W. 769, 69 Neb. 203; Ottenstein v. Alpaugh, 2 N. W. 219, 9 Neb. 237; State ex rel. Leidigh v. Holcomb, 65 N. W. 873, 46 Neb. 612; State v. Moore, 76 N. W. 474, 56 Neb. 82; Comstock-Castle Stove Co. v. Caulfield, 95 N. W. 783, 1 Neb. [Unof.] 542; Snyder v. Gross, 95 N. W. 636, 69 Neb. 340, 5 Ann. Cas. 152; Wilson v. State, 72 Pac. 517, 67 Kan. 44).

The accomplishment of fraud in the line of an official's duty is "virtute officii," and his sureties are responsible therefor. Board of Com'rs v. Sullivan, 93 N. W. 1056, 89 Minn. 68.

The acts for which a sheriff or his sureties may be held liable are termed acts done "virtute officii," and those for which they cannot be held liable are termed "colore officii." The distinction is that acts done "virtute officii" are when they are within the authority of the officer but done in an improper exercise of his authority or in abuse of the law, while acts done "colore officii" are where they are of such nature the office gives him no authority to do them. Gold v. Campbell, 117 S. W. 463, 468, 469, 54 Tex. Civ. App. 269 (citing Leger v. Warren, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 222, 78 Am. St. Rep. 738).

In an information charging embezzlement "by virtue or under color of his relation as an officer," the words "by virtue or under color of his relation as an officer," as applied to the expression of his or her relation as an officer; may be said to mean one and the same thing, to wit, the obtaining of money or property by reason of or because of such official relation. Therefor the information is not void for duplicity. Hendee v. State, 113 N. W. 1050, 1052, 80 Neb. 80.

"In considering this question—liability on official bonds—some courts have adopted a distinction between acts 'virtute officii' and acts 'colore officii'; holding sureties on official bonds liable in the former case, and not in the latter. A definition of such acts is thus stated in People v. Schuyler, 4 N. Y. 173, founded on the common law: 'Acts done "virtute officii" are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him, whilst acts done "colore officii" are where they are of such nature that his office gives him no authority to do them.' This distinction is said to be disregarded in most jurisdictions. And in a very full and able note in Feller v. Gates (Or.) 91 Am. St. Rep. 511, Mr. Freeman, the author, says, what our investigation convinces us is true: 'The distinction suggested has been productive of anything but harmony among the authorities, and, in its attempted application to particular cases, it has served to confuse rather than clarify. It is a distinction hard to make in theory, and even more difficult to apply in practice. Not only do courts differ as to liability of sureties for acts colore officii, but, among those authorities which agree that such acts are covered by the obligation of the bond, the most widely divergent views are entertained as to what constitute acts colore officii, within the meaning of the definition.' * * * If a state constable, in an attempt to discharge a duty of his office, in the seizure of contraband liquor or the arrest of one openly violating the dispensary law, should, without just excuse, commit an assault and battery, or if in overcoming resistance he should so exceed his duty as to become the aggressor in an assault and battery, to the injury of another, then there is liability upon his bond. But an assault and battery committed by a constable under a bald assumption and usurpation of authority, without process or authority of any kind, would not be covered by the terms of his bond." Wieters v. May, 50 S. E. 547, 548, 549, 71 S. C. 9.

BY WAY OF

The words "by way of punishment," in an instruction authorizing the award of damages by way of punishment, define puni-

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tive or exemplary damages. Weiskopf v. Ritter (Ky.) 97 S. W. 1120, 1121.

BY-LAW

The words "ordinances," "rules," "regulations," and "by-laws" are synonymous terms. State ex rel. Krebs v. Hoctor, 120 N. W. 199, 200, 83 Neb. 690 (citing 6 Words and Phrases, p. 5025).

"By-laws" of a corporation are rules of law adopted to regulate its acts, and the rights and duties of members among themselves. Smoot v. Bankers' Life Ass'n, 120 S. W. 719, 728, 138 Mo. App. 438.

"By-laws" of a corporation are defined as private statutes for the government of the corporate body. Cook speaks of them as a permanent rule of action, and Thompson broadly distinguishes them from resolutions and regulations, and Bouvier's definition runs in the same line. In no way can such by-laws be held to be analogous to the hasty proceedings of the executive committee or of directors. Where it was required that the salary of a corporate officer be fixed by a "by-law," it could not be fixed by an ordinary resolution or ordinary vote of the corporation, or of the directors. Hayes v. Canada, A. & P. S. S. Co., 181 Fed. 289, 296, 104 C. C. A. 271.

The "by-laws" of a private corporation are not in the nature of legislative enactments, so far as third persons are concerned. They are mere regulations or self-imposed rules for the management and control of corporate affairs, not intended for strangers who do not subject themselves to their influence, and in this respect are different from the provisions of the charter. Dempster Mfg. Co. v. Downs, 101 N. W. 735, 736, 126 Iowa, 80, 106 Am. St. Rep. 340, 3 Ann. Cas. 187.

The "by-laws" of a corporation are rules and ordinances made by a corporation for its own government. They are the rule of its life, and its affairs are conducted in accordance with their provisions. Renn v. United States Cement Co., 73 N. E. 269, 270, 36 Ind. App. 149.

The office of "by-laws" of a building and loan association is to regulate the conduct and define the duties of the members toward the corporation and among themselves. They constitute the contract between the members, which determine their rights, provided they do not violate the statute or public policy. Hogsett v. Ætna Bldg., etc., Ass'n, 96 Pac. 52, 55, 78 Kan. 71 (citing Thompson on Building Associations, §§ 41, 51).

The word "by-law" means those regulations which as one of its legal incidents a corporation is empowered to make affecting the management of its business, the control of its officers and agents, and the rights and duties of the members between themselves and between the corporation. Cheney v. Canfield, 111 Pac. 92, 93, 158 Cal. 342, 32 L. R. A. (N. S.) 16.

"The function of a 'by-law' of a private corporation is to prescribe the rights and duties of the members in reference to the internal government of its affairs; and in reference also to the rights and duties which exist between the members themselves by virtue of their membership in the same corporate body. The right of a private corporation to enact such by-laws is inherent and incident to its existence. This power is subject to the condition that the by-law must be reasonable, and not contravene or be inconsistent with the charter or any existing law of the state." Bornstein v. District Grand Lodge No. 4 Independent Order B'nai B'rith, 84 Pac. 271–272, 2 Cal. App. 624.

A "by-law" is a rule or law adopted by a corporation or association for the regulation of its own action and concerns, and of the rights and duties of its members among themselves. The term has a peculiar and limited signification, being used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members amongst themselves. Hayes v. German Beneficial Union, 35 Pa. Super. Ct. 142, 148.

The by-laws of a corporation are laws for regulation of its officers and the management of its property, and have much the same force as between the members and officers in the conduct of corporate affairs that a statute has, and can only be repealed or amended as provided by law. J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co., 119 N. W. 1048, 1050, 18 N. D. 253.

As law

See Law.

Resolutions and ordinances

A "by-law" is a law made by a municipality for the regulation of affairs within its authority. In general and professional use the term "ordinance" is almost, if not quite, equivalent in meaning to the term by-law, and is the word most generally used to denote the by-laws adopted by municipal corporations. An ordinance amending an ordinance passed by an incorporated town in what was Indian Territory, granting to a corporation a franchise to furnish the town with light and heat by means of natural gas, and extending the time set in the ordinance amended for furnishing the same, is an "ordinance" within Mansf. Dig. Ark. § 924, relating to the passage of ordinances. Town of Sapulpa v. Sapulpa Oil & Gas Co., 97 Pac. 1007, 1010, 22 Okl. 347.

"'By-laws' are rules and ordinances made by a corporation for its own govern-

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ment." While the terms "ordinances" and "by-laws" are sometimes used interchangeably, a mere resolution granting a franchise to a street car company is not a "by-law" nor an ordinance, and is ineffective. Holst v. Savannah Electric Co., 131 Fed. 931, 940 (quoting and adopting the definitions in 1 Bouv. p. 274; 1 Dillon, Mun. Corps. par. 307).

Warrant

Under Sand. & H. Dig. Ark. § 5273, which provides that "each city council shall cause to be provided for its clerk's office a seal, which seal shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate under the provisions of this act or of any by-law or ordinance of the city," a city warrant is not a "by-law." Condon v. City of Eureka Springs, 135 Fed. 566, 571.

BYSTANDER

Witnesses and persons interested are not bystanders within the meaning of the statute allowing such a bill of exceptions to be certified to by bystanders, and a bill filed by them cannot supersede the bill of exceptions approved by the trial court. Gay Oil Co. v. Akins, 140 S. W. 739, 100 Ark. 552.

Under Rev. St. 1909, § 7268, providing that, when ordered by the court, the sheriff shall summon petit jurors from the bystanders, and that no person shall be summoned as a standing juror twice within one year, the last provision does not relate to jurors summoned by the sheriff from the bystanders; for "bystanders" means talesman, and statutes describing the mode of drawing regular jurors do not affect the power of the court, when a panel has become exhausted, to call in talesman, irrespective of prior service. Schneider v. Chew, 138 S. W. 857, 858, 157 Mo. App. 354.

BYWAY

A "byway" being a public way of which the public are entitled to make use as of right, an electric railway company where its tracks cross it is under the duty not to subject the traveling public to latent dangers at such crossing from an unguarded third rail. Tarlucki v. West Jersey & S. R. Co., 81 Atl. 495, 82 N. J. Law, 138.

On demurrer to a declaration alleging that an "ancient byway" where it crossed a railway operated by a third rail charged with an electric current was "unguarded and unprotected," in a suit against the railway by a pedestrian on the ancient byway for injuries received by coming in contact with the current, the word "byway" must be taken to be the equivalent of the word "byroad," as used in 3 Gen. St. 1895, p. 2827, § 113, and page 2836, § 154. Tarlucki v. West Jersey & S. R. Co., 81 Atl. 495, 82 N. J. Law, 138.

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C

C. C.

Where a certificate of acknowledgment commenced with the words, "The State of Texas, Tyler County," and was signed "C. J. Booth, C. C. T. C., such abbreviations should be construed to mean county clerk of Tyler county, and sufficiently disclosed the official character of the officer. Best v. Kirkendall (Tex.) 107 S. W. 932, 933.

C. G. S. SYSTEM

Units of electrical force and volume have been fixed by law with reference to what is known as the centimeter-gram-second system, generally referred to as the "C. G. S. system." This system was adopted with reference to length, expressed by the centimeter, mass, expressed by the gram, and time, expressed by the second. These are the fundamental units of scientific work. Peoria Waterworks Co. v. Peoria Ry. Co., 181 Fed. 990, 1001.

C. O. D.

As part of contract of shipment

It cannot be said that a "bill of lading" and "C. O. D. shipment" are not in some of their features alike. "Both are, in a sense, contracts for the shipment of goods. A 'bill of lading' is a contract between the carrier and the sender, for a consideration, to transport and deliver goods at a specified place to a person therein named, or to his order, and in commercial usage it may be, in a sense, negotiable; that is, the bill of lading has become symbolical, and stands for the property itself. We do not understand that a 'C. O. D.' has this characteristic. Ordinarily, where goods are shipped under a bill of lading, the property passes as soon as they are delivered at the point of shipment to the common carrier. But if the bill of lading is taken in favor of the consignor himself, or some agent of his, by commercial usage and the decisions of the court the property does not pass, though intended for some consignee at the point of destination, until some stipulation is complied with, as payment of the purchase money." Concurring opinion of Henderson, J. Keller v. State (Tex.) 87 S. W. 669, 687, 1 L. R. A. (N. S.) 489.

A "C. O. D." package is in many respects similar to the open package. The consignee generally pays the express charges in both cases, and in neither instance is the package delivered unless such charges are paid; the same not having been prepaid by the consignor. In addition, in the C. O. D. package, the consignee pays the price of the article shipped, and the carrier transports the cash so received to the consignor, taking pay therefor. In substance, it is the same as if the consignee should send by the express company the sum of money he owes the consignor, paying the company for its services. It is the duty of an express company as a common carrier to serve the public impartially, and it has no right to refuse to receive and carry packages of liquors from lawful dealers therein in one state, while it receives and carries the same in other states, nor to refuse to carry the same C. O. D. and to collect and return the purchase money from the consignee in accordance with the general custom of the business, where it follows such custom with respect to other commodities; nor can it require a consignee of such liquors before delivery to furnish a certificate or affidavit that he is a bona fide purchaser of the same for his own personal use or has a state license to sell liquors. Crescent Liquor Co. v. Platt, 148 Fed. 894, 901.

Where an express company, through its agent, had at its office packages containing intoxicating liquors transported and held with direction that the same should be delivered to the consignees on payment of the purchase price, as designated by the shipper, and charges for transportation, the shipments were what is known as "C. O. D." Latta v. United States Express Co. (Iowa) 92 N. W. 68.

As affecting sale

"Undoubtedly the initials 'C. O. D.' mean collect on delivery, or, more fully stated, delivered upon payment of the charges due the seller for the price and the carrier for the carriage of the goods." The fact that the goods sold were shipped C. O. D. did not prevent title from passing to the purchaser upon their delivery to the carrier, although he was not entitled to actual possession until he paid or tendered the purchase price. State v. Mullin, 85 N. E. 556, 558, 78 Ohio St. 358, 18 L. R. A. (N. S.) 609, 125 Am. St. Rep. 710.

"An order for goods to be shipped 'collect on delivery' makes payment a condition precedent to or concurrent with delivery to the purchaser, but it does not necessarily make payment a condition precedent to the transfer of title." United States v. Lackey, 120 Fed. 577, 578.

A shipment "C. O. D." means to "deliver upon payment of the charges due the seller for the price and the carrier for the carriage of the goods." The delivery of such a shipment to the carrier designated by the consignee is a delivery to the consignee subject to the vendor's lien, and upon such delivery the sale is complete, and therefore a vendor shipping butterine from P. could be indicted in the county in which P. was lo-

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cated for selling such butterine contrary to the statute. State v. Peters, 39 Atl. 342, 343, 91 Me. 31 (quoting and adopting the definition given in State v. Intoxicating Liquors, 73 Me. 278).

On an order for shipment of goods by express "C. O. D.," the carrier designated in the order is the agent of the purchaser, and, in the absence of evidence to the contrary, a delivery to the carrier is a delivery to the purchaser, and title to the goods passes to the purchaser on delivery to the carrier. State v. Intoxicating Liquors, 57 Atl. 798, 799, 98 Me. 464.

"A 'C. O. D.' package, by commercial usage, means 'collect on delivery'—that is, for the price of the goods shipped and the express charges—and is generally applied to small packages, and not to large consignments of goods, which are ordinarily shipped under bills of lading. As to bills of lading taken in favor of the consignor or his agent, or even if taken in favor of the consignee, if the bill is forwarded to some bank, with draft attached, the property does not pass until the payment of the purchase money. The authorities appear to treat the payment of the purchase money as a condition precedent to the investment of the title in the purchaser. On the other hand, the same courts hold that a 'C. O. D. package,' although it requires payment to the carrier before the delivery of the goods, is not a condition precedent to the investment of title in the property; but they treat this merely as a method of collecting the money for the goods, and the contract is regarded as a lien to enforce this payment." Concurring opinion of Henderson, J. Keller v. State (Tex.) 87 S. W. 669, 688, 1 L. R. A. (N. S.) 489.

CAB

See Taximeter Cab.

CABINET

CABINET WOODS NOT FURTHER MANUFACTURED THAN SAWED

Cabinet wood sawed lengthwise on two or more sides is dutiable under Tariff Act July 24, 1897, c. 11, par. 198, schedule D, § 1, 30 Stat. 167, covering "cabinet woods not further manufactured than sawed." I. T. Williams & Sons v. United States, 126 Fed. 838, 839.

CABLE

Dutiable as article manufactured from wire, see Articles Within Tariff Act.

CABLE CAR

A "cable car" is a car operated by means of a steel cable or rope in the track beneath the surface to which a large metal grip is attached, or released from, by means of what may be termed a "handle" to the grip, which extends from the grip, through a slot in the track up into the grip car, where the gripman stands and operates the car. By manipulation of this handle the gripman can cause it to clasp the cable, and thereby start and run the car, and he can also release the grip and thereby stop the car. Young v. Metropolitan St. R. Co., 103 S. W. 135, 126 Mo. App. 1.

CABOOSE CAR

See Dead Caboose; Dinkey Caboose.

A caboose car is a car attached to the rear of a freight train, fitted up for the accommodation of the conductor, brakeman, and chance passengers. Louisville & N. R. Co. v. Commonwealth, 78 S. W. 167, 168, 117 Ky. 345.

Evidence that plaintiff rode in a "caboose car" attached to a freight train does not show that he was a passenger, as such a car is defined by Webster as one "used on freight or construction trains for workmen or train crew." Bergan v. Central Vermont R. Co., 74 Atl. 937, 938, 82 Conn. 574.

A caboose car is intended solely for the accommodation of the men connected with the train, contains their bunks and mattresses, in which they sleep, and in which is there deposited the lamps of the cars and the tools used by the men. It is not adapted for passengers, although passengers are sometimes allowed to ride on it. Shoemaker v. Kingsbury, 79 U. S. (12 Wall.) 369, 375, 20 L. Ed. 432.

CABRETTA SKINS

"Cabretta skins" are "sheep skins," within Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 664, 30 Stat. 201, relating to raw skins "except sheep skins with the wool on," and the growth thereon is subject to duty, as provided in paragraph 360, Schedule K, § 1, 30 Stat. 183, for "wools on the skin." Lawrence Johnson & Co. v. United States, 140 Fed. 116, 117.

CADET

As army officer, see Army Officer.

CADET MIDSHIPMAN

In designating students at the Naval Academy under Act July 15, 1870, § 12, as "cadet midshipmen," the style is used merely to distinguish a midshipman at school, and he is an officer and the time of service as such should be credited on a claim for additional pay as an officer under Act March 3, 1883. United States v. Cook, 9 Sup. Ct. 108, 109, 128 U. S. 254, 32 L. Ed. 464.

CALAMINE

The zinc ores known as carbonate, silicate, and sulphide of zinc are free of duty,

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the carbonate and silicate as "calamine," and the sulphide as "minerals, crude," under Tariff Act July 24, 1897, c. 11, § 2, Free List, pars. 514, 614, 30 Stat. 196, 199, except that when they contain lead they are subject to the duty provided on "lead-bearing ore of all kinds," in section 1, Schedule C, par. 181, 30 Stat. 166. United States v. Brewster, 167 Fed. 122, 123, 92 C. C. A. 574.

CALAMITY

At the request of plaintiff in an action for breach of defendant's contract to furnish him lumber to plane, which they agreed to do "except in cases of delay beyond control of" defendants, the court instructed that such clause meant the act of God or some "calamity" beyond the control of defendants. For defendants it instructed that the burden of proof was on plaintiff to show, not only that they had failed to furnish the lumber as required by the contract, "but also that such failure was caused by circumstances not beyond the control of" defendants. Held that, reading the instructions together, the word "calamity" would be understood as used in the sense of "mischance" or "misfortune," and so would not be misleading. Beekman Lumber Co. v. Kittrell, 96 S. W. 988, 991, 80 Ark. 228.

The earthquake of April 18, 1906, was a calamity within Code Civ. Proc. § 1963, subd. 40, providing a presumption of survivorship with reference to persons killed in the same calamity. Grand Lodge A. O. U. W. of Washington v. Miller, 96 Pac. 22, 23, 8 Cal. App. 25.

CALCIUM CARBIDE

See Crystalline Calcium Carbide.

Calcium carbide is a combination of calcium and carbon in the proportion of one part of calcium (Ca) to two parts of carbon (C), and is expressed in the chemical formula CaC^2. The principal use of calcium carbide is to make acetylene gas which is used for illuminating purposes. Union Carbide Co. v. American Carbide Co., 181 Fed. 104, 105, 104 C. C. A. 522.

CALCULAGRAPH

A "calculagraph" is an instrument for automatically recording lapsed time and is used specifically in recording the length of time a long distance telephone has been used by the operation of a lever at the beginning and end of such use, and also the time of day when such use was commenced. Calculagraph Co. v. Wilson, 132 Fed. 20, 22.

CALCULATE—CALCULATED

Under Code Civ. Proc. § 2077, subd. 2, providing that, when permanent or visible or ascertained boundaries or monuments are inconsistent with the measurement of lines, angles or surfaces, the boundaries or monuments are paramount, where a mining claim could be easily located from the description contained in the patent by reference to the monuments referred to, the patent was valid, and the land was not subject to relocation by reason of the fact that an erroneous length was given to the tying line in the description, which was merely a "calculated line" and not a surveyed line. Galbraith v. Shasta Iron Co., 76 Pac. 901, 902, 143 Cal. 94.

As intended

A witness failing, without reasonable excuse, to attend in obedience to a subpœna, is guilty of contempt, and punishable by fine not exceeding $250, together with the costs and expenses of the contempt proceeding, though the act was not willful, so as to be punishable as a criminal contempt, and did not injure the party for whom he was summoned, he having been successful, but was only "calculated" to injure him; this being the clear intent of 2 Rev. St. (1st Ed.) pt. 3, c. 7, tit. 3, § 43, and chapter 8, tit. 13, §§ 20–22, and the change in phraseology when these provisions were enacted into Code Civ. Proc. §§ 14, 2266, 2281, 2284, now Judiciary Law (Consol. Laws, c. 30) §§ 753, 754, 770, 773, not showing an intention to change the substance of the law. People ex rel. Springs v. Reid, 124 N. Y. Supp. 205, 207, 139 App. Div. 551.

A bill for unfair competition in trade by the use by defendant of a name for a periodical similar to one used by complainant must clearly allege that it was so used with intent to deceive the public or patrons, and an allegation that it was "calculated to deceive" is insufficient. Industrial Press v. W. R. C. Smith Pub. Co., 164 Fed. 842, 843, 90 C. C. A. 604.

CALENDAR

CALENDAR DAY

Statutory Construction Law, § 27, declares that a "calendar day" shall include the time from midnight to midnight. In re Niel, 106 N. Y. Supp. 479, 55 Misc. Rep. 317.

CALENDAR MONTH

As month, see Month.

A "calendar month" is not one of any given number of days throughout the year, but varies in length according to the Gregorian calendar. As, for instance, a "calendar month" beginning in February, except in leap year, is of 28 days' duration. In re Gregg's Estate, 62 Atl. 856, 857, 213 Pa. 260.

CALENDAR YEAR

As year, see Year.

A "calendar year" is ordinarily and in common acceptation considered to be 365 days. Geneva Cooperage Co. v. Brown, 98 S. W. 279, 124 Ky. 16, 124 Am. St. Rep. 388.

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The statutory limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of "previous years" and two-thirds of the levy of the "current year" gives no authority to the board to take into account the levy of the "current calendar year" prior to the making of such levy. Until it is made, there is no "levy of the current year." Ordinarily, the terms "this year," "current year," or "the previous year," mean in each instance the calendar year in which the event under discussion took place and the one before it, but the Legislature did not have this meaning in putting the words into this statute. Clark v. Lancaster County, 96 N. W. 593, 599, 69 Neb. 717.

"Calendar year" means the year from January 1st to December 31st, inclusive, and not a period of 12 months commencing at any fixed or designated month, and terminating with the day of the corresponding month in the next succeeding year under a law requiring liquor licensee to pay a designated sum for each calendar year or part thereof. Carroll v. Wright, 63 S. E. 260, 267, 131 Ga. 728.

Act March 20, 1909, § 1, requires that every fire insurance company shall, before obtaining certificate of authority, etc., file the prescribed bond. Section 3 requires that before any company shall issue any policy it shall first have filed, "during the calendar year in which such policy may issue, a bond," etc. By practice and by statutory provision, the state department did not issue the certificates to insurance companies until March. Held, that the words "calendar year," as used in section 3, would be read in connection with section 1, and construed to mean the year in which the certificate is to run, since it was obvious that the Legislature considered that the certificate was to run a calendar year, and since any other construction would leave an interval between January and March, during which time a policy issued by the company would not be preceded by a bond "filed during the calendar year." Ætna Ins. Co. v. Hawkins, 125 S. W. 313, 316, 103 Tex. 195.

CALF

CALFSKINS

See Japanned Calfskins.

CALIBRATION

The reduction of the cross-section of the metal in an electric safety fuse, which insures quicker disruption at the place where such reduction is found, is called "calibration." Johns-Pratt Co. v. Sachs Co., 175 Fed. 70, 74, 99 C. C. A. 92.

CALL

See, also, Puts.

A contract looking to the sale and future delivery of wheat known as a "call," is not an option for a purchase, but is only a contract for a contract for the purchase and sale of wheat, and is not within Rev. St. 1909, § 4780, prohibiting all purchases and sales or contracts for the purchase and sale of grain, either on margin or otherwise without any intention of receiving and paying for the property bought or of delivering the property sold. Taylor v. Sebastian, 138 S. W. 549, 550, 158 Mo. App. 147.

An "option" in the peculiar language of dealers in grain may consist of a "put" or a "call." A "put" is the privilege of delivering or not delivering the thing sold, and a "call" is the privilege of calling for or not calling for the article bought. Optional contracts in this sense are usually settled by adjusting the market values as the party having the option may elect. It is simply a mode adopted for speculating in differences in market value of grains or other commodities, and it was in this sense that the term "option" was used in Cr. Code Ill. (Hurd's Rev. St. 1905, c. 38) § 130, declaring that whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity shall be subject to a fine. Zeller v. Leiter, 99 N. Y. Supp. 624, 626, 627, 114 App. Div. 148 (citing Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414).

For stock subscriptions

A "call" is an official declaration by the proper corporate authorities that the whole or a specified part of a subscription for stock is required to be paid. Campbell v. American Alkili Co., 125 Fed. 207, 209, 61 C. C. A. 317 (quoting and adopting definition in Cook, Corp. § 104).

The word "assessment" and the words "call" or "installments" are used interchangeably in the statute; yet, strictly speaking, the word "assessment" means a demand upon stockholders for payments above the par value of their stock to meet the money demands of creditors of the corporation, while the word "call" or "installments" means the action of the board of directors of the corporation demanding the payment of all or a portion of unpaid subscriptions. The word "assessments," as used in Rev. Codes, § 2769, granting power to a corporation to admit stockholders or members, and to sell the stock or shares for the payment of assessments or installments, is distinguished from "calls" or "installments," and means assessments upon full-paid stock, as distinguished from calls or installments for portions of unpaid subscriptions. Wall v. Basin Mining Co., 101 Pac. 733, 736, 16 Idaho, 313, 22 L. R. A. (N. S.) 1013.

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"An assessment is a term often used to designate the same thing as a 'call,' but sometimes refers to a payment sought to be recovered from stockholders above and in addition to the par value of their stock." Omo v. Bernart, 65 N. W. 622, 623, 108 Mich. 43 (quoting Cook, Stock, Stockh. & Corp. Law, § 104).

CALL A POLICEMAN

To "call a policeman" generally signifies that an arrest is to be made. Grayeon v. St. Louis Transit Co., 71 S. W. 730, 734, 100 Mo. App. 60.

CALL PATENT

Where nothing appeared in a "call patent"—that is, one whose corners are all stakes, or all but one, or whose lines were not run out and marked at the time—except a discrepancy between the figure made by platting the patent calls and the surveyor's plat, it is not proof of a mistake in the patent, and the plat does not control the call of the patent. Hall v. Pratt, 134 S. W. 900, 901, 142 Ky. 561.

CALL SURVEY

A "call survey" is a survey by protraction. Bramblet v. Davis, 141 Fed. 776, 780, 72 C. C. A. 204.

CALLED

See Duly Called and Held.

CALLED FOR TRIAL

Under Pen. Code, § 1368, providing that when an action is called for trial, if a doubt arises as to the defendant's sanity, the court may submit the question to a jury and the trial must be suspended until the question is determined, a case was not "called for trial" where accused was brought into court for arraignment, but was not arraigned, and at that stage of the proceedings his insanity was adjudged and he was committed to the state hospital. The language "when an action is called for trial" cannot be construed to mean "at any time during the pendency of a criminal charge." Napa State Hospital v. Solano County, 88 Pac. 501, 502, 4 Cal. App. 510.

CALLED IN QUESTION

Under Const. art. 5, § 22, giving justices jurisdiction unless "the boundaries or title to any real property shall be called in question," and Rev. St. 1887, § 3852, providing that a justice shall not have jurisdiction where possession of real property "is put in issue," the phrases "called in question" and "put in issue" have the same meaning, and justices' courts have no jurisdiction of actions, where the boundaries or title to real estate are called in question. Hammer v. Garrett, 99 Pac. 124, 126, 15 Idaho, 657.

CALLED MEETING

A meeting of the city council, not had on a regular meeting date, at which the mayor and all aldermen were present, was a valid "called meeting," within the city charter and an ordinance providing that called meetings may be had at any time at the pleasure of the mayor, by written notice designating the time and place, or on application of two aldermen, notwithstanding such a notice may not have been given. Ryan v. City of Tuscaloosa, 46 South. 638, 640, 155 Ala. 479.

CALLING

See Dangerous Calling; Ordinary Calling; Practice a Calling; Public Calling.

"The words 'calling' and 'business' are evidently used in the Constitution in a very broad sense when taken together, but the signification of each one is uncertain; yet we are to infer that they were not used to designate the same thing. Taken together, they certainly embrace every legitimate avocation in life by which an honest support for a family may be obtained. The former was probably used in the sense of 'profession' or 'trade,' which would embrace all such employments as by course of study or apprenticeship in any of the learned professions, liberal arts, or mechanical occupations, a person has acquired skill or ability to follow, and which has become practically a matter of personal skill, in its nature not temporary in existence." Semple v. Schwarz, 109 S. W. 633, 637, 130 Mo. App. 65 (quoting and adopting definition in Shryock v. Latimer, 57 Tex. 677).

The Constitution protects a homestead consisting of lots not exceeding $5,000 in value, provided the same shall be used as a place to exercise the "calling" or "business" of the head of the family. A debtor purchased land worth $3,000, on which a two-story dwelling stood. He moved and remained away two years, although he intended to return. He returned when the dwelling was occupied by a tenant, and he built a one-story house on a part of the land. On the two-story house being vacated, he moved into it and rented the small house. He also rented out rooms in the two-story house. He had no income except from his rents. Held, that the renting of the rooms of the house and of the small house was not the pursuit of a calling or business within the Constitution, though the words "calling" and "business" taken together embrace every legitimate avocation of life by which an honest support for a family may be obtained. Lyon v. Files, 110 S. W. 999, 1001, 50 Tex. Civ. App. 630.

As property

See Property.

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CALVINISM

The name "Presbyterianism" indicates primarily a system of church government through chosen representatives, consisting of the church session as the governing body in each congregation, and a presbytery consisting of all the ministers, in number not less than five, and one ruling elder from each congregation, within a certain district, and a synod embracing at least three presbyteries, and consisting of ministers and ruling elders from the local churches, and the General Assembly, which is a representative body composed of ministers and ruling elders selected by each of the presbyteries, and the name also indicates a doctrine commonly known as "Calvinism." Ramsey v. Hicks, 91 N. E. 344, 346, 174 Ind. 428, 30 L. R. A. (N. S.) 665.

CAME

See Come.

CAMERA

See Single Camera.

CAMORRA

By "camorra," as used in a libelous publication charging plaintiff with having been paid by "the camorra" to libel and vilify certain people, is understood to have been meant a clique, ring, cabal, or confederation of Italians in the city, banded together for dishonest and dishonorable purposes. People v. Crespi, 46 Pac. 863, 864, 115 Cal. 50.

CAMP MEETING

P. S. 496, subd. 6, exempts from taxation real and personal estate sequestered or used for public, pious, or charitable uses. Plaintiff, a Methodist evangelist, acquired full title to two lots of land, one of which he set apart and used exclusively for camp meeting purposes, under the auspicies of no particular denomination, but open to persons of such denominations as he wished to have there, and on which, with the aid of voluntary contributions of labor and money, he erected cottages, a boarding hall, preacher's stand and seats, a dormitory for preachers, several church tents, and a barn, and during camp meeting, as an incident thereto and without profit, he charged for the use of cottages, including board, for meals, and for feed and shelter of horses, the income from which was used for carrying on the camp meetings. From the other tract, not connected with the camp ground, he sold timber in payment of a note for money borrowed for improvements upon the camp ground. Held, that the word "sequester" meant to set apart, to put aside, to separate, and that a "camp meeting" meant a religious gathering, held usually by Methodists, for conducting a series of religious services in the open air or in a tent, lasting for several days, during which those present lodged in tents or temporary houses; and that the lot not connected with the camp ground was taxable, but that the camp meeting ground and its improvements were exempt; the charges for board, etc., not operating to deprive the property of such exemption. Johnson v. Jones (Vt.) 83 Atl. 1085, 1086.

CAMP MEETING BUILDING

As public building, see Public Building.

CAMPAIGN

A season's operation of a beet sugar factory is generally referred to as a "campaign." Neely v. Detroit Sugar Co., 101 N. W. 664, 665, 138 Mich. 469.

CAMPHOR

As medicine, see Medicine.

CAMPHOR, CRUDE

The classification of synthetic camphor should be determined by the same considerations as of natural camphor, and where, measured by the principal tests, it still retains impurities that bring it far below the standard of refined camphor, and closely resembles the crude natural product, it is subject to classification as "camphor, crude," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 515, 30 Stat. 197, rather than as "camphor refined," under section 1, Schedule A, par. 12, 30 Stat. 152. United States v. Schering & Glatz, 163 Fed. 246, 247, 90 C. C. A. 192.

CAN

Defendant's roadmaster wired plaintiff "can offer you extra force at $65 a month. Will want you at once." Held, that a contention that, by using the potential form "can offer," the roadmaster did not make a positive offer of employment, but only intended to open negotiations, was unsound, especially as plaintiff accepted the offer, reported for duty, was placed in charge of the work, and prosecuted it for several days until discharged. King v. Seaboard Air Line Ry. Co., 53 S. E. 237, 238, 140 N. C. 433.

It has been held that a statement that the debtor will pay when he "can" is valid as a promise, even without the proof of ability. The word as thus used has been held too indefinite to constitute a condition, and hence that a promise to pay when the debtor "can" is an absolute promise. Letters written by a debtor to his creditor's attorney, in which, referring to the note sued on, he says, "will pay as soon as I can," and in which, after offering a certain amount in compromise, he adds, "It's that or wait until I get it," is a sufficient admission that the debt is unpaid to revive the cause of action, under Comp. Laws, § 2926, providing that causes of ac-

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tion founded upon contract shall be revived by admission that the debt is unpaid. Cleland v. Hostetter, 79 Pac. 801, 803, 13 N. M. 43.

As is

The word "can," as used in an oil lease for a term of three years "and as much longer as oil and gas can be found in paying quantities," has the same meaning as the word "is," commonly used. Lowther Oil Co. v. Miller-Sibley Oil Co., 44 S. E. 433, 436, 53 W. Va. 501, 97 Am. St. Rep. 1027.

As may

A fidelity policy, stipulating that insurer will reimburse insured, a bank, for losses sustained by the fraud of an assistant cashier, and that the employé "can" perform other duties without notice to insurer, covers a loss occasioned by the fraud of the employé, while acting as cashier, without notice to insurer: the word "can" meaning "may." Farmers' & Merchants' State Bank of Verdon v. United States Fidelity & Guaranty Co., 133 N. W. 247, 248, 28 S. D. 315, 36 L. R. A. (N. S.) 1152.

CANNOT STATE

In an action against a railway for damages for destruction of property by fire set from a locomotive, the defendant had a finding that the locomotive was equipped with approved devices to arrest sparks; but there was no finding as to the condition of said appliances save that the jury had, in answer to interrogatories thereon, answered, "We cannot state," and "We do not know." There was a finding that the inspection was not thorough, and the charge of negligence in respect to management of the locomotive was not negatived. Held, such answers were not equivalent to a finding of no evidence, and that defendant was not entitled to judgment in its favor on the answers. Cleveland, C. C. & St. L. Ry. Co. v. Hayes, 79 N. E. 448, 449, 167 Ind. 454.

CANAL

See Line of Ship Canal.
Improvement of canal, see Improvement.
Ship canal as county purpose, see County Purpose.

Under Revisal 1905, § 4026, which provides for proceedings to assess among persons benefited, the cost of maintenance of a drainage canal, dug along any natural depression or waterway and maintained for seven years, an artificial drain of from two to five feet in width is a "canal," though, in the proceeding to assess the cost of maintenance, the evidence refers to it both as a "ditch" and a "canal." Ange & Forest v. Atlantic Coast Line R. Co., 75 S. E. 796, 797, 159 N. C. 547.

A conduit through which a water power company conducts the water from its dam across a river to the place of use is not strictly a ditch or a "canal," but is a conduit through which water is diverted from the natural channel in which it would flow if left unobstructed, and the company is liable for the fees imposed by Act March 11, 1903 (Sess. Laws 1903, p. 233), § 10, providing that upon the issuance of a certificate by the state engineer in relation to the completion of any canal, ditch, or other works, a fee to cover the expense of the examination of such works shall be paid to the state engineer. Idaho Power & Transp. Co. v. Stephenson, 101 Pac. 821, 824, 16 Idaho, 418.

As highway

See Highway.

As improvement of stream

See Improvement.

As internal improvement

See Internal Improvement.

CANARY SEED

"Canary seed," which is a botanical grass seed, but is used principally as a bird seed and which is not known commercially as grass seed, is not free of duty under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 656, providing for grass seeds not specially provided, but is dutiable under section 1, Schedule G, par. 254, 30 Stat. 171, covering "seeds of all kinds not specially enumerated." Nordlinger v. United States, 127 Fed. 683, 684, 62 C. C. A. 409.

CANCEL—CANCELLATION

The word "cancel," within a provision requiring trustees to make payments to canal obligations, means to "render null and void." Babbitt v. Fidelity Trust Co., 66 Atl. 1076, 1078, 72 N. J. Eq. 745.

A cancellation means the forgiving and obliteration of a debt. It is in no sense a payment, but excludes the idea of payment, for it is the very thing that makes payment unnecessary. As used in a codicil directing cancellation of certain debts owing by legatees to testatrix, it implied a forgiveness and obliteration of the debt. Brown v. Gibson's Ex'r, 59 S. E. 384, 386, 107 Va. 383.

The term "repeal" is synonymous with "annul," "cancel," "reverse," and "abolish," so that a statute or ordinance is repealed when it is destroyed, abolished, abrogated, canceled, annulled, recalled, or rescinded by a later one. City of St. Louis v. Kellman, 139 S. W. 443, 445, 235 Mo. 687; Wilson v. People, 85 Pac. 187, 189, 36 Colo. 418.

Dismiss synonymous

"Dismiss" is the equivalent of "cancel" within the meaning of a contract to "cancel" a suit. A contract by a plaintiff to cancel a suit implies his payment of costs up

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to that time. Klitzke v. Smith, 91 N. E. 748, 749, 46 Ind. App. 26.

Effect

To "cancel" is to annul and destroy. Cancellation of a contract necessarily implies a waiver of all rights thereunder by the parties. Whedon v. Lancaster County, 114 N. W. 1102, 1104, 80 Neb. 682. After a contract is discharged either by rescission or substitution of a new contract, no action can be maintained on the original contract; but, for any benefits accruing to either party by part performance of the contract unless expressly released, an action on quantum meruit or quantum valebat may be maintained. Lipschutz v. Weatherly & Twiddy, 53 S. E. 132, 134, 140 N. C. 365 (citing Dreifus v. Columbian Exposition Salvage Co., 45 Atl. 370, 194 Pa. 475, 75 Am. St. Rep. 704).

Where an actor agreed to perform for defendant in vaudeville, at four certain cities, and the contract provided that it might be canceled by either party on written notice, a letter from defendant stating that, on account of vaudeville having proved a failure in three of the named cities, defendant was obliged to cancel the dates, amounted to a cancellation of the contract as to all the cities. Fagan v. Aborn, 99 N. Y. Supp. 479, 480, 50 Misc. Rep. 666.

Agreement

Under the rule that the effect of a pleading is not necessarily determined by the technical definition of a single word, but that words used in a pleading must be construed with reference to the context, and when it is apparent that a word is not used in its statutory sense it will be interpreted in relation to the pleading as a whole, in an action to recover sums paid under a contract of conditional sale on the retaking of possession by the seller, where the answer alleged that the seller rescinded and canceled the contract on default in payment of the price by the buyer, the words "rescind" and "cancel" are not used to indicate a statutory rescission of the contract. Pfeiffer v. Norman, 133 N. W. 97, 98, 22 N. D. 168, 38 L. R. A. (N. S.) 891.

Evidence that plaintiff, who had entered into a written contract with a corporation, told the secretary that he wanted the contract destroyed, and the secretary had said that it was not there, but that he could get it, and plaintiff told him to do so, and destroy the signatures and send it to him, which the secretary did, did not show a valid "cancellation," within Civ. Code, § 1699; there being nothing to show any authority on the part of the secretary to release plaintiff. Blair v. Brownstone Oil & Refining Co., 120 Pac. 41, 42, 17 Cal. App. 471.

Capital stock

The words "retirement" and "cancellation," in connection with the capital stock of corporations, wherever used in the franchise act or in the amendment of that act (P. L. 1906, p. 31), mean permanent retirement and actual cancellation by the method and in full compliance with the provisions of the statute. Knickerbocker Importation Co. v. State Board of Assessors, 65 Atl. 913–915, 74 N. J. Law, 583, 7 L. R. A. (N. S.) 885.

Insurance policy

As used in a declaration alleging that defendant insurance company, in violation of its agreement, modified a policy so that it covered a part only of the goods insured and thereby canceled the policy as to the other goods, the words "modified" and "canceled" plainly referred to the physical changes made and to the effect which those changes would have had if authorized. Goodhue v. Hartford Fire Ins. Co., 55 N. E. 1039, 1040, 175 Mass. 187, 189.

Mortgage

A written demand on a mortgagee, signed by the mortgagor, whose debt has been paid, to "please cancel all mortgages against me on the record," is a sufficient notice under Code 1896, § 1066, to require the mortgagee to enter "the fact of payment or satisfaction on the margin of the record." Partridge v. Wilson, 37 South. 441, 442, 141 Ala. 164.

Will

Testator, after executing his will, took a red pencil and wrote the words null and void, with his name and the date, across the face of each sentence containing any disposition of property. Held, that there being no extrinsic evidence of the transaction, except that the paper was in testator's custody at his death, such act constituted a "cancellation" requiring a denial of probate. In re Barnes' Will, 136 N. Y. Supp. 940, 941, 76 Misc. Rep. 382.

Code Supp. 1907, § 3276, provides that wills can only be revoked, in whole or in part, by cancellation or destruction, by the direction of testator, with the intention of revoking them, or by the execution of subsequent wills, and when done by cancellation requires the revoking will to be witnessed in the same manner as the making of a new will. *Held*, that the cancellation may be merely by an instrument of cancellation, or by a part of another will containing an express revocation clause, or by the execution of an inconsistent will without such clause, the word "cancellation" meaning a revocation of a written instrument; and there may also be a revocation by physical destruction. Blackett v. Ziegler, 133 N. W. 901, 904, 153 Iowa, 344, 37 L. R. A. (N. S.) 291.

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Webster's International Dictionary defines "cancellation" as to revoke or recall. Blackstone says that cancellation means to have lines drawn through it in the form of lattice work, but that the phrase is now used figuratively for any manner of obliterating or defacing it. Burrill's Law Dictionary defines "canceling" as the defacing or obliterating a deed, will, or other instrument so as to destroy its legal effect. Bouvier says "cancellation" is the act of crossing a writing, and it is used sometimes to signify the manual operation of tearing or destroying the instrument itself. 2 Rev. St. (1st Ed.) p. 64, § 42, provides that a will may be revoked by writing made for that purpose, and by certain acts, to wit, burning, tearing, canceling. Held, that the word "canceled" indicated an act in contradistinction to a writing, and that a will cannot be revoked by an indorsement on its back in writing signed by the testator to the effect that it was revoked. In re Miller's Estate, 100 N. Y. Supp. 346, 347, 50 Misc. Rep. 70.

Drawing black lines through and over words in a will is sufficient as a physical fact to constitute a "cancellation" of the words over which they appear, within the meaning of Civ. Code, § 1192, subd. 2, providing that wills may be revoked in whole or in part by being canceled or obliterated, with the intent of revoking the same, by the testator himself or by some person in his presence and by his direction, notwithstanding the words were not entirely obliterated, providing that they are put there by the testator or at his direction for the purpose of cancellation. In re Wikman's Estate, 84 Pac. 212, 213, 148 Cal. 642.

CANCER

As disease peculiar to women, see Diseases Peculiar to Women.

CANDIDATE

Primary Election Law, § 24, provides that no person shall, to aid or promote his nomination to an office under the act, expend any money or valuable thing except for personal expenses, and that no candidate for nomination under the act shall expend to aid his nomination more than 15 per cent. of the yearly compensation attached to the office. Held, that one is a candidate for nomination within the act when he is expending his money in employing and sending out workers or perfecting an organization advertising or exploiting himself, and influencing public opinion in his favor or against an opponent, though he has not yet filed his nomination paper. Adams v. Lansdon, 110 Pac. 280, 290, 18 Idaho, 483.

Acts 1908, c. 122, § 168, as amended by Acts 1910, c. 427, requiring all candidates for public office to file statements of their expenses in connection with primary elections, does not apply to members of party committees elected at such primary elections; they not being candidates for public office. Usilton v. Bramble, 82 Atl. 661, 663, 117 Md. 10.

A political aspirant becomes a candidate at the time of filing his affidavit of intention of becoming a candidate for a specified office, in accordance with Rev. Laws 1905, § 184, within the meaning of the corrupt practice act, requiring every person who shall be a candidate to file an affidavit setting forth in detail all sums of money expended in endeavoring to secure his nomination or election, and is not required thereby to include in such affidavit of expense items anterior to the time of filing his affidavit of intention to become a candidate. State ex rel. Brady v. Bates, 112 N. W. 1026, 1027, 102 Minn. 104, 12 Ann. Cas. 105.

Comp. St. 1903, c. 26, § 32, provides that in no case shall the candidate of any political party be entitled to be designated on the official election ballot as the candidate of more than one political party, and shall be designated on the "official ballot" as the "nominee of the party" in whose nomination his name appears as the political party with which he affiliates. Held, that the words "candidate of any political party" and the "nominee of the party" mean a person who has been selected by a party as its candidate for public office, and do not refer to one who is desirous of becoming a candidate and whose name is submitted to the choice of the voters at a primary election. A party's candidate and its nominee cannot be determined until after a choice has been made at a primary. State ex rel. Adair v. Drexel, 105 N. W. 174, 177, 74 Neb. 776.

As officer

See Officer.

CANDY

See Floss Candy; Spun Candy; Sugar Candy.

CANNING PURPOSES

Under Pub. Laws Me. 1901, c. 240, imposing a penalty for catching, packing, preserving, selling, or offering for sale within certain dates any herring for "canning purposes" less than eight inches in length, the words "for canning purposes" simply modify the limitation of the taking of herring under eight inches in length, which are principally used for sardines, and do not imply a license to take herring of larger size for canning purposes in close time. State v. Kaufman, 57 Atl. 886, 888, 98 Me. 546.

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CANOE

As tool, see Tools—Tools of Trade.

CANT HOOK

A "cant hook," consisting of a large handle of wood, over which an iron cuff is slipped and fastened a few inches from the bottom, into which cuff a hook is fastened by a bolt, and which is operated by hand by the operator catching hold of the handle, and placing the hook on a log, and using the implement as a lever, is not a "simple tool"; and the servant is not negligent in using it, unless he knows of defects therein, or ought to have known thereof by the use of ordinary care. Parker v. W. C. Wood Lumber Co., 54 South. 252, 98 Miss. 750, 40 L. R. A. (N. S.) 832.

CANVASS

See, also, Proceedings of County Board.

Webster's New International Dictionary defines the word "canvass": "(2) To solicit or seek orders, contributions, support, subscriptions, votes, or political support before an election, etc.; to solicit; commonly followed by 'for,' as to canvass for a seat in Parliament; to 'canvass' for a book, a publisher, or in behalf of a charity." And defines "solicit": "To ask earnestly; to make a petition to; to appeal to (for something), as, to 'solicit' a man for alms. (2) To endeavor to obtain by asking or pleading; to plead for, as, to 'solicit' an office, a favor, alms." Where a grocer maintains a delivery wagon, and an employé delivers goods previously ordered from him when making a former delivery, or which have been ordered by letter or telephone from the customer direct to the store, the fact that a patron receiving goods orders others from the person delivering, not being asked, solicited, or requested so to do by him, does not establish the fact of "canvassing or soliciting orders for any article, goods, or merchandise," under the provisions of an ordinance imposing a license tax on such occupation, so as to render either the agent or his principal liable for the tax. Village of Scribner v. Mohr, 132 N. W. 734, 735, 90 Neb. 21, Ann. Cas. 1912D, 1287.

Election

The "canvass" by the judges of election is merely their count. Graham v. Peters, 93 N. E. 315, 316, 248 Ill. 50.

That accused as an election officer made marks on a tally sheet as another officer called off the votes warranted a finding that accused "counted" and "canvassed" the votes; it being unnecessary that he handle each ballot. Commonwealth v. Edgarton, 86 N. E. 768, 771, 200 Mass. 318.

An order of the State Board of Canvassers committing to the county board of canvassers of a county the entire record, with instructions to the county board to recanvass the vote of the county and hear and consider the ground of protest filed by the attorney for a contestant, and to take such testimony as may be competent in support and rebuttal thereof, and to determine the result, etc., authorizes the county board to consider testimony in support of another contestant; the word "canvassing" implying investigation; examination. State ex rel. Davis v. State Board of Canvassers, 68 S. E. 676, 679, 86 S. C. 451.

As judicial act

See Judicial Act.

Tabulate synonymous

See Tabulated.

CANVASSER

Of elections

Under P. L. 1898, p. 312, § 164, providing that the term "incumbent" means the person whom the "canvassers" declare elected the word "canvassers" means the board who originally canvass and estimate the votes. The county board, on a recount, does not declare the result of the election nor issue a certificate, and does not, on a recount, necessarily canvass the votes; its duties generally being limited to a recount of only part of the votes, and, though the Justice of the Supreme Court, on a recount may declare who is elected, he in no sense canvasses the votes, but merely decides disputed questions which the board fails to decide by a majority vote. The only canvassers who declare the result of an election are the boards of election. Darling v. Murphy, 57 Atl. 263, 264, 70 N. J. Law, 435.

CAPABLE

See Incapable.

The amount due under a contract to convey, at an agreed price per acre, land valuable principally for its timber, was "capable of being made certain by calculation," within the meaning of Civ. Code, § 3287, providing that persons entitled to damages certain or capable of being made certain by calculation may recover interest, though there was a deduction to be made as a mere matter of calculation for timber cut by the vendor from an ascertained number of acres. McCowen v. Pew, 123 Pac. 354, 355, 18 Cal. App. 482.

CAPACITY

See Corporate Capacity; Criminal Capacity; Diminished Capacity; Earning Capacity; Fiduciary Capacity; Incapacity; Individual and Corporate Capacity; Lessened Capacity; Mental Capacity; Private Capacity; Professional Capacity; Public Capacity; Rated Capacity; Representative Capacity; Testamentary Capacity.

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"Capacity to" is a synonym of "can," as used in a statute declaring that a witness to a will may attest by his mark, "provided he can swear to the same." Gillis v. Gillis, 23 S. E. 107, 110, 96 Ga. 1, 30 L. R. A. 143, 51 Am. St. Rep. 121.

"Capacity to" perform a duty includes not only technical skill, but also proper disposition to use the same. A competent captain of a ship sailing on waters unknown to him must not only be adept in the part of navigation, and capable of making practical use of his acquirements, but he must also be a man who studies diligently to learn what conditions beset his progress, and thereupon make use of the information obtained. The Fri, 140 Fed. 123, 124.

"Capacity" means size, space, or compass. It means power or force; it means intellectual capability, both to receive and to perform; but its primary significance is passive. It is the ability to receive. Its secondary meaning is active. It is the ability to do or to resist. A contract by a dealer to furnish to a purchaser a definite pump of known manufacture, "having a capacity of 300 gallons per minute against a head of 350 feet," which has been selected by the purchaser and is to be built by the manufacturer, is not a warranty of the size, design, construction, materials, efficiency, and endurance of the pump, but is, like its name, descriptive and limited in effect to a warranty of the quality of size. Reynolds v. General Electric Co., 141 Fed. 551, 554, 73 C. C. A. 23 (citing Cent. Dict. "Capacity").

The term "capacity," in Mills' Ann. St. § 2403, providing that reservoirs in a water district may be awarded priorities to the extent of capacity for storage purposes, means, not the amount of water needed in the reservoir to irrigate lands of the owner, but the amount the reservoir will hold when filled once. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 98 Pac. 729, 733, 44 Colo. 214.

Demurrage Act, April 12, 1905, gives shippers or consignees 48 hours for loading or unloading cars of less than 60,000 pounds capacity, and 72 hours for cars of 60,000 pounds or greater capacity, and imposes a demurrage of not more that $1 per car per day on all cars not tendered to the company within those periods. Rev. St. 1899, § 1193, classifying freight, became effective the same time as the demurrage law, and places lumber, laths, etc., in class G, and section 1194, Rev. St. 1899, as amended by Sess. Acts 1905, p. 102, fixes a rate for freight in class G in car load lots of 30,000 pounds minimum weight, not exceeding five cents per 100 pounds for the first 25 miles, one-half cent per 100 pounds for the second 25 miles, etc. Held, construing the demurrage act in connection with the statute, that the word "capacity" in the demurrage act did not refer to the estimated carrying capacity of the car, but to the weight of the load, so that the consignee of lumber weighing less than 60,000 pounds in a 60,000 pound capacity car, would be entitled to only 48 hours free time in which to unload. E. R. Darlington Lumber Co. v. Missouri Pac. R. Co., 116 S. W. 530, 534, 216 Mo. 658.

CAPACITY TO EARN MONEY

The phrase "capacity to earn money," as used in Pub. St. 1901, c. 191, § 12, declaring that, in assessing damages for the death of a person, the jury shall consider his probable duration of life and capacity to earn money, must be understood to mean capacity to earn money for the estate of the person killed; and hence an instruction should be given, in an action for negligence causing the death of the child, that deceased would have been incapable of earning money for his estate during his minority. Carney v. Concord St. Ry., 57 Atl. 218, 224, 72 N. H. 364.

CAPACITY TO SUE

See Legal Capacity.

CAPERS

Dutiable as pickles, see Pickles.

CAPIAS

The term "capias," in the statute providing a punishment for the escape of prisoners confined under sentence of imprisonment or under a capias, is used in a broad sense and includes a writ for the holding of the person. The mere verbal directions of the circuit judge to the jailer to take charge of defendants fined for an offense will not warrant a conviction under the statute. Saylor v. Commonwealth, 93 S. W. 48, 49, 122 Ky. 776.

CAPIAS AD RESPONDENDUM

The writ of capias ad respondendum, by which Comp. Laws 1897, § 9998, permits personal actions to be commenced in certain cases where an order for bail shall be indorsed on the writ by a judge of the court from which the writ issues, directing the amount in which bail is to be taken, is in form both a summons addressed to defendant to appear and defend the suit, and a command to the sheriff to take defendant into custody, and keep him until discharged according to law. People ex rel. McCallum v. Gebhardt, 118 N. W. 16, 17, 154 Mich. 504.

The writ is noneffective as authority to make an arrest, and is not issued until, upon affidavit showing the nature of plaintiff's claim, the order directing the amount of bail is indorsed upon the writ; and hence the fact that the writ is dated the day before the making of the affidavit does not constitute premature issuance. Stevens v. Ottawa Probate Judge, 118 N. W. 17, 154 Mich. 509.

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CAPIAS UTLAGATUM

The sale in case of an outlawry was made by the sheriff under a writ called "capias utlagatum" and is distinguished from a sale made on an execution, upon the ground that the sheriff, in the case of a capias utlagatum, is not bound to sell the property levied upon by him, but only to keep it for the king's use, whereas on an execution he is bound to sell, and has the power to pass the title, and by sale does pass it. It was upon the theory that the title had not passed that restitution of the goods themselves was made in outlawry cases, while restitution of the money only was made in the case of valid sales on execution. August v. Gilmer, 44 S. E. 143, 146, 53 W. Va. 65.

CAPITAL

See Authorized Capital; Average Capital; Capital Stock; Moneyed Capital; Share Capital; Working Capital.
Fully paid in, see Fully Paid In.

"Capital" is defined as "affecting the head or life; incurring or involving the forfeiture of life; punishable with death; as treason or murder are capital offenses or crimes; capital trials; capital punishment." Caesar v. State, 57 S. E. 66, 67, 127 Ga. 710 (quoting and adopting the definition in Cent. Dict. and Webster's International Dict.).

"Capital," as used in Code 1887, § 2878, providing that persons forming a partnership association by contributing capital thereto, which capital only shall be liable for its debts, must record a statement setting forth "the total amount of capital of the association; when and how to be paid; and the amount to be subscribed by each member"—is used in the restricted sense of cash or its equivalent. Deckert v. Chesapeake Western Co., 45 S. E. 800, 801, 101 Va. 804 (citing Van Horn v. Corcoran, 18 Atl. 16, 127 Pa. 255, 4 L. R. A. 386).

An agreement that a company should "raise the amount of working capital" meant the "raising of money," and not the acquiring of material. Janney v. Pancoast International Ventilator Co., 122 Fed. 535, 538.

The word "capital," as used in Revision 1888, § 3836, as amended by Pub. Acts 1889, p. 36, c. 63, providing that shares of capital stock shall be set in the list returned by the owner for assessment at their market value, but so much of the capital as shall be invested in real estate shall be deducted, describes the surplus over the company's liabilities, representing the fund in which the shareholder is equitably interested, and to which he would look for his final dividend, were the company to be wound up. Appeal of Bulkeley, 58 Atl. 8, 77 Conn. 45.

The "capital" of a corporation is the sum total of its stock whether common or preferred. Where a corporation issued both common and preferred stock, the latter being subject to redemption by the company, and that any holder of such stock might five years after the organization of the corporation have it redeemed at par upon six months' notice, a preferred stockholder cannot enforce this agreement to the prejudice of creditors, for the capital of a corporation is the sum total of its stock, whether common or preferred, and is subject to the payment of creditors, and certificates of stock being mere evidences that the holders have invested in the enterprise cannot give the holders rights against creditors. Rider v. John G. Delker & Sons Co., 140 S. W. 1011–1013, 145 Ky. 634, 39 L. R. A. (N. S.) 1007.

Under the provisions of the banking act of 1866, p. 129, c. 102, § 1, that no tax shall be assessed on the "capital" of any bank, the word "capital" applies to one or another of three different mental conceptions: First, to the shares or interest which the stockholders have in the corporation; secondly, to the money or property which the incorporators contribute and transfer to the corporation as "capital," and which thus becomes its property; and, thirdly, the word is often used as a mere measure or size of the corporation as a test for graduating taxes, usually by way of license. First Nat. Bank of City of Superior v. Douglas County, 102 N. W. 315, 316, 124 Wis. 15, 4 Ann. Cas. 34.

The term "capital," as used in the provisions of the Tax Acts which relate to the return for taxation of property of a corporation by its president (Acts 1886, p. 24; Acts 1888, p. 29), means the same as all the property of the corporation. Georgia R. & Banking Co. v. Wright, 54 S. E. 52, 56, 125 Ga. 589.

In subjecting all classes of bankers to taxation upon their capital, the statute does not discriminate in favor of any class, and the term "capital" should be read as meaning the same thing in respect to a corporation that it does in respect to an individual banker. In other words, whatever comprises capital in the business of an individual banker likewise comprises capital in the business of a banking corporation, for the purposes of the statute. Leather Manufacturers' Nat. Bank v. Treat, 128 Fed. 262, 264, 62 C. C. A. 644.

" 'Capital' is a term which, as applied to private corporations as ordinarily constituted, is used with widely varying significations. In one sense—the strict sense—it is employed to designate specifically the fund, property, or other means contributed or agreed to be contributed by the share owners as the financial basis for the prosecution of the business of the corporation; such contribution being made either directly through stock subscriptions, or indirectly through the declaration of stock dividends. As thus used, the term signifies those resources whose dedi-

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cation to the uses of the corporation is made the foundation for the issuance of certificates of 'capital' stock, and which, as the result of the dedication, become irrevocably devoted to the satisfaction of all the obligations of the corporation. Sometimes the term 'capital' is used when what is meant to be designated is that portion of the assets of a corporation, regardless of its source, which is utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits. Frequently the term is employed in a still wider sense as descriptive of all the assets, gross or net, of a corporation whatever their source, investment, or employment." Smith v. Dana, 60 Atl. 117, 121, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51 (citing State v. Norwich & W. R. Co., 30 Conn. 290; Bailey v. Clark, 88 U. S. [21 Wall.] 284, 22 L. Ed. 651; Christensen v. Eno, 12 N. E. 648, 106 N. Y. 97, 60 Am. Rep. 429; Iron Ry. Co. v. Lawrence Furnace Co., 30 N. E. 616, 49 Ohio St. 102; Reid v. Eatonton Mfg. Co., 40 Ga. 103, 2 Am. Rep. 563; Commonwealth v. Charlottesville Perpetual Bldg. & Loan Co., 20 S. E. 364, 90 Va. 790, 44 Am. St. Rep. 950; Thompson's Comm. Corp. § 1660; Iowa State Sav. Bank v. City Council of Burlington, 61 N. W. 851, 98 Iowa, 739; People ex rel. Lemmon v. Feitner, 67 N. Y. Supp. 893, 56 App. Div. 280; Hemenway v. Hemenway, 63 N. E. 919, 181 Mass. 406; Security Co. v. Town of Hartford, 23 Atl. 699, 61 Conn. 89; Appeal of Batterson, 72 Conn. 374, 44 Atl. 546; People ex rel. Union Trust Co. v. Coleman, 27 N. E. 818, 126 N. Y. 433, 12 L. R. A. 762; Ohio & M. R. Co. v. Weber, 96 Ill. 443; State ex rel. Batz v. Lewis, 95 N. W. 388, 118 Wis. 432).

Where testator directed that his business should be continued for five years, and that so much of the net profits as could be spared without injury to the business should be divided among his children, and that when the business was closed up the "capital" should be distributed among them, and that his daughters' shares should be held in trust with remainders for their children, it was held that the profits were to be divided among the children, though some of them during the five years were used in enlarging the plant, which improvement increased the price for which the property was sold. The total amount realized from the sale of the plant was "capital" within the meaning of the will. In re Weschler's Estate, 61 Atl. 1091, 1092, 212 Pa. 508.

In an action by an administrator for wrongful death for the benefit of the widow and next of kin, plaintiff is entitled to recover a "capital fund" which shall represent the present value of all the peculiar loss which will fall upon the widow and next of kin by the premature death of intestate, to be ascertained by taking into account all the possibilities. Hackney v. Delaware & A. Telegraph & Telephone Co., 55 Atl. 252, 253, 69 N. J. Law, 335.

As capital stock

"'Capital stock' and 'capital' are practically the equivalent of each other, when considered as the basis of a franchise tax." People ex rel. Commercial Cable Co. v. Morgan, 70 N. E. 967, 969, 178 N. Y. 433, 67 L. R. A. 960.

Capital stock distinguished

There is a well-understood distinction between the "capital" or property of incorporated companies and their "capital stock." The term "capital" is often used interchangeably with "capital stock," and both are frequently used to designate the property and assets of the corporation, but this use is improper. The "capital stock" of a corporation is the amount subscribed and paid in by the shareholders or the security to be paid in and upon which the corporation is to conduct its operations, and the amount of the "capital stock" remains the same, irrespective of gains or losses. The term "capital," however, properly means, not the "capital stock" in this sense, but the actual property or estate of the corporation whether in money or property. "Capital" is the aggregate of the sums subscribed and paid in or secured to be paid in by shareholders with the addition that all gains or profits realized in the use and investment of these sums or, if losses have been incurred, then, it is the residue after deducting such losses. Person & Riegel Co. v. Lipps, 67 Atl. 1081, 1083, 1084, 219 Pa. 99 (citing Clark & M. Corp. 1140; 2 Beach, Corp. § 466).

"Capital" and "capital stock," while sometimes interchangeable, are not one and the same thing. "Capital" includes the entire assets of the bank, whether represented by the money paid in for the issuance of the stock, surplus, undivided profits, or other property of the bank, and may vary from time to time according to its profits or losses; while "capital stock" is fixed and definite, and represents only the total amount derived from the issuance of the shares of stock. Hence a city ordinance imposing a tax on the capital stock of banks located within a city is not in violation of Acts 1902–04, p. 163, § 17, providing that no tax shall be assessed on the capital of any bank. West v. City of Newport News, 51 S. E. 206, 208, 104 Va. 21.

Income distinguished

The increase in the value of a fund held in trust to pay the income to one for life, and on his death to transfer the same to others, is a part of the capital, and is not income, and the remaindermen are entitled thereto. Carpenter v. Perkins, 74 Atl. 1062, 1065, 83 Conn. 11.

What is "income" from capital stock, to which a life tenant is entitled under a will, as distinguished from "principal," to which

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the remainderman is entitled, depends largely on testator's presumed intention. Where corporate stock is given to one for life, remainder to another, the "income" shall be distinguished from the capital in accordance with the testator's intention, and declarations and acts of the company in declaring what shall be income and what shall be capital govern. In re Bunker's Estate, 137 N. Y. Supp. 104, 108, 77 Misc. Rep. 320.

As between a life tenant, who is entitled to the income from certain stock in a corporation, and a remainderman, who will receive the corpus of the estate after the death of the life tenant, stock dividends declared out of surplus earnings, after the death of testator, are income, and belong to the life tenant as a part of the earnings of the original stock, and, if the funds out of which the dividends are declared have accrued or been earned before the life estate arose, the dividends will be held to be principal and belong to the remainderman. Goodwin v. McGaughy, 122 N. W. 6, 9, 108 Minn. 248.

Where corporate stock was held in trust, the "income" to be paid to the beneficiaries, and the corporation went out of business and its assets were sold, that proportionate part of the price received on such sale represented by the shares of stock and items of increased amount of material, betterments, and good will of the company constituted a part of the "capital" of the trust estate, and not "income." Where a will creates a trust and authorizes the trustees to sell corporate stock constituting the trust estate and to invest the proceeds, and exempts them from liability for losses, showing that testatrix realized that the value of the estate might fluctuate, and profits on investments are credited to capital, premiums paid on bonds purchased will be charged to "capital" and not to "income." In re Stevens, 95 N. Y. Supp. 297, 312, 46 Misc. Rep. 623.

Testator had corporate stock which after his death declared an extra cash dividend out of its accumulated surplus, and, under a plan to increase its capital stock, the corporation gave the stockholders a right to take at par new stock to equal 40 per cent. of the stock held, and it was stipulated that each stockholder covenanted to take that amount of the stock and upon paying the extra cash dividend it should be applied in payment of such subscription. Held, that the shares of the stock so received by testamentary trustees under testator's will did not become part of the "capital" of the trust fund, but were income. In re Carey, 118 N. Y. Supp. 504, 506, 63 Misc. Rep. 489.

As a general rule, as between life tenants of corporate stock held in trust and remaindermen, a cash dividend on the stock is to be regarded as income, and stock dividends as "capital." The fact that undistributed profits of a corporation, or surplus in any form, have been invested by the corporation in permanent work, improvements, or extensions, does not render a cash dividend declared by the corporation out of proceeds of a sale of such improvements capital, instead of income. The general rule that, as between life tenants of corporate stock held in trust and remaindermen, a cash dividend declared on corporate stock is to be regarded as income, and a stock dividend as "capital," is not a rule yielding whenever an investigation appears to indicate its failure in a given case to accomplish what might be conceived as exact justice, on the basis of a theoretical view of ultimate rights. Where a corporation withdrew from certain incidental branches of its business, and converted its investment in such branches into cash, which was distributed as a dividend, the amount of the corporation's capital remaining unchanged, there was no partial liquidation, so as to warrant a holding that the dividend was "capital" rather than income, as between life tenants and remaindermen. A disposition of a dividend on corporate stock as income for life tenants, instead of as capital for the remaindermen, could not be regarded as operating to the injury of the remaindermen, where it appeared that the capital stock constituting the corpus of the estate remained worth three times what it was when the trust took effect. Smith v. Dana, 60 Atl. 117, 121, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51.

Where a corporation declared a cash dividend from earnings, and voted an increase of capital stock to a like amount on the same day, giving every stockholder the right to subscribe to the new stock, the proceeds of the sale of the rights to subscribe to the new stock constitute capital, and belong to remaindermen as against a life tenant. Hyde v. Holmes, 84 N. E. 318, 319, 198 Mass. 287.

Shares of stock distinguished

The "capital" on which the privilege taxes on cotton seed oil mills are based, under Code 1906, § 3801, is the property or assets invested in the business, rather than the corporate stock. Crenshaw Oil Co. v. Johnson, 48 South. 5, 94 Miss. 773.

As stock

See Stock (In Corporation Law).

CAPITAL CASE

See Capital Crime or Offense.

A "capital case" is a case in which a person is tried for a capital crime. Adams v. State, 48 South. 219, 224, 56 Fla. 1.

Under Rev. St. 1909, § 5294, providing that no appeal in a criminal case shall stay any case, unless the Supreme Court or the court rendering the judgment shall for probable cause make an order staying the proceedings, except in "capital cases," where the granting, of an appeal shall operate as

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a stay, an appeal stays only those cases in which the sentence is that of capital punishment, and not all cases where the indictment charged a capital offense. Ex parte Dipley, 135 S. W. 56, 57, 233 Mo. 235; Ex parte Smith, 135 S. W. 58, 233 Mo. 241.

Rev. St. 1899, § 1837, provides that rape shall be punishable by death or imprisonment in the penitentiary for a term of years, and section 2698 declares that in capital cases the order granting an appeal shall operate as a stay absolutely. Held, that where petitioner was convicted of rape, but was sentenced to the penitentiary for a term of 50 years, his case was not a "capital case," and his imprisonment under the sentence was therefore not suspended by an order granting an appeal. In re Vickers, 100 S. W. 585, 201 Mo. 643.

CAPITAL CRIME OR OFFENSE

See Capital Case; Capital Felony.

A conviction in a federal District Court of murder in the second degree, punishable only by imprisonment, is not reviewable in the Supreme Court under Act March 3, 1891, c. 517, § 5, 26 Stat. 827, as amended by Act Jan. 20, 1897, c. 68, 29 Stat. 492. as a case of "conviction of capital crime" although accused could have been convicted of a capital offense. Rakes v. United States, 29 Sup. Ct. 244, 245, 212 U. S. 55, 53 L. Ed. 401.

A "capital crime" is one for which the punishment of death is inflicted. Adams v. State, 48 South. 219, 224, 56 Fla. 1; Commonwealth v. Ibrahim, 68 N. E. 231, 232, 184 Mass. 255.

CAPITAL EMPLOYED

Where a foreign corporation was organized with a paid-in capital stock invested in improved real estate previously owned by the several stockholders in common, dividends being derived from rentals of such property, the capital so invested was "the capital employed within the state," within Tax Law, Laws 1896, p. 856, c. 908, §§ 181, 182; and hence the corporation was properly taxable thereunder. People ex rel. Wall & Hanover St. Realty Co. v. Miller, 90 N. Y. Supp. 755, 756, 98 App. Div. 584.

A foreign corporation has its "capital employed within the state," under statutes imposing taxes on capital so employed, where its charter authorized unlimited dealings in real estate of every description anywhere in the United States and in all kinds of personal property, where the corporation has no surplus, and all of its capital is invested in a single office building and employed in the care and management of the same and in the collection of rents; the net income being devoted to the payment of dividends. People ex rel. Wall & H. St. Realty Co. v. Miller, 78 N. E. 1102, 1105, 181 N. Y. 328.

The capital of a corporation is "capital employed," within the meaning of Laws 1896, c. 908, § 182, providing that the tax on domestic corporations shall be computed on the basis of the amount of its capital stock employed within the state, when its stock is devoted to the purpose for which the corporation was formed. A corporation is liable to be taxed though it is merely a holding corporation for an individual. People ex rel. Waclark Realty Co. v. Williams, 91 N. E. 266, 267, 198 N. Y. 54, 28 L. R. A. (N. S.) 371.

Money of a foreign corporation invested in structures on leased ground is "capital employed within this state," under the corporation tax law, although the structures may become in law the property of the owner of the ground. People ex rel. Long Dock Mills & Elevator v. Wilson, 106 N. Y. Supp. 1, 2, 121 App. Div. 376.

The cash on hand and notes owned by a foreign corporation, doing business in the state as importers, which are the proceeds of the sale of imported goods in the unbroken original packages, may be taxed under Laws N. Y. 1896, p. 800, c. 908, § 7, as "capital employed in business within the state," without infringing the prohibition of Const. U. S. art. 1, § 10, against taxing imports, although the bulk of the proceeds of such sales are remitted to the home office in Ireland, where it is customary to hold the notes in New York for collection, and to retain there sufficient sums to meet the local expenses of the business, and to pay the duties on subsequent importations. People of State of New York v. Wells, 28 Sup. Ct. 193, 196, 208 U. S. 14, 52 L. Ed. 370.

CAPITAL FELONY

See Capital Crime or Offense.

The expression "capital felony," when used in our law, is merely descriptive of those felonies to which the death penalty is affixed as a punishment under given circumstances, to distinguish such felonies from that class in which under no circumstances would death ever be inflicted as a penalty for the violation of the same. Felonies in the Penal Code are thus divided into two classes—capital felonies, and felonies not capital. If under any circumstances the penalty of death can be inflicted, the offense is "capital," whether it is actually inflicted in a particular case or not. If under no circumstances the death penalty can be inflicted, the offense is not capital. When a person on trial for murder is found guilty of that offense, but with a recommendation by the jury that he be imprisoned for life in the penitentiary, he is convicted of a "capital felony," and a writ of error sued out to review a judgment overruling a motion for a new trial in such a case is properly returnable to the Supreme Court. Caesar v. State, 57 S. E. 66, 67, 127 Ga. 710.

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CAPITAL INVESTED

An assessment for taxation of a waterworks company for "capital invested in merchandise and manufacturing" included its pipes, hydrants, etc., but did not include "solvent credits" of the corporation; they being a separate kind of property, which should have been listed separately. Adams v. Vicksburg Waterworks Co. (Miss.) 47 South. 530, 531; Same v. City Waterworks & Light Co., Id. 531. Nor did it include a corporate franchise to construct waterworks in a city and use the streets therefor; the franchise being personalty of a different kind, which was taxable by itself. Adams v. Bullock, 47 South. 527, 530, 94 Miss. 27, 19 Ann. Cas. 165.

The amount of capital invested in a business ordinarily is the whole amount of money used in carrying on that business. The average capital of a grain dealer is defined by Revenue Act, § 66, Laws 1903, p. 407, c. 73, Comp. St. 1905, § 4987, to be the average amount which the total investment in the business exceeds the tangible property which can be separately assessed. Held that the assessor must find what capital, if any, from time to time there was, not including in the computation the tangible property, and the average or mean of the capital so found is to be assessed in addition to the tangible property. Judgment (1906) 109 N. W. 385, reversed on rehearing. Central Granaries Co. v. Lancaster County, 113 N. W. 199, 201, 77 Neb. 319.

Credits or bills receivable of a person are taxable as capital invested in the state, within Tax Law, Laws 1896, p. 800, c. 908, § 7, though the credits are the proceeds of sales of imported goods in original packages; the tax not being on imports, and so not contravening Const. U. S. art. 1, § 10. People ex rel. Burke v. Wells, 95 N. Y. Supp. 100, 107 App. Div. 15.

CAPITAL STOCK

See Value of Capital Stock.
Diminishing capital stock, see Diminish.

The words "capital stock" may mean either the capital subscribed, the share capital, or the capital paid in, the actual assets with which the company does business, and in P. L. 1904, p. 275, providing that the directors of a corporation shall not divide, withdraw, or pay to the stockholders any part of the "capital stock of such corporation, or reduce its capital stock except as authorized by law," they seem to be used in both senses, and when the Legislature forbids the dividing, withdrawing, or paying to the stockholders any part of the capital stock, it means the capital actually invested; when it forbids the reduction of the "capital stock," it means the share capital subscribed or the authorized capital. Goodnow v. American Writing Paper Co., 69 Atl. 1014, 1016, 73 N. J. Eq. 692.

Under the provisions of the banking act of 1866, p. 129, c. 102, § 1, that no tax shall be assessed on the capital of any bank, the words "capital stock" apply to one or another of three different mental conceptions: First, to the shares or interest which the stockholders have in the corporation; secondly, to the money or property which the incorporators contribute and transfer to the corporation as capital, and which thus becomes its property; and, thirdly, the word is often used as a mere measure or size of the corporation as a test for graduating taxes, usually by way of license. First Nat. Bank of City of Superior v. Douglas County, 102 N. W. 315, 316, 124 Wis. 15, 4 Ann. Cas. 34.

"'Capital stock' and 'capital and property' mean practically the same thing. Primarily, the 'capital stock' is money paid in by the stockholders in compliance with the terms of their subscriptions. It soon, however, takes the form of real estate or personal property, or both, including machinery, buildings, credits, rights of action, etc., so that it may be taken to mean personal property and such real estate as may be necessary to the daily operations of the company and its moneys and credits." Scottish Union & Nat. Ins. Co. v. Bowland, 25 Sup. Ct. 345, 350, 196 U. S. 611, 49 L. Ed. 619 (citing Lee v. Sturges, 19 N. E. 560, 564, 46 Ohio St. 153, 160, 2 L. R. A. 556, 558).

Accumulated earnings

"The stock or 'capital stock' of a corporation is the fund or capital, consisting of money or goods, employed in conducting the business of the company"; and a fund possessed by a mutual insurance company arising from premiums earned on fire and marine policies of insurance, which was invested, pursuant to an authority contained in the charter, in bonds and mortgages and stocks so as to yield an income to be divided among the members, the fund itself being forbidden to be so distributed, constitutes the capital stock of the company. Mut. Ins. Co. of Buffalo v. Board of Sup'rs of Erie County, 4 N. Y. 442, 445.

As authorized amount

Laws 1907, p. 237, c. 140, § 23, requiring payment of certain fees upon increase in the capital stock of a corporation, refers to an increase in the authorized capital, and such fees are payable whenever there is an increase in the power of the corporation to issue stock, regardless of whether any part of the new stock is actually issued or subscribed. The fact that such section provides that the fee exacted when the capital stock of a corporation is increased shall be paid at the time the certificate thereof is filed with the Secretary of State, does not enable a corporation, which has effected a valid increase, to defeat or postpone the right of

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the state to such fee by omitting to file a certificate. State v. St. Louis & S. F. R. Co., 105 Pac. 685, 687, 81 Kan. 404.

The capital stock of a national bank is the sum on which it is authorized to do business constituting the permanent basis of its credit, and does not include the deposits of the bank. State v. Clement Nat. Bank, 78 Atl. 944, 950, 84 Vt. 167, Ann. Cas. 1912D, 22.

As amount subscribed

"Capital stock" of a corporation, in its primary sense, means the fund, property, or other means contributed, or agreed to be contributed, by the share owners as the financial basis for the corporation's business, either directly through stock subscriptions, or indirectly through the declaration of stock dividends. The term signifies those resources, the dedication of which to the uses of the corporation is made the foundation for the issuance of certificates of capital stock, and which, as a result of the dedication, becomes irrevocably devoted to the satisfaction of all obligations of the corporation. Stamford Trust Co. v. Yale & Towne Mfg. Co., 75 Atl. 90, 92, 83 Conn. 43.

The words "capital stock," in Laws 1907, p. 744, requiring foreign corporations seeking to do business in the state to pay for filing the articles of incorporation a fee of $25 where the capital stock is $50,000 or under, $75 where the capital stock is over $50,000 and not more than $100,000, and $25 additional for each additional $100,000 of capital stock, do not include authorized stock not subscribed, but include unpaid subscribed stock, and a foreign corporation must pay fees on a basis of its authorized and unpaid subscribed stock. London & L. Fire Ins. Co. v. Ludwig, 112 S. W. 197, 198, 86 Ark. 581.

The phrase "capital stock," as employed in acts of incorporation, is never used to indicate the value of the property of the company, but to designate the amount of capital stock contributed by the stockholders for the purposes of the corporation, and, though the value of the stock may be increased by surplus profits or diminished by losses, the amount of capital stock remains the same. The term, as used in an act supplemental to a charter empowering an association to raise by tax any sum not exceeding $500, provided that the "capital stock" shall not exceed $4,000, is not as a restriction of the value of the property to be held at any one time by the association, but a limitation of the sum it may raise by taxation. State v. Morristown Fire Ass'n, 23 N. J. Law, 195, 196, 197.

"Capital stock," within Civ. Code, § 309, relating to the distribution of the capital stock of corporations, refers to the actual property of the corporation contributed by the shareholders. Tapscott v. Mexican Colorado River Land Co., 96 Pac. 271, 273, 153 Cal. 664.

As assets

"The 'capital stock' of a corporation is a trust fund for creditors, and hence it cannot employ its funds to purchase its own shares." Maryland Trust Co. v. National Mechanics' Bank, 63 Atl. 70, 76, 102 Md. 608 (quoting and adopting the definition in 2 Thomp. Corp. §§ 20, 54).

The amount of the "capital stock" of a corporation is the amount contributed by the shareholders for the prosecution of the business, and as the term is used in the revenue act it includes the assets of the corporation, and the value of the capital stock depends upon the assets and property of the corporation and their amount; but as the term is used in Laws 1871–72, p. 300, § 16, making the directors and officers of a corporation assenting to an indebtedness exceeding the amount of the capital stock liable therefor, it does not include the assets of the corporation. Slater v. Taylor, 89 N. E. 271, 272, 241 Ill. 102.

As capital

Under General Corporation Act (P. L. 1896, p. 286) § 30, providing that no corporation shall withdraw or pay to the stockholders any part of its capital stock except according to the act and on violation of the provisions making the directors jointly and separately liable to the full amount of the stock so withdrawn and paid out with interest thereon, the words "capital stock" mean such part of the property of the company as represents its capital for which the stock was issued, and, if defendant as a director withdraws a portion of the assets of the company, he would be liable to the creditors for the amount placed beyond their reach. Audenreid v. East Coast Milling Co., 59 Atl. 577, 585, 68 N. J. Eq. 450.

Civ. Code, § 309, prohibits corporate directors from dividing, withdrawing, or paying to stockholders any part of the capital stock, but provides that nothing therein shall prevent a division or distribution of capital stock remaining after paying all debts on dissolution of the corporation. Held that, while the stockholders could not authorize anything the directors could not do, and the term "capital stock" meant the actual capital or property used in the business, and not the nominal capital, an agreement, made upon plaintiff's alleged discovery of fraud by defendant in inducing plaintiff to purchase half the capital stock of a corporation, and demand for rescission of the contract of sale, by which defendant agreed to sell the corporate property and return to plaintiff the purchase price, keeping the remainder himself, could be legally carried out under the latter part of the section by dissolving the corporation after paying all debts, winding up its affairs, and dividing the proceeds under the agreement; and hence it would be assumed that such method was contemplated

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by the agreement. Burne v. Lee, 104 Pac. 438, 441, 156 Cal. 221.

In Comp. Laws 1907, § 4411, making it a misdemeanor "to divide, withdraw or in any manner except as provided by law, pay to any stockholders or any of them any part of the capital stock of the corporation," the term "capital stock" means the capital of the corporation on which it transacts business, whether such capital consists of money, property, or other valuable commodities. Cooper v. Utah Light & R. Co., 102 Pac. 202, 209, 35 Utah, 570, 136 Am. St. Rep. 1075.

Capital synonymous

See Capital.

As capital paid in

The capital stock of a business corporation is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business and for the benefit of the creditors, and belongs to the corporation as a legal entity, and is distinguished from the amount of property owned by it. Capital stock is a liability of the corporation to its shareholders after creditors' claims have been liquidated. Markle v. Burgess, 95 N. E. 308, 309, 176 Ind. 25.

Franchises

The term "capital stock," when applied to the capital stock of a corporation, embraces the franchise of the corporation, as well as its physical property. Georgia R. & Banking Co. v. Wright, 132 Fed. 912, 919.

As property belonging to corporation

The capital stock of a corporation is the money contributed by the corporators to the capital, and belongs to the corporation. Consolidated Coal Co. of St. Louis v. Miller, 86 N. E. 205, 206, 236 Ill. 149.

The term "capital stock," as used in the provisions of the Tax Acts, which relate to the return for taxation of property of a corporation by its president (Acts 1886, p. 24; Acts 1888, p. 29), means the same as all the property of the corporation. Georgia R. & Banking Co. v. Wright, 54 S. E. 52, 56, 125 Ga. 589.

The roadbed, machinery, depots, and other property used by a railroad company in operating its road are not literally a part of the "capital stock," taking these words in their usual acceptation. "Capital stock" exists only nominally, while the money or property which it represents is the tangible reality. The legislature has, however, given a legislative interpretation of the words "capital stock," so far as applied to the various railroad companies of this state, and "capital stock" as used in the general revenue act, subjecting to taxation all property owned by incorporated companies over and above their capital stock, includes the roadbed, machinery, and depots. Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 550, 558.

As affecting the liability of corporate property to taxation, the kind of property denominated as "capital stock" does not mean shares of stock, either separately or in the aggregate, but designates the property of the corporation subject to taxation as a homogeneous unit, partaking of the nature of personalty, and subject to the burdens imposed upon it at the domicile of the owner. Keokuk & Hamilton Bridge Co. v. People ex rel. County Treasurer, 43 N. E. 691, 695, 161 Ill. 132.

"Capital stock" of a corporation in a state statute imposing a tax on the capital stock of a corporation refers to property which the corporation has received and presumably holds. It is not the individual property of the shareholders which is contemplated by that which is in the treasury of the corporation or included in its assets. Powers v. Detroit, G. H. & M. Ry. Co., 26 Sup. Ct. 556, 559, 201 U. S. 543, 50 L. Ed. 860.

As property

See Personal Property.

Shares of stock distinguished

A tax on the "shares of stock" of a bank owned by the stockholders is not a tax on the "capital stock" of the bank. Second Ward Sav. Bank v. City of Milwaukee, 69 N. W. 359, 361, 94 Wis. 587.

The "capital stock" of a corporation is the money or property put into the corporate funds by the subscribers for their stock, which fund becomes the property of the corporation. A share of said capital stock is the right to partake, according to the amount put into the fund, of the surplus profits, and, upon dissolution of the corporation, of the fund remaining after payment of debts. Rev. St. 1898, § 1751, enacts that the capital stock of a corporation, divided into shares, shall be deemed personalty, and, when certificates thereof are issued, such shares may be transferred by indorsement and delivery of the certificate. Section 1753 (Laws 1899, c. 193, § 1) provides that no corporation shall issue any stock or certificate of stock, except in consideration for money, labor, or property actually received, equal to the par value thereof, and that all stocks issued contrary to such provision shall be void. Section 1773 contemplates the transaction of business by a corporation with its stockholders before it is at liberty to do so with others, and section 4436 punishes the issuance of a false certificate of stock. Held, that the words "issue any stock" and "all stocks issued," in section 1753, referred to certificates of stock as distinguished from the stock itself, and that hence the section did not deprive stockholders for less than par from having equitable relief against promoters who had defrauded the corporation. Pietsch v. Krause, 93 N. W. 9, 11, 116 Wis. 344 (quoting and adopting definition in Burrall v. Bushwick R. Co., 75 N. Y. 211).

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"Capital stock" is the aggregate of the money invested in a corporate enterprise by the subscriber thereto, and may consist in cash or be represented by the realty or personalty in which the cash has been invested. "Shares" of stock represent the holder's right to vote at corporate meetings and to receive his portion of the dividends and of the residue of the corporation's property upon its dissolution. Hence, since capital stock and shares of capital stock represent different property rights, the corporation's and the shareholders' both may be lawfully taxed. Judy v. Beckwith, 114 N. W. 565, 569, 137 Iowa, 24, 15 L. R. A. (N. S.) 142, 15 Ann. Cas. 890.

The term "capital stock," as used in the tax law, does not mean share stock, but is limited to the actual money or property paid in and possessed by a corporation as such. People ex rel. Twenty-Third St. R. Co. v. Feitner, 87 N. Y. Supp. 304, 306, 92 App. Div. 518 (citing People ex rel. Union Trust Co. v. Coleman, 27 N. E. 818, 126 N. Y. 433, 12 L. R. A. 762; People ex rel. Manhattan Ry. Co. v. Barker, 40 N. E. 996, 146 N. Y. 304).

"The term 'capital stock' of a corporation, as used in statutes taxing franchises of corporations, means, not share stock, but the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. The term 'capital stock' is often loosely used in speech, and sometimes in statutory phraseology, to denote capital and nothing more. It is defined as money or property which is put in a single corporate fund by those who, by subscription therefor, become members of a corporate body. 'Capital stock' and 'capital' are practically the equivalent of each other when considered as a basis for a franchise tax." People ex rel. Consolidated Ginseng Co. of America v. Kelsey, 93 N. Y. Supp. 369, 371, 105 App. Div. 175 (quoting and adopting definition in People ex rel. Commercial Cable Co. v. Morgan, 70 N. E. 967, 178 N. Y. 433, 67 L. R. A. 960).

The words "capital stock," as used in Corporation Tax Law (Laws 1896, c. 908) § 182, providing that every corporation organized under the law of the state shall pay an annual tax, computed on the basis of the amount of its capital stock employed within the state, does not mean the share stock held by individuals, but the capital stock which it represents, so employed; and, so construing the term "capital stock," United States bonds should, in the absence of proof that they were bought by the corporation with its surplus, be treated as capital, and as part of the basis on which the franchise tax is to be computed. People ex rel. Commercial Cable Co. v. Morgan, 70 N. E. 967, 969, 178 N. Y. 433, 67 L. R. A. 960.

The phrase "capital stock employed in this state," as used in Laws 1896, c. 908, as amended by Laws 1901, c. 558, imposing a license tax on foreign corporations, means that part of the corporation's corporate fund with which it does business within the state, regardless of the amount of its share stock. People ex rel. Consolidated Ginseng Co. of America v. Kelsey, 93 N. Y. Supp. 369, 371, 105 App. Div. 175.

CAPPING

The "capping" of a stick of dynamite consists of inserting into the stick an exploder and fastening it there by wires wound about the end of the stick. Hall v. Cayuga Lake Cement Co., 97 N. Y. Supp. 955, 957, 111 App. Div. 801.

CAPTAIN

See Brevet Captain.

The officer commanding a company is a "captain." Campbell v. Gilkyson, 75 Atl. 160, 161, 78 N. J. Law, 327.

Under a statute making the captain or owner of a steamer liable to a penalty for making a voyage without a licensed first or principal engineer in charge of the engines, it is held that one who was in command when the law was violated, though but for a single voyage, was liable to the penalty, even though another was regularly employed as captain. Leonard v. Board of Engineers, 10 Ala. 52, 55.

CAPTION

Of indictment

The "caption" of an indictment may be used, as declared by Code 1907, § 7131, to describe a part of the indictment itself, or in a technical sense as descriptive of that entry of record showing when and where the court was held, who presided as judge, the venire of the grand jury, and who were summoned and sworn as grand jurors. Thornton v. State, 59 South. 234, 235, 4 Ala. App. 205.

The "caption" of an indictment is not merely the marginal statement at the head of the indictment and venire, but is the entry of record showing when and where the court is held, who presided as judge, the complete venire and indorsements, and who were summoned and sworn as grand jurors, which record entries may be looked to, to supply any defect or clerical error in the special caption or heading of the indictment. Collins v. State, 58 South. 80, 82, 3 Ala. App. 64.

The "caption" of an indictment is the preamble, which is designed to indicate in a general way the kind of a crime alleged to have been committed, and to show that the trial court has jurisdiction thereof, and a mistake therein in designating the correct name of the offense is not a fatal defect, for it is the sufficiency of the averments of the charging part of an indictment that is the

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gist of the accusation. State v. Emmons, 106 Pac. 451, 452, 55 Or. 352.

The caption, which is that entry of record, showing when and where the court is held, who presided as judge, the venire, and who were summoned and sworn as grand jurors, is an essential part of an indictment. Williams v. State, 54 South. 535, 536, 171 Ala. 56.

CAPTIVE

CAPTURED PROPERTY

Property is "captured" on land when seized or taken from hostile possession by military forces under orders from a commanding officer. Lamar v. Browne, 92 U. S. 187-194, 23 L. Ed. 650.

"Captured property," under Act March 12, 1863, defining it as property which had been taken or seized when in hostile possession, by the military and naval forces of the United States, is property which has been actually seized by such forces. United States v. Padelford, 76 U. S. (9 Wall.) 531-540, 19 L. Ed. 788.

CAR

See Cable Car; Caboose Car; Coal Car; Combination Car; Each Car; Electric Car; Foreign Car; Freight Car; Hand Car; Open Car; Pile Driver Car; Railroad Car; Self-Containing Convertible Car; Semi Convertible Car; Sleeping Car; Standing Car; Street Car; Transit Car; Wholly Convertible Car.

Any car, see Any.

Engaged in operation of car, see Engaged.

Operating car, see Operate.

Railroad car as house, see House.

A vestible curtain on a sleeping car is a part of the "car" within a contract binding the sleeping car company to furnish "cars" to a railway company and keep the same in repair. Pullman Co. v. Norton (Tex.) 91 S. W. 841, 845.

"The term 'cars,' when employed in an employer's liability act, may be taken to mean any kind of a vehicle other than a locomotive or tender, used by a railroad company for the transportation of passengers, employés, or property upon and along its tracks. The term is not confined to coaches nor to freight cars, but embraces all kinds of cars." A tram car used on a tram railroad operated by a railroad company for the purpose of transporting cross-ties and other freight or material to its creosote plant, where its cross-ties were treated, was a "car" within Acts 25th Leg. approved June 18, 1897 (Laws 1897, p. 14, c. 6), making a railroad liable for injuries to a servant while engaged in operating "cars" by reason of the negligence of any other servant. Missouri, K. & T. Ry. Co. of Texas v. Smith, 99 S. W. 743, 744, 45 Tex. Civ. App. 128 (quoting and adopting definition in 3 Elliott, Railroads, § 1354).

A shovel car is a "car" within the meaning of Act March 2, 1893, c. 196, § 2, 27 Stat. 531, requiring any car used in moving interstate traffic to be equipped with an automatic coupler. Schlemmer v. Buffalo, R. & P. Ry. Co., 27 Sup. Ct. 407, 408, 205 U. S. 1, 51 L. Ed. 681.

The word "car," in the statute punishing every person who shall willfully break or injure any car which now is or which may hereafter be in use on any railroad in the state, refers to passenger and freight cars on railroads where locomotives, roundhouses, and water stations are essential in their operation, and does not include a street car, and the willful breaking of the window of a street car in use on a street railway is not a violation of the statute. State v. Cain, 76 Pac. 443, 444, 69 Kan. 186.

Engine and tender

The word "car," in its ordinary use and acceptance, does not include the tender of a locomotive. The tender of a locomotive is not a "car" within St. 1895, p. 412, c. 362, § 2 (Rev. Laws, c. 111, § 203), providing "no railroad corporation shall haul or permit to be hauled or used on its lines * * * any car which is not equipped with couplers," etc., and act March 2, 1893, c. 196, § 8, 27 Stat. 532, providing "any employé of such corporation who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk," etc. Larabee v. New York, N. H. & H. R. Co., 66 N. E. 1032, 1033, 182 Mass. 348.

As an engine is a "car" within the safety appliance statute, when such engine is engaged in interstate commerce, any car or cars attached to that engine are used in connection with the car engaged in interstate commerce, and consequently come within the amendment of the safety appliance act (Act March 2, 1903, c. 976, 32 Stat. 943). United States v. Chicago & N. W. Ry. Co., 157 Fed. 616, 619.

Hand car

A hand car is a "car" within a statute providing that, when a person shall die from an injury received through the negligence of any employé while running any "car" or train of cars, the railroad company shall be subject to a certain penalty. Boyd v. Missouri Pac. Ry. Co., 139 S. W. 561, 566, 236 Mo. 54 (citing Chicago, M. & St. P. R. Co. v. Artery, 11 Sup. Ct. 129, 137 U. S. 507, 34 L. Ed. 747; Perez v. San Antonio & A. P. R. Co., 67 S. W. 137, 28 Tex. Civ. App. 255; Benson v. Chicago, St. P., M. & O. Ry. Co., 77 N. W. 798, 75 Minn. 163, 74 Am. St. Rep. 444; Kansas City, M. & B. R. Co. v. Crocker, 11 South. 262, 95 Ala. 412).

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Removing a hand car from a railway track is the operation of a "car" within the Fellow Servant Statute, Rev. St. 1895, art. 4560f. Texas & P. R. Co. v. Hervey (Tex.) 89 S. W. 1095, 1096.

Under a statute making railroad companies liable for injuries to servants caused by negligence of fellow servants in the operation of cars, a section crew, placing a hand car on the track, is engaged in the operation of a "car," within the statute. Houston & T. C R. Co. v. Jennings, 81 S. W. 822, 823, 36 Tex. Civ. App. 375.

Passenger car

Under Act Feb. 20, 1911 (St. 1911, p. 65) § 1, requiring common carriers to provide two brakemen on passenger trains consisting of four or more passenger coaches or cars, two brakemen are not required on passenger trains of four or more cars where less than four are passenger coaches or passenger cars, the word "passenger" in the statute qualifying "cars" as well as "coaches"; the words "coaches," and "cars" including all cars used for transportation of passengers. Ex parte Galivan, 122 Pac. 961, 162 Cal. 331.

The requirement of the safety appliance act that it shall be unlawful for any railroad company to use "any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car, for greater security to men in coupling and uncoupling cars," applies to passenger cars, and a failure to comply therewith is not excused by the fact that the cars in question were equipped with air hose, steam hose or other appliances affording some measure of protection to employés. United States v. Norfolk & W. Ry. Co., 184 Fed. 99, 101.

As property

See Property.

Push car

A push car, used for transporting ballast for the repair of a track, is a "car," within the meaning of a statute providing that a railway company shall be liable for injuries to a servant in operating a car through the negligence of any other servant. Seery v. Gulf, C. & S. F. R. Co., 77 S. W. 950, 951, 34 Tex. Civ. App. 89.

As structure

See Structure.

CAR LOAD

Where defendants, dealers in live stock, wired plaintiffs, who were in the banking business, "Will honor J's $500 draft car load steers, bill lading attached," the defendants could not be permitted to show what would be understood among dealers in and shippers and carriers of cattle by the use of the term "car load," as found in the telegram, and also that the animals shipped to defendants did not in weight constitute a "car load," according to the understanding and custom existing among such dealers, shippers, and carriers. The testimony might have been admissible had a controversy arisen between J. and these defendants, or between either of the parties just mentioned and the common carrier. It might well be inferred in such an action that the parties dealt and contracted with reference to prevailing usages and customs. Keavy v. Thuett, 50 N. W. 126, 127, 47 Minn. 266.

CAR PULLER

An appliance which was used in the basement of an elevator to draw cars along a track was known as a "car puller," and consisted of a drum to which power was applied by means of certain levers causing it to revolve and wind about it a rope, the end of which was attached by means of a hook to such cars as it was desired to move. Dill v. Marmon (Ind.) 71 N. E. 669.

CAR TRACK

See Street Railroad Track.

CARBOLINEUM

"Carbolineum," or "Carbolineum Avenarius," consists of dead oil modified by subjection to the action of chlorine gas, and is dutiable under the provision in paragraph 15, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152, as "preparations of coal tar not colors or dyes, and not medicinal, not specially provided for," rather than under the provision for "chemical compounds" in paragraph 3 of said act, 30 Stat. 151, or free of duty as "dead or creosote oil" in paragraph 524 of said act, Free List, § 2, c. 11, 30 Stat. 197. Downing v. United States, 123 Fed. 1000, 1001.

CARBON

Articles composed of, see Articles Within Tariff Act.

CARBON COPY

As copy, see Copy.

CARBONIC ACID

"'Carbonic acid' is a gaseous compound of carbon and oxygen, and aërated beverages, like artificial mineral waters, champagne, and beer, are charged with it, and owe their sparkle and effervescence to it." There being no proof that the process of charging a glass bottle, protected by wicker work, with carbonic acid gas to a pressure of about 200 pounds to the square inch, is essentially dangerous, a druggist selling such bottles and carbonic acid capsules to be discharged therein for aërating liquid was not liable for injuries caused to a purchaser by the explosion of one of the bottles. Bruckel v. J. Milhau's Son, 102 N. Y. Supp. 395, 397, 116 App. Div. 832.

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CARDED SILK

In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 660, for "silk, raw, or as reeled from the cocoon, but not * * * advanced in manufacture in any way," held: (1) That the provision does not cover any form of raw silk advanced beyond the condition of skeins; (2) that silk known as "singles," or "silk on tubes," which has been wound from the skeins onto tubes, the effect of this process being to advance the silk a stage in preparation for its ultimate use, has been "advanced in manufacture"; and (3) that silk in this form is not free of duty under this provision, but dutiable under paragraph 384, § 1, Schedule L, of said act, as "silk * * * not further advanced or manufactured than carded or combed silk." Klots v. United States, 139 Fed. 606, 607, 71 C. C. A. 590.

CARDS

See Game of Cards; Poker; Shop Card; Three-Card Monte.

CARE

See Due Care; Due Care and Diligence; Extraordinary Care; Good Care; Great Care; High Care; High Degree of Care and Diligence; Highest Degree of Care; Highest Possible Degree of Care and Diligence; Ordinary Care; Proper Care; Reasonable and Ordinary Care; Reasonable Care; Reasonable Diligence and Care; Slight Care; Unusual Care; Utmost Care; Utmost Care and Skill.

All possible care, see All.

"'Care' is defined: responsibility, care, or oversight; watchful regard and attention." Hewey v. Metropolitan Life Ins. Co., 62 Atl. 600, 602, 100 Me. 523.

"Care" and "carefulness" are antonyms for "neglect" and "negligence." Statements in answer to interrogatories submitted to the jury that work causing the injury was carefully done, and that the men engaged therein exercised ordinary and reasonable care, are conclusions. Avery v. Nordyke & Marmon Co., 70 N. E. 888, 893, 34 Ind. App. 541.

An instruction, "that the term 'negligence' means the want of that care and prudence which a man of ordinary 'intelligence' would exercise under all the circumstances of the situation," is erroneous, where the case is bottomed on negligence and defended on the ground of contributory negligence, since it does not correctly define the term. "Intelligence" is not a synonym for either "caution," "prudence," or "care." Van Cleve v. St. Louis, M. & S. E. R. Co., 101 S. W. 632, 634, 124 Mo. App. 224.

The improper unloading of a ship by stevedores causing it to roll over and sink amounts to the "care or delivery of cargo," as used in section 1 of Act Feb. 13, 1893, c. 109, 27 Stat. 445, rather than "management of a vessel," within section 3 of such act, which provides for the exemption of the shipowners from liability resulting from faults or error in navigation of the vessel. The Germanic, 124 Fed. 1, 3, 9, 59 C. C. A. 521.

Laws 1898, c. 321, § 4, as amended by Laws 1901, c. 666, § 2, provides that the board of supervisors of Oneida county shall allow the sheriff's bills for the "care, supervision, and maintenance" of prisoners in the county jails; such care, provision, and maintenance being defined to include board, washing, and every charge of any nature, which can legally be made in connection with the prisoners. Held, that the provision applies to the things and services which the sheriff is to furnish of a similar nature to the things specified, and does not include drugs, medicines, and medical and surgical supplies furnished by the order of the jail physician; the sheriff not being liable for such articles. People ex rel. Nugent v. Board of Sup'rs of Oneida County, 121 N. Y. Supp. 372, 373, 65 Misc. Rep. 327.

As custody

There is no distinction between the words "care" and "possession," as used in Code 1906, § 1136, making it a crime for any agent, clerk, officer, etc., to embezzle money which shall have come to his "care or possession," so that an indictment charging that defendant had the money under his "care" is sufficient, as is also one charging that he had the same in his "possession." Richburger v. State, 44 South. 772, 774, 90 Miss. 806.

As diligence

"'Care' means more than mere mechanical skill. It includes circumspection and foresight with regard to reasonably probable contingencies." The rule as to the degree of care in the use of electricity is the same as in the use of steam and other agencies. The care must be proportionate to the danger. In determining the danger, it is the duty of those in control to have in view all the surroundings, including the contingency of other wires and their liability to fall and come in contact with the dangerously charged wire. Youmans v. Moore & Barnes, 48 S. E. 283, 285, 69 S. C. 350 (quoting Anderson v. Jersey City Electric Light Co., 43 Atl. 654, 655, 63 N. J. Law, 387).

"Care and foresight" is the reasonably practicable degree of care and diligence, in view of all the facts and circumstances shown in evidence, that a very prudent and careful person engaged in a like business would ordinarily and reasonably take and exercise, or would be fairly and reasonably expected to use under like or similar cir-

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cumstances. Logan v. Metropolitan St. Ry. Co., 82 S. W. 126, 128, 183 Mo. 582.

A passenger carrier's duty to exercise the utmost "care, diligence, and foresight" relates to future events, since no amount of care, diligence, or foresight can avoid what has already happened. Wheaton v. North Beach & M. R. Co., 36 Cal. 590, 594.

As maintenance

The word "care" in Civ. Code, § 138, authorizing the court in an action for divorce, before or after judgment, to give such directions for the custody, care, and education of the children as may be proper, etc., is, if not synonymous with "maintenance," a broader term, and, when combined with "custody" and "education," it includes every element of provision for the physical, moral, and mental well-being of the children, and an order for the benefit of the children is within the jurisdiction of the court, whether it uses the term "maintenance and support" or the broader expression "custody, care and education." Harlan v. Harlan, 98 Pac. 32, 36, 154 Cal. 341.

CARE AND CUSTODY

Acts Jan. 26, 1905 (Acts 29th Leg. c. 7), which provided that upon the state's receipt of title to the so-called "Alamo property" the Governor should deliver it, together with the Alamo church property already owned by the state, to the custody and care of the Daughters of the Republic of Texas, a private corporation, to be maintained by them in good order and repair without charge to the state, and to be remodeled only upon plans adopted by the corporation and approved by the Governor, and that all the property should be subject to future legislation, by the use of the words "care and custody" placed the corporation in the exclusive and absolute control within the conditions prescribed by the act; the "care and custody" of persons or property carrying the idea of exclusive possession. Conley v. Daughters of the Republic of Texas (Tex.) 151 S. W. 877, 880.

CARE FOR

See Stay with and Care for; Watered, Fed, and Cared For.

CARE OF A PHYSICIAN

See Under the Care of a Physician.

CARE OF A SICK PERSON

Expenses for care of sick person, see Expenses.

CAREFUL

In an action for negligent personal injuries, the use of the word "careful" in the court's charge, wherein he defined negligence to be the failure to use that degree of care which an ordinarily careful and prudent person would exercise, could not have misled the jury; the words "careful" and "prudent" being often used to express the same idea. Southwestern Telegraph & Telephone Co. v. Sanders (Tex.) 138 S. W. 1181, 1184.

CAREFUL MINING

See Skillful and Careful Mining.

CARELESS

See Grossly Careless; Reckless—Recklessly—Recklessness.

The word "careless," as used in a complaint for negligence, does not impute willfulness or intention; it means nothing more than simple negligence. Atchison, T. & S. F. R. Co. v. Baker (Ind. T.) 104 S. W. 1182, 1192 (quoting and adopting definition in Jacquin v. Grand Ave. Cable Co., 57 Mo. App. 320).

"Carelessly" and "negligently" are synonymous terms. Mascott Coal Co. v. Garrett, 47 South. 149, 151, 156 Ala. 290 (citing Words and Phrases, vol. 1, p. 974); Southern Ry. Co. v. Horine, 49 S. E. 285, 121 Ga. 386.

In an instruction as to punitive damages, to the effect that plaintiff claimed that defendant intentionally injured her, that it injured her "carelessly," that it did not care whether she suffered injury or not, and that that was what was meant by willfulness, the use of the word "carelessly" was not fortunate, since "carelessly" is more nearly synonymous with "negligently" and "inadvertently" than with "willfully" or "wantonly"; but, taking the instruction as a whole, its use was not reversible error. Horn v. Southern Ry., 58 S. E. 963, 965, 78 S. C. 67.

Under an allegation in a petition against a railroad company for negligent treatment of plaintiff employé at the company's hospital, stating that the surgeon furnished "carelessly and negligently and unnecessarily" performed a specified operation, the words "carelessly and negligently" are not synonymous with "unnecessarily"; the latter term negativing necessity for the operation, while the other terms refer to the manner of performing the operation. Williams v. Union Pac. R. Co. (Wyo.) 124 Pac. 505, 508.

As willful or willfully

See Willful—Willfully.

CARELESS STATEMENT

In Derry v. Peek, 14 App. Cas. 337, Lord Herschell thus explained what is meant by a "statement made recklessly or without care": "To make a statement careless, whether it be true or false, and therefore without any real belief, its truth appears to me to be an essentially different thing from making through want of care a false statement which is nevertheless honestly believed to be true." Donnelly v. Baltimore Trust & Guaranty Co., 61 Atl. 301, 306, 102 Md. 1.

CARELESSNESS

"Carelessness" is a relative term and is a lack of due care. Breeden v. Frankfort

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Marine, Accident & Plate Glass Ins. Co., 119 S. W. 576, 586, 220 Mo. 327.

While "carelessness" does not necessarily imply wantonness, wantonness may include negligence, since wantonness exists without an intent to injure. Kramm v. Stockton Electric R. Co., 86 Pac. 903, 904, 3 Cal. App. 616.

"Negligence" implies an omission to do a thing which a person ought to do, while "carelessness" implies heedlessness or inattention. Larkin v. Taylor, 5 Kan. 433, 445.

"Negligence" and "carelessness" are generally esteemed as not only not willfulness but rather the opposite. Schooler v. Arrington, 81 S. W. 468, 469, 106 Mo. App. 607 (following Gibeline v. Smith, 80 S. W. 961, 106 Mo. App. 545).

CARETAKER

"Caretakers" accompanying cattle shipped, who follow the cattle when they have been unloaded in the yards to be fed, watered, and rested, are not to be regarded as mere volunteers or trespassers. While the railroad company, its agents and managers, are charged with the duty of feeding and caring for the cattle while in the yards, the accompanying caretaker has a right to follow and inspect the cattle and see that they are receiving proper care. Atchison, T. & S. F. R. Co. v. Allen, 88 Pac. 966, 967, 75 Kan. 190, 10 L. R. A. (N. S.) 576.

Where plaintiff, who was shipping a stallion over defendant's road, paid his fare and was permitted to ride in the car with the horse, with the knowledge and acquiescence of defendant's servants in charge of the train, and he was injured there by the unusually violent switching of the car, plaintiff was a passenger in practically the same situation as a "caretaker," and was therefore not bound to alight at the station when the train arrived at destination, but was entitled to be carried to the stockyards where the horse was to be unloaded. Indianapolis Southern R. Co. v. Tucker (Ind.) 98 N. E. 431, 435.

CARING

The word "caring," in an instruction in an action by a parent for injuries to his minor child authorizing a recovery for the services of his wife in nursing and medical attendance made necessary by the injury, is synonymous with "nursing," and means the usual attendance on sick persons, and the use thereof does not render the instruction misleading. Johnson v. St. Paul & W. Coal Co., 111 N. W. 722, 723, 131 Wis. 627.

Nursing synonymous

See Nursing.

CARGO

See Another Cargo.

A caisson lashed to a vessel for transportation to another place may be considered cargo, though not actually on board, and therefore the subject of a salvage claim. Gonzales v. United States, 42 Ct. Cl. 299, 313.

"Cargo" is the lading of a ship or vessel, and may be prize when the vessel is not, or the vessel may be when the cargo is not. United States v. Dewey, 23 Sup. Ct. 415, 420, 188 U. S. 254, 47 L. Ed. 463.

CARGO RUN

Where bananas are taken on board a vessel at various ports and placed according to grades in various compartments, and unloaded in the inverse order of loading, and carried directly to cars, or thrown on the dock if unfit for shipment, and such fruit is sold by the importer, who refuses to select it, to a buyer who agrees to take "regular cargo run," the term "cargo run" does not mean the same as average of the cargo, or imply that the fruit placed in a particular car will be as good as that placed in some other car, and is not significant of quality, condition, or class of fruit, and in such contract has no meaning other than taking the fruit of the grade or class ordered as it comes from the vessel, with such inspection as is given the fruit, generally, at the dock. Fruit Dispatch Co. v. Le Seno, 110 N. W. 526, 528, 147 Mich. 149.

CARNAL ABUSE

See, also, Abuse of Female Child; Carnal Knowledge.

The prosecution will not be required to elect between offenses charged in an indictment alleging that defendant did "carnally know and abuse" prosecutrix, as "carnal knowledge" and "carnal abuse" thus used are synonymous terms. Curtis v. State, 117 S. W. 521, 523, 89 Ark. 394.

"Carnal knowledge" is "carnal abuse," as used in section 115, Crimes Act 1898 (P. L. p. 826), providing that "any person who shall have carnal knowledge of a woman against her will, * * * or who, being of the age of sixteen years or over, shall unlawfully and carnally abuse a woman under the age of sixteen years with or without her consent, shall be guilty of a high misdemeanor." So an indictment thereunder for abuse of a woman child under 16 is not vitiated by adding to the words, "did unlawfully and carnally abuse," the words, "and then and there did unlawfully have carnal knowledge of the body" of the said child. They may be rejected as surplusage. State v. Cannon, 60 Atl. 177, 72 N. J. Law, 46.

"Carnal abuse" or "criminal abuse" is an act of assault or debauchery of the female sexual organs by the genital organs of the male and falls short of knowledge with its accompanying penetration. Under a statute providing that any person having carnal knowledge of a woman forcibly against her will, or who being 16 years old shall car-

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nally abuse a woman under that age, etc., it is not accurate as a general proposition to say that carnal knowledge is carnal abuse. State v. Hummer, 65 Atl. 249, 251, 73 N. J. Law, 714 (Bishop, Stat. Crimes [2d Ed.] p. 361, § 489).

CARNAL INTERCOURSE

See Habitual Carnal Intercourse.

CARNAL KNOWLEDGE

See Carnal Abuse; Carnaliter Cognovit. As rapuit, see Rapuit.
See, also, Sexual Intercourse.

"Carnal knowledge" means sexual intercourse. Under a statute providing that any person having carnal knowledge of a woman forcibly against her will, or who being 16 years old shall carnally abuse a woman under that age, etc., it is not accurate as a general proposition to say that carnal knowledge is carnal abuse. State v. Hummer, 65 Atl. 249, 251, 73 N. J. Law, 714.

The words "carnal knowledge" mean sexual intercourse, and hence an information charging accused with having carnal knowledge with another was insufficient to charge sodomy, where there were no allegations showing such other was a male. People v. Carroll, 81 Pac. 680, 681, 1 Cal. App. 2.

"Carnal knowledge" includes what is meant by "carnal abuse," if not synonymous therewith, as used in Gen. St. 1902, § 1148, directed against a person who shall carnally know and abuse a female under 16, and to "abuse," within the meaning of that section, is not to injure the genital organs of the female, and to an extent not naturally resulting from an act of normal intercourse with a fully developed female. State v. Sebastian, 69 Atl. 1054, 1057, 81 Conn. 1.

In a prosecution for having had carnal knowledge of a female of previous chaste character it is unnecessary for the court to define "carnal knowledge" in its charge; and, if such definition is necessary, a treatment of it as equivalent to and interchangeable with "sexual intercourse" is sufficient. State v. De Witt, 84 S. W. 956, 957, 186 Mo. 61 (distinguishing State v. Grubb, 41 Pac. 951, 55 Kan. 678; Davis v. State, 43 Tex. 189).

In a prosecution under Gen. St. 1902, § 1148, providing that any person who shall carnally know and abuse any female under 16 years of age shall be punished, etc., the terms "carnal knowledge" and "abuse," in the statute, mean carnal knowledge, and "carnal knowledge" means sexual bodily intercourse, and the term "abuse" should not be construed independently, as requiring proof of injury to the genital organs in addition to intercourse. State v. Ferris, 70 Atl. 587, 81 Conn. 97.

Having "carnal knowledge" is but a euphemism of the expression "commit adultery." United States v. Griego, 72 Pac. 20, 22, 11 N. M. 392 (citing Helfrich v. Commonwealth, 33 Pa. 68, 75 Am. Dec. 579).

Penetration

"Carnal knowledge" is complete, upon proof of an actual penetration, without emission. State v. Williams (Del.) 80 Atl. 1004, 1006; State v. Sigerella (Del.) 82 Atl. 31, 7 Pennewill, 311.

An information for rape, alleging that accused did ravish and carnally know, etc., was sufficient, under Rev. Pen. Code, § 325, defining rape as an act of sexual intercourse, etc.; the words "carnal knowledge" meaning sexual bodily connection between man and woman. State v. La Mont, 120 N. W. 1104, 1105, 23 S. D. 174.

As ravish

See Ravish.

CARNALITER COGNOVIT

To carnally know. An essential allegation in an indictment for rape. Such term, however, is not synonymous with "rapuit," nor does it take the place of an allegation that the connection was against the woman's will. Beard v. State, 97 S. W. 667, 671, 79 Ark. 293, 9 Ann. Cas. 409.

CARPENTER

For county as holding an office, see Officer.

CARPENTER'S WORK

A subcontract for woodwork according to specifications, which, under titles "architectural iron" and "general iron work," called for all cast and wrought iron work, not included under structural steel and architectural iron work, to complete the building according to the drawings, and which, under the title "carpenter's work," required the contractor to furnish all the window frames, the material for which for portions not exposed to the weather should be kiln-dried and free from defects impairing its durability, was ambiguous on the question whether the contractor must furnish iron frames for windows and exterior doors, or need only furnish the woodwork, and evidence of the preliminary negotiations and conduct of the parties after the contract was executed was admissible to define the meaning of the terms employed, for ordinarily "carpenter's work" of itself does not cover the furnishing of iron door frames. Derby Desk Co. v. Conners Bros. Const. Co., 90 N. E. 543, 544, 204 Mass. 461.

CARRAGEEN

"Carrageen," "Irish moss," or "sea moss," is a species of seaweed whose gela-

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tinous qualities render it valuable as an article of food. It is a marine plant of the genera corallina. It is a seaweed (Chondrus crispus) which grows abundantly along the rocky parts of the Atlantic coasts of Europe and North America. It is collected for commercial purposes on the west and northwest of Ireland and in very large quantities on the coast of Plymouth county, Mass., U. S. It is used for food, medicine, and a thickener for printing calico and for finning beer. "Sea grass" used for making mattresses and upholstering purposes is an entirely different article from sea moss and is not known commercially as sea moss and is not dutiable as such under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 81, 30 Stat. 151, but is entitled to free entry under section 2, Free List, par. 617, 30 Stat. 199, which covers "moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for." In re F. W. Myers & Co., 123 Fed. 952, 955 (quoting and adopting definition in Worcester's Dict., Imperial Dict., and Ency. Brit.).

CARRIAGE

See Contract of Carriage; Shotgun Carriage.

The phrase "carriages and vehicles used for transportation," in statutes empowering municipalities to license and regulate carriages and vehicles used for the transportation of passengers, is restricted to those of hackmen, public cartmen, and the like, and to permit city authorities to exact a license fee and exercise supervisory jurisdiction over the transportation by private persons of their own property in their own wagons is so unreasonable that no such construction should be given to the statutes unless the intent is perfectly clear. Kellam v. City of Newark, 75 Atl. 548, 550, 79 N. J. Law, 364.

Automobile

Automobiles are not included in Rev. Laws, c. 208, § 55, punishing refusal to pay for use of a "carriage." Commonwealth v. Goldman, 91 N. E. 392, 205 Mass. 400.

An automobile is a carriage within the meaning of a covenant in a deed reserving a strip of land for a carriageway forever. Diocese of Trenton v. Toman, 70 Atl. 606, 610, 611, 74 N. J. Eq. 702.

Under Sayles' Ann. Civ. St. 1897, art. 2395, exempting to the head of a family one carriage, an automobile is a carriage. Parker v. Sweet (Tex.) 127 S. W. 881.

An automobile is not a carriage, within the statute providing that highways shall, unless otherwise provided, be kept in repair at the expense of the city or town in which they are situated, so that they may be reasonably safe and convenient for travelers with their horses, teams, and carriages, since the carriages referred to are those drawn by animal power. Doherty v. Inhabitants of Ayer, 83 N. E. 677, 679, 197 Mass. 241, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355.

Rev. Laws, c. 31, § 1, provides that highways shall be kept in a reasonably safe condition for travelers with horses, teams, and "carriages." Held, that an "automobile" is a vehicle which can carry passengers or inanimate matter, and so is a "carriage" within the meaning of the statute. Baker v. City of Fall River, 72 N. E. 336, 337, 187 Mass. 53.

Act April 29, 1874, under which defendant turnpike company was organized, provides on page 86, cl. 6, § 30, that it may appoint toll gatherers to collect from every person using the road tolls and rates mentioned for any coach, sulky, chaise, phaeton, wagon, or any other carriage of burden or pleasure, and clause 9 declares that, if any person owning, riding in, or driving any sulky, chaise, or other carriage of burden or pleasure shall pass through the toll gate with intent to defraud the company, they shall be liable to a penalty. Held, that since by Act April 19, 1905 (P. L. 217) § 1, automobiles and motor vehicles are recognized as "carriages of burden or pleasure," the act providing that they shall not be operated on any street or highway until the operator shall have procured a license, defendant turnpike company could not exclude automobiles from passage over its road. Scranton v. Laurel Run Turnpike Co., 73 Atl. 1063, 1064, 225 Pa. 82.

Bicycle

It has been established by judicial decisions that, so far as its use on the highway is concerned, the bicycle is to be regarded as a "carriage or vehicle" and subject to the same burdens as other vehicles. Simpson v. Whatcom, 74 Pac. 577, 578, 33 Wash. 392, 63 L. R. A. 815, 99 Am. St. Rep. 951.

The word "carriage" may be broad enough to include a bicycle within a statute forbidding any person to drive any sort of carriage so as to endanger the life or limb of any passenger, and the person who rides a bicycle may be said to "drive" it. A statute declaring a fine for every person who shall ride or drive faster than a common pace covers a town ordinance imposing a penalty for driving an automobile on the public streets at a greater speed than fifteen miles an hour, so that the ordinance is void. State v. Thurston, 66 Atl. 580, 582, 28 R. I. 265.

The word "carriages," as used in Gen. Laws 1896, c. 72, § 1, imposing on towns the duty of keeping highways in repair, "so that the same may be safe and convenient for travelers with their teams, carts, and carriages," does not include a bicycle; and hence a bicycle rider is not entitled to recover for injuries sustained by reason of a defect in the street, where the defect would not have caused injury to an ordinary traveler.

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Fox v. Clarke, 57 Atl. 305, 25 R. I. 515, 65 L. R. A. 234, 1 Ann. Cas. 548.

Wagon synonymous

See Wagon.

CARRIED

See Carry.

Transported synonymous, see Transport —Transportation.

CARRIER

See Common Carrier; Connecting Carrier; Forwarding Carrier; Liable as Carrier; Private Carrier; Public Carrier.

Service of carrier, see Service.

A bill of lading provided that "no carrier shall be liable for loss or damage not accruing on its portion of the route, nor after said property is ready for delivery to the consignee." Held that, the stipulation being intended to qualify or limit the common-law liability and therefore to be strictly construed against the carrier and in favor of the shipper, the term "carrier" should be taken as referring, not merely to the transportative capacity of the company, but to the contracting entity in its dual capacity of common carrier and warehouseman. Central of Georgia R. Co. v. A. F. Merrill & Co., 45 South. 628, 629, 153 Ala. 277.

In making a contract of carriage, a ticket agent is the "carrier corporation," as is the conductor on the train in carrying the contract out. Cornell v. Chicago, R. I. & P. R. Co., 128 S. W. 1021, 1023, 143 Mo. App. 598.

As warehouseman

See Warehouseman.

CARRIER OF PASSENGERS

See, also, Passengers.

Persons operating elevators are carriers of passengers. Anderson Art Co. v. Greenburg, 118 Ill. App. 220, 224.

A merchant who operates an elevator in his store for the transportation of his customers sustains the relation of carrier to a customer who is directed by him to take the elevator, and is consequently bound to exercise the highest degree of care for the customer's safety while the latter is actually aboard or is entering the elevator. Morgan v. Saks, 38 South. 848, 849, 143 Ala. 139.

The relation of "carrier and passenger" continues until the passenger has left the carrier's premises or has been allowed a reasonable time to leave. Atlantic City R. Co. v. Kiefer, 66 Atl. 930, 932, 75 N. J. Law, 54 (citing Hansley v. Jamesville & W. R. Co., 20 S. E. 528, 115 N. C. 602, 32 L. R. A. 543, 44 Am. St. Rep. 474).

A lumber company operating an engine and flat cars to haul timber and transport its employés to and from their work is not a carrier of passengers, and its employés while being transported are not passengers. Self v. Adel Lumber Co., 64 S. E. 112, 5 Ga. App. 846.

Street car companies are "carriers of passengers," and are held to the same degree of care and vigilance in preventing injuries to their passengers as is required of other railroads carrying passengers for hire. Redmon v. Metropolitan St. Ry. Co., 84 S. W. 26, 28, 185 Mo. 1, 105 Am. St. Rep. 558 (citing Jackson v. Grand Ave. Ry. Co., 24 S. W. 192, 118 Mo. 199; O'Connell v. St. Louis Cable & W. Ry. Co., 17 S. W. 494, 106 Mo. 482; Clark v. Chicago & A. Ry. Co., 29 S. W. 1013, 127 Mo. 197; Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799); Schloemer v. St. Louis Transit Co., 102 S. W. 565, 568, 204 Mo. 99.

"The relation of 'carrier and passenger' commences when a person with the good-faith intention of taking passage and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. In the case of a railroad, this relation arises not merely when the passenger enters the train with a ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier with intention to take a train in due course." Hence a railroad is liable for injuries to a woman from being forced to stand in the cold for a long time by reason of the obstruction of the entrance to the station, where she was going to take a train, by defendant's train of freight cars. Louisville & N. R. Co. v. Daugherty (Ky.) 108 S. W. 336, 337, 15 L. R. A. (N. S.) 740 (quoting and adopting definition in 6 Cyc. p. 536).

One who conducted a hotel and sanitarium, in connection with which he used an automobile to carry patrons to and from the railroad station, for which a fare was charged, was guilty of "carrying passengers for hire in an automobile" without having obtained a license therefor as prescribed by ordinance for such carriage. Galen Hall Co. v. Atlantic City, 68 Atl. 1092, 76 N. J. Law, 20.

CARRIER'S LIEN

A "carrier's lien" is nothing more than the right to retain the goods until the charge for carriage is paid, "and there is in this respect an analogy between this so-called lien and the right which a seller has who sells goods for cash." Lembeck v. Jarvis Terminal Cold Storage Co., 59 Atl. 360, 362, 68 N. J. Eq. 492.

CARROMS

The word "carroms," as applied to a game to be played with disks, where the object is not to strike the disks together, but

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to drive a single one into a pocket, or to the boards on which it is played, is used in a popular sense to describe one object hitting and glancing away from another, and is not so descriptive that it may not be used as a trade-mark. Ludington Novelty Co. v. Leonard, 119 Fed. 937, 940.

CARRY

The term "carry," as used in a contract by which one of the parties to a contract for the purchase of a patent right agreed to "carry" the interest of another party who was to have a part interest therein, means "advance" the money to pay his interest. Mann v. Urquhart, 116 S. W. 219, 222, 89 Ark. 239.

CARRY INTO INDIAN TERRITORY

The words "to carry or have carried into," as used in act of Cong. of March 1, 1895 (28 Stat. 697, c. 145, § 8), punishing any person who shall carry or in any manner have carried into the Indian Territory any intoxicating liquors, etc., is synonymous with the word "introduce" in an indictment alleging that accused "did * * * introduce" within the limits of the Indian Territory intoxicating liquors. United States v. Buckles, 97 S. W. 1022, 1024, 6 Ind. T. 319.

CARRY ON

"Carried on," as used in the constitutional requirement that a prosecution shall be carried on in the name and by the authority of the state, means and refers to the prosecution which is by a written complaint. Ex parte Jackson (Tex.) 96 S. W. 924, 925.

CARRY ON BUSINESS

See Continue to Carry On Business; Transacting Business.

Exercising any power as synonymous, see Exercising Any Power.

Exercising corporate franchises synonymous, see Exercising Corporate Franchises.

See, also, Doing Business; Engaged.

The phrase "carry on," when applied to business, means to prosecute; to help forward; to continue. Trozzo v. People, 117 Pac. 150, 154, 51 Colo. 323 (quoting and adopting the definition in Worcester's Dict. as contained in Florsheim Bros. Dry Goods Co. v. Lester, 29 S. W. 34, 60 Ark. 120, 27 L. R. A. 505, 46 Am. St. Rep. 162).

To "carry on" is defined as meaning "to prosecute, to help forward, to continue, as to carry on business;" and also as meaning "to continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade." The making in one state of a contract by which one party agrees to complete and deliver in another state certain machinery, and the other party to pay for it, does not constitute a carrying on of business in the state where the contract is made. Cooper Mfg. Co. v. Ferguson, 5 Sup. Ct. 739, 742, 113 U. S. 727, 28 L. Ed. 1137 (citing Worcester's Dict. and Webster's Dict.).

Under a statute providing for the licensing of persons "to carry on the business" of pawnbroking, there may be one or more acts of receiving articles on pawn without engaging in the business, or there may be the occupation of pawnbroking without the completion of an actual contract of pawnbroking. Commonwealth v. Schwartz, 83 N. E. 326, 327, 197 Mass. 107.

Greater New York Charter, Laws 1901, p. 605, c. 466, § 1416, forbids a justice of the Court of Special Sessions to "carry on any business," but he shall devote his whole time and capacity, so far as public interests demand, to the duties of his office. Held, that to "carry on a business" implies such a relation to the business as identifies a person with it, and imposes upon him some duty or responsibility in connection with its management, and the prohibition is not violated by one acting as vice president of a corporation where the incumbent of that office has no specific duties in relation to it, and is not actively engaged in the conduct of the business of the corporation, and is not responsible either to the corporation or its stockholders for the conduct or management of the business, and does not actively interfere in any way in relation to it. In re Deuel, 111 N. Y. Supp. 969, 972, 127 App. Div. 640.

In the English partnership act, defining a partnership as the relation subsisting between persons carrying on a business in common with a view of profit, the words "carrying on a business" imply a relation entirely different from the enforced relation of tenants in common, as the owners of a ship or of a house, who must either let the property lie idle or keep it in some way occupied or used, deriving a return from such occupation or use. Manson v. Williams, 153 Fed. 525, 531, 82 C. C. A. 475.

The conducting of a social club is not the "carrying on of a business," trade, or occupation in the sense of the license statutes of Louisiana. Consequently a social club is not subject to license taxes except in so far as it engages in the sale of intoxicating liquors to its members. State v. New Orleans Chess, Checkers & Whist Club, 40 South. 526, 528, 116 La. 46 (following State v. Boston Club, 12 South. 895, 45 La. Ann. 586, 20 L. R. A. 185).

Since a conviction of a violation of Act April 26, 1909 (Laws 1909, c. 196), punishing one who shall engage or assist in operating or managing any house of prostitution, cannot be had unless it is shown that accused had control of and conducted or assisted in the management and operation of the affairs of the house in some manner, or that he was

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able to bring about or assist in bringing about prostitution, a charge that if accused in any manner aided or abetted a third person in the management of the house he is guilty is erroneous; the word "management" meaning the act of managing; the manner of treating, directing, carrying on, or using for a purpose; and the word "operate" meaning to put into or to continue in operation or activity; the word "manager" meaning one who has the conduct or direction of anything; and the phrase "to carry on," when applied to business, meaning to prosecute, to help forward, to continue, etc. Trozzo v. People, 117 Pac. 150, 154, 51 Colo. 323.

One who was selling strawberries, pineapples, and bananas out of a push cart in a street, but not blocking the highway or making any disturbance but going from place to place disposing of fruit to whoever desired to purchase, acted in violation of an ordinance providing that no persons should in any part of a public street "carry on any trade or business" unless especially authorized. State v. Barbelais, 64 Atl. 881, 882, 101 Me. 512.

Fixed place

The expression "carrying on business," as used in Code, art. 75, § 132, rendering one liable to be sued in a county in which his business is carried on, relates to a fixed occupation, connected with some of the branches of trade, industry, or commerce, or the continuous pursuit of some calling or profession such as is ordinarily engaged in as a means of livelihood, or for the purpose of gain or profit. It does not consist in the mere transaction of one's own private affairs. Nor does the making of a single transaction with another person in the line of a particular business constitute a carrying on of that business. A nonresident of a county owned property there, which he managed and received the rents from, and also collected rent from property which he owned as cotenant with another, receiving a commission from his cotenant for collecting the latter's share. He was not engaged in regular business, within the meaning of the section. State, to Use of Gemundt, v. Shipley, 57 Atl. 12, 13, 98 Md. 657, 1 Ann. Cas. 742.

Foreign corporations

R. I. Gen. Laws 1896, c. 253, as amended by Pub. Laws 1902, c. 980, provides that no foreign corporation shall carry on within the state the business for which it was incorporated or enforce in the courts of the state any contract made herein unless it complies with the following sections. Held, that the "carrying on business" referred to in the first clause was not the same thing as the making of a contract within the state, and a compliance with the statute after the making of a contract, but before the commencement of an action for its breach, was a sufficient compliance authorizing the corporation to maintain an action thereon. Swift & Co. v. Little, 65 Atl. 615, 28 R. I. 108.

That a foreign brewing corporation shipped beer into Montana, and sold the same to defendant, a domestic corporation operating a distributing agency, did not constitute "carrying on business" within the state. Uihlein v. Caplice Commercial Co., 102 Pac. 564, 567, 39 Mont. 327.

To "carry on" means, according to lexicographers, to "promote," "advance," or "help forward" (Webster). Under Act Feb. 18, 1901, 31 Stat. 794, which provides that, "before any foreign corporation shall begin to carry on business in the Indian Territory," it shall file a certificate designating a resident agent on whom process may be served, and also stating its principal place of business in the territory, and that if it fails to comply with such provisions all of its contracts with citizens and residents of the territory shall be void and shall not be enforced in its favor by any of the courts therein, proof that a foreign corporation, having no place of business in the territory, in a single instance completed an executory contract of sale therein by delivery of the property and taking notes and a mortgage for the purchase price through a local bank acting as its agent, is not sufficient to subject it to the penalty for "carrying on business" by rendering its notes and mortgage nonenforceable, though it never filed the statutory certificate. Ammons v. Brunswick-Balke-Collender Co., 141 Fed. 570, 575, 72 C. C. A. 614.

Single transaction

Isolated transactions do not constitute carrying on business by a foreign corporation. Hunter W. Finch & Co. v. Zenith Furnace Co., 92 N. E. 521, 523, 245 Ill. 586.

Ordinarily it takes more than a single transaction to constitute "carrying on business." Williams v. City of Tifton, 60 S. E. 113, 114, 3 Ga. App. 445 (citing 1 Words and Phrases, p. 979; 3 Words and Phrases, p. 2155).

The doing by a foreign corporation of a single act of business in the Indian Territory, without appointing a resident agent on whom summons may be served, is not a violation of an act of Congress providing that, before any foreign corporation shall begin to carry on business in the Indian Territory, it shall designate an agent on whom summons or other process may be served, etc. Ammons v. Brunswick-Balke-Collender Co., 82 S. W. 937, 940, 5 Ind. T. 636.

CARRYING ARMS OR WEAPONS

"Coming into possession of a pistol while at a public gathering is not carrying a pistol to a public gathering." A conviction cannot be had under an accusation charging accused with carrying a pistol about his person to a place of public worship, the same being a designated church where a congregation

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was then assembled for public worship, on proof that accused came into possession of the pistol at a spring from which the congregation was using water, and which was so near the church as to be in legal contemplation a church. Culberson v. State, 47 S. E. 175, 176, 119 Ga. 805 (quoting Modesette v. State, 41 S. E. 992, 115 Ga. 582).

On a trial for unlawfully carrying a pistol, where the evidence merely showed that two witnesses saw accused put a pistol in a pan, and did not see where he got it but only saw it while it was in his hand, it was error to give the general charge against accused since "carry" in Acts 1909, p. 258, § 2, is synonymous with "bear," and it was for the jury to say whether accused carried the pistol in the sense of bearing arms. Nichols v. State, 58 South. 681, 682, 4 Ala. App. 115.

Defendant was guilty of "carrying a pistol," where he got out of the vehicle he was driving and at the point of a pistol, theretofore kept under the seat of the vehicle, forced another party to desist from a difficulty with the latter's wife. Hill v. State, 100 S. W. 384, 50 Tex. Cr. R. 619.

One placing a pistol on some cotton in a wagon driven by him, about halfway between the seat and the rear end of the wagon, is not guilty of "carrying the pistol on and about his person." Thompson v. State, 86 S. W. 1033, 1034, 48 Tex. Cr. R. 146.

CARRYING CONCEALED WEAPONS

See, also, Concealed Weapons; Unlawfully Carrying.

Shannon's Code, § 6641, providing that "it shall not be lawful for any person to carry publicly or privately any dirk, razor, concealed about his person, sword cane, * * * or any kind of pistol except the army or navy pistol, usually carried in warfare, which shall be carried openly in the hand," is violated by a hack driver carrying a pistol under the driver's seat of his hack, for the law may be violated just as fully and completely by the carrying of a weapon in a handbag as in a pocket, for it is the carrying with the purpose of going armed that is the offense and not the concealment about the person, with the single exception of the razor, which must be concealed about the person in order to constitute a violation of the statute. It is the practice of going armed that is proposed to be prohibited by the act. Kendall v. State, 101 S. W. 189, 118 Tenn. 156, 121 Am. St. Rep. 994, 11 Ann. Cas. 1104.

Though under Rev. St. 1899, § 1863, declaring it a good defense to the charge of carrying a concealed deadly weapon, if defendant show that his life had been threatened, or that he had good reason to carry it in the necessary defense of his person, home, or property, it is necessary, to justify the carrying of a concealed weapon by one whose life has been threatened, that he believed there was danger of the threat being executed, yet he has not the burden of showing that he had good reason to believe and did believe that the carrying of the weapon was necessary to his defense, further than to show that his life was threatened, and that he consequently armed himself with the weapon to defend himself against the danger of such threat. One is not guilty of "carrying a concealed weapon" in contravention of Rev. St. 1899, § 1263, where he is carrying a pistol because the mainspring was broken and he could not find a machinist with whom to leave it for repairs. State v. Casto, 95 S. W. 961, 963, 119 Mo. App. 265 (citing State v. Venable, 93 S. W. 356, 117 Mo. App. 501; Wharton's Crim. Ev. § 322).

CARTED

It is not usual to speak of goods delivered upon and carried by a dray, as "shipped"; the usual expression being "carted or hauled." And hence a quotation of prices on goods to be shipped from a factory was ambiguous as to whether they were sold f. o. b. cars. Crystal Case Co. v. Arnett, 85 Pac. 302, 303, 73 Kan. 774.

CARTING

A decree in partition in 1817, when steam railroads were unknown, giving each tenant the right of "carting" timber across the other's land, does not authorize a present owner of a tract of the land to construct a steam railroad over an adjoining tract, especially since the privilege was not incorporated in conveyances subsequent to the decre under which the parties claimed. Roper Lumber Co. v. Richmond Cedar Works, 73 S. E. 902, 904, 158 N. C. 161.

CARTON

"By 'cartons' * * * we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents." United States v. Nicholls, 22 Sup. Ct. 918, 919, 186 U. S. 300, 46 L. Ed. 1173.

CARTWAY

Cartways are quasi public roads in which the public has a direct personal interest. Barber v. Griffin, 74 S. E. 110, 111, 158 N. C. 348.

A private railroad extending from a station on a railway company's line to the owner of standing timber, constructed and exclusively operated by the owner of the timber for the transportation thereof, is not a cartway, within Code, §§ 2056, 2057, authorizing the laying out of cartways by persons settled on or cultivating any land, which cartways

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shall be open for the free passage of all persons. Cozard v. Kanawha Hardwood Co., 51 S. E. 932, 933, 139 N. C. 283, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779.

CASE

"By * * * 'cases' * * * we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents." United States, v. Nicholls, 22 Sup. Ct. 918, 919, 186 U. S. 300, 46 L. Ed. 1173.

Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, providing that the value of "cases" and similar coverings shall be added to the dutiable value of their contents, includes tin cans and stoneware receptacles. Austin, Nichols & Co. v. United States, 171 Fed. 79, 96 C. C. A. 183.

CASE (In Practice)

See Civil Action—Case—Suit—etc.; Criminal Case or Cause; Exceptional Case; Gravel Pit Case; Homicide Case; Important Case; Law of the Case; Like Cases; Moot Case; Prima Facie Case; Proper Case; Remedial Cases; Rule in Shelley's Case; Special Case; Stage of Case; Statement of the Case; Sufficient Case for Jury; Trespass on the Case.
All cases, see All.
Any case, see Any.
Every case, matter, or proceeding, see Every.
Other cases, see Other.
Report of case, see Report.
Settlement of, see Settle—Settlement.
Such case, see Such.
See, also, Cause (In Practice).

Kirby's Dig. § 3490, allowing the clerk of the circuit court 10 cents "for indexing each case, each item," does not refer to indexing orders of court relating to commissioners of accounts, petit jurors, and grand jurors; their entry and indexing being a part of the burden of the office. Hempstead County v. Harkness, 84 S. W. 799, 73 Ark. 600 (citing Kirby's Dig. § 3490, distinguishing Trimble v. Railway Co., 19 S. W. 839, 56 Ark. 249; Logan County v. Trimm, 22 S. W. 164, 57 Ark. 487).

The word "case," as used in the second section of the third article of the Constitution of the United States, is a subject on which the judicial power is capable of acting and which has been submitted to it by a party in the forms required by law. Lake v. Lake, 30 Pac. 878, 880, 17 Nev. 230 (adopting definition in Osborn v. Bank of United States, 22 U. S. [9 Wheat.] 738, 6 L. Ed. 204).

An affidavit of merits on a motion for change of venue read, "Deponent has fully and fairly stated his defense to said 'action' and all the facts relative 'thereto' to his counsel." Held, that the word "thereto" refers to "action," and that "action" is synonymous to "case"; hence the clause should be construed to read "and all the facts relative to the 'action,' i. e., 'case.'" Larocque v. Conhaim, 92 N. Y. Supp. 99, 101, 45 Misc. Rep. 234 (citing Bouv. Law Dict. and Black's Law Dict., sub verba "Case").

The word "cases," in Code Civ. Proc. § 615, requiring the court to change the place of trial "in the following cases, etc.," means contingencies, chances, conditions, or state of circumstances; in other words, whenever any of the grounds enumerated in that section is made to appear. State ex rel. Carleton v. District Court of Lewis and Clarke County, 82 Pac. 789, 790, 33 Mont. 138, 8 Ann. Cas. 752.

Code Civ. Proc. § 3251, subd. 3, provides that "upon a motion for a new trial, upon a case," the same sum shall be allowed as costs "as upon appeal as prescribed in subdivision 4 of this section." Subdivision 4, before its amendment, provided that either party, upon an appeal to the Supreme Court from an inferior court, should be entitled to a taxation of $20 before argument and $40 for argument. Subdivision 4 was amended by Laws 1902, c. 515, by inserting, after the words "an inferior court," the words "excepting upon appeal to the Supreme Court from the City Court of the City of New York." Held, that a motion for a new trial on the ground of newly discovered evidence was one upon a "case," and where such motion was made in respect to a judgment of the City Court of the City of New York the prevailing party on the motion was entitled to $20 before argument and $40 for argument; but such allowances should not be made as upon appeal, as by such subdivision 4 the costs in such a case on appeal are limited to $10. Brennan v. Joline, 127 N. Y. Supp. 676, 678, 70 Misc. Rep. 537.

As action, cause, or suit

The primary meaning of "case" is "cause," when applied to legal proceedings. It imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. In its generic sense, the word includes all causes, special or otherwise. A "case" is a contested question before a court of justice; a suit or action; a "cause"; a state of facts involving a question for discussion or decision, especially a "cause" or suit in court. Under Rev. St. 1899, § 1674, giving the circuit court appellate jurisdiction from judgments of the county courts in all cases not expressly prohibited by law, and section 1788 providing that appeals from the county court shall be prosecuted in the same manner as is provided for the regulation of appeals from justices of the peace to circuit courts, and shall be de-

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termined anew without regarding any error or informality in proceedings of the county court, an appeal lies from the county to the circuit court only in judicial cases involving life, liberty, and property, and not in a "case" wherein the county court acts in an administrative and ministerial capacity, as in revoking a liquor license for the causes and in the manner prescribed by Rev. St. 1899, § 3012, in which no right of life, liberty, or property is involved. Barnett v. Pemiscott County Court, 86 S. W. 575, 576, 111 Mo. App. 693 (quoting and adopting the definition in Black's Law Dict., and citing Robertson v. Baldwin, 17 Sup. Ct. 326, 165 U. S. 275, 41 L. Ed. 715; Calderwood v. Peyser, 42 Cal. 115; Home Ins. Co. v. North Western Packet Co., 32 Iowa, 223, 7 Am. Rep. 183; Ex parte Towles, 48 Tex. 433; Kundolf v. Thalheimer, 12 N. Y. 596).

"The primary meaning of the word 'case,' according to lexicographers, is 'cause.' When applied to legal proceedings it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice." Gibson v. Sidney, 69 N. W. 314, 315, 50 Neb. 12.

The word "cases," in Rev. St. 1857, c. 82, § 83, excluding the operation of section 78, making parties and other persons interested in suits competent as witnesses in "cases" prosecuted or defended by executors or administrators, is not synonymous with the word "suits," in section 78, but is restricted in its signification to the particular question of the competency of any witness offered. Gunnison v. Lane, 45 Me. 165, 166.

Rev. St. c. 79, § 46, provides that questions of law arising on reports of cases may come before the Supreme Judicial Court as a court of law. Held, that the word "case" is used in its unrestricted sense, as a contested question before a court or justice, a suit or action, a cause, and the phrase "reports of cases" contemplates a method of submitting questions involving both law and fact, in the most comprehensive manner, to the decision of the court so that a report of a case under the statute must submit the whole controversy for final decision unless some question is reserved, and hence, upon a report without restriction, the law court may pass upon the question of costs in a probate case (quoting Words and Phrases, vol. 1, p. 985). Mather v. Cunningham, 78 Atl. 102, 103, 107 Me. 242.

In ordinary phraseology the word "case" means event, happening, incidents, condition, and the like, but in a legal sense it means "cause, suits, action, or a contested question before a court of justice." Const. art. 14, § 1, provides that all county officers shall be paid salaries to be fixed by the Legislature. Section 2 provides for fees to be collected by the sheriff and an accounting therefor, and that, in addition to the salary of the sheriff, he shall be entitled to receive from the party for whom the services are rendered in "civil cases" such fees as may be prescribed by law. By section 3, the salaries of county officers are to be fixed by law within stated maximum limits. Rev. St. 1899, § 1112, fixed the salaries of sheriffs, and by section 1113 declared that the sheriff in addition to his salary might receive from the party for whom the service is rendered in civil cases certain stated fees. By section 1232, county officers receiving money for any county were required to pay the same into the county treasury. Laws 1901, c. 79, § 1, provided for an inspection of horses about to be transported or driven out of the state. Section 3 made the sheriff of each county an inspector, and required that he keep a record of inspections and file certain reports. Section 8 provided for a fee of 15 cents per head on all horses inspected, in full compensation for all inspection. Held, in an action by a sheriff to recover inspection fees paid into the county treasury pending a judicial determination, that the word "case" was to be construed as synonymous with "cause," "suit," "action," a "contested question" before a court of justice; that the term "civil cases," as used in the Constitution, was in contradistinction to criminal cases, and was to be broadly construed as inclusive of all cases not criminal, and that it was used as meaning a legal proceeding of some nature for the protection of a private right or the redress of a private wrong; and that the services of the sheriff as inspecter were not rendered in civil cases, and hence that he was not entitled to the fees collected. Messenger v. Board of Com'rs of Converse County, 117 Pac. 126, 130, 19 Wyo. 309 (citing Bouv. Law Dict.; Calderwood v. Peyser, 42 Cal. 115; United States v. Dolla, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665; In re Account of District Attorney, 23 Fed. 26; United States v. Volz, 28 Fed. Cas. 384; Dickey v. Smith, 26 S. E. 373, 42 W. Va. 805; Kundolf v. Thalheimer, 12 N. Y. 593; Gold v. Vermont Cent. R. Co., 19 Vt. 478; Crum v. Johnson, 3 Neb. [Unof.] 826, 92 N. W. 1054).

The term "case," within the provisions of the federal Constitution, extending the judicial powers to all cases in law and equity arising under the Constitution, laws, and treaties, etc., means a suit instituted according to the regular course of judicial procedure. Congress could not, as was attempted by the act of March 1, 1907 (34 Stat. 1015, c. 2285), confer jurisdiction upon the court of claims, and by appeal, upon the federal Supreme Court of suits against the United States, to be brought by certain named Cherokee Indians, for themselves and others similarly situated, to determine the validity of acts of Congress passed since the act of July 1, 1902 (32 Stat. 716, c. 1375), so far as such acts purport to increase or extend the restrictions upon alienation, incumbrance,

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or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of the Cherokee lands and funds, since this is nothing more than an attempt to provide for a final judicial determination in the Supreme Court of the constitutional validity of congressional legislation, without a "case" or "controversy" to which, under the federal Constitution, the judicial power alone extends. Muskrat v. United States, 31 Sup. Ct. 250, 253, 219 U. S. 346, 55 L. Ed. 246 (quoting and adopting definition in Marbury v. Madison, 5 U. S. [1 Cranch] 137, 2 L. Ed. 60).

All proceedings in action included

The clause "on any issue in the case" as used in Rev. St. 1899, § 1549, providing that "if a verdict shall be found on any issue in the case for plaintiff, costs shall be given at the discretion of the court," is very comprehensive, and the term "case" includes all the issues presented by the parties for judicial inquiry and determination and embraces issues tendered by defendant's counterclaim as well as those tendered by the petition. Ozias v. Haley, 125 S. W. 556, 557, 141 Mo. App. 637.

A commission from the department of justice to an attorney, appointing him a special assistant to a district attorney, is not to be construed with technical nicety; and such a commission, appointing an attorney as special assistant to a district attorney to assist in the preparation and trial of "cases" in the United States against the officers of an insolvent national bank, against some of whom indictments had previously been returned, is to be construed as having been given under Rev. St. § 363, and to authorize the person so commissioned to assist in the performance of any duties of the district attorney, including appearance before the grand jury to present evidence for new indictments. United States v. Twining, 132 Fed. 129, 132.

As employed in Code of Criminal Procedure, art. 494, requiring that the court shall give a written charge distinctly setting forth the "law applicable to the case," means the law applicable to the case as made by the parties; that is, the law applicable to the pleadings and the evidence. Lister v. State, 3 Tex. App. 17, 25.

As cause of action

The word "case," when considered alone, means the facts or state of facts which constitute the rights of the individual or his cause of action, which the "proceeding," "action," or "suit" protects or enforces. State ex rel. Kochtitzky v. Riley, 101 S. W. 567, 569, 203 Mo. 175, 12 L. R. A. (N. S.) 900.

Controversy or question distinguished

By "cases" and "controversies," as used in the Constitution limiting the judicial power, was intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights or the prevention, repression, or punishment or wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such form that the judicial power is capable of acting upon it, then it has become a "case." The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. "Controversies," if distinguishable at all from "cases," is so in that it is less comprehensive and includes only suits of a civil nature. Muskrat v. United States, 31 Sup. Ct. 250, 254, 219 U. S. 346, 356, 55 L. Ed. 246 (quoting and adopting definition by Chief Justice Marshall in Marbury v. Madison, 5 U. S. [1 Cranch] 137, 2 L. Ed. 60).

Election contests

The statute providing that circuit courts shall have appellate jurisdiction from the judgments and orders of county courts in all "cases" not expressly prohibited by law allows appeals in all "cases"; that is, in all suits where there are parties and a subject-matter between them, or where there is a contested question before a court of justice, a suit or action, a cause. An ex parte proceeding to hold an election under the local option law, in which there is no contest, and in which persons seeking an appeal from an order for holding such election are not parties, and in which they have no more interest than the general public, is not a "case" within the meaning of the statute. Haynes v. Cass County Court, 115 S. W. 1084, 1085, 135 Mo. App. 108 (citing 1 Words and Phrases, p. 993).

As pending suit

The term "cases," when used in connection with the courts, refers only to matters pending before them. (Concurring opinion by McCarty, J.). Gibbs v. Gibbs, 73 Pac. 641, 646, 26 Utah, 382.

"The word 'case' usually conveys the idea of a controversy or issue already before the court and not a preliminary proceeding before a magistrate, commissioner, or grand jury." United States v. Rosenthal, 121 Fed. 862, 866.

Special proceedings

An application for a family allowance for infant beneficiaries of an estate is a "proceeding" and a "case," within Code Civ. Proc. § 372, providing that a guardian ad litem may be appointed in any case, etc. In re Snowball's Estate, 104 Pac. 446, 447, 156 Cal. 235.

Rev. St. 1909, § 4063, which disqualifies a judge of probate to sit in a case in which he is interested, etc., applies to an insanity

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inquiry; the term "case" in the statute including any matter pending before him which is the subject of judicial investigation. State ex rel. Morris v. Montgomery, 142 S. W. 474, 475, 160 Mo. App. 724.

The words "the case," as used in Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137, requiring the board of general appraisers to "examine and try the case" submitted to it by a collector of customs, literally require the board, first of all, to determine its own jurisdiction, so far, at least, as to ascertain whether there is a protest, or whether the protest is apparently valid. This involves the question whether it was made in time, because, if not made in time, it is not a protest. United States v. Brown, Durrell & Co., 127 Fed. 793, 797, 62 C. C. A. 473.

A proceeding for naturalization under Act June 29, 1906, c. 3592, 3 Stat. 596, is not a "case" within the meaning of Act March 3, 1891, c. 517, § 6, 26 Stat. 828, which provides that Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and there being no provision for direct review in the naturalization act a Circuit Court of Appeals is without jurisdiction to review the decision of a District or Circuit Court in such a proceeding. Moreover, the admission of an alien to citizenship is a political, and not a judicial, act, and, having been vested by Congress in the courts to be exercised on proof "to the satisfaction of the court," its exercise is discretionary, and not reviewable. United States v. Dolla, 177 Fed. 101, 103, 100 C. C. A. 521, 21 Ann. Cas. 665.

CASE (Action On)

An action setting forth an injury resulting from an action which was not caused by direct force, but which was consequential, or an injury resulting indirectly from the act complained of, was an "action on the case." Welch v. Seattle & M. R. Co., 105 Pac. 166, 167, 56 Wash. 97, 26 L. R. A. (N. S.) 1047.

The distinction between "assumpsit" and "case" is that the one is a breach of a contract, and the other a breach of a duty growing out of a contract express or implied. Alabama Great Southern R. Co. v. Norris, 52 South. 891, 892, 167 Ala. 311.

CASE (On Appeal)

The "case on appeal" is part of the transcript on appeal and is a narrative of such matters which took place at the trial as are pertinent to the exceptions taken. It is no part of the record proper. State v. Matthews, 55 S. E. 342, 343, 142 N. C. 621.

In Smith v. Grant, 15 N. Y. 590, it is said that a case is now in substance very nearly, if not identically, what a bill of exceptions always was in legal practice, except as to the formal statement of facts which is now required to be inserted. In Bissel v. Hamlin, 20 N. Y. 519, it is said the office of a case is simply to present the questions which are to be examined in the appellate court. It should present those questions with legal and logical precision. Griggs v. Day, 45 N. Y. Supp. 309, 319.

CASE ARISING UNDER LAWS OF UNITED STATES

"A suit against an officer of the United States for acts done in the performance of official duties is a 'case arising under the laws of the United States.'" Bryant Bros. Co. v. Robinson, 149 Fed. 321, 323, 79 C. C. A. 259 (quoting and adopting definition in Bachrack v. Norton, 10 Sup. Ct. 106, 132 U. S. 337, 33 L. Ed. 377; Sonnentheil v. Christian Moerlein Brew. Co., 19 Sup. Ct. 233, 172 U. S. 401, 43 L. Ed. 492).

Where the United States marshal in his official capacity levied on real estate under an execution issued out of the federal court, an injunction issued by a state court restraining the marshal from proceeding further under the writ was removable to the United States Circuit Court as a "case arising under the laws of the United States," though the marshal was joined as a defendant with one over whom jurisdiction was dependent on other considerations, it being immaterial that there was no diversity of citizenship. Frank v. Leopold & Feron Co., 169 Fed. 922, 923.

CASE AT LAW

A petition for letters of administration is not a "case at law," as that term is understood and construed by the courts. Under Const. art. 6, § 6, declaring that the right of trial by jury shall extend to all cases at law, petitioners for letters of administration had no constitutional right to a jury trial. In re McClellan's Estate, 107 N. W. 681, 685, 20 S. D. 498.

CASE AT LAW AND EQUITY

Proceedings in probate and guardianship matters are not "cases" at law and equity under Const. art. 5, § 20. Idaho Trust Co. v. Miller, 102 Pac. 360, 361, 16 Idaho, 308.

The writ of quo warranto was a common-law remedy included in Rev. St. 1887, §§ 4612–4619, which provided for quo warranto to inquire into the authority by which a person holds or exercises an office, and those provisions of the statute are still in force, and the jurisdiction to be exercised under these provisions falls within the category of "cases both at law and equity," as used in Const. art. 5, § 20, relating to the jurisdiction of district courts. Toncray v. Budge, 95 Pac. 26, 30, 14 Idaho, 621.

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A "case in law" or equity consists of the right of one party, as well as of the other, and may be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. Macon Grocery Co. v. Atlantic Coast Line R. Co., 30 Sup. Ct. 184, 186, 215 U. S. 501, 506, 507, 54 L. Ed. 300 (quoting and adopting the language of Chief Justice Marshall in Cohens v. Virginia, 19 U. S. [6 Wheat.] 264, 379, 5 L. Ed. 257, 285, as quoted in Patton v. Brady, 22 Sup. Ct. 493, 184 U. S. 608, 46 L. Ed. 713).

CASE IN WHICH STATE IS A PARTY

The phrase "in which a state shall be party," used in Const. art. 3, § 2, providing that the Supreme Court shall have jurisdiction in all such cases, does not embrace original suits of a civil nature brought by the state to enforce a judgment rendered for violation in its penal or criminal laws. State of Oklahoma v. Gulf, C. & S. F. Ry. Co., 31 Sup. Ct. 437, 440, 220 U. S. 290, 55 L. Ed. 469, Ann. Cas. 1912C, 524.

CASE-MADE

"A 'case-made' is not a part of the record of the cause, and the certificate of a trial judge that a 'case-made' is correct as such has no force beyond the function assigned to it by the statute. It cannot take rank with the sworn evidence of the official stenographer whose duty it is to take and reproduce the testimony." Girard Life Insurance, Annuity & Trust Co. v. Loving, 81 Pac. 200, 201, 71 Kan. 558.

A "case-made" on a writ of error should contain nothing but that which is necessary to enable the appellate court to pass on the question involved; and where, at the conclusion of a trial before the court without a jury, the court orally reviews the evidence and expresses his opinion on the law and the facts, and there are no special findings of fact and conclusions of law asked for, and the findings and judgment of the court are embodied in a journal entry, the oral opinion of the court cannot be considered as a part of the case-made. Guss v. Nelson, 78 Pac. 170, 172, 14 Okl. 296.

A "case-made," otherwise called a "case settled," or a "case agreed upon," or, more frequently, a "case," is a statutory method of preparing a "record" for appellate review. It is a written statement of the facts in a case, agreed to by the parties, and duly authenticated by the judge who tried the case, and submitted to an appellate court for the purpose of obtaining a review of the alleged errors of law occurring in the proceedings of the court below, as shown in the record thus presented. Thompson v. Fulton, 119 Pac. 244, 245, 29 Okl. 700.

CASE MAY BE

See As the Case May Be.

CASE OF DEATH

See In Case of Death.

CASES OF FELONY

Under Kirby's Dig. § 2469, providing that fees in criminal cases shall be paid by defendant, but, if sufficient property cannot be found, they shall be paid by the county, "except in such cases of misdemeanor," where the county is not to be liable, and section 2470, providing that in cases of felony, where defendant shall be convicted and shall not have property to pay the costs, the same shall be paid by the county, one who is indicted for a felony, and who is convicted of a misdemeanor included therein, and who has no property to pay the costs, cannot be imprisoned or hired out to pay such costs, but the county must pay them; the words "cases of felony" in section 2470 referring to cases where the indictment and trial is for a felony, including a misdemeanor of the same generic class as the felony. Smith v. State (Ark.) 150 S. W. 149, 150.

CASES OF MISDEMEANOR

Under Kirby's Dig. § 2469, providing that fees in criminal cases shall be paid by defendant, but, if sufficient property cannot be found, they shall be paid by the county, "except in such cases of misdemeanor," where the county is not to be liable, and section 2470, providing that in cases of felony, where defendant shall be convicted and shall not have property to pay the costs, the same shall be paid by the county, one who is indicted for a felony, and who is convicted of a misdemeanor included therein, and who has no property to pay the costs, cannot be imprisoned or hired out to pay such costs, but the county must pay them; the term "cases of misdemeanor" in section 2469 meaning cases where parties are charged solely with a misdemeanor and tried and convicted. Smith v. State (Ark.) 150 S. W. 149, 150.

CASEIN INDUSTRIELLE

So-called casein industrielle, which is produced by drying the substance left after drawing off the whey from skimmed milk that has been allowed to sour, held to be "lactarene," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 594, 30 Stat. 199. B. P. Ducas Co. v. United States, 143 Fed. 362, 363.

CASH

See Net Cash; Per Cent. Off for Cash; Spot Cash.

Received in cash or otherwise, see Otherwise.

"Cash" will not be construed to include real estate, in the absence of a clear intent to use it for that purpose. Watson v. Martin, 77 Atl. 450, 228 Pa. 248, 20 Ann. Cas. 1288.

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"Cash" ordinarily means money which the owner has on hand or subject to his right of immediate possession, and a certificate of deposit, the sum to remain on deposit for a time stated, is not ordinarily treated as "cash on hand or in bank." Offutt v. Troll, 139 S. W. 487, 488, 159 Mo. App. 90.

As money

See Money.

As personal property

See Personal Property.

CASH BASIS

In a contract for the sale of cotton, stating the terms as "'cash basis,' note at sixty days from date of shipment of each one hundred bales, interest added," the words, used as they stand by themselves, may be understood to mean that the parties have provided for alternative methods of payment, either of which will be accepted as equivalent to the other, but it is not beyond doubt whether such is the intended meaning. The term "cash basis" is sufficiently ambiguous to be susceptible of another meaning, and, if it has acquired a general settled and commonly understood meaning which the parties must be presumed to have used, it was error to reject evidence of such trade meaning. Morris v. Supplee, 57 Atl. 566, 567, 208 Pa. 253.

CASH DIVIDEND

A dividend on the capital stock of a corporation payable in stock of another corporation which the first corporation had purchased out of earnings and held as an asset and distributed so that it passed from its control and ownership, has all the characteristics of a "cash dividend," defining that term to include all distributions of surplus assets, whether in the form of cash or property taken from the body of the assets to become the property of the shareholder. Union & New Haven Trust Co. v. Taintor, 83 Atl. 697, 699, 85 Conn. 452.

"Cash dividends" within the rule entitling life beneficiaries under testamentary trusts thereto when the trust funds are invested in stocks include all distributions of the surplus assets of a corporation, whether cash or property, made to shareholders pro rata through dividend declarations in such manner that the assets so distributed are separated from the body of the corporate assets to become the shareholders' property. Bishop v. Bishop, 71 Atl. 583, 590, 81 Conn. 509.

CASH ITEM

See Proper Cash Item.

CASH MARKET VALUE

In the absence of a qualification, a sale on the market being presumed to be for cash, the terms "market value" and "cash market value" are deemed equivalent. Hetland v. Bilstad, 118 N. W. 422, 423, 140 Iowa, 411.

In condemnation proceedings, the only way to arrive at the cash market value of the land sought to be condemned is to estimate the specific identical land taken, by placing a value upon it; and this can only be done by a statement of facts, and by opinions and estimates of parties acquainted with the land. Upon such facts, opinions, and estimates of the land must the valuation be based. Wray v. Knoxville, L. F. & J. R. Co., 82 S. W. 471, 473, 113 Tenn. 544.

CASH ON HAND

A bond insuring a fraternal order against the dishonesty of its treasurer required insured's auditing committee once quarterly to make a full and complete examination of the treasurer's books and accounts, and verify the bank balance by comparison of the cash on hand with the check book and bank book. It also required all moneys coming into his custody to be deposited immediately on the next succeeding business day in a bank. It further required insured to give notice of anything of which it had knowledge likely to cause a claim on or loss to the insurer or of any dishonest act or default. Held, that the "cash on hand" which the auditing committee was required to verify was the cash on deposit in the bank as shown by the books of the bank, and, where the committee merely examined the treasurer's bank book and check book without making any inquiry at the bank and thus failed to discover a defalcation, the insurer was not liable. Atlantic City Aerie No. 64, Fraternal Order of Eagles, v. International Fidelity Ins. Co., 85 Atl. 325, 328, 83 N. J. Law, 583.

CASH PAYMENT

In the provision of a corporate charter that stock "may be paid for in cash or in monthly installments," the word "cash" is not used to designate the medium of payment, but as the opposite of credit, and does not prevent payment for corporate stock by the transfer of property to, or the performance of services for, the corporation. Lee v. Cutrer, 51 South. 808, 809, 96 Miss. 355, 27 L. R. A. (N. S.) 315, Ann. Cas. 1912B, 478 (citing 1 Words and Phrases, pp. 996, 997; 6 Cyc. 700).

Ten per cent. of the capital stock of a railroad company was deposited with a bank to the credit of the company, subject to be drawn out only on checks signed by the officers of the company. The bank in which the deposit was made was interested in the company but was absolutely responsible. The money was paid in in good faith within Railroad Laws (Laws 1890, c. 565, § 2, as amended by Laws 1892, c. 672), requiring payment in good faith in cash of at least 10 per cent. of the minimum amount of the capital stock as a condition precedent to a valid corporation. In re Wood, 91 N. Y. Supp. 225, 228, 99 App. Div. 334.

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Where a village obligation provides for payment in cash, payment in the legal warrant of the village is sufficient. Hart v. Village of Wyndmere, 131 N. W. 271, 278, 21 N. D. 383.

The statement required in the affidavit accompanying the certificate, by the filing of which a limited partnership is created, that the sum specified in the certificate has been "actually and in good faith paid in in cash" is held to have been substantially true when it appears that the amount was contributed by a delivery for that purpose by the special partner to the general partner of a certified check, and even by the delivery of an uncertified check when it appears that his account in the bank upon which it was drawn was good for the amount, and that the check was paid upon presentation immediately after the formation of the partnership. On the other hand, it is held that the statement was not substantially true when it appears that the contribution was in the form of goods or credits, or anything else which is not in substance and effect a cash payment. The requirement of the statement in the affidavit that the amount of the special capital has been "actually and in good faith paid in" is designed to inform prospective creditors not only that the capital has been actually paid in cash but also that it has not been paid collusively, and that there is no secret or illicit arrangement between the general partners and the special partners whereby it is in effect a fictitious payment, or one which will not practically inure to the use of the partnership. If the amount has been paid in cash, so that it becomes a part of the capital, for use as capital may ordinarily be used by a partnership, the requirement is satisfied. Webster v. Lanum, 137 Fed. 376, 379, 70 C. C. A. 56.

Plaintiff's decedent, defendant, and another were sole shareholders in a trust carrying on a wholesale liquor business under a firm name. At the expiration of the trust they continued the same and, in the agreement, authorized plaintiff's decedent to issue to himself 1,000 additional shares on paying into the trust $100 in cash for each share so issued. At the date of such continuing agreement, decedent had to his credit in the trust $67,978.27, defendant had $8,032.27, and the other trustee had $10,000, which last-named credits were transferred to decedent, the transferrors being indebted to him, and were by him transferred to the trust, together with $13,988.46 borrowed from a bank on his individual note. Such transferred credits and a check on the bank from which he had borrowed amounted to $100,000, which he owed for the stock which he had transferred to himself. Held, the transferred credits and check were a payment in cash and fulfilled the terms of the agreement under which decedent transferred the stock to himself. The payment by check was a "payment in cash," notwithstanding the fact that the note given the bank on which the check was drawn was afterwards paid by the trust out of credits standing in favor of plaintiff's decedent. A payment of a stock subscription in a trust, out of credits due from the trust, is a "payment in cash," though the credits result from a running account, and include unascertained profits. Breck v. Barney, 66 N. E. 643, 645, 183 Mass. 133.

A contract for the sale of standing timber requiring payment in cash "or vendor's option of equivalent value" means only that payment is to be in cash unless vendor chose to accept something of equivalent value if offered him, and did not render the contract uncertain as to the price, as giving the vendor the right to demand something other than money in satisfaction. Lee Lumber Co. v. Hotard, 48 South. 286, 288, 122 La. 850, 129 Am. St. Rep. 368.

CASH SALE

A "cash sale" is a sale conditioned on payment concurrent with delivery and not a sale on credit. Berlaiwsky v. Rosenthal, 71 Atl. 69, 70, 104 Me. 62.

In order to constitute a cash sale, it must be understood between the parties that the sale is for cash, and this agreement may either be expressed or implied from the circumstances of the transaction. Hill v. Butler, Stevens & Co., 70 S. E. 34, 35, 8 Ga. App. 669.

"A 'cash sale' and a 'sale upon subsequent condition' are entirely different. In the first the payment of the purchase money and delivery of the property are concurrent acts, one and the same transaction, while the latter is a sale and delivery of the thing sold on condition subsequent, subject to be defeated by failure of the purchaser to comply with the terms of the contract of purchase. The former may be avoided by the vendor upon the failure by the vendee to pay the purchase money while the property is in his hands or in the hands of any other purchaser, unless the payment of the purchase price has been waived." Strother v. McMullen Lumber Co., 98 S. W. 34, 36, 200 Mo. 647 (quoting with approval from Johnson-Brinkman Commission Co. v. Central Bank of Kansas City, 22 S. W. 813, 116 Mo. 570, 38 Am. St. Rep. 615).

Under Civ. Code 1910, § 4126, providing that the title to cotton and certain other agricultural products sold under cash sale does not pass by delivery until the cash is in fact paid, a sale is no less a cash sale, when so intended by the parties, because the money is not paid concurrently with the delivery, and the actual paying over of the cash is temporarily deferred in meeting the convenience of the parties in making a settlement. Atlantic Coast Line R. Co. v. W. W. Gordon & Co., 73 S. E. 594, 595, 10 Ga. App. 311.

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"A 'sale for cash on delivery' may be entirely consistent with the investment of title, though the purchase money be not paid at the time of delivery of the property. In such case 'the buyer, though he has title, is not entitled to possession until he pays the price, for payment and delivery in such case are presumed to be concurrent acts, and, until payment is made, the seller may retain the goods by virtue of his vendor's lien, but he retains the goods, and not the title'" (citing and approving Austin v. Welch, 72 S. W. 881, 31 Tex. Civ. App. 526). "And such, I understand, is the doctrine applied to C. O. D. shipments by the authorities." (Concurring opinion of Henderson, J.) Keller v. State (Tex.) 87 S. W. 669, 688, 1 L. R. A. (N. S.) 489.

Civ. Code 1895, § 3546, provides that products sold by planters and commission merchants "on cash sale" shall not be considered the property of the buyer until fully paid for, though they may have been delivered to the buyer. Held, that the term "on cash sale" is not confined to sales where the payment of actual money is to be made immediately, but includes sales where it is expressly understood that the payment of actual money shall not be delayed for any longer than necessary in the ordinary course of business to reduce negotiable paper to actual cash, and also includes such time as may be necessary and may be agreed upon to be necessary to enable the buyer, when the seller wishes to afford that convenience, to make immediate arrangements to procure the necessary cash. McCall v. Hunter, Pearce & Batty, 70 S. E. 59, 61, 8 Ga. App. 612.

As affected by custom

A custom among commission merchants will not render a sale, where the money is not to be paid for several days, a "cash sale." Bliss v. Arnold, 8 Vt. 252, 254, 30 Am. Dec. 467; Catlin v. Smith, 24 Vt. 85.

The merchants and traders of Boston and other cities had got up an arrangement by which they agreed that a sale or purchase on 30 days' indulgence should not be regarded as upon credit but a cash transaction. Held, impossible that a 30-day sale could be a "cash sale." Chapman v. Devereux, 32 Vt. 616, 622.

As authorizing credit

A "cash sale" of cotton delivered on Saturday is not converted into a credit sale because, on the Monday following, the commission merchant receives a check for the purchase money, deposits the same in bank, draws against the account thus increased, and marks the bill "paid." Charleston & W. C. Ry. Co. v. Pope & Fleming, 50 S. E. 374, 376, 122 Ga. 577.

In the language of the commercial world, sales, where it is intended that the purchaser is to have a short credit, as, for example, 10 days, or even 30 days, are often termed "cash sales," while the strict legal signification of a cash sale is undoubtedly one where delivery and payment are to be concurrent acts and be performed at the same instant of time. Eau Claire Canning Co. v. Western Brokerage Co., 73 N. E. 430, 440, 213 Ill. 561.

CASH SURRENDER VALUE

"The term 'cash surrender value' means the cash value, ascertainable by known rules, of a contract of insurance abandoned and given up for cancellation by the insured to the owner, having contract right to do so." Van Kirk v. Vermont Slate Co., 140 Fed. 38, 45 (quoting and adopting the definition in Re Welling, 7 Am. Bankr. Rep. 340, 344, 345, 113 Fed. 189, 192, 51 C. C. A. 151, 154).

A policy of life insurance has no "cash surrender value" unless it is so provided in the policy. In re Mertens, 131 Fed. 972, 975.

The words "cash surrender value," as used in the proviso of Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565, which permits a bankrupt to redeem a policy of insurance on his life from the claims of creditors by paying or securing to the trustees the cash surrender value, embrace policies which, by their terms, or by the practice or concession of the company issuing them, have such value. Hiscock v. Mertens, 27 Sup. Ct. 488, 491, 205 U. S. 202, 51 L. Ed. 771.

Net value distinguished

See Net Value.

CASH VALUE

See Full and Fair Cash Value; Full Cash Value.

The cash value of an article is the amount of cash for which it will exchange in fact. That amount depends on the opinion of the public, of possible buyers, or of that part of it which will pay the most. Ankeny v. Blakley, 74 Pac. 485, 489, 44 Or. 78 (citing National Bank of Commerce v. City of New Bedford, 29 N. E. 532, 155 Mass. 313).

Where common stock, when issued, had no value, and the persons owning it were required to be actively engaged in the management of the corporation, and the common stock had never been sold on the market, and the preferred stock was subject to redemption at any time, the "cash value" of the assets of the common stock is shown by the value of the assets applicable to it when an appraisement of such stock was made. Boggs v. Boggs & Buhl, 66 Atl. 105, 107, 217 Pa. 10.

A policy on whisky provided that the company should not be liable beyond the actual "cash value" at the time of any loss, and that the loss should be estimated according to such value, with proper deduction for depreciation, and should not exceed what it would then cost the insured to repair or replace the same with material of the like kind. The whisky was of different ages.

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Held, that the "cash value," within the meaning of the policy, as applicable to the whisky, was the market value in the wholesale liquor market at the time it was destroyed, and could not be determined by taking the cost of the material, the expense of manufacturing, the charges of carrying it in bond, insurance, and interest. Frick v. United Firemen's Ins. Co., 67 Atl. 743, 746, 218 Pa. 409.

The words "cash value of the property," in Rev. St. 1898, § 1943a, providing that no fire insurance company shall issue any policy limiting the amount to be paid in case of loss below the actual cash value of the property if within the amount of the insurance for which premium is paid, evidently refer to the property destroyed, not the property insured. Newton v. Theresa Village Mut. Fire Ins. Co., 104 N. W. 107, 109, 125 Wis. 289.

In an action for the destruction of a house by fire from a railroad engine, the court instructed that, as to the dwelling house, plaintiff's measure of damages was the "reasonable cash value" of the dwelling when destroyed, and the measure of damages for destruction of the household goods was the "reasonable value" of said goods at the time of the destruction. Held, that the instruction was not erroneous for using the words "cash value" instead of "market cash value"; "market value" being the cash value for which an article will sell for in cash on the market, and reasonable "cash value" being equivalent to reasonable "market cash value." Missouri, K. & T. Ry. Co. of Texas v. Murray (Tex.) 150 S. W. 217, 218.

As value

See Value.

In tax law

Though the constitutional provisions that all property not exempt shall be taxed in proportion to its value to be ascertained as provided by law, and defining "property" as including corporate stock, are not self-executing, any deficiency was supplied by Pol. Code, § 3627, requiring property to be assessed at its full cash value, and section 3617 defining that cash value to be the amount at which the propertly would be taken in payment of a just debt from a solvent debtor. Cheseborough v. City and County of San Francisco, 96 Pac. 288, 291, 153 Cal. 559.

Allegations as to the "cash value," "fair value," or "true value" of the property do not come within Sess. Laws 1902, p. 238, § 10, requiring all taxable property to be assessed at its "full cash value." Humbird Lumber Co. v. Thompson, 83 Pac. 941, 945, 11 Idaho, 614.

The "cash value" of a railroad for purposes of taxation must be determined mainly by its net earnings capitalized at the current rate of interest, taken in consideration with any immediate prospect of increase or decrease in earning capacity; and if the utility of the road, as so determined, is not equal to its cost, which is prima facie its value, then the value must be determined by utility alone. State v. Nevada Cent. R. Co., 81 Pac. 99, 102, 28 Nev. 186, 113 Am. St. Rep. 834.

CASHIER

The "cashier" of a bank is its agent. His acts within his official sphere are binding on the bank, and he may borrow money in the regular course of the bank's business and pledge its property for its payment. Citizens' Bank v. Bank of Waddy, 103 S. W. 249, 250, 126 Ky. 169, 11 L. R. A. (N. S.) 598, 128 Am. St. Rep. 282 (citing 5 Cyc. p. 579; 4 Thomp. Corp. § 4748; 1 Moss, Banking, §§ 158, 160; Davenport v. Stone, 62 N. W. 722, 104 Mich. 521, 53 Am. St. Rep. 467; Chemical Nat. Bank v. City Bank of Portage, 16 Sup. Ct. 417, 160 U. S. 653, 40 L. Ed. 568; Auten v. United States Nat. Bank, 19 Sup. Ct. 628, 174 U. S. 143, 43 L. Ed. 920; Aldrich v. Chemical Nat. Bank, 20 Sup. Ct. 498, 176 U. S. 618, 44 L. Ed. 611).

In an information charging embezzlement, the allegation that defendant was "cashier" at the time he converted the money to his own use was as much a charge that the money was in his possession and under his custody and control by virtue of his office as though the charge was inserted in express terms. People v. Messer, 111 N. W. 854, 857, 148 Mich. 168.

The "cashier" of a bank is an executive officer by whom its debts are received and paid and its securities taken and transferred, and his acts, to be binding, must be done within the ordinary course of his duties. Spongberg v. First Nat. Bank of Montpelier, 110 Pac. 716, 718, 18 Idaho, 524, 31 L. R. A. (N. S.) 736, Ann. Cas. 1912A, 95 (quoting and adopting the definition in United States v. City Bank of Columbus, 62 U. S. [21 How.] 356, 16 L. Ed. 130).

"The court defines the 'cashier' of a bank to be an executive officer by whom its debts are received and paid and its securities taken and transferred. * * * His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through subordinate officers, all moneys and notes of the bank, delivers up all discounted notes and securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business." A cashier has no implied power merely by virtue of his office to give away, surrender, or release the bank's securities, and hence no implied power to accept money for interest in advance on a note held by the bank with an agree-

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ment to extend the time of payment, and thus discharge an indorser from his liability. Bank of Ravenswood v. Wetzel, 50 S. E. 886, 888, 58 W. Va. 1, 70 L. R. A. 305, 6 Ann. Cas. 48 (quoting and adopting United States v. City Bank of Columbus, 62 U. S. [21 How.] 356, 16 L. Ed. 130).

One who received the money of a foreign insurance company and handled all its cash in its office in the state was a "cashier" or "treasurer," as used in a statute providing for the service on such officers of process against the corporation. Russell v. Pittsburgh Life Ins. & Trust Co., 115 N. Y. Supp. 950, 954, 62 Misc. Rep. 409.

An employé of a corporation, whose duties are confined to bookkeeping and to the receipt of money when defendant's superintendent is not in the office, and who does not indorse its checks, is not a "cashier," upon whom service of summons may be had, by which officer is meant the financial agent of a corporation, who has charge of its funds and has the right to take charge of such funds to the exclusion of every other person. Van Damm v. New York Cent. Storage Co., 132 N. Y. Supp. 394, 395.

The uniform Negotiable Instruments Law provides that, when an instrument is "indorsed to a person as 'cashier,'" it is deemed prima facie to be payable to the bank of which he is such officer and may be negotiated by the indorsement either of the bank or of the officer (B. & C. Comp. § 4444). First Nat. Bank v. McCullough, 93 Pac. 366, 368, 50 Or. 508, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758.

As clerk

See Clerk.

CASINO

A building called a "casino," built by a city in a public park, is one, the use of which may vary from time to time, irrespective of how the word may be defined. Ross v. City of Long Branch, 63 Atl. 609, 73 N. J. Law, 292.

CASK

The term "cask" is generally understood to be a receptacle for liquids, either larger or smaller than the usual barrel, and, as employed in the statute respecting the manufacture and sale of spirituous liquors, pertaining to wholesale dealers, has a well-recognized import as a vessel containing not less than 20, 10, or 5 gallons wine measure, as provided by Rev. St. §§ 3287, 3323, 3244. Williams v. United States, 158 Fed. 30, 32, 88 C. C. A. 296.

CAST

CAST OF SCULPTURE

The phrase "casts of sculpture," as used in Tariff Act July 24, 1897, c. 11, par. 649, 30 Stats. 151, 201, providing when casts of sculpture are entitled to free entry, is not confined in its meaning to casts of those clay figures which were fashioned by the hands of genius, while excluding those of inferior artists or workmen. Plaster casts of clay models, though painted and gilded and produced in unlimited quantities, are casts of sculpture within the meaning of this act. Benziger v. United States, 24 Sup. Ct. 189, 193, 192 U. S. 38, 48 L. Ed. 331.

CASTING VOTE

As determining majority, see Majority.

There was no acceptance of street improvements by the board of public works, as required by Code, § 870, where the question was never considered or deliberated upon together by the two members of the board, one of whom merely approved the tentative schedule of assessments prepared by the engineer, while the other refused to assent thereto, nor did the approval of the schedule by the engineer constitute a "casting vote" under Laws 32d Gen. Assem. c. 26, providing that he shall give the casting vote in case of a disagreement, since there can be no acceptance without meeting, consultation, and deliberation by the members of the board. Gilcrest & Co. v. City of Des Moines (Iowa) 137 N. W. 1072, 1075.

CASTINGS

As machinery, see Machinery.
As materials, see Materials.

Iron castings, which by careful additional work have been fitted as parts of machines, are no longer dutiable as "castings," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C. par. 148, 30 Stat. 162, but have been advanced to the condition of "articles * * * of iron * * * partly * * * manufactured," under paragraph 193. John Bromley & Sons v. United States, 156 Fed. 958, 959, 84 C. C. A. 458.

The provision for "castings" in such act does not include cast-iron machinery parts, which have been drilled, bored, planed, fitted, and finished. Lehigh Mfg. Co. v. United States, 153 Fed. 596, 597.

CASTLE

See Dweller's Castle.

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CASUAL

CASUAL AND INVOLUNTARY

"The act (relating to trespassing on state timber lands) very wisely makes a distinction between trespasses committed involuntarily and those committed willfully. The definition of 'casual and involuntary' should not be restricted. The words are intended to convey the idea that, when an illegal cutting of state timber lacks the elements of willfulness and intention, then the damage shall be double the value only. One who, through mistake or inadvertence, passes beyond his own boundary line and cuts and carries away timber of another is not guilty of willful trespass. * * * Willful, in the present case, is not determined by the mere fact that appellant knowingly and purposely entered upon the land in question and cut the state timber thereon. * * * To determine what is meant by 'willful' we must ascertain the purpose with which the act was performed. Did appellant intend to commit a wrong against the state and appropriate the timber without regard to the rights of the state? * * * The finding of the trial court that appellant was guilty of the willful trespass is not sustained by the evidence. On the contrary, the record conclusively shows that appellant had reasonable ground for believing that authority had been granted and honestly acted on such belief." State v. Shevlin-Carpenter Co., 113 N. W. 634, 637, 102 Minn. 470.

CASUAL DEFICIENCY

The term "casual deficiencies," in Ga. Const., forbidding any county to incur a debt without submission to a popular vote, except loans to supply casual deficiencies of revenue, means some unforeseen or unexpected deficiency, or an insufficiency of funds to meet some unforeseen and necessary expense, and does not include the borrowing of money to meet current expenses. Hall v. Greene County, 46 S. E. 69, 119 Ga. 253 (quoting and adopting Lewis v. Lofley, 19 S. E. 57, 92 Ga. 804).

CASUAL EJECTOR

The person who by prearrangement was present for the purpose of ousting the nominal lessee, in ancient ejectment proceedings, was termed the "casual ejector"; the action being commenced by the nominal lessee for the benefit of the actual claimant and the defendant being ordinarily the "casual ejector." Mt. Pleasant Cemetery Co. v. Erie R. Co., 65 Atl. 192, 193, 74 N. J. Law, 131.

CASUAL VACANCY

Where a county commissioner elect refuses to qualify, there is a "casual vacancy," which may be filled as provided by Const. art. 14, § 7, declaring that any casual vacancy in such office may be filled by the court of common pleas. Commonwealth v. Wise, 65 Atl. 535, 540, 216 Pa. 314.

CASUALTY

See Unavoidable Casualty; Unforeseen Casualty.
Other casualty, see Other.
See, also, Accident—Accidental.

A "casualty" is an unforeseen accident; a misfortune. Gill v. Fugate, 78 S. W. 188, 191, 117 Ky. 257.

"Casualty" means inevitable accident, or what Civ. Code, art. 1933, calls a "fortuitous event." A cause beyond human control may be a "fortuitous event" or "irresistible force." Cook & Laurie Contracting Co. v. Denis, 49 South. 1014, 1015, 124 La. 161.

"Casualty" is a word of quite frequent use, yet it cannot be said that its definition has been very accurately settled by the courts. Strictly and literally "casualty" is perhaps to be limited to injuries which arise solely from accident without any element of conscious human design or intentional human agency; or, as it is sometimes expressed, inevitable accident, something not to be foreseen or guarded against. But in ordinary usage "casualty," like "accident," is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on part of the person suffering from the injury. Bankers' Mut. Casualty Co. v. First Nat. Bank of Council Bluffs, 108 N. W. 1046, 1048, 131 Iowa, 456.

That one was accidentally shot, preventing his appearing at court, is ground for setting aside judgment on his forfeited bail, within Civ. Code Prac. § 518, empowering the court rendering a judgment to vacate it, after the term, "for unavoidable casualty or misfortune, preventing the party from appearing or defending"; "casualty" being that which happens without design or without being foreseen. Hargis v. Begley, 112 S. W. 602, 603, 129 Ky. 477, 23 L. R. A. (N. S.) 136.

A "casualty," within Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415, exempting railway companies from penalty for working employés overtime in case of "casualty," etc., is an act proceeding from an unknown cause or an unusual effect of a known cause. United States v. Kansas City Southern Ry. Co., 189 Fed. 471, 477.

Rev. St. § 3221, provides that when any spirits are destroyed by accidental fire or other "casualty" without any fraud, collusion, or negligence of the owner, after they should have been drawn off by the gauger and placed in the distillery warehouse, no tax shall be collected thereon, or, if collected, it shall be refunded. Held, that spirits lost after seizure by an internal revenue officer, through the latter's mere negligence, were not lost by reason of "casualty," within such

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section. United States v. Sisk, 176 Fed. 885, 889, 100 C. C. A. 355.

An instruction in an action for damages for negligently destroying plaintiff's wheat stacks by fire that if the jury believed that the fire which destroyed plaintiff's grain was the result of "mere accident or casualty," and not of negligence by defendant, they should find for defendant was not erroneous; the word "casualty" being synonymous with "accident." Webb v. Baldwin, 147 S. W. 849, 851, 165 Mo. App. 240.

Result of lawful act

The word "casualty," as used in Civ. Code 1895, § 3135, providing that the destruction of a tenement by fire or the loss of possession by any casualty not caused by the landlord shall not abate the rent contracted to be paid, does not include an effect arising from legislative action. Lawrence v. White, 63 S. E. 631, 634, 131 Ga. 840, 19 L. R. A. (N. S.) 966, 15 Ann. Cas. 1097.

CASUALTY INSURANCE

"Casualty insurance" are words of quite frequent use, yet it cannot be said that their definition has been very accurately settled by the courts. Strictly and literally "casualty" is perhaps to be limited to injuries which arise solely from accident without any element of conscious human design or intentional human agency; or, as it is sometimes expressed, inevitable accident, something not to be foreseen or guarded against. But in ordinary usage "casualty," like "accident," is quite commonly applied to losses and injuries which happen suddenly, unexpectedly, not in the usual course of events, and without any design on part of the person suffering from the injury. Bankers' Mut. Casualty Co. v. First Nat. Bank of Council Bluffs, 108 N. W. 1046, 1048, 131 Iowa, 456.

CASUALTY OCCURRING BEFORE JUDGMENT

Where the cause was submitted almost a year before judgment, the illness of the reporter before its rendition, culminating in his death after its rendition, and without certification or translation of his notes, was not a casualty occurring before judgment, within Code, § 4091, authorizing granting of new trials at terms subsequent to judgment. Dumbarton Realty Co. v. Erickson, 120 N. W. 1025, 1026, 143 Iowa, 677, 136 Am. St. Rep. 778, 21 Ann. Cas. 258.

CASUS OMISSUS.

A case omitted and when used with reference to statutes is within the maxim, "A case omitted is to be held as intentionally omitted." "Where a 'casus omissus' does really occur in the statute * * * through the inadvertence of the Legislature, * * * the rule is that the particular case thus left unprovided for must be disposed of according to the law as it existed prior to such statute. * * * 'A casus omissus,' observes Buller, J., 'can in no case be supplied by a court of law, for that would be to make laws.'" Estes v. Terrell, 92 S. W. 407, 409, 99 Tex. 622 (quoting and adopting definition in 6 Cyc. p. 702; Broom, Leg. Max.).

While it might be argued from the fact that the Legislature limited the power of county courts respecting the county levy, the powers of school boards respecting school levies, and the powers of municipal corporations respecting their levies, and cut down the state tax, that it was also its intention to limit the power of the county courts in respect to road levies, there being nothing in the statute carrying this intention into execution, there exists what is termed a "casus omissus," which the court cannot supply. State v. Wirt County Court, 59 S. E. 884, 888, 63 W. Va. 230.

CAT FACES

"Cat faces," as the term is used in sawmills, are scars on logs. Moses v. Grant Lumber Co., 38 South. 684, 685, 114 La. 933.

CATALOGUE SYSTEM OR METHOD

The chief element of a "catalogue system or method" of doing business consists in dealing directly with the customer or consumer by means of placing in his hands a printed catalogue containing a description of the articles of merchandise offered for sale and the price thereof. Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n, 150 Fed. 413, 415.

CATCH-BASIN

As paving, see Pave—Pavement.

CATGUT

"'Catgut' is prepared from the small intestine of the sheep by a process of cutting and cleaning and drying. In fact, the intestine of the sheep has not become the 'catgut' of commerce until it has been subjected to this process. After it has gone through a further sterilization, increasing its value ten to one-hundred fold, it becomes the manufactured article known as 'surgical antiseptic catgut.'" Davies, Turner & Co. v. United States, 115 Fed. 232.

CATHERINE

Kate and Kittie are the same name; one being a nickname and the other a pet name for "Catherine." Corr v. Sun Printing & Publishing Ass'n, 69 N. E. 288, 290, 177 N. Y. 131.

CATHOLIC BISHOP

As corporation, see Corporation.
As institution, see Institution.

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CATTLE

See Common Carriers of Cattle; Hides of Cattle; Stock Cattle.

"Cattle" is a generic term and may embrace a number of animals and different kinds of stock. State v. Jackson, 105 N. W. 51, 52, 128 Iowa, 543.

The word "cattle" usually includes horses and sheep (Louisville, & F. R. Co. v. Ballard, 59 Ky. [2 Metc.] 177, 183), as well as a cow, steer, or ox. Robertson v. State, 1 Tex. App. 311.

The word "cattle" includes all domestic quadrupeds, such as horses, mules, etc., as well as oxen, cows, etc. Newark & S. O. H. C. R. Co. v. Hunt, 12 Atl. 697, 699, 50 N. J. Law, 308, 311 (citing Worcest. Dict. tit. "Cattle").

"In its limited sense the word 'cattle' is used to designate the different varieties of horned animals, but it is also frequently used with a broader signification as embracing animals in general which serve as food for man." Decatur Bank v. St. Louis Bank, 88 U. S. (21 Wall.) 294, 299, 22 L. Ed. 560.

As bovine species only

The term "hides of cattle," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 437, 30 Stat. 192, is not used in a commercial sense, but according to the ordinary dictionary meaning of the words, and refers to the hides of domesticated animals of the bovine species, including those of the East India buffalo. "Cattle" are "domesticated bovine animals, as oxen, cows, bulls, and calves," or "live stock; domestic quadrupeds which serve for tillage and other labor or as food for man." In popular speech the term "cattle" is used in the United States in a restricted sense and is more specially applied to the group of so-called straight back "cattle" (cows, oxen, steers, and bulls), as distinguished from the hump cattle of India and Africa. United States v. Schmoll, 154 Fed. 734, 735 (citing Rossbach v. United States, 116 Fed. 781; Id., 122 Fed. 1020, 57 C. C. A. 678; United States v. Winter & Smillie, 134 Fed. 841, 67 C. C. A. 437).

Buffalo

Singapore buffaloes are not "cattle," because they are not domesticated, and their hides are therefore not within the provision for hides of "cattle," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 437, 30 Stat. 192. Furthermore, the presence in the same paragraph of a drawback provision with respect to leather indicates an intention to include therein only such hides as can be tanned into leather, a use of which these Singapore hides are not susceptible. United States v. Wadleigh, 172 Fed. 169, 170.

Hogs

"In England, even in a criminal case, where there is a greater strictness of construction than in a civil controversy, pigs are held to be included within the words 'any cattle.' And in other cases in that country involving life and liberty, the word has been construed so as to embrace animals not used for food." Decatur Bank v. St. Louis Bank, 88 U. S. (21 Wall.) 294, 300, 22 L. Ed. 560.

Under Rev. St. 1899, § 1988, making it a misdemeanor to willfully and maliciously or cruelly maim, wound, beat, or torture any horse, ox, or other "cattle," an information charging that accused unlawfully, maliciously, and cruelly did maim, wound, and torture to death three hogs is sufficient. State v. Prater, 109 S. W. 1047, 1049, 130 Mo. App. 348.

Horses

The word "cattle," as used in Mansf. Dig. Ark. § 1655, providing that a person converting unbranded cattle shall not be deemed guilty of larceny, does not include horses. Keys v. United States, 103 Pac. 874, 875, 2 Okl. Cr. 647.

The term "cattle," as used in a statute making it a criminal offense to willfully and maliciously kill, maim, or wound any cattle of another, includes horses and mares. State v. Taylor, 85 S. W. 564, 566, 186 Mo. 608.

CATTLE GUARD

The term "cattle guard," as employed in Ky. St. 1793, providing that all corporations and persons owning and operating railroads shall erect and maintain cattle guards at all terminal points and fences constructed along their lines, means such an appliance as will prevent animals from escaping from inclosures in which they are confined over the railroad track and going upon land of others adjoining the right of way. The cattle guard need not be so constructed as that under no condition can cattle pass over it, but must be reasonably sufficient for the purpose intended. Nashville, etc., R. Co. v. Russell, 110 S. W. 317, 318, 129 Ky. 14 (quoting and adopting the definition in Louisville, H. & St. L. R. Co. v. Beauchamp, 55 S. W. 716, 108 Ky. 47).

Acts 1885, c. 91, imposing on every railroad company the duty of providing at all highway crossings "cattle guards" sufficient to prevent cattle from getting on the railroad, requires a guard sufficient to turn the cattle off from the road, and the construction of a cattle guard shown to be of the kind in general use by first-class railroads is not necessarily a compliance with the statute if it in fact is insufficient to turn cattle. Pittsburgh, C., & St. L. R. Co. v. Newsom, 74 N. E. 21, 22, 35 Ind. App. 299.

CATTLE OR WAGON PASS

A deed requiring the construction of a "cattle or wagon pass" means a pass suffi-

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cient for cattle and farm wagons, whether loaded or unloaded. It is common knowledge that some farm products which are taken by wagon through a farm or from one field to another will need a space of 12 feet in width and 10 feet in height to pass through. Owens v. Carthage & W. Ry. Co., 85 S. W. 987, 988, 110 Mo. App. 320.

CAUSA CAUSANS

Where a street car conductor, while handling the trolley rope from a position on the ground behind the car as it was entering the bar, was through the sudden starting of the car by the motorman, caught by the rope and dragged into a repair pit, the "causa causans" was the conduct of the motorman although the pit was the "causa sine qua non" of the injuries. Dulfer v. Brooklyn Heights R. Co., 101 N. Y. Supp. 207, 208, 115 App. Div. 670 (citing Trapp v. McClellan, 74 N. Y. Supp. 130, 68 App. Div. 362; Laidlaw v. Sage, 52 N. E. 679, 158 N. Y. 73, 44 L. R. A. 216; Leeds v. New York Telephone Co., 70 N. E. 219, 178 N. Y. 118–122).

CAUSA MORTIS

See Gift Causa Mortis.

CAUSA SINE QUA NON

Where a street car conductor, while handling the trolley rope from a position on the ground behind the car as it was entering the barn, was, through the sudden starting of the car by the motorman, caught by the rope and dragged into a repair pit, the "causa causans" was the conduct of the motorman althongh the pit was the "causa sine qua non" of the injuries. Dulfer v. Brooklyn Heights R. Co., 101 N. Y. Supp. 207, 115 App. Div. 670 (citing Trapp v. McClellan, 74 N. Y. Supp. 130, 68 App. Div. 362; Laidlaw v. Sage, 52 N. E. 679, 158 N. Y. 73, 44 L. R. A. 216; Leeds v. New York Telephone Co., 70 N. E. 219, 178 N. Y. 118–122).

CAUSE

See Adequate Cause; Challenge of Cause; Colorable Cause; Efficient Cause; First Cause; For Cause; Good Cause; Immediate Cause; Independent Intervening Cause; Independently of All Other Causes; Initial and Moving Cause; Initial Cause; Just Cause; Justifiable Cause; Legal Cause; Natural Causes; Originating Cause; Primary Cause; Probable Cause; Procuring Cause; Proximate Cause; Reasonable Cause; Remote Cause; Same Cause; Separate Causes; Trial Cause; Unavoidable Cause; Unforeseen Cause; Without Legal Cause; Without Sufficient Cause.

Any and all causes, see Any.
Any cause, see Any.
Any cause whatsoever, see Any.
Any other cause, see Any Other.
Other cause, see Other.

A cause sufficient to justify expulsion of a member of a corporation, formed for social purposes and conferring on its directors power to expel members for cause, is conduct which in some way or to some degree tends to injure the corporation materially, or in reputation, or is contrary to and destructive of the purpose of its organization, and a member may not be expelled arbitrarily and on insufficient grounds. Barry v. The Players, 132 N. Y. Supp. 59, 61, 147 App. Div. 704; Id., 97 N. E. 1102, 204 N. Y. 669.

On trial of an action by a wife for permanent alimony, it is not error to refuse a request by defendant for an instruction that, if plaintiff left her husband without cause, she would not be entitled to alimony, and that the word "cause" means some unlawful act or unlawful doing. Parker v. Parker, 67 S. E. 812, 134 Ga. 316..

That the reduction of the coal deposits in the mine so that the required minimum tonnage could not be produced by the usual and customary method of mining in the district, as claimed by defendant, was not a cause within the terms of the saving clause which would relieve defendant from payment of the specified minimum royalty. New York Coal Co. v. New Pittsburgh Coal Co., 99 N. E. 198, 207, 86 Ohio St. 140.

In a declaration of law in an action by a trustee in bankruptcy to recover an alleged preference, the phrase "ground to believe" is equivalent to the phrase "cause to believe," used in Bankrupt Act July 1, 1898, c. 541, § 60, subd. "b," 30 Stat. 562, providing that, if a bankrupt shall have given a preference and the person receiving it shall have had reasonable "cause to believe" that it was intended thereby to give preference, it shall be voidable by the trustee. Edwards v. Carondelet Milling Co., 83 S. W. 764, 766, 108 Mo. App. 275 (citing Benedict v. Deshel, 68 N. E. 999, 177 N. Y. 1, 11 Am. Bankr. Rep. 20).

Delay in the discharge of vessels laden with coal, due to the arrival at the same port at about the same time of a large number of such vessels, each under a separate charter to the same party, was not the result of "causes or accidents beyond the charterer's control," within a provision of the charter parties exempting it from liability for demurrage in such case. W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 412, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126.

Under a building contract requiring the contractor to pay the owner a stated sum per day for delay in completing the building

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beyond the time fixed by the contract, but further providing that the penalty should be suspended, should the work be delayed "by causes beyond the control of the contractor," such provision must be construed with regard to the circumstances and to the ordinary course of business at the time of the contract. The bare fact that materials were ordered and delayed in manufacture or transit does not show a cause beyond the control of the contractor; nor does the failure to get material from a particular man, unless it was of such peculiar character as not to be procurable elsewhere; and, even when shown that there was unavoidable delay in obtaining material, it must be further shown that the delay in completion of the building was in fact due to that cause. Simpson Bros. Corporation v. John R. White & Son, 187 Fed. 418, 423.

For removal from office

Under a municipal board's power to remove an officer for "cause," the "cause" intended is just cause, and the power may be exerted only after he has had opportunity for defense. State ex rel. Haight v. Love, 39 N. J. Law, 14, 22, affirmed 39 N. J. Law, 476.

Under a statute authorizing street commissioners to appoint regular policemen who "shall be subject to removal for cause," the term "for cause" does not mean the arbitrary will of the appointing power, for that might be the outgrowth of mere whim, caprice, prejudice, or passion, which would in reality be no cause at all, but must mean some cause affecting or concerning the ability or fitness of the incumbent to perform the duties imposed upon him, such as inefficiency, incompetency, or other kindred disqualification. Board of Street Com'rs v. Williams, 53 Atl. 923, 925, 96 Md. 232.

That one elected treasurer of a city had, while formerly serving as revenue collector, embezzled money from the city which was due at the time of his election was not a "cause" for his removal from office, within Rev. St. 1899, § 5761, which provides that the mayor may, with the consent of the city council, remove from office, for cause shown, any elective officer of the city, as the statute contemplates official misconduct rather than a defect in title for which the remedy is quo warranto. State ex rel. Schulz v. Patton, 110 S. W. 636, 640, 131 Mo. App. 628.

The powers of the mayor and aldermen, under Laws 1901, p. 797, c. 283, § 2, permitting the mayor of the city of Nashua, with the advice and consent of a majority of the board of aldermen, to remove any member of the board of public works for cause, are judicial; the word "cause" meaning legal cause, after notice and hearing, so that certiorari would lie to review and set aside the proceeding. Hagerty v. Shedd, 74 Atl. 1055, 1057, 75 N. H. 393.

Improper judicial determinations or mistakes based merely upon errors of judgment, and without corrupt or improper motives, do not constitute "cause" for which a city magistrate may be removed from office by the Supreme Court under Const. art. 6, § 17, and New York Charter, § 1401a, but he may be removed for such conduct as satisfies the court that he has been actuated by unworthy or illegal motives in the exercise of his judicial duties, or if he has committed such acts as to justify the inference that either from gross ignorance or from a perverted character, or from a lack of judicial qualities, he has so administered the power conferred upon him as to show that he should not be continued in office. Hence, where it appeared that a magistrate's discharge of a prisoner committed to the workhouse was granted in violation of the plain provisions of the statute and was the result of a solicitation of his associate, occupying offices with him, who had received a fee for his interference, and that he had granted similar discharges without examination or investigation, and had paid $250 to suppress the publication of a story in relation to his official conduct, it was sufficient to justify the conclusion that his conduct had been such that the orderly administration of justice required his removal. In re Droege, 114 N. Y. Supp. 375, 385, 129 App. Div. 866.

Of accident or injury

The term "cause," as it relates to an injury, applies only to proximate or immediate, and not to remote, causes, and, in ascertaining which is proximate and which remote, the law refuses to indulge in metaphysical niceties. Atchison, T. & S. F. R. Co. v. Calhoun, 29 Sup. Ct. 321, 322, 213 U. S. 1, 53 L. Ed. 671.

Every effect is the result of a combination of causes, in the broad sense of the word "cause"; but the legal meaning of the word is somewhat different, the law having adopted as its normal standard that course of conduct in which the acts of all persons concerned are legal and conducted with common prudence, and, if hurt is occasioned to some individual without this standard course of affairs being disturbed, it is considered as having happened from no juridic cause, but is attributed to an accident; but if a hurt occurs which would not have occurred, according to the laws of ordinary human probabilities, if some wrongful or negligent act had not disturbed the normal course, the law considers the normal and prudent activities of such persons as were concerned in the transaction as conditions, and not as causes, and regards the wrong as operating through the innocuous medium, which is therefore deemed the legal cause of the hurt. Atlantic

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Coast Line R. Co. v. Daniels, 70 S. E. 203, 205, 8 Ga. App. 775.

Under Employers' Liability Act (Laws 1902, c. 600), providing that no action for injury shall be sustained by an employé unless notice of the time and place and "cause" of the injury is given, the word "cause" does not mean a conclusion of the injured person but a statement of the facts out of which the injury arose. Bovi v. Hess, 107 N. Y. Supp. 1001, 1004, 123 App. Div. 389. The word "cause," as used in such act, may refer to the physical cause, or to the particular act of omission or commission, which, under the law of master and servant, is a breach of the master's duty; and, since the statute contemplates that the notice shall be given by the injured person himself, it will be sufficient if it contains an honest and fairly accurate statement of the physical cause of the injury. A notice of injury to a servant under such act recited that plaintiff received painful and permanent injuries to his left hand from which two fingers and a part of the third were amputated while he was working on a machine provided by the master; that such injuries were sustained by the plaintiff solely by the negligence and carelessness of the person notified, as plaintiff's master, in providing plaintiff with an unsafe and defective machine or implement with which to do his work; and that the machine was not properly safe-guarded and protected, so as to prevent such injury. Held that, since Labor Law (Laws 1897, c. 415) § 81, requires that all machinery shall be properly guarded, and a violation of this provision may be evidence of negligence, the notice sufficiently specified the physical cause of injury, and was not objectionable for failure to state the part of the machine inflicting the injury and that it was improperly guarded. Valentino v. Garvin Mach. Co., 123 N. Y. Supp. 959, 961, 139 App. Div. 139. In such act the word "cause" does not mean the person responsible for the injury, or the possession or nonpossession of authority of any designated individual. Kalisher v. Browning, King & Co., 116 N. Y. Supp. 856, 857, 63 Misc. Rep. 67.

The words "caused" and "contributed" in an instruction in an action for personal injury to an employé, stating that the jury should find for defendant if plaintiff's negligence "caused or contributed" to the injury, were synonymous. Fourche River Valley & I. T. R. Co. v. Tippett, 142 S. W. 520, 524, 525, 101 Ark. 376.

Under Employers' Liability Act (Laws 1902, c. 662), providing that no action under the act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within a specified time, the "cause" of the injury relates to the particulars of the accident by which the employé sustained the injuries, to enable the employer to make the necessary investigation as to what caused the accident, etc., and a notice of injury to the employé causing his death, stating that the injuries were caused solely by reason of the negligence of the employer in that he, as employer, failed to furnish the employé with a safe place in which to work and suitable tools, does not state the "cause" of the injury and is insufficient. Finnigan v. New York Contracting Co., 107 N. Y. Supp. 855, 858, 122 App. Div. 712.

Interstate Commerce Act, providing that a carrier issuing a bill of lading shall be liable to the owner thereof for any injury to the property "caused" by it or any connecting carrier, and that no contract shall exempt the carrier from such liability, prohibits a carrier from limiting its liability; the word "caused" being coextensive with the measure of the carrier's liability at common law. Holland v. Chicago, R. I. & P. R. Co., 123 S. W. 987, 994, 139 Mo. App. 702.

Interstate Commerce Act, making the initial carrier liable for any loss, damage, or injury caused by it or a connecting carrier, creates a liability for all loss or damage for which the carrier would be liable at common law. Louisville & N. R. Co. v. Warfield & Lee, 65 S. E. 308, 310, 6 Ga. App. 550.

CAUSE (Verb)

The word "cause," in Rev. St. 1899, § 5989, providing that, when a city of the fourth class desires to pave its streets, the board of aldermen shall by resolution declare such improvement to be necessary and "cause" the resolution to be published in some newspaper, etc., is used in its common meaning, "to effect," "to produce," "to bring about," and the mode in which publication is to be effected, produced, or brought about is not specifically designated. Webb v. Strobach, 127 S. W. 680, 682, 143 Mo. App. 459.

To "cause" means to act as a cause or agent in producing; to effect, bring about, be the occasion of, make, force, or compel; to effect as an agent; to produce or bring into existence. The power given to the county dispensary board, before permitting any dispensary to offer liquor for sale, to cause it to be put into packages of specified quantities involves the power of bottling it through such agencies as they deem best and authorized it to establish a bottling plant of its own for that purpose. State ex rel. Watts v. Cain, 58 S. E. 937, 938, 78 S. C. 348 (quoting Cent. Dict. and Webster's International Dict.).

In Rev. Codes 1905, § 869, requiring the State Superintendent of Public Instruction to examine or cause to be examined all teachers' answer papers submitted to him, the phrase "cause to be examined" is, as regards official action, the equivalent of the individual performance of it by the officer,

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State v. Stockwell, 134 N. W. 767, 779, 23 N. D. 70 (citing 2 Words and Phrases, p. 1012).

The word "cause," as used in the school law, requiring every person having the custody of a child to cause the child to attend public school, does not require a person having the custody or control of a child and living at a distance from the school, unreasonable for the child to walk, to convey the child to school. State v. Hall, 64 Atl. 1102, 1104, 74 N. H. 61.

A policy insured property against all direct loss or damage by fire, except as otherwise provided in the policy; one of the exceptions being against loss caused directly or indirectly by earthquake. The property located in San Francisco was destroyed by fire on April 19, 1906, but the insurer pleaded that the loss would have been prevented by the use of the city's water supply had not such use been rendered unavailable by the breaking of the water mains by an earthquake shock on the preceding day. Held, that the loss was not "caused directly or indirectly by earthquake," within the exception, and that the fire, and not the earthquake, was the proximate cause thereof. Commercial Union Assur. Co. v. Pacific Union Club, 169 Fed. 776, 777, 95 C. C. A. 242; Norwich Union Fire Ins. Society of Norwich & London, Eng., v. Same, 169 Fed. 778, 95 C. C. A. 244.

A policy insuring the owner of property "against all direct loss or damage by fire except as hereinafter provided" contained a provision that the company should "not be liable for loss caused directly or indirectly by invasion, * * * or for loss or damage occasioned by or through any * * * earthquakes." Held, that the words "directly or indirectly" did not apply to the provision respecting earthquakes; that, construing such provision most strongly against the insurer in accordance with the settled rule, and giving the words their common, ordinary meaning, the word "occasioned" was equivalent to "caused," and the phrase "by or through" was but a repetition of words meaning the same thing, so that the provision excepted only loss or damage caused directly by earthquake, and that a loss indirectly caused by the progress of a fire from a distance, although originally started by an earthquake, was not within the exemption. Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard, 164 Fed. 404, 406, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

A fire insurance policy provided that the company should "not be liable for loss caused, directly or indirectly, by invasion, * * * or by order of any civil authority, or for loss or damage occasioned by or through * * * earthquake." Held, that the words "directly or indirectly" did not apply to the provision respecting earthquake; that, construing such provision most strongly against the insurer, in accordance with the established rule, the word "occasioned" was equivalent to "caused," and related to the origin of the fire; and the provision exempted the company from liability for a loss only where an earthquake was the immediate, direct, and proximate cause of the fire which destroyed the property. Baker & Hamilton v. Williamsburgh City Fire Ins. Co. of Brooklyn, 157 Fed. 280, 284.

Where a garnishment bond recited that plaintiffs in a pending suit caused writs of garnishment to issue, the use of the word "caused" is not conclusive that the issuance of the writs had preceded the execution and filing of the bond, but merely served to identify the suit out of which the garnishment proceedings arose Geiser Mfg. Co. v. Watkins (Tex.) 126 S. W. 611.

A declaration, averring that plaintiff owned bales of cotton near the railroad, and that defendant negligently "caused or allowed" said cotton to be damaged by fire communicated by means of said locomotives, was not equivocal because of the alternative averment, as the words as so used were synonymous. Louisville & N. R. Co. v. Smith, 50 South. 241, 244, 163 Ala. 141.

An allegation in the complaint that defendant "caused" the affidavits charging the offense to be filed, and plaintiff to be arrested and prosecuted, is a sufficient charge that defendant initiated the prosecution. Stainer v. San Luis Valley Land & Mining Co., 166 Fed. 220, 227, 92 C. C. A. 128.

The lessee of land agreed by the terms of the lease to erect a building thereon, and took possession and made contracts with general contractors for its erection, under which the work was done. The lessor in no way contracted with the general contractor, or authorized the furnishing of material, and the work was not done at its expense or request, and when the building was partly completed the land and improvements reverted to the lessor. Code 1904, § 2483, provides that, if any person who shall "cause" a building to be erected owns less than a fee-simple estate in the land, then only his interest therein shall be subject to mechanics' liens. Held, that the lessor did not "cause" it to be erected. Atlas Portland Cement Co. v. Main Line Realty Corp., 70 S. E. 536, 538, 112 Va. 7.

An allegation that defendant published or "caused to be published" a libel is sufficient, though the libel was in a foreign language. If defendant caused the libel to be published, it is immaterial whether he did so by sending it to one who did not himself understand it, or by some other means. Sending it to such a person would not of itself be a publication, but it might be the means of causing the publication. Haase v. State, 20 Atl. 751, 752, 53 N. J. Law, 34.

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Under Rev. Civ. Code, arts. 1581, 1582, requiring that the testator must either dictate or, in the absence of dictation, present the instrument which he has "caused to be written" and declare that it contains his last intentions, it was formerly held that the term "caused to be written" meant that testator must have dictated the words reduced to writing by another, but this has been expressly overruled, and a nuncupative will is not invalid because written in the presence of witnesses without formal dictation. Succession of Reems, 38 South. 930, 931, 115 La. 102 (citing Bordelon's Heirs v. Baron's Heirs, 11 La. Ann. 676; Prendergast v. Prendergast, 16 La. Ann. 219, 79 Am. Dec. 575; Succession of Morales, 16 La. Ann. 267).

Where, in the execution of their joint enterprise, one partner deposits a nonmailable circular in the mail by the authorization of another, or with his knowledge and acquiescence, the latter "causes" the circular to be so deposited within the meaning of U. S. Comp. St. 1901, p. 2658. Burton v. United States, 142 Fed. 57, 58, 73 C. C. A. 243.

Consolidation Act (Laws 1882, c. 410) § 474, provides that, whenever an excavation for building or other purposes shall be carried to more than 10 feet below the curb, the person causing such excavation shall preserve the adjoining walls and structures from injury. Held that, where a landowner directed either his servants, agents, or an independent contractor to make an excavation, such owner is the "person causing it to be made," and if the excavation exceeds the 10-foot depth and injures the buildings of an adjoining owner, it is no defense that the work was done by an independent contractor, without interference by the owner of the land on which it was being made. Rosenstock v. Laue, 125 N. Y. Supp. 361, 362, 140 App. Div. 467.

"Wholly within the rule of the common law, a person may, by giving a bond of indemnity, in fact wrongfully contribute to the death of another and therefore be held responsible as a 'person causing the death,' for which damages may be recovered." Rev. Codes Mont. § 6486, creating a right of action for wrongful death against the person causing the death, imposes responsibility upon all whose actual wrongdoing contributes to the death of another, whether they be employés or employers, indemnitees or indemnitors. Northam v. Casualty Co. of America, 177 Fed. 981, 985.

CAUSE (In Practice)

See, also, Case.

The word "cause," used in Act No. 40 of 1880, providing that any judge may be recused if interested in the cause, but that in all civil and criminal causes it shall not be sufficient cause to challenge the judge that he is a citizen or inhabitant of the state or parish, does not mean merely civil causes. State v. Banta, 47 South. 538, 539, 122 La. 235.

Where "issue" and "cause," as used in the definition of perjury as false swearing in a matter material to the issue or cause in question, are synonymous, as in a divorce action based upon a single specific act of adultery, evidence could not be material on the "cause" and not on the "issue." People v. Teal, 89 N. E. 1086, 1089, 196 N. Y. 372, 25 L. R. A. (N. S.) 120, 17 Ann. Cas. 1175.

Comp. Laws 1909, § 1974, providing that the judge of the district court of a county in which a superior court is created, upon motion of plaintiff in any cause pending in the district court or which may thereafter be filed in such district court, shall transfer such cause by order to the superior court of the county where it shall stand for trial as if it had been originally filed therein, applies to criminal as well as civil cases; the word "cause" being defined to be any suit or action, or any question, civil or criminal, contested before a court or justice. Ex parte Copeland, 115 Pac. 627, 5 Okl. Cr. 551.

Code Civ. Proc. § 46, forbidding a judge to sit or take part in the decision of a "cause or matter" in which he has been an attorney or counsel, refers only to actions or special proceedings in which a judge might take part; the word "cause" meaning a cause of action, and the word "matter" referring to some judicial proceeding which, under the Code, is included in special proceedings for the enforcement of civil rights. Keeffe v. Third Nat. Bank of Syracuse, 69 N. E. 593, 594, 177 N. Y. 305.

Hepburn Act (Act June 29, 1909, c. 3591, § 10), relating to rates of interstate carriers, and providing that laws in conflict with the act are repealed, but the amendments provided for shall not affect "causes now pending" in courts of the United States, but such causes shall be prosecuted to conclusion, does not relieve offenders under Elkins Act Feb. 19, 1903, c. 708, § 1, from subsequent indictment and prosecution for such offense, though there is much force in the contention that the words "causes now pending" refer only to civil causes. United States v. Chicago, St. P., M. & O. R. Co., 151 Fed. 84, 100.

As action, case, or suit

"The word 'cause' is defined as a suit or action." In re Oliver's Guardianship, 83 N. E. 795, 796, 77 Ohio St. 474.

In any legal sense, "action," "suit," and "cause" are convertible terms. Tillamook County v. Wilson River Road Co., 89 Pac. 958, 959, 49 Or. 309 (citing Bouv. Law Dict. and Anderson's Law Dict.).

A "cause" is a suit, action, or any question, civil or criminal, contested before a court of justice. A probate proceeding is a cause within a constitutional provision providing that, in all "causes" in the district

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courts, plaintiff or defendant shall, upon application made in open court, have the right to a jury trial. Tolle v. Tolle, 104 S. W. 1049, 1050, 101 Tex. 33.

Under Rev. St. U. S. § 629, relating to removal of causes and providing that it shall then be the duty of the state court to accept said petition and bond and proceed no further in such "suit," and, the said copy being entered as aforesaid in the said circuit court of the United States, the "cause" shall then proceed in the same manner as if it had been originally commenced in the circuit court, the word "suit" and "cause" mean the same thing, since in common usage, and very often in statutes and decrees, the words "suit," "action," "case," and "cause" are used interchangeably to indicate the same thing. As defined by Bouvier, a "cause" is a contested question before a court of justice; it is a suit or action. Young v. Southern Bell Telephone & Telegraph Co., 55 S. E. 765, 767, 75 S. C. 326, 7 L. R. A. (N. S.) 501, 9 Ann. Cas. 940.

A "cause" is a case or contested question for a court of justice. United States v. Dolla, 177 Fed. 101, 103, 100 C. C. A. 521, 21 Ann. Cas. 665.

The words "case" and "cause" are constantly used as synonymous in statutes and judicial decisions, each meaning a proceeding in court, a suit or action; and a sheriff's fees as inspector of horses, about to be taken out of the state, are not earned in a civil case, within Rev. St. 1899, § 1113, allowing a sheriff certain fees in civil cases from the party to whom the services were rendered. Messenger v. Board of Com'rs of Converse County, 117 Pac. 126, 130, 19 Wyo. 309.

The primary meaning of "case" is "cause" when applied to legal proceedings. It imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. In its generic sense, the word includes all causes, special or otherwise. A "case" is a contested question before a court of justice; a suit or action; a "cause"; a state of facts involving a question for discussion or decision, especially a "cause" or suit in court. Under Rev. St. 1899, § 1674, giving the circuit court appellate jurisdiction from judgments of the county courts in all cases not expressly prohibited by law, and section 1788, providing that appeals from the county court shall be prosecuted in the same manner as is provided for the regulation of appeals from justices of the peace to circuit courts, and shall be determined anew without regarding any error or informality in proceedings of the county court, an appeal lies from the county to the circuit court only in judicial cases involving life, liberty, and property, and not in a "case" wherein the county courts acts in an administrative and ministerial capacity, as in revoking a liquor license for the causes and in the manner prescribed by Rev. St. 1899, § 3012, in which no right of life, liberty, or property is involved. Barnett v. Pemiscot County Court, 86 S. W. 575, 576, 111 Mo. App. 693 (quoting and adopting the definition in Black's Law Dict., and citing Robertson v. Baldwin, 17 Sup. Ct. 326, 165 U. S. 275, 41 L. Ed. 715; Calderwood v. Peyser, 42 Cal. 115; Home Ins. Co. v. N. W. Packet Co., 32 Iowa, 223, 7 Am. Rep. 183; Ex parte Towles, 48 Tex. 413; Kundolf v. Thalheimer, 12 N. Y. 596).

The term "cause," in Rev. St. § 828, subd. 10, providing for charging a fee for making dockets, etc., "on the trial or argument of a cause," is synonymous with "case" or "suit," and indicates a proceeding in court. Keatley v. United States, 41 Ct. Cl. 384, 388.

Election contest

The "cause," as used in a statute requiring notice stating the cause of an election contest, is the contestor's "cause of action"—the wrong committed. It is the fact or combination of the facts which gives rise to his right of contest or of action. A notice stating that the contestor made contest on the ground that there were many illegal and fraudulent votes cast for contestee, the names of the voters and precincts wherein they voter being unknown, and that there were many legal votes cast for contestor and not counted for him, the name and precinct being unknown, is insufficient for indefiniteness. Hale v. Stimson, 95 S. W. 885, 888, 198 Mo. 134 (quoting Whitney v. Blackburn, 21 Pac. 874, 17 Or. 564, 11 Am. St. Rep. 857).

Const. art. 5, § 10, providing for a jury trial of all causes in the district court, does not give the right to a trial by a jury in a contest of a local option election, as such a contest is not a "cause" within the meaning of the section. McCormick v. Jester, 115 S. W. 278, 286, 53 Tex. Civ. App. 306.

A contested primary election for the office of sheriff of which the district court is given final jurisdiction is not a "cause" within Const. art. 5, § 10, providing that, in the trial of all causes in the district court, the plaintiff or defendant shall have the right to trial by jury, and hence the right to trial by jury does not obtain as to such contest. Hammond v. Ashe, 131 S. W. 539, 103 Tex. 503.

Habeas corpus

Bouvier's Law Dictionary defines a "cause" as a suit or an action; any question, civil or criminal, contested before a court of justice. Const. Bill of Rights, art. 1 § 15, providing that the right of trial by jury shall remain inviolate, and Const. art. 5, § 10, providing that in the trial of all causes in the district court either party shall on application have the right of trial by jury, do not entitle a party to a jury trial in habeas corpus proceeding as a constitutional right. Pittman v. Byars, 112 S. W. 102, 106, 51 Tex. Civ. App. 88.

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Issue synonymous

See Issue (In Practice).

Special proceedings

A summary proceeding for the dispossession of a tenant is a "cause" in which equitable defenses and counterclaims may be interposed. Maher v. Edwards, 110 N. Y. Supp. 1083, 1085, 59 Misc. Rep. 488.

An appeal from an order of distribution entered by the court of probate is a "cause" within the meaning of section 16 of the Practice Act (Rev. St. 1903, p. 1402). Ford v. Ford, 117 Ill. App. 502, 508.

Proceedings for the deportation of Chinese persons are not "causes," within Rev. St. § 566, declaring that the trial of issues of fact in the United States District Courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, etc., shall be by jury. Toy Tong v. United States, 146 Fed. 343–347, 76 C. C. A. 621.

CAUSE AND EFFECT

"Sound philosophy attributes effects to their approximate causes." Osborn v. Bank of United States, 22 U. S. (9 Wheat.) 738, 890, 6 L. Ed. 204.

"It [the word 'effect'] is often used in the sense of acting injuriously upon persons and things." Ryan v. Carter, 93 U. S. 78, 84, 23 L. Ed. 807.

"The consequence of a man's acts are not his acts. Between the consequence and the disclosure that lead to it there may be * * * immediate agencies." Shuey v. United States, 92 U. S. 73, 76, 23 L. Ed. 697.

"Cause" and "consequence" are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce or aid in producing, that result is a consequence of the event, and the event is the result of the cause. Monroe v. Hartford St. Ry. Co., 56 Atl. 498, 501, 76 Conn. 201.

La. Civ. Code, art. 1893, provides that an obligation without a cause can have no effect, and article 1896 defines the word "cause" as the consideration or motive for a contract. Held, that a gratuitous option, by which the grantor agreed, until a certain date, to sell certain land to plaintiff for a specified price, was a mere nudum pactum, and insufficient to sustain an action for breach both under such sections and at common law. Kirby-Carpenter Co. v. Burnett, 144 Fed. 635, 638, 75 C. C. A. 437.

CAUSE OF ACTION

See Claim; Foundation of Action; Inconsistent Causes of Action; Joint Cause of Action; Judgment; New Cause of Action; No Cause of Action; Right of Action; Same Cause of Action; Substantial Cause of Action.

Cause of action arising, see Arise—Arising.

Jurists have found it difficult to define the term "cause of action." It is defined as "the right which a party has to institute and carry through a proceeding; the act on the part of the defendant which gives the plaintiff his cause of complaint; a wrong committed or threatened; matter for which an action may be brought; the entire state of facts that give rise to an enforceable claim. The phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment." Georgia R. & Banking Co. v. Wright, 53 S. E. 251, 256, 124 Ga. 596 (quoting 1 Bouv. Law Dict. 295; 1 Stroud, Jud. Dict. [2d Ed.] 275; citing City of Columbus v. Anglin, 48 S. E. 318, 120 Ga. 785).

A "cause of action" is the particular matter for which suit is brought. Rochester Borough v. Kennedy, 78 Atl. 133, 136, 229 Pa. 251.

A "cause of action" consists of the right of the plaintiff, as well as of the injury to that right. Mangum v. Lane City Rice Milling Co. (Tex.) 95 S. W. 605, 606. It signifies plaintiff's primary right, and defendant's wrongful violation thereof. Rice v. Chicago, B. & Q. R. Co., 131 S. W. 374, 378, 153 Mo. App. 35; Hales v. Raines, 141 S. W. 917, 162 Mo. App. 46. It is inconceivable separately from the rights which it invades. Telulah Paper Co. v. Patten Paper Co., 112 N. W. 522, 524, 132 Wis. 425. And is not limited to a mere ground on which a recovery may be based. Hales v. Raines, 141 S. W. 917, 920, 162 Mo. App. 46. It accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it. Barry v. Minahan, 107 N. W. 488, 490, 127 Wis. 570.

A "cause of action" is made up of the contract and its breach. Bay City Iron Works v. Reeves & Co., 95 S. W. 739, 740, 43 Tex. Civ. App. 254.

Strictly "a cause of action" is the wrongful invasion of a private right for which law or equity affords the injured person redress against the wrongdoer; and, whether it be ex contractu or ex delicto, the cause cannot accrue until a wrong has been committed. Sperry v. Cook, 120 S. W. 654, 655, 138 Mo. App. 296.

A "cause of action" cannot exist without the concurrence of a right, a duty, and a default; or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused. Bruner v. Martin, 93 Pac. 165, 166, 76 Kan. 862, 14 L. R. A. (N. S.) 775, 123 Am. St. Rep. 172, 14 Ann. Cas. 39.

A "cause of action" is the right claimed or wrong suffered by the plaintiff on the one hand and the duty or delict of the defendant on the other. It is not the prayer which constitutes the cause of action, but

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the facts which authorize relief. In a general sense, the term means a claim which may be enforced; the right to prosecute an action with effect. As thus used it is distinguished from the subject of an action which is what was formerly understood as the subject-matter of the action. Bremen Min. & Mill. Co. v. Bremen, 79 Pac. 806, 812, 13 N. M. 111.

The cause of the injury upon which the right of action is founded is not the "cause of action" itself but is only one element in the cause of action. Parris v. Atlanta, K. & N. Ry. Co., 57 S. E. 692, 694, 128 Ga. 434.

Laws 1911, p. 195, amending Code 1907, § 470, so as to give the circuit court jurisdiction over an election contest as to the office of sheriff, and repealing conflicting laws and going into effect immediately, enacted pending a sheriff election contest before the judge of probate as authorized by Code 1907, § 471, terminates the contest notwithstanding Const. 1901, § 95, providing that, after suit has been commenced on any "cause of action," the Legislature may not take away such cause of action or destroy any existing defense, since a "cause of action" comes into existence when there is an invasion of a legal right without justification or sufficient excuse, while an "action" is a means of redress of the legal wrong described by the words "cause of action" and a "cause of action" within the Constitution, comprehends only causes of action arising out of the violation of vested rights, and does not include the right to a public office; a "public office" being a personal public trust created for the benefit of the state without any element of property. Scheuing v. State (Ala.) 59 So. 160, 161.

In section 5623 of the statute (Comp. Laws 1909), which provides that several causes of action may be united in the same petition, where they arise out of the same transaction, or transactions connected with the same subject of action, the term "cause of action" means a redressible wrong. Its elements being the wrong and the relief provided. The "subject of action" is a primary right and its infringement. The term "transaction" is used in the first clause with reference to, and expressive of, all the acts, or groups of related acts, which go to make up one entire project, system, or deal, referred to as a "transaction," and in the latter clause it is used to include and encompass only such acts, or groups of acts, as in themselves constitute separate, redressible wrongs; and such wrongs (transactions) are connected with the same "subject of action" whenever they affect, grow out of, or constitute separate infringements of, the same primary right. Stone v. Case, 124 Pac. 960, 963, 34 Okl. 5, 43 L. R. A. (N. S.) 1168.

By Rev. St. 1899, § 3622, a homestead is subject to levy on all causes of action existing when it was acquired, etc., and for this purpose such time shall be the date of filing the deed in the proper office for record. Held, that the term "causes of action," as relating to causes founded on contract, refers rather to the contractual obligation than to its breach, the test being whether the obligation was contracted before the filing, and where defendant promised to marry plaintiff in June, 1903, fixing February 24, 1904, as the date of the wedding and purchased a farm in October, 1903, filing the deed for record on February 11, 1904, and six days later married another woman and occupied the farm as a homestead, plaintiff's cause of action for breach of promise accrued within the statute in June, 1903, and not at date of the wedding, and an execution on a judgment obtained by her was leviable on the homestead, even if occupation as such related back to filing the deed. Sperry v. Cook, 120 S. W. 654, 656, 138 Mo. App. 296.

Rev. St. 1909, §§ 6704, 6711, subjects a homestead to levy of execution on all causes of action existing at the time of its acquisition, which is the date of the filing of the homestead deed in the proper office for the record of deeds. Defendant who, in June, 1903, promised to marry plaintiff, and set February 24, 1904, for the wedding, purchased a farm in October, 1903, and filed his deed for record February 11, 1904, and six days later married another woman, and in March occupied the farm as his homestead, and a judgment against him in plaintiff's action for breach of marriage promise was obtained in May following. Held, that while the word "debt," as used in the homestead law, extended its operation to include indebtedness arising out of money obligations not due, a "debt" was an unconditional promise to pay a fixed sum at some specified time, differing from a contract to be performed in the future upon a condition precedent which might never happen; that the term "cause of action" meant matter for which an action might be brought, and accrued when a person first had the right to bring an action; that, even though the property did not become a homestead until after the cause of action upon which process was founded had accrued, plaintiff's cause of action did not accrue when the promise of marriage was made; and hence that the homestead was not subject to execution on her judgment. Sperry v. Cook, 152 S. W. 318, 320, 247 Mo. 132.

A pure accident will not supply a "cause of action." Nave v. Flack, 90 Ind. 205, 210, 46 Am. Rep. 205.

The phrase "cause of action" means the matter for which an action may be brought. The "cause of action" is the wrong. Excelsior Clay Works v. De Camp, 80 N. E. 981, 982, 40 Ind. App. 26 (citing Bouv. Dict. Bliss, Code Pl. § 113).

A "cause of action" is "matter for which an action may be brought. A 'cause of action' is said to accrue to any person when

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that person first comes to a right to bring an action." Jacobs v. Mexican Sugar Refining Co., 93 N. Y. Supp. 776, 782, 104 App. Div. 242 (quoting Bouv. Law Dict.).

The "cause of action," in suits for damage arising from negligence, is the act done or omitted to be done by the defendant, affecting plaintiff, which causes a grievance for which the law gives a remedy. Lee v. Republic Iron & Steel Co., 89 N. E. 655, 656, 241 Ill. 372.

A "cause of action" is a wrong. It may arise from the refusal to respond to an obligation. It is also defined as a matter for which an action may be brought; the ground on which an action may be sustained and the fact, or combination of facts, which give rise to a right of action. Jerome v. Rust, 122 N. W. 344, 345, 23 S. D. 409.

A "cause of action" arises out of an antecedent primary right and corresponding duty and the breach of the right and duty by the person on whom the duty rests; the primary right and duty and the wrong together constituting the cause of action in the legal sense. McKee v. Dodd, 93 Pac. 854, 855, 152 Cal. 637, 14 L. R. A. (N. S.) 780, 125 Am. St. Rep. 82.

A "cause of action" arising out of a modification of the contract sued on by plaintiff is within Mills' Ann. St. § 57, subd. 1, providing that a counterclaim may be on a "cause of action" arising out of the transaction set forth in the complaint. Bannerot v. McClure, 90 Pac. 70, 73, 39 Colo. 472, 12 L. R. A. (N. S.) 126.

An erroneous ruling by the trial court cannot be held to furnish a "cause of action," as that phrase is commonly understood. Act Cong. July 20, 1892, c. 209, 27 Stat. 252, providing that any citizens entitled to commence any action or suit in any court of the United States may commence and prosecute to conclusion any such suit or action, refers to a legal demand by one against another, and not to the rulings of any trial court. Bristol v. United States, 129 Fed. 87, 89, 63 C. C. A. 529.

Where, in an action for injuries to a servant run down by an engine, the complaint alleged that the railroad was negligent in running the engine at an unnecessarily high speed, and in negligently failing to give any signal of the danger or the approach of the engine, the allowance during the trial of an amendment, alleging that the railroad negligently failed to keep a sufficient, or any, lookout for persons on the track, did not change the original cause of action, but merely made the averments of negligence more definite and certain; a "cause of action" being that which produces the necessity for bringing action. Doyle v. Southern Pac. Co., 108 Pac. 201, 211, 56 Or. 495 (citing 2 Words and Phrases, p. 1015).

The term "cause of action," in Wilson's Rev. & Ann. St. 1903, § 4220, providing that where the "cause of action" has arisen in another state or country between nonresidents of the territory, and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in the territory, means "matter for which an action may be brought," "the whole cause of action, * * * every fact which it is necessary to establish in order to support the right to judicial relief." Doughty v. Funk, 84 Pac. 484, 486, 15 Okl. 643, 4 L. R. A. (N. S.) 1029.

A "cause of action" is composed of the right of plaintiff and obligation, duty, or wrong of defendant, and these combined constitute a "cause of action." A "cause of action" set forth in an amended complaint is not a new cause of action where a judgment on the original complaint will bar a judgment on the amended complaint, and where a complaint is bad, and the cause is tried on an amended complaint, the action relates to the time of the commencement of the original suit, and a plea of limitations must be determined as of that date unless the amended pleading states a new cause of action. Ft. Wayne Iron & Steel Co. v. Parsell, 94 N. E. 770, 776, 49 Ind. App. 565.

A "cause of action" is that which produces or affects the results complained of, and the phrase, as used in the statutes fixing the jurisdiction of the courts according to where the cause of action arises, means that which creates the necessity for bringing the action, and arises when that is not done which should have been done, and that is done which should not be done. In re Shaffer's Estate, 76 Atl. 716, 717, 228 Pa. 36.

"The meaning of the phrase 'cause of action' is not so well settled that it is used always in the same sense or with a precise understanding of its significance in modern Codes. Each of several counts in a petition is called a separate cause of action, even when, properly speaking, they all state the same cause of action in different ways to meet the facts as they may be developed on the trial. In such instances there is only one cause of action in the true meaning of the term and a general verdict is good, whereas, when there are several distinct causes of action, it would not be. * * * Various definitions of 'cause of action' are collected in the notes of Pom. Code Proc. (4th Ed.) p. 459, § 346 et seq. The author says in substance, that the term signifies a plaintiff's primary right and the defendant's wrongful violation of that right. This elucidation is the outcome of much thought and analysis of the authorities and looks sound." Litton v. Chicago, B. & Q. R. Co., 85 S. W. 978, 981, 111 Mo. App. 140 (citing Campbell v. King, 32 Mo. App. 38; Brownell v. Pacific R. Co.,

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47 Mo. 239; Owens v. Hannibal & St. J. R. Co., 58 Mo. 394).

Plaintiff, from its office in G. county, by telephone, agreed with defendant's manager at its office in F. county to sell cotton seed delivered f. o. b. in G. county, payable in F. county by draft with bill of lading attached, the seller to pay the freight and to sell cotton seed from other points and divert it to F. county. Rev. St. 1895, art. 1194, subd. 23, provides that a suit against a private corporation may be commenced in any county in which the cause of action arose. Held, that the "cause of action" comprehended the agreement between the parties, its performance by one, and its breach by the other, and that the acts to be done under the agreement constituted a performance in F. county, so that no cause of action "arose" in G. county; and hence that the defendant was entitled to a change of venue. Planters' Cotton Oil Co. v. Whitesboro Cotton Oil Co. (Tex.) 146 S. W. 225, 226.

Within the statute of limitations, an amended complaint sets up a new cause of action composed of the right of plaintiff and the obligation, duty, or wrong of defendant, where the new allegation deprives defendant of any defense he had to the original action, where the evidence that would have proved the original complaint will not prove the new, where the new allegations, if in reply, would have amounted to a departure, where the amended complaint sets up a title not before asserted, or where a judgment on the first complaint would be no bar to a judgment on the amended complaint. Raley v. Evansville Gas & Electric Light Co., 90 N. E. 783, 784, 45 Ind. App. 649.

A "cause of action," as used in Code 1899, c. 50, § 16, providing that the jurisdiction of justices of the peace shall not extend to any action unless the cause of action arose in his county, or the defendant or one of the defendants resides therein or, being a nonresident of the state, is found or has property or effects within the county, means the breach of duty by the defendant complained of as the basis of the action. Roberts v. Hickory Camp Coal & Coke Co., 52 S. E. 182, 184, 58 W. Va. 276 (citing Harvey v. Parkersburg Ins. Co., 16 S. E. 580, 37 W. Va. 272).

Under P. S. 1503, which provides that counts in trespass may be joined with counts in trespass on the case, if for the same cause of action, counts for malicious prosecution and for abuse of process, while distinguishable, stand alike, where joined with a count in trespass and met by demurrer for misjoinder, and a count which alleges in substance that the defendant without cause maliciously sued out a body writ against the plaintiff, and caused him to be arrested thereon and imprisoned, may be joined with a count in trespass for imprisonment, where the injury complained of in each count is the same imprisonment; the "cause of action" referred to in the statute being the fact or facts which give rise to a right of action—the matter for which an action may be brought; and a joinder of counts is not to be tested by the gist of the respective counts joined, but by the gravamen thereof, and, where the substance of the claim made under different counts is the same, identity is sufficiently established, though not alleged, and though the gist of one differs from that of the others. Slayton v. Davis, 81 Atl. 232, 233, 85 Vt. 87.

As facts giving right of action

All the facts which taken together are necessary to fix the responsibility for an injury constitute the "cause of action." Johnson v. American Smelting & Refining Co., 116 N. W. 517, 518, 80 Neb. 255; McAndrews v. Chicago, L. S. & E. Ry. Co., 162 Fed. 856, 858, 89 C. C. A. 546; United States v. United States Fidelity & Guaranty Co., 66 Atl. 809, 810, 80 Vt. 84.

"The expression 'cause of action' means the whole cause of action; that is, all the facts which together constitute the plaintiff's right to maintain the action." Parris v. Atlanta, K. & N. Ry. Co., 57 S. E. 692, 694, 128 Ga. 434.

"The cause of action is the statement of facts, upon the happening or nonhappening of which the plaintiff bases his action." Lassiter v. Norfolk & C. R. Co., 48 S. E. 642, 643, 136 N. C. 89, 1 Ann. Cas. 456.

The term "cause of action" signifies the situation or state of facts, entitling one to sustain an action; a right of recovery. Ritter v. Hoy, 55 South. 1034, 1 Ala. App. 643.

A cause of action is the fact or combination of facts which gives rise to a grant of action, the existence of which affords a party a right to judicial interference in his behalf. A suit is the pursuit in a court of justice of the remedy to which the party by reason of the existence of the supposed facts believes himself to be entitled. Baltimore & O. R. Co. v. Larwill, 93 N. E. 619, 621, 83 Ohio St. 108, 34 L. R. A. (N. S.) 1195.

A "cause of action," as the term is used in pleading, is not the name under which a list of facts may be classed, but it consists of the facts giving rise to the action. Where the cause of action set up in an amended bill is wholly distinct from the cause of action set up in the original bill, and the bar of limitations has become complete in the interval between the filing of the two, no relief can be had on the new cause of action set up in the amended bill. In an action to redeem land sold under a trust deed, an amendment alleging that the sale was conducted by a person not authorized in writing by the acting trustee, as required by the deed of trust, which allegation was not included in the original bill, stated a new cause of action. Cox v. American Freehold

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& Land Mortgage Co. of London, 40 South. 739, 742, 88 Miss. 88 (quoting and adopting definition in Box v. Chicago, R. I. & P. Ry. Co., 78 N. W. 694, 107 Iowa, 660).

Under a statute authorizing the joinder of different causes of action in the same complaint, where they arise out of the same transaction or transactions, connected with the same subject of action, the phrase "cause of action" embraces the facts necessary to be pleaded and proved to establish defendant's liability to plaintiff, including the facts which show plaintiff's right, and those which show defendant's violation of that right. McArthur v. Moffett, 128 N. W. 445, 447, 143 Wis. 564, 33 L. R. A. (N. S.) 264.

"Cause of action" includes every fact necessary for plaintiff to prove to entitle him to succeed, every fact that defendant would have a right to traverse. The terms "right of action" and "cause of action" are equivalents. The term "cause of action" comprehends the right to sue, and implies that there is some person in existence who can assert, and also one who can lawfully be sued, and if one has no legal right to sue, he has no cause of action and not merely a bad cause of action. Walters v. City of Ottawa, 88 N. E. 651, 653, 240 Ill. 259.

A cause of action consists of the facts from which plaintiff's primary right and the defendant's corresponding duty have arisen, together with the facts showing defendant's wrong. American Can Co. v. Stare, 138 N. W. 67, 68, 150 Wis. 627.

Proceedings in error

"Lord Coke defined 'action' to be 'a legal demand of one's right,' and 'cause of action' comprises every fact a plaintiff is obliged to prove in order to obtain judgment, or conversely every fact the defendant would have the right to traverse (Chesapeake & O. R. Co. v. Dixon, 21 Sup. Ct. 67, 179 U. S. 131, 139, 45 L. Ed. 121, 125). The words 'action' and 'cause of action' are not ordinarily applicable to writs of error." The right to prosecute a writ of error from a Circuit Court of Appeals without giving security for costs is not given by Act July 20, 1892, 27 Stat. 252, c. 209, providing for the prosecution of suits or "actions" in forma pauperis, as that act does not apply to appellate proceedings. Bradford v. Southern Ry. Co., 25 S. Ct. 55, 57, 195 U. S. 243, 49 L. Ed. 178.

Remedy distinguished

A "cause of action" is distinguished from the "remedy," which is simply the means by which the obligation or corresponding action is effectuated, and also from the "relief" sought. Lemon v. Hubbard, 102 Pac. 554, 556, 10 Cal. App. 471.

"Mr. Pomeroy, in his work on Code Remedies, in defining the term 'cause of action' and in distinguishing it from 'the remedy,' at sections 347 and 348 (4th Ed.) says: 'Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict; and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements the primary right and duty and the delict or wrong combined constitute the 'cause of action,' in the legal sense of the term, and as it is used in the Codes of the several states. They are the legal cause or foundation whence the right of action springs; this right of action being identical with the 'remedial right,' as designated in my analysis. In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in an abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The 'cause of action,' as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong. The 'cause of action' thus defined is plainly different from the remedial right and from the remedy or relief itself. The remedial right is the consequence, the secondary right, which springs into being from the breach of the plaintiff's primary right by the defendant's wrong, while the remedy is the satisfaction of this remedial right." Where a complaint alleged the facts in respect to a contract, the performance of services thereunder and breach by defendant, an amendment merely adding a statement as to the reasonable value of the services rendered does not change the cause of action or add a new cause of action, though it allows a recovery on a quantum meruit instead of on an express contract. Casady v. Casady, 88 Pac. 32, 34, 31 Utah, 394.

As right of action

A "cause of action" is the right one has to institute a judicial proceeding. Dillon v. Great Northern R. Co., 100 Pac. 960, 963, 38 Mont. 485; Cohen v. Clark, 119 Pac. 775, 777, 44 Mont. 151.

A cause of action is neither the circumstances that occasioned the suit nor the remedy employed, but a legal right of action. Anderson v. Wetter, 69 Atl. 105, 109, 103 Me. 257, 15 L. R. A. (N. S.) 1003.

The term "cause of action," as used in the statute of limitations, is synonymous

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with the term "right of action." Paine v. Dodds, 103 N. W. 931, 933, 14 N. D. 189, 116 Am. St. Rep. 674.

The "capacity to sue" is the right to come into court, and differs from a "cause of action," which is the right to relief in court. Howell v. Iola Portland Cement Co., 121 Pac. 346, 347, 86 Kan. 450.

The "accrual of a cause" of action, within the statute of limitations, means the right to sue, and when one person may sue another a cause of action has accrued; a "cause of action" existing in a legal sense when there is such a mature right as may be declared on and maintained, subject only to such valid defenses by which it may be defeated. Port Arthur Rice Mill. Co. v. Beaumont Rice Mills (Tex.) 143 S. W. 926, 928.

The term "cause of action," as used in the statute of limitations, is used, not in the technical sense, but in the popular sense of the right to maintain a particular action against which the statute is invoked; and a cause of action accrues when the holder thereof first obtains the right to resort to that particular form of action for relief. Colonial & U. S. Mortgage Co. v. Northwest Thresher Co., 103 N. W. 915, 920, 14 N. D. 147, 70 L. R. A. 814, 116 Am. St. Rep. 642, 8 Ann. Cas. 1160.

Under Code Civ. Proc. § 483, which requires that, when a complaint sets forth two or more causes of action, the statement of facts constituting each cause of action must be separate and numbered, the term "cause of action" is synonymous with the right to bring a suit, and means that where the facts alleged show one primary right of the plaintiff, and one wrong done to him by the defendant which involves that right, that the plaintiff has stated only one cause of action, and hence, in an action by a brakeman against his employer for personal injuries, it is proper for the plaintiff to plead in his complaint as one cause of action facts constituting negligence under the common law, facts constituting negligence under the employer's liability act of the state of New Jersey, and facts constituting negligence under the act of Congress known as the federal employer's liability act, or any two of those grounds of liability. Payne v. New York, S. & W. R. Co., 95 N. E. 19, 21, 201 N. Y. 436.

As separate property

See Separate Property.

As subject-matter

Subject-matter distinguished, see Subject-Matter.

Within the rule that the test of the plaintiff's right to amend his petition is whether the identity of the cause of action is preserved, the phrase "cause of action" means the subject-matter on which the plaintiff grounds his right of recovery, and not the formal statement of facts set forth in the petition. Myers v. Moore, 110 N. W. 989, 990, 78 Neb. 448.

The expression "cause of action" indicates the subject or subject-matter of the action but is meaningless as showing a particular cause of action. A "cause of action," as the term is used in pleading, consists of the facts giving rise to the action. Cox v. American Freehold & Land Mortgage Co., 40 South. 739, 742, 88 Miss. 88 (quoting and adopting definition in Box v. Chicago, R. I. & P. Ry. Co., 78 N. W. 694, 107 Iowa, 660).

Subject of action distinguished

See Subject (Of Action).

CAUSE OF DEFENSE

A demurrer that an answer does not state facts sufficient to constitute a ground of defense is sufficient, though the language of the statutes (Burns' Ann. St. 1901, § 349) is "cause of defense." Durbin v. Northwestern Scraper Co., 73 N. E. 297, 301, 36 Ind. App. 123.

CAUSE OF INJURY

The "cause of injury" upon which the right of action is founded is not the cause of action itself but is only one element in the cause of action. Parris v. Atlanta, K. & N. Ry. Co., 57 S. E. 692, 694, 128 Ga. 434.

The term "cause of the injury," in N. Y. Laws 1902, c. 600, § 2, providing that no action for recovery of compensation for injury or death shall be maintained unless notice of the time, place, and "cause of the injury" is given to the employer within 120 days, does not mean the same as the cause of the negligent act resulting in the occurrence of the accident but means a definite and precise statement of the cause of the injury. A notice stating that on a certain day, while in defendant's employ on a certain building, two steel columns were placed in a careless position on the temporary bridge two feet above the fourteenth floor, seventeenth tier, that the top one rolled or was pushed off onto plaintiff's leg, breaking it four inches above the knee, was sufficient notice of the "cause of the injury," as well as the cause of the accident, if that be necessary. Hurley v. Olcott, 119 N. Y. Supp. 433, 434, 134 App. Div. 631.

CAUSE OF PROCEEDING

The right to file a petition in error on leave granted to reverse a judgment of the district court is a "cause of proceeding" and is saved by Rev. St. § 79, notwithstanding the act to revise and consolidate the statutes relating to circuit and other courts passed February 7, 1885. O'Donnell v. Downing, 1 N. E. 438, 43 Ohio St. 62 (citing Lafferty v. Shinn, 38 Ohio St. 49; Bode v. Welch, 29 Ohio St. 19, 22).

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CAUSE SHOWN

Statutory authority to set aside a decree for "cause shown" does not authorize the vacation of a decree entered by consent. Hyde v. Superior Court, 66 Atl. 292, 296, 28 R. I. 204.

CAUSE TO THE CONTRARY

Where a surviving partner claims and alleges that property claimed by the administrator of the partnership estate is his individual property and does not belong to the partnership, and when cited to appear sets up title to himself, it is showing "cause to the contrary" within B. & C. Comp. § 1134, providing that a surviving partner shall be required by the county court or judge to deliver partnership property to the administrator of the partnership estate, unless he shows cause to the contrary. Harrington v. Jones, 99 Pac. 935, 936, 53 Or. 237.

CAUSING INJURY

Event causing injury, see Event.

CAUSEWAY

Under a statute authorizing a railroad company to erect a bridge or causeway across any navigable rivers, streams, or tidewaters, an embankment across a tidewater creek raised for a passageway over the stream may properly be denominated a "causeway." Rogers v. Kennebec & P. R. R. Co., 35 Me. 319, 324.

CAUTION

See Due Care and Caution; Due Caution; Juratory Caution; Ordinary Caution.

To "caution" means to give notice of danger; to warn against danger. To "caution," as used in the statute, making it unlawful for a minor to enter a place in a coal mine against "caution," or to do any other act whereby lives or the security of the mine, etc., means to give notice of, or warn against, danger. Koppala & Lampe v. State, 93 Pac. 662, 663, 15 Wyo. 398.

An instruction "that the term 'negligence' means the want of that care and prudence which a man of ordinary 'intelligence' would exercise under all the circumstances of the situation" is erroneous, where the case is bottomed on negligence and defended on the ground of contributory negligence, since it does not correctly define the term. "Intelligence" is not a synonym for either "caution," "prudence," or "care." Van Cleve v. St. Louis, M. & S. E. R. Co., 101 S. W. 632, 634, 124 Mo. App. 224.

"If one attempts to pass over a place of danger, the law requires him to exercise 'caution commensurate with the obvious peril'; but this means that the law only requires of the party to exercise ordinary care, the danger and his knowledge thereof considered." Vertrees v. Gage County, 115 N. W. 863, 864, 81 Neb. 213 (quoting and approving City of Beatrice v. Reid, 59 N. W. 770, 41 Neb. 214).

CAUTIOUS

The standard by which the conduct of defendant, in an action for malicious prosecution, should be tested is that of an ordinary cautious and prudent man. The word "cautious," when not so limited, may suggest the idea of timidity, or, as defined secondarily by Webster, "overprudent; fearful; timorous." Jenkins v. Gilligan, 108 N. W. 237-238, 131 Iowa, 176, 9 L. R. A. (N. S.) 1087.

CAVE

As building, see Building (In Criminal Law).

CAVEAT

The "caveat" may be filed by any person who would be injured by the probate of a will, and its function is to prevent probate without the caveator's having an opportunity to be heard. In re Myer's Estate, 64 Atl. 138, 140, 69 N. J. Eq. 793 (citing In re Coursen's Will, 4 N. J. Eq. 409).

"The 'caveat' is a remedy given to prevent a patent from issuing in certain cases where the directions of the law have been violated to the injury of the commonwealth, or where some other person hath a better right." Wilson v. Mason, 5 U. S. (1 Cranch) 45, 101, 2 L. Ed. 29.

The act of April 22, 1858, providing "that the probate by the register of the proper county of any will devising real estate shall be conclusive as to such realty, unless with five years from the date of such probate those interested to controvert it shall by caveat and action at law, duly pursued, contest the validity of such will as to such realty," is badly worded, and hence difficult of comprehension. The framer of the act knew that it would not do to make the probate absolutely conclusive of the execution of the will, that some time must be given within which to contest that execution, but he evidently was not acquainted with the legal forms necessary to reach that end. This is evident from the manner in which he has used the word "caveat," and also that in which he has connected it with the words "and action at law." He evidently regarded a caveat as a means or process for contesting a will, and an action or issue at law as a continuation thereof. Taking this view of the matter—and it is the only one that can be adopted without the rejection of a word which was evidently deemed material by the framer of the act—and the difficulty is of easy solution. Thus, the caveat will then mean the initiatory process, or notice preceding a contest before the register, and

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the action at law an issue triable in the common pleas, directed by the orphans' court, after an appeal thereto from the decree of the register, and this appeal may be taken, in the ordinary form, at any time within five years. Wilson v. Gaston, 92 Pa. 207, 213, 215 (cited and approved in Appeal of McCort, 98 Pa. 33, 37).

CAVEAT EMPTOR

The maxim of "caveat emptor," based upon the mutuality of the opportunity of investigation by vendor and vendee, is inapplicable to the case of hermetically sealed goods. Tomlinson v. Arnour & Co., 65 Atl. 883, 884, 74 N. J. Law, 274.

The doctrine of "caveat emptor" has no application to cases of actual fraud in representations made by a vendor to a vendee respecting material facts and in the belief of and upon the faith of which the vendee acts. Kell v. Trenchard, 142 Fed. 16, 17, 73 C. C. A. 202.

The maxim "caveat emptor" applies exclusively to a purchaser. He must take care and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive, notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or ears to the inlet of information and then say he is a bona fide purchaser without notice. Dennis v. Northern Pac. Ry. Co., 55 Pac. 210, 215, 20 Wash. 320 (citing Burwell's Adm'rs v. Fauber, 62 Va. [21 Grat.] 446, Coal Co. v. Doran, 12 Sup. Ct. 239, 142 U. S. 417, 35 L. Ed. 1063); Moore v. Sawyer, 167 Fed. 826, 843 (quoting Simmons Creek Coal Co. v. Doran, 12 Sup. Ct. 246, 142 U. S. 417, 35 L. Ed. 1063, quoting the Virginia Court of Appeals).

The rule of "caveat emptor" applies where the buyer of dairy cows was a competent judge of such property and had full opportunity and ample time for inspection before buying and where there was no express warranty of the fitness of the animals for dairy purposes. Dorsey v. Watkins, 151 Fed. 340, 345.

Where an assignment of certain patents was granted with a condition that, if default was made in payment of any of the installments of the consideration therefor, it should become null and void, and after the assignee granted a license to a third party to use the patents a default was made and a reassignment taken, the license was not a defense to a charge of infringement, since the rule of "caveat emptor" applied, and it was the licensee's duty to inquire into the assignee's right to grant such license. Abbett v. Zusi, 1 Fed. Cas. 9.

The rule of "caveat emptor" applies to sales of choses in action as in other sales of personal property. Hence, if the seller has sold the thing to one person, and therefore has no title to pass to a second, the latter takes nothing by his purchase. The assignee's right of action is without prejudice to any discount, set off, or defense the debtor has before notice of the assignment. Columbia Finance & Trust Co. v. First Nat. Bank, 76 S. W. 156, 158, 116 Ky. 364 (citing Ky. St. § 474; Civ. Code Prac. § 19).

The rule of "caveat emptor" applies with full force and vigor to purchasers of property from trustees, executors, and other persons acting in any fiduciary capacities. Neary v. Neary, 97 N. W. 302, 304, 70 Neb. 319.

The maxim "caveat emptor" applies in the sale of provisions by one dealer to another in the course of general commercial transactions, and hence there is no implied warranty or representation of quality or fitness. Nelson v. Armour Packing Co., 90 S. W. 288, 289, 76 Ark. 352, 6 Ann. Cas. 237 (citing Howard v. Emerson, 110 Mass. 320, 14 Am. Rep. 608; Giroux v. Stedman, 14 N. E. 538, 145 Mass. 439, 1 Am. St. Rep. 472; Benj. Sales [Bennett's 7th Ed.] pp. 661, 691; 2 Mechem, Sales, §§ 1356, 1357; Tiedeman, Sales, § 191).

The maxim "caveat emptor" will apply as to patent defects if the purchaser has full means of knowledge thereof by the exercise of ordinary attention to his business, which requires him to at least look at what he buys as it comes into his possession, or when it is offered to him or within a reasonable time thereafter, so as to observe patent imperfections if there are such. A person is chargeable with knowledge of all that under the circumstances of the case he ought to know, and he is also chargeable with such knowledge as he in fact possesses, whether such possession is the result of the exercise of mere ordinary care or not. Northern Supply Co. v. Wangard, 94 N. W. 785, 786, 117 Wis. 624, 98 Am. St. Rep. 963.

The doctrine of "caveat emptor" rests upon the principle that the purchaser sees, or may see, and know what he buys; and, not demanding an express warranty, it will be conclusively held that he was content to rely upon his own judgment, and, if the goods prove inferior in quality, the purchaser has no remedy, but must bear the loss himself. It may be said, however, that when chattels are sold generally for all purposes to which they are adapted, and the seller is not the manufacturer or producer, and the property is in existence and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim "caveat emptor" applies, even though defects exist in the goods which are not discoverable on examination. Oil Well Supply Co. v. Watson, 80

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N. E. 157, 158, 168 Ind. 603, 15 L. R. A. (N. S.) 868.

Under the doctrine of "caveat emptor," which applies to purchases in open market, one who purchases in open market does so at his own risk and peril and is liable to the true owner of the property purchased, if the seller and ostensible owner is not the true owner. Schmidt v. Rankin, 91 S. W. 78, 84, 193 Mo. 254.

In judicial sales

A purchaser at a sheriff's sale or a commissioner's sale is a "purchaser in invitum," and the doctrine of caveat emptor applies in its full force. Wells v. Gay, 46 South. 497, 93 Miss. 268.

The rule of caveat emptor applies with full force to purchases at judicial or quasi judicial sales, and the purchaser acquires only the title of defendant to the process. Winter, Loeb & Co. v. Montgomery Cooperage Co., 53 South. 905, 907, 169 Ala. 628.

The rule of "caveat emptor" applies to judicial sales. A sheriff's deed made in pursuance of a sale of a debtor's homestead, which at the time of the levy is occupied as such by the debtor and his family, the judgment running against the husband individually, will not divest the debtor of his title to the homestead nor invest the purchaser with any title thereto. Van Doren v. Weideman, 94 N. W. 124, 127, 68 Neb. 243, 110 Am. St. Rep. 419.

"The maxim of 'caveat emptor' unquestionably applies to a sale under execution, and the purchaser ordinarily acquires no better title than the debtor could have conveyed at the time the lien attached." Rippe v. Badger, 101 N. W. 642, 125 Iowa, 725, 106 Am. St. Rep. 336.

"Caveat emptor" means "let the purchaser beware." The doctrine is applicable to its full extent to a purchaser of land for taxes. State Finance Co. v. Beck, 109 N. W. 357, 359, 15 N. D. 374.

The maxim "caveat emptor" applies to the purchaser at a tax sale, and, in the absence of statute in terms giving him a remedy for the recovery of his investment, he cannot recover the taxes paid from the taxpayer. Mitchell v. Minnequa Town Co., 92 Pac. 678, 41 Colo. 367.

"A purchaser at a court sale purchases under the rule 'caveat emptor' (look out, buyer)." On a summary proceeding to sell an infant's interest in land, the rule applies. The court sold only such title as the infants had. The purchasers purchased at their own risk and were held to know the source and condition of the title. Headley v. Hoopengarner, 55 S. E. 744, 750, 60 W. Va. 626.

The maxim "caveat emptor" is usually applied with strictness to the purchases of goods at execution sale. Hancock v. Shockman, 69 S. W. 826, 828, 4 Ind. T. 138 (quoting and adopting definition in Rodgers v. Smith, 2 Ind. 526).

In sales of land

The maxim "caveat emptor" did not prevent a purchaser of land, who did not know the extent of an acre as it appears on the ground, from relying on the vendor's representation as to the number of acres in the tract. Sipola v. Winship, 66 Atl. 962, 967, 74 N. H. 240.

CAVIAR

Dutiable as an article preserved for food, see Preservation—Preserved.

CAVING

The falling of a "nigger-head," which is a large hard substance found in coal, or partly in the coal, and partly in the walls, is such a "caving in" as the statute requires mine owners or operators to furnish timbers to guard against. Pachko v. Wilkeson Coal & Coke Co., 90 Pac. 436, 437, 46 Wash. 422.

CEASE

CEASE TO ACT

By refusing to act in a particular case, an attorney does not "cease to act" as such, within a statute which provides that, where an attorney dies, or is removed, or suspended, or ceases to act as such, his client should be entitled to appoint another attorney within 30 days before further proceeding in the case. People ex rel. Coon v. Plymouth Plank Road Co., 32 Mich. 248, 250.

CEASE TO BE OPERATED

A fire policy covering a mill plant for the manufacture of flour and other feed products stipulated that the entire policy should be void if the manufacturing establishment ceased to be operated for more than 10 consecutive days. The mill was not operated for the manufacture of flour when the policy was issued and for a longer period than 10 days thereafter, but was, at the issuance of the policy and afterward until the property was destroyed, operated in the manufacture of meal, bran, and other feed products. Held, that the establishment had not ceased operation within the meaning of the policy. Capital Fire Ins. Co. v. Carroll, 109 Pac. 535, 538, 26 Okl. 286.

CEASE TO EMPLOY

In a contract between an employer and a labor union, whereby the employer agreed to employ for a certain period only members of a union in good standing and "cease to employ any one and all those employés who are not in good standing" in such union, the phrase "cease to employ" is merely a euphemism for the word "discharge." Jacobs v. Cohen, 76 N. E. 5, 11, 183 N. Y. 207.

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2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280.

CEASE TO OCCUPY

Where the owner of a homestead left it from November 10th to May 10th, leaving the house furnished substantially as it was when he and his wife were living therein, and the house during their absence was left in charge of a neighbor, who took care of it, and the owner acquired no other home during his absence, he did not cease to occupy his homestead, within Rev. Laws 1905, § 3458. Jaenicke v. Fountain City Drill Co., 119 N. W. 60, 106 Minn. 442.

CEDE

As purchase, see Purchase.

CELESTIAL MARRIAGE

Under the doctrine of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, marriages celebrated and solemnized by mere civil authority and with only the sanction of the law are regarded as marriages for time only, while a marriage solemnized by a duly constituted church authority or "by the Holy and Eternal Priesthood of the Saints" is designated a "celestial or patriarchal marriage" binding not only during this life but throughout the life to come. As used in Const. art. 6, § 3, disqualifying as voters, jurors, or officers, among others, one who is a bigamist, polygamist, or living in what is known as patriarchal or celestial marriage, the words "bigamous," "polygamous," "plural," "celestial," and "patriarchal" marriages were meant and intended to prohibit and forbid any man having more than one wife at one time under whatever name or designation he might choose to style his marriage; and the use of each of these words was directed against bigamous and polygamous marriages. The "celestial" or "patriarchal" marriage, in order to come within the prohibition of the Constitution, must be "bigamous" or "polygamous." One who teaches or practices having more than one wife at any one time or belonging to an organization teaching such doctrine is disqualified for the duties of an elector, and consequently for holding any civil office within the laws of the state, but it is not intended by the Constitution to interfere with the religious beliefs and opinions of any one. Toncray v. Budge, 95 Pac. 26, 38, 14 Idaho, 621.

CELLAR

As building, see Building (In Criminal Law).

The "cellar" on the truck of a railway car or engine is a receptacle placed underneath the bearing of the axle for the purpose of keeping the bearing properly oiled while in motion. Crow v. Houck's Missouri & A. Ry. Co., 111 S. W. 583, 585, 212 Mo. 589.

Tenement House Act (4 Comp. St. 1910, p. 5321) § 10, defines a "cellar" as a storeroom more than one-half below the level of the curb. Board of Tenement House Supervision of New Jersey v. Schlechter, 83 Atl. 783, 784, 83 N. J. Law, 88.

Under N. Y. Tenement House Act (Laws 1901, c. 334, § 91, subd. 8), defining a "cellar" as a story more than one-half below the level of the curb, rooms which are more than one-half below the level of the curb are contained in a "cellar" although they are more than one-half above the surface of an adjoining sunken court. People ex rel. Cohen v. Butler, 109 N. Y. Supp. 900, 904, 125 App. Div. 384.

CELLULAR BOX

A "cellular box," used in photographers' cameras, is one containing several cells, in each of which a separate exposure may be made. Mahoney v. Jenkins, 138 Fed. 404, 405, 70 C. C. A. 662.

CEMENT

See Asphaltic Cement; Natural Cement.

Portland cement is the slow-setting product of a high temperature kiln burning, a pulverized cement rock or mixture of clay and limestone of a very exact and regular composition. Natural cement is the quick-setting product of a low temperature kiln burning, a cement rock of irregular composition. Donaldson v. Roksament Stone Co., 170 Fed. 192, 193.

CEMETERY

Actually used for cemetery, see Actually Used.

As graveyard, see Graveyard.

As purely public charity, see Purely Public Charity.

CEMETERY ASSOCIATION

As business corporation, see Business Corporation.

As charity, see Charity.

CEMETERY CORPORATION

As charitable institution, see Charitable Institution.

CEMETERY LAND

A statute exempting from sale under execution the "cemetery lands" and property of cemetery associations applies only to land of the association actually brought into use as a cemetery, though another act authorizes the holding of 125 acres for cemetery purposes. Spear v. Locust Wood Cemetery Co., 66 Atl. 1068, 1070, 72 N. J. Eq. 821.

CEMETERY PURPOSES

A tract of land purchased by an incorporated cemetery association for ceme-

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tery purposes and platted into lots for such purposes is "used exclusively for cemetery purposes," within the statute exempting from taxation the property used exclusively for cemetery purposes belonging to a cemetery association organized upon a basis whereby the association cannot derive pecuniary profit. Oak Hill Cemetery Co. v. Wells, 78 N. E. 350, 351, 38 Ind. App. 479.

The phrase "cemetery and burial purposes only" in a certificate of incorporation of a cemetery company did not warrant making a gift of money to a church organization whose members, or some of them, were also members of the company. Clark v. Rahway Cemetery Co., 61 Atl. 261, 262, 69 N. J. Eq. 631.

CENSUS

See Subsequent Census.

A "census" of a city is an official enumeration of inhabitants with details of sexes, age, and family. It is a public document to be preserved in the archives of the city rather than a mere sum total of inhabitants. The census required by Rev. St. 1899, § 3028, 6300, providing for taking the census of cities, means an official enumeration of the inhabitants and a public record thereof. State ex rel. Ryan v. Wooten, 122 S. W. 1101, 1103, 139 Mo. App. 221 (quoting and adopting the definition in 6 Cyc. p. 725).

CENTAVO

The Spanish word "centavo" is said to be in Spanish and in South American countries a copper cent or nickel coin in value six-tenths of a cent (actual) and one cent (nominal); the one-hundredth of a peso. Serralles' Succession v. Esbri, 26 Sup. Ct. Rep. 176, 179, 200 U. S. 103, 50 L. Ed. 391.

CENTER

See Wood Centers.
See, also, Middle.

Under a deed calling to the "center of the lake," every abutting property owner on the lake is entitled to the land under water of the land in front of his premises to the thread of the lake which passes through the center of the lake, along its longest diameter, if there be no outlet or inlet. Calkins v. Hart, 118 N. Y. Supp. 1049, 64 Misc. Rep. 149.

CENTER LINE

"Public roads and highways, also railroads, are regarded as having three lines: The 'center line,' which is usually the line surveyed when the road is laid out, and on each side of which the road is laid; the two side lines, at equal distances from the center line, and between which lies the territory covered by the road. When, in a conveyance of real estate adjoining a highway, such highway is referred to as constituting a boundary, the center line will be held to be the boundary so referred to, unless the language used in so referring to it shows clearly that a side line, instead of the center, was intended." Couch v. Texas & P. Ry. Co., 107 S. W. 872, 873, 49 Tex. Civ. App. 188 (quoting and adopting definition in Maynard v. Weeks, 41 Vt. 617).

CENTIMETER-GRAM-SECOND SYSTEM

Units of electrical force and volume have been fixed by law with reference to what is known as the "centimeter-gram-second system," generally referred to as the "C. G. S. system." This system was adopted with reference to length, expressed by the centimeter, mass, expressed by the gram, and time, expressed by the second. These are the fundamental units of scientific work. Peoria Waterworks Co. v. Peoria Ry. Co., 181 Fed. 990, 1001.

CENTRAL

The term "central" means at or near the center. A bicycle bell described as centrally pivoted in an application for a patent does not necessarily mean that it is pivoted in the exact center. Nutter v. Mossberg, 128 Fed. 55, 57.

CENTRAL LINE OF ROADWAY

The rule declared in an ordinance requiring vehicles to turn to the right to enable each other to pass without collision is the same as that prescribed in Rev. St. 1899, § 9458, and means that when two vehicles meet, going in opposite directions, the driver of each must drive to the right of the "central line of the roadway," which line is the one that bisects the middle line of the usable road, and is not necessarily the middle line of a paved or dedicated street, and where, on account of obstructions, a part thereof is made impassable, the statute refers to the remaining passable way. Harmon v. Fowler Packing Co., 108 S. W. 610, 611, 129 Mo. App. 715.

CENTRALLY

The word "centrally" does not necessarily mean in the exact center. Bredin v. Solmson, 132 Fed. 161, 162. And a claim for a patented weather strip is not infringed because it described a rib as located centrally with reference to the base, while in the other device the rib is either more to one side of the center of the base, on one side, or sometimes may be omitted altogether. M. Solmson & Co. v. Bredin, 136 Fed. 187, 189, 69 C. C. A. 203.

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CERTAIN

See Reasonably Certain; Uncertain.

The word "certain," as used in Cr. Code 1902, § 1, providing that, upon view of felony committed or upon certain information that a felony has been committed, any person may arrest the felon and take him to a judge or magistrate, is used in the sense of trustworthy, capable of being depended upon, credible, positive, or reliable, and has reference to the evidence or information upon which the person making the arrest is allowed to act and not to the actual fact that a felony has been committed. State v. Griffin, 54 S. E. 603, 604, 74 S. C. 412.

"Certain" is defined in Webster's Dictionary as meaning free from doubt. A charge that if a passenger's sickness was not the result of her being put off the train, and that it was "reasonably certain" to have resulted from other causes, the carrier is not liable is erroneous as requiring proof beyond reasonable doubt. St. Louis, A. & T. Ry. Co. v. Burns, 9 S. W. 467, 468, 71 Tex. 479, 481.

As capable of being rendered certain

"The law regards that as 'certain' which is capable of being ascertained and definitely fixed. Mobile & O. R. Co. v. Tennessee, 14 Sup. Ct. 968, 972, 153 U. S. 497, 38 L. Ed. 793.

"That is 'certain' which is by necessary reference made certain." United States v. Smith, 18 U. S. (5 Wheat.) 153, 159, 5 L. Ed. 57.

CERTAIN ASCERTAINED MEMBERSHIP

The meaning of a finding that a society has had at all said times "a certain ascertained membership" is that an organization exists sufficiently formed to take; i. e., the number at any time could be determined, not necessarily the same persons, but as "having at all times a certain ascertained membership." In re Merchant's Estate, 77 Pac. 475, 476, 143 Cal. 537.

CERTAIN, DEFINITE, AND ASCERTAINED AMOUNT

A judgment for a specified sum, with interest from a designated date, and costs taxed at a specified amount, is a judgment for a "certain, definite, and ascertained amount." Thomas v. Mariner, 66 Atl. 99, 100, 5 Pennewill, 571.

CERTAINTY

See Moral Certainty; Reasonable Certainty.

"Certainty" is the quality of being established beyond doubt, and the phrases "to a moral and reasonable certainty" and "beyond a reasonable doubt," as applied to the quality of proof in a case, are identical in meaning. Austin v. State, 64 S. E. 670, 6 Ga. App. 211.

The certainty required in an award is certainty to a common intent, not to a certain intent in general, or in every particular, but certainty which is attained by giving to the words their ordinary sense; not excluding, however, any meaning derived from fair argument or inference. Clark Millinery Co. v. National Union Fire Ins. Co., 75 S. E. 944, 948, 160 N. C. 130.

"Certainty," as applied to the law of damages, means freedom from doubt, and as "reasonable certainty" and "reasonable probability" bear no resemblance to each other, plaintiff, in an action for personal injuries, while entitled to recover for such future suffering and injury as she proves to be reasonably probable, is not required to prove such future injuries and suffering by testimony reasonably certain or free from doubt. Johnson v. Connecticut Co., 83 Atl. 530, 531, 85 Conn. 438.

"'Certainty' means the absence of doubt," and reasonable "certainty" is not to be required in an instruction as to the future pain and suffering which plaintiff can recover for; a reasonable probability being all that is necessary. St. Louis Southwestern R. Co. of Texas v. Hawkins, 108 S. W. 736, 741, 49 Tex. Civ. App. 545 (quoting and adopting definition in Gulf, C. & S. F. Ry. v. Harriett, 15 S. W. 556, 80 Tex. 73).

A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity. Following the general principles of equity, there is required a greater degree of "certainty" and definiteness for specific performance than to obtain damages at law. For specific performance is required that degree of "certainty" which leaves in the mind of the chancellor or court no reasonable doubt as to what the parties intended and no reasonable doubt of the specific thing equity is to compel done. The element of completeness denotes that the contract embraces all the material terms; that of "certainty" denotes that each one of these terms is expressed in a sufficiently exact and definite manner. An incomplete contract, therefore, is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may, indeed, embrace all the material terms, but one or more of them is expressed in so inexact, indefinite, or obscure language that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect. Van Dyke v. Norfolk So. R. Co., 72 S. E. 659, 665, 112 Va. 835 (citing 6 Pom. Eq. Jur. § 764).

The "certainty" required in declaration, or plea, is such a statement of the facts constituting the cause of action or ground of defense as will enable them to be understood by the party answering them, the jury, and

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the court, and Code 1907, § 5321, enjoining brevity consistent with perspicuity, and the presentation of facts so intelligibly that a material issue in law or fact can be taken thereon by the adverse party, does not impair the substance of this requirement. Weller & Co. v. Camp, 52 South. 929, 930, 169 Ala. 275, 28 L. R. A. (N. S.) 1106.

"Certainty in an indictment" means that the facts constituting the basis of the prosecution must be stated with such a degree of explicitness and detail that the accused may understand without reasonable hesitation exactly what charge he is called upon to meet and may prepare his defense with a view thereto; that he may be entitled to plead the judgment in bar of a second prosecution for the same offense; and that the court may be informed of the facts alleged so as to determine whether they are sufficient in law to support a conviction, should one be had. These objections being general, there is no difference in respect to the "certainty" required between the common-law offenses and statutory crimes, though in the forms of pleading there may be important differences. An indictment under Code 1899, c. 32, § 19, for keeping and maintaining a common and public nuisance, which alleges merely that the defendant "in the house and building in said city knowingly and unlawfully permitted intoxicating liquors to be sold and vended contrary to law," was insufficient. State v. Parkersburg Brewing Co., 45 S. E. 924, 925, 53 W. Va. 591 (quoting and adopting Black, Intox. Liq. § 437).

CERTIFICATE

See Beneficiary Certificate; False Certificate; Fraudulent Certificate; Gold Certificate; Improvement Certificate; Land Certificate; Patent Certificate; Registration Certificate; Tax Certificate; Without a Certificate.

A "certificate" is "a writing giving assurance that a thing has or has not been done; * * * that a fact exists or does not exist." Cook v. Ziff Colored Masonic Lodge, No. 119, 96 S. W. 618, 620, 80 Ark. 31 (quoting and approving definition in Anderson's Law Dict.).

A "certificate" is defined as "a written testimony to the truth of any fact; a written declaration legally authenticated"; and as "a writing giving assurance that a thing has or has not been done, that an act has or has not been performed." Popularly the term "certificate" would import a document in which the officer issuing the same purports to state on his own authority that certain acts have been done. Dolan v. United States, 133 Fed. 441, 449, 69 C. C. A. 274 (quoting and adopting the definitions in Webster's and Anderson's Law Dict.).

A "certificate" is, strictly speaking, a certain assurance of that which it states. A writing certifying that a person therein named is competent to pay a certain sum and recommending him as possessing credit to that extent is as to the competency of the person to pay a certificate and as to his credit a recommendation. Lord v. Colley, 6 N. H. 99, 103, 25 Am. Dec. 445.

Under Civ. Code 1895, §§ 5526, 5541, providing that exceptions pendente lite must be not only tendered within the time prescribed by statute but, if allowed in the trial court, also "certified" to be true by the judge and ordered to be placed on the record, merely granting leave to file a paper or ordering that it be made a part of the record does not amount to a "certificate" verifying the case. Binyard v. State, 55 S. E. 498, 126 Ga. 635 (citing Howard v. Chamberlin, 64 Ga. 684, 694, and Nacoochee Hydraulic Mining Co. v. Davis, 40 Ga. 309).

A document made by a deputy surveyor, which is usually called a survey, is in fact a certificate under his hand that he has surveyed such and such a tract for the person named, and such a document is properly termed a "certificate." General Proprietors Eastern Division of New Jersey v. Force, 68 Atl. 914, 928, 72 N. J. Eq. 56.

An instrument issued by a lodge and denominated therein a "certificate," but which was a perfectly plain written engagement to pay a certain sum of money, absolutely and unconditionally, within a specified time, contained all the requisites of a promissory note and should be deemed such. Greenwood Lodge No. 135, Ancient and Accepted Masons, v. Priebatsch, 35 South. 427, 83 Miss. 120.

A certificate in shorthand attached to the shorthand report of a trial, signed by the judge and reporter, and filed with the clerk, is not a certificate within Code, §§ 3675, 3749, 3752, 3753, requiring the report of trial to be certified by the judge and reporter, etc., shorthand characters not being "writing." Howerton v. Augustine, 132 N. W. 814, 815, 153 Iowa, 17.

The word "certificate," as used in Act March 11, 1903, relating to the appropriation of public waters, and regulating the issuance of a certificate and license after inspection by the state engineer, applies to the paper to be issued upon proof of the completion of the works. Idaho Power & Transp. Co. v. Stephenson, 101 Pac. 821, 823, 16 Idaho, 418.

"A 'certificate' under seal, when invested with legal force and effect, is a solemn instrument, and ought to be complete, certain, and final in itself, without any collateral addition or commentary. Its very form and character as a certificate presuppose that it has the verification and protection of the authenticating signature and seal. Any matter extraneous, that is, not contain-

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ed in the body of the instrument, has not this verification and protection." Merrell v. Tice, 104 U. S. 557, 561, 26 L. Ed. 854.

A "certificate" of a justice of an acknowledgment by the mortgagee of an instrument reciting payment and satisfaction of a mortgage canceling and discharging the same and releasing and quitclaiming to the mortgagor the premises conveyed, is a "certificate" in relation to a matter wherein such certificate may be received as legal proof within the meaning of Gen. St. 1860, c. 162, §§ 1, 2, making the forging and uttering of such certificate a punishable offense. Meserve v. Commonwealth, 137 Mass. 109, 111.

A map on which a deceased surveyor, who was not acting in any public station or interest, had stated in writing the measurements of a mill dam has no validity as a "certificate" so as to be admissible as original evidence in a private controversy, and the calling it a certificate cannot change its character or clothe it with official solemnity. Runk v. Ten Eyck, 24 N. J. Law, 756, 761, 762.

A United States Land Office receiver's receipt for purchase money of lands preempted is a sufficient "certificate" under Code Civ. Proc. § 1925, to constitute prima facie evidence of title, though it does not contain the word "certify." Witcher v. Conklin, 24 Pac. 302, 84 Cal. 499.

Laws 1841, c. 44, § 6, required every notary public to record at length all acts, protests, and other things by him noted or done in his official capacity, and required that all copies or certificates by him granted should be under his hand and notarial seal. Section 12 made the protest of any foreign or inland bill or note, duly certified by any notary under his hand and official seal, legal evidence of the facts stated in such protest, etc. Held, that the word "certificate" in section 6 is equivalent to the word "protest" in section 12, when it is under the hand and seal of the notary. Ticonic Bank v. Stackpole, 41 Me. 302, 305.

The warehouse receipts authorized to be issued under the State Warehouse Act (Laws 1912, p. 707) are not "scrip, certificates, or other evidence of state indebtedness" within the meaning of Const. art. 10, § 7, restricting the issuance of such paper. State ex rel. Lyon v. State Warehouse Commission, 75 S. E. 392, 396, 92 S. C. 81.

As judgment

See Judgment.

As record

See Record.

As personal property

Clearing house certificate as personal property, see Personal Property.

Land certificate as personal property, see Personal Property.

Warrant

A mere "warrant" locatable on any public land cannot be considered as the equivalent of a "certificate of entry" or receiver's receipt showing that the applicant has paid for a particular tract of land and is entitled to a patent therefor. J. W. Frellsen & Co. v. Crandall, 45 South. 558, 559, 120 La. 712.

Under Sand. & H. Dig. Ark. § 5273, which provides that each city council shall cause to be provided for its clerk's office a seal, which seal shall be affixed to all transcripts, orders, or certificates which it may be necessary or proper to authenticate under the provisions of this act, a city warrant is not a "certificate." Condon v. City of Eureka Springs, 135 Fed. 566, 571.

CERTIFICATE HOLDER

In a certificate in an Illinois Mutual Benefit Society authorizing the "certificate holder" to surrender his certificate by paying the association all claims thereunder and returning the same to the secretary, the term "certificate holder" represented the member and not the beneficiary. Hence the beneficiary had no vested interest in the certificate under the Illinois law. Franklin Life Ins. Co. v. Morrell, 106 S. W. 680, 681, 84 Ark. 511.

CERTIFICATE OF CITIZENSHIP

A certified copy of the record of a court showing the admission of an alien to citizenship constitutes a "certificate of citizenship," within the meaning of Rev. St. §§ 5425, 5427, making it a crime to use, or aid and abet another in using, false certificates of citizenship for purposes therein specified. Dolan v. United States, 133 Fed. 440, 447, 69 C. C. A. 274.

CERTIFICATE OF DEPOSIT

A "certificate of deposit" is a subsisting chose in action, and represents the fund it describes, so that a delivery of it, as a gift, constitutes an equitable assignment of the fund. Philpot v. Temple Banking Co., 60 S. E. 480, 483, 3 Ga. App. 742.

As negotiable instrument

A certificate of deposit in ordinary form is a "negotiable instrument," within the provisions of the Pennsylvania negotiable instrument act of 1901 (P. L. 194). Forrest v. Safety Banking & Trust Co., 174 Fed. 345, 347.

Under Laws 1905, p. 243, providing that an instrument, to be negotiable, must be in writing and signed by the maker or drawer, contain an unconditional promise or order to pay a sum certain in money, be payable on demand or at a fixed future time, be payable to order or to bearer, and where the instrument is addressed to a drawee he must be indicated with reasonable certainty, a certificate of deposit issued by a bank, payable to the order of the payee, is a "negotiable instrument." Dickey v. Adler, 127 S. W. 593, 594, 143 Mo. App. 326.

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As promissory note

See Promissory Note.

CERTIFICATE OF ELECTION

The term "commission," as used in Code Civ. Proc. § 1127, providing that whenever an election is annulled or set aside by the judgment of a superior court, and no appeal has been taken within ten days thereafter, the commission, if any is issued, is void and the office vacant, included a "certificate of election" issued to petitioner as superintendent of schools, so that, on no appeal being taken within ten days after judgment, declaring petitioner's certificate of election invalid in a contest regularly instituted, as authorized by Code Civ. Proc. §§ 1111–1127, the judgment rendered petitioner's certificate finally ineffectual as evidence of title to the office. Wilson v. Fisher, 82 Pac. 421, 442, 148 Cal. 13 (citing People ex rel. Finigan v. Perkins, 26 Pac. 245, 85 Cal. 509, 512; People ex rel. Barker v. Shaver, 59 Pac. 784, 127 Cal. 347, 350; Bledsoe v. Golgan, 70 Pac. 924, 138 Cal. 34, 36, 39).

CERTIFICATE OF IDENTIFICATION

The certificate of the trial judge certifying to the different papers and documents used upon a motion to dismiss an appeal from a justice's court, though incorporated in the record and designated as a bill of exceptions, is not strictly a bill of exceptions, but is a certificate of identification under the statute as to the papers used upon the motion, and being such, it was unnecessary to serve the same upon counsel for respondent. Libby v. Spokane Valley Land & Water Co., 98 Pac. 715, 717, 15 Idaho, 467.

CERTIFICATE OF INSURANCE

In benefit society as life insurance contract, see Life Insurance.

As property, see Property.

CERTIFICATE OF NOMINATION

The phrase "certificate of nomination for a new party," as used in Laws 1907, c. 52, § 40, providing for the filing of "certificate of nomination for a new party," construed to mean the necessary certificate when nominated by convention and not by direct primary. Morrissey v. Wait, 138 N. W. 186, 188, 92 Neb. 271.

An act incorporating a city providing for caucuses for the selection of candidates to be voted for at the first election, and that all "certificates of nomination" of candidates shall be filed at least nine days before the first election, merely provides for the filing of certificates of nomination at caucuses; and Gen. Laws 1909, c. 11, § 18, providing for the filing of "certificates of nomination" and "nomination papers," governs as to the filing of nomination papers, since the statutes by long usage make certificates of nomination refer to nominations by caucuses, while nomination papers, relate to nominations by individual voters. Greenough v. Waterman, 75 Atl. 865, 866, 30 R. I. 447.

CERTIFICATE OF ORDER OF TRANSFER

As used in a statute relating to appeals requiring "certificate of the order of transfer," those words probably meant a certified copy of transfer. Finley v. Chamberlin, 35 South. 1, 3, 46 Fla. 581.

CERTIFICATE OF PROBABLE CAUSE

"Originally a supersedeas was a writ directed to an officer commanding him to desist from enforcing the execution of another writ which he was about to execute or which might come into his hands. In modern times the term is often used synonymous with a stay of proceedings which of itself suspends the enforcement of a judgment." In Oregon a writ of supersedeas is unknown, though a "certificate of probable cause" issued by the trial judge or by a justice of the Supreme Court is tantamount thereto, the effect of which is to suspend the enforcement of the judgment until it can be reviewed on appeal. State v. Small, 90 Pac. 1110, 1111, 49 Or. 595 (quoting Dulin v. Pac. Wood & Coal Co., 33 Pac. 123, 98 Cal. 304, 306; citing State v. Armstrong, 74 Pac. 1025, 45 Or. 25).

CERTIFICATE OF SALE

The informal instruments executed by the tax collector under La. Act No. 42 of 1871, § 62, are known in the law of tax sales as "certificates of sale" in contradistinction to "deeds of sale." Such an instrument was not a title but was mere inchoate title. Gauthreaux v. Theriot, 46 South. 892, 898 121 La. 871, 126 Am. St. Rep. 328 (citing Cooley, Tax. [3d Ed.] p. 992).

CERTIFICATE OF STOCK

"Certificates of stock" are the evidence representing shares of stock which are choses in action. Talbot v. Talbot, 78 Atl. 535, 543, 32 R. I. 72, Ann. Cas. 1912C, 1221.

"Certificates of stock" are mere evidences that the holders thereof have invested the sums called for in the certificates in the enterprise. Rider v. John G. Delker & Sons Co., 140 S. W. 1011, 1012, 145 Ky. 634, 39 L. R. A. (N. S.) 1007.

A stock certificate is merely evidence, and does not itself constitute the right of a stockholder. New York & Eastern Telegraph & Telephone Co. v. Great Eastern Telephone Co., 69 Atl. 528, 531, 74 N. J. Eq. 221.

A "certificate of stock" is the written evidence of the right of a party to a pro rata share of the net profits of a corporation when declared, or to a like share of the assets after payment of its debts in case of dissolution of the corporation. Beckwith v. Galice Mines Co., 93 Pac. 453, 456, 50 Or. 542, 16 L. R. A. (N. S.) 723.

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"Shares of stock" represent an interest in the earnings and property of the corporation and a "certificate" is not stock itself, but only a convenient representation of it, as one may be a stockholder without having a certificate issued to him. In re Culver's Estate, 123 N. W. 743, 744, 145 Iowa, 1, 25 L. R. A. (N. S.) 384.

A "stock certificate" is merely a muniment or representative of title. The stock which it represents exists apart from the certificate, and its existence is contemplated to endure so long as the corporation continues. Zander v. New York Security & Trust Co., 70 N. E. 449, 451, 178 N. Y. 208, 102 Am. St. Rep. 492.

A "stock certificate" is merely evidence and does not itself constitute the right of a stockholder. New York & Eastern Telegraph & Telephone Co. v. Great Eastern Telephone Co., 69 Atl. 528, 531, 74 N. J. Eq. 221.

A stock certificate is a written acknowledgment by a corporation of the interest of the shareholder in the corporate property, and is evidence of his ratable share in the distribution of the assets of the corporation on the winding up of its business. Markle v. Burgess, 95 N. E. 308, 309, 176 Ind. 25.

A "certificate of stock" representing the share of the owner may be in the hands of some person other than the debtor or the corporation, but the certificate is not the share itself. For most purposes it is not regarded as property but only as evidence of the existence and ownership of the shares. Lipscomb's Adm'r v. Condon, 49 S. E. 392, 393, 395, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938 (citing 10 Cyc. 588; Cecil Nat. Bank v. Watsontown Bank, 105 U. S. 217, 222, 26 L. Ed. 1039; Crumlish's Adm'r v. Shenandoah Val. R. Co., 22 S. E. 90, 40 W. Va. 627; Pacific Nat. Bank v. Eaton, 11 Sup. Ct. 984, 141 U. S. 227, 234, 35 L. Ed. 702; First Nat. Bank of Davenport v. Gifford, 47 Iowa, 575; Brigham v. Mead, 92 Mass. [10 Allen] 245; Curtis v. Crossley, 45 Atl. 905, 59 N. J. Eq. 358, 361; Agricultural Bank v. Burr, 24 Me. 256; Rio Grande Cattle Co. v. Burns, Walker & Co., 17 S. W. 1043, 82 Tex. 50, 56).

A "certificate of stock" is tangible personal property. Hence it may be recovered by an action in replevin. Opperman v. Citizens' Bank, 85 N. E. 991, 992, 44 Ind. App. 401 (citing Smith v. Downey, 34 N. E. 823, 35 N. E. 568, 8 Ind. App. 179, 52 Am. St. Rep. 467; Read v. Brayton, 38 N. E. 261, 143 N. Y. 342; 2 Cook, Corp. [4th Ed.] § 577).

A "certificate of stock" is, from one point of view, a mere muniment of title like a title deed. It is not the stock itself but evidence of the ownership of the stock; that is to say, it is a written acknowledgement by the corporation of the interest of the shareholder in the corporate property and franchises. It operates to transfer nothing from the corporation to the shareholders but merely affords to the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock but merely written evidence of the ownership of shares. The certificate, therefore, has value in itself only as evidence, and, apart from the shares which it represents, it is utterly worthless. St. 1898, § 1751, enacts that the capital stock of a corporation, divided into shares, shall be deemed personalty, and, when certificates thereof are issued, such shares may be transferred by indorsement and delivery of the certificate. Section 1753 (Laws 1899, c. 193, § 1) provides that no corporation shall issue any stock or certificate of stock, except in consideration for money, labor, or property actually received equal to the par value thereof, and that all stocks issued contrary to such provision shall be void. Section 1773 contemplates the transaction of business by a corporation with its stockholders before it is at liberty to do so with others; and section 4436 punishes the issuance of a false certificate of stock. Held, that the words "issue any stock" and "all stocks issued," in section 1753, referred to certificates of stock as distinguished from the stock itself, and that hence the section did not deprive stock subscribers for less than par from having equitable relief against promoters who had defrauded the coporation. Pietsch v. Krause, 93 N. W. 9, 11, 116 Wis. 344 (quoting and adopting definition in 1 Cook, Stock, Stockh. & Corp. Law, § 14).

A certificate of corporate stock is merely evidence of ownership, and the situs of the interest which it represents must for the purposes of administration be in the state in which the corporation is organized and has its place of business. Warrior Coal & Coke Co. v. National Bank of Augusta, Ga. (Ala.) 53 South. 997, 1000.

As fund

See Fund.

As money

See Money.

As negotiable instruments

A "certificate of stock" is not a "negotiable instrument." Talcott v. Standard Oil Co., 134 N. Y. Supp. 617, 623, 149 App. Div. 694.

"Certificates of stock" passing from hand to hand, like negotiable paper, have the character of negotiability. Bassett v. Perkins, 119 N. Y. Supp. 354, 355, 359, 65 Misc. Rep. 103 (citing Am. Exch. Nat. Bank v. Woodlawn Cemetery, 87 N. E. 107, 194 N. Y. 126; American Exch. Nat. Bank v. Woodlawn Cemetery, 87 N. E. 107, 194 N. Y. 116; 1 Dos Passos, Stockbrokers, 705).

" 'Certificates of stock' in a corporation are but mere evidences of the holder's right to a given share in the franchises and property of the corporation and are not negotiable

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instruments." Stock represented by certificates is subject to assessment for subscription calls, though in the hands of purchasers having no knowledge that the subscription is unpaid. O'Dea v. Hollywood Cemetery Assn., 97 Pac. 1, 8, 154 Cal. 53 (quoting and adopting definition in Barstow v. Savage Min. Co., 1 Pac. 349, 64 Cal. 388, 49 Am. Rep. 705; Graves v. Mono Lake Hydraulic Mining Co., 22 Pac. 665, 81 Cal. 304; Craig v. Hesperia L. & W. Co., 45 Pac. 10, 113 Cal. 7, 35 L. R. A. 306, 54 Am. St. Rep. 316).

As security

See Security.

Share of stock distinguished

See Share of Stock.

CERTIFICATE TO BILL OF EXCEPTIONS

According to Civ. Code 1895, § 5533, the certificate to the bill of exceptions is the writ of error, and after the trial judge has signed the certificate he loses jurisdiction of the case and is without power to correct the same or give an additional certificate. Jones v. State, 56 S. E. 453, 454, 127 Ga. 281 (citing Woolf v. State, 80 S. E. 796, 104 Ga. 536).

CERTIFY

See Duly Certified.

"To 'certify' is to testify to in writing; to make known or establish as a fact. The word is not essential to a certificate." Cook v. Ziff Colored Masonic Lodge, No. 119, 96 S. W. 618, 620, 80 Ark. 31 (quoting and approving definition in Anderson's Law Dict.); Chadbourne v. Hartz, 101 N. W. 68, 69, 93 Minn. 233.

As used in Rev. St. 1895, art. 2284, as amended by Acts 30th Leg. 1907, c. 91, requiring the officer before whom a deposition has been taken to certify on the envelope inclosing the deposition for its return that he in person deposited same in the mail for transmission, the word "certify" means that the certificate indorsed on the envelope must be authenticated by the officer's seal. Hartford Fire Ins. Co. v. Becton, 125 S. W. 883, 884, 103 Tex. 236.

The word "certify," as used in a paper reciting, "This is to certify that the notes held by me against A. shall be null and void after my death and noncollectible," seems quite clearly to indicate absence of idea of dealing, one man with another, contractually, but instead a purpose to proclaim to whom it may concern that the declarant then had a certain intention, namely, that his son's notes should be void after his death; and hence such paper was testamentary merely in character and was accordingly revoked by will of later date, disposing of testator's entire property. Templeton v. Butler, 94 N. W. 306, 307, 117 Wis. 455.

The condition of a bond was that the principal should obey all orders and regulations of a voluntary association of which he was a member. The bond further provided for a service upon the principal of a copy of any decision, order, or regulation of which he was declared to be in default. The principal was expelled from the association in proceedings regularly conducted against him. The surety paid the penalty of the bond, and brought an action against the principal to recover the amount thus paid. The principal claimed in this action that a certified copy of the proceedings had not been served upon him as provided in the bond. An official notification in writing had been given to him of the action of the board of governors signed by the secretary. Held, that the notice was sufficient under the terms of the bond, inasmuch as to certify means to testify in writing; to make a declaration about in writing; to make attestation in writing; to give certain information of a fact in writing. Title Guaranty & Trust Co. of Scranton v. Hildebrand, 41 Pa. Super. Ct. 136, 140.

The words to be "certified by some officer authorized to administer oaths," as used in Rev. St. 1895, art. 4218j, requiring the purchasers of school lands to make proof of occupancy by affidavit, corroborated by the affidavits of three disinterested and credible persons to be "certified by some officer authorized to administer oaths," mean that the officer is to certify that the corroborating affiants are "disinterested and credible persons." Logan v. Curry, 69 S. W. 129, 131, 95 Tex. 664.

Under an ordinance requiring that the street committee of a village should "certify" to a bill of costs for the construction of a public improvement, the marking of the bill of costs "approved" did not amount to a certification of the bill. People v. Patton, 79 N. E. 51, 52, 223 Ill. 379.

CERTIFIED CHECK

A "certified check" is one drawn by a depositor upon funds to his credit in a bank, which a proper officer of the bank certifies will be paid when duly presented for payment. Holland v. Mutual Fertilizer Co., 70 S. E. 151, 153, 8 Ga. App. 714.

Under the conditions of a street improvement contract requiring bidders to deposit a "certified check" with the bid, the deposit by a bidder of a cashier's check on an accredited bank to the order of the town, indorsed by the bidder, is a substantial compliance; there being no substantial distinction between a cashier's check so indorsed and a certified check for the purpose of qualifying the bidder. Hornung v. Town of West New York, 81 Atl. 1116, 82 N. J. Law, 266.

The word "certify," as applied to bank checks, indicates that certain words have

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been written or printed on a check, and that the check has passed from the custody of the bank into the hands of some other party, and that thereby the person certifying created an obligation of the bank. United States v. Heinze, 161 Fed. 425, 427.

The "certifying of a check" is equivalent to an acceptance of a bill of exchange payable on demand, whereby the sum so specified is immediately transferred from the drawer's account, thereby making the bank primarily liable to a bona fide holder of the check for value. State v. Miller, 85 Pac. 81, 82, 47 Or. 562, 6 L. R. A. (N. S.) 365.

In the transaction of the business of a bank, and in the transaction of the business of a depositor, it sometimes becomes desirable that the depositor, in addition to drawing this order or check against the fund to his credit in the bank, desires that the person to whom the check may be delivered shall be authoritatively advised and informed by the bank that the depositor has to his credit in the bank an amount of money equal to the amount of the check which he thus draws. This act of authoritative information that the maker of the check has such funds to his credit in the bank is, according to the custom of banks, usually evidenced by an indorsement on the face of the check, signed by some competent officer of the bank, declaring that the check is good. This proceeding is called the "certification" or "certifying" of the check and operates to add to the liability of the maker of the check for its amount the liability of the bank for a like amount, for it is a contractual assurance by the bank that funds to that amount are on deposit in the bank to the credit of the maker, and that the bank will hold such funds, equaling the amount of the check, to be used solely for the satisfaction and payment of the check. Chadwick v. United States, 141 Fed. 225, 229, 72 C. C. A. 343.

The "certification" of a check is to indicate the assent of the certifying bank to the request of the drawer of the check that the drawee will pay to the holder the sum mentioned. Security Bank of New York v. National Bank of the Republic, 67 N. Y. 458, 462, 23 Am. Rep. 129.

CERTIFIED COPY

Copy as meaning, see Copy.

To "certify" is to testify in writing. A sheriff leaving with the holder of property a copy of a warrant of attachment with the title of the action and the words "a copy" "warrant of attachment" indorsed thereon complied with Code Civ. Proc. § 649, providing that property may be attached by leaving a certified copy of the warrant, etc. Courtney v. Eighth Ward Bank, 35 N. Y. Supp. 1049, 1050, 14 Misc. Rep. 386.

Since the town recorder is the official custodian of the town records, his certificate to the correctness of a copy of a resolution is sufficient, in view of Code, §§ 4630, 4635, relating to the effect of documents as evidence which are duly authenticated and certified by public officers, and section 4643, raising a presumption of genuineness of the signature of such officers, and the copy of the resolution filed was sufficiently certified by the town recorder; to "certify" a document being to affirm or assert in writing its correctness or identity, and to "attest" being to affirm to be true or genuine. Sawyer v. Lorenzen & Weise, 127 N. W. 1091, 1093, 149 Iowa, 87, Ann. Cas. 1912C, 940 (citing 2 Words and Phrases, p. 1033).

CERTIORARI

The "writ of certiorari," as known in Delaware, was a common-law writ issued from a superior court, directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case. Rash v. Allen, 76 Atl. 370, 374, 1 Boyce (Del.) 444.

"Certiorari" at common law was an original writ issuing out of Chancery, or the King's Bench, commanding agents or officers of inferior courts to return the record of a cause pending before them, so as to give the party more sure and speedy justice. Cushman v. Commissioners' Court of Blount County, 49 South. 311, 312, 160 Ala. 227.

A writ of "certiorari" is essentially the commencement of a proceeding independent of that to be reviewed. It is a remedy afforded by law to enable one who has been, or may be, injured by a determination of a judicial nature, good merely in form, but void for jurisdictional error to vacate it. State ex rel. Milwaukee Medical College v. Chittenden, 107 N. W. 500, 507, 127 Wis. 468.

"Certiorari" has several offices, among which is that of supplying defects of justice in cases obviously entitled to redress, and yet unprovided for by the ordinary forms of proceedings. It is especially applicable in cases where inferior boards, officers, or tribunals exceed their authority, and no method of appeal has been provided by statute. It has been repeatedly invoked in this state for the review of acts of boards of supervisors and is appropriate where the board of supervisors of a county exceeds its power providing for the construction of a bridge over a stream or on the boundary between it and the adjacent county. Bremer County v. Walstead, 106 N. W. 352, 354, 130 Iowa, 164 (citing 4 Encyc. Pl. & Pr. 9, Lamansky v. Williams, 101 N. W. 445, 125 Iowa, 578; Way v. Fox, 80 N. W. 405, 109 Iowa, 340; Hildreth v. Crawford, 21 N. W. 667, 65 Iowa, 339; Goetzman v. Whitaker, 46 N. W. 1058, 81 Iowa, 527; Richman v. Board, 26 N. W. 24, 70 Iowa, 627; Herrick v. Carpenter, 6 N. W. 574, 54 Iowa, 340).

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"Certiorari" is the great corrective writ by which the superior courts exercise a supervisory power over inferior courts, tribunals, and boards which exercise judicial functions and by which their records and proceedings are brought under review, to the end that all abuses of power may be corrected, and that they may be held strictly to the jurisdiction marked out for them and prevented from transcending the powers by law conferred upon them. The State Railroad Commission is an inferior tribunal within the contemplation of Rev. Code 1892, § 90, and is subject to the supervision and control of the superior courts of the state through the writ of "certiorari." Gulf & S. I. R. Co. v. Adams, 38 South. 348, 349, 85 Miss. 772 (citing Yazoo & M. V. R. Co. v. Adams, 25 South. 355, 77 Miss. 777).

The writ of certiorari lies only to correct errors in law, and not to review the decision of a subordinate tribunal of a question of fact submitted to it for judgment. Nelson v. Board of Engineers of Portland Fire Department, 75 Atl. 64, 66, 105 Me. 551.

"Certiorari, except as it has been enlarged and extended by statute, is a common-law writ. In its office it is confined to reviewing proceedings of inferior courts, officers, boards and tribunals, where there is no other remedy provided by statute. The writ in terms directs inferior courts, officers, boards, or tribunals to certify to the superior court the record of their proceedings for inspection and review, and the writ can run only to persons or tribunals that have acted judicially in making the determination sought to be reviewed." People ex rel. Rochester Tel. Co. v. Priest, 88 N. Y. Supp. 11, 95 App. Div. 44.

The office of the writ of certiorari is to provide for a review of the judicial action of inferior courts, special tribunals, public officers, and bodies exercising judicial functions. People ex rel. Republican & Journal Co. v. Wiggins, 92 N. E. 789, 790, 199 N. Y. 382.

Where the record on an appeal from a justice's court to the superior court contained a statement of the case, the superior court was necessarily called upon to determine the nature of the appeal (that is, as to whether it was on both the law and facts or on the law alone and whether a trial de novo was warranted); and, the superior court having jurisdiction to decide that question, "certiorari" will not lie to review the conclusion reached. "Such writ cannot be converted into a writ of error merely because there is no appeal. 'It may not be used to correct errors or irregularities within the jurisdiction of the inferior tribunal. It is too well settled to require the citation of authorities that the writ of review runs to inferior tribunals, boards, or officers exercising judicial functions solely to correct errors in excess of jurisdiction, or, in other words, to confine such tribunals and officers exercising judicial functions to their proper jurisdiction.'" Smith v. Superior Court of Napa County, 84 Pac. 54–56, 2 Cal. App. 529 (quoting and adopting Borchard v. Sup'rs of Ventura county, 77 Pac. 708, 144 Cal. 10).

Certiorari is a prerogative writ by which the Supreme Court exercises a jurisdiction to supervise the proceedings of inferior tribunals and governmental establishments, including municipal corporations, and the adjudication of the Supreme Court setting aside municipal proceedings operates in rem to nullify what has been unlawfully done to obliterate the record thereof, and to deprive all parties of any justification afforded by the record; the parties being the state on one hand and the municipality or other custodian of the record on the other. Specht v. Central Passenger Ry. Co. (N. J.) 68 Atl. 785, 788.

"Certiorari" will not lie where title to office and its emoluments are involved. State ex rel. Rawlinson v. Ansel, 57 S. E. 185, 186, 76 S. C. 395, 11 Ann. Cas. 613.

The office of the writ of certiorari is to review proceedings and judgments of inferior courts or tribunals acting judicially, where no appeal or other adequate remedy is afforded. State ex rel. Ross v. Posz, 118 N. W. 1014, 1015, 106 Minn. 197.

The writ of certiorari is simply the medium through which the judgment in a case pending before an inferior judicatory may be reviewed in the superior court. Where the judgment of a judge of a city court, awarding the custody of a minor child, is carried to the superior court by "certiorari," the case is still "a habeas corpus" case in the latter court, and the judgment of that court can be reviewed in this court only upon a "fast" bill of exceptions. The decision in Mansfield v. State, 20 S. E. 249, 94 Ga. 74, is in principle controlling. Weaver v. Thompson, 74 S. E. 901, 11 Ga. App. 132.

"The office of the writ of 'certiorari' is to review erroneous verdicts and judgments by some inferior judicatory or person lawfully exercising judicial power. It does not lie to review either a void judgment by a court legally constituted or any pretended judgment by an individual or body of individuals assuming to exercise judicial powers without lawful authority." W. D. Simpkins & Co. v. Hester, 59 S. E. 322, 3 Ga. App. 160.

Except where altered by statute, "certiorari" is an extraordinary common-law remedy. Originally it could be invoked only to review judicial proceedings and to correct errors of law apparent on admitted and established facts. The office of the writ is to bring to the superior court for review the record and proceedings of an inferior court,

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an officer, or tribunal, exercising judicial functions, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors, if any, corrected. It is not essential that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are quasi judicial. It is enough if the officer or tribunal whose act is sought to be reviewed, acts judicially in making the decision, whatever may be the public character of the officer or tribunal. Wheeling & E. G. R. Co. v. Town of Triadelphia, 52 S. E. 499, 503, 58 W. Va. 487, 4 L. R. A. (N. S.) 321.

Authority to issue a writ of "certiorari" as an original and independent proceeding to review a conviction in an inferior federal court is not found in the grant to the Circuit Courts of Appeals by Act March 3, 1891, c. 517, § 12, 26 Stat. 826, of the powers specified in Rev. St. § 716, which authorizes certain federal courts to "issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions," where the only question in the case was whether the punishment of the offense charged was within the jurisdiction of the federal courts, and the case was put in proper condition for a review on writ of error. Whitney v. Dick, 26 Sup. Ct. 584, 586, 202 U. S. 132, 50 L. Ed. 963.

As discretionary writ

Duty of "certiorari" is not a writ of right but is reached only in the discretion of the court as an extraordinary process when other and ordinary remedies are inadequate. State ex rel. Skogstad v. Anderson, 109 N. W. 981, 982, 130 Wis. 227 (citing Harris, Certiorari, § 43).

A "writ of certiorari" is not a writ of right, and whether it should be issued upon the presentation of a petition therefor is in a large measure discretionary with the court. While this is not an arbitrary discretion, to justify issuing the writ good cause must be shown by the petition, otherwise the writ should be denied. City of Chicago v. Condell, 79 N. E. 954, 955, 224 Ill. 595 (citing Board of Sup'rs v. Magoon, 109 Ill. 142; Trustees of Schools of Township 21 v. School Directors of Union District, 88 Ill. 100; Commissioners of Mason & Tazewell Special Drainage Dist. v. Griffin, 25 N. E. 995, 134 Ill. 330; Hyslop v. Finch, 99 Ill. 171).

A "writ of certiorari" is not a writ of right but will be granted only in the discretion of the court, where it appears that the inferior tribunal has committed some error of law that has caused substantial harm to the petitioner, who has not been guilty of laches in seeking his remedy; Bennett v. Randall, 67 Atl. 525, 526, 28 R. I. 360, 125 Am. St. Rep. 743 (citing McAloon v. License Com'rs of Pawtucket, 46 Atl. 1047, 1048, 22 R. I. 191, 198; 4 Ency. Pl. & Pr. 34, footnote 1; 2 Spelling, Extr. Rd. § 1897; Knapp v. Heller, 32 Wis. 467; Ex parte Buckley, 53 Ala. 42; State ex rel. Grady v. Lockhart, 52 Pac. 315, 18 Wash. 531, 535; People v. Mayor, etc., of City of New York, 5 Barb. [N. Y.] 43, 49).

"Certiorari" is not a writ of right and is only sustainable where there is no other adequate remedy. State ex rel. Fairbanks v. Ayers, 91 S. W. 398, 116 Mo. App. 90.

Limited to jurisdictional questions

Certiorari is not limited to reviewing questions of jurisdiction, but lies to review any error appearing on the face of the record which cannot be reached by appeal or writ of error. State ex rel. Iba v. Mosman, 133 S. W. 38, 41, 231 Mo. 474.

Certiorari runs against individual tribunals not to review their proceedings, but only to determine whether they have acquired, and have not exercised, their jurisdiction. Conover v. Gatton, 96 N. E. 522, 524, 251 Ill. 587.

A writ of "certiorari" reaches only jurisdictional errors, when sued out to test the validity of some judicial or quasi judicial proceeding. It has no other use except to bring before the court a record material to be considered in exercising jurisdiction in deciding a matter presented by some other writ. Certiorari teaches and requires the production of a judicial or quasi judicial record, but never the body of any person, while a writ of habeas corpus reaches the latter but not the former. Gaster v. State, 94 N. W. 787, 788, 117 Wis. 668, 98 Am. St. Rep. 968.

The office of the writ of "certiorari" is not so much to determine the valid existence of the tribunal, board, or officer, while acting in a judicial capacity, as it is to determine whether the jurisdiction of such tribunal, board, or officer has been exceeded. "The character of the act or determination sought to be reviewed, rather than the tribunal or officer by which the act or determination is made, is the test for determining whether the writ should be issued, for it is only a determination which is made 'when exercising judicial functions' that can be reviewed." Beaumont v. Samson, 90 Pac. 839, 840, 5 Cal. App. 491 (quoting and adopting definition in Quinchard v. Board of Trustees, 45 Pac. 856, 113 Cal. 664, 668).

Under Code Civ. Proc. § 1068, providing that "certiorari" may issue where the inferior court has exceeded its jurisdiction, an order of the superior court canceling an order admitting to citizenship cannot be reviewed by certiorari, if the lower court had jurisdiction, even though the order was rendered upon insufficient evidence or in some

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irregular method not going to the jurisdiction, but under Code Civ. Proc. § 473, authorizing a motion to set aside a judgment only in case it is made within ten months after judgment is taken, where a motion to annul an order admitting an alien to citizenship was made more than three years after the original order, the appearance of the naturalized citizen and his consent to the granting of the motion would not give the court jurisdiction. In re Tinn, 84 Pac. 152, 148 Cal. 773, 113 Am. St. Rep. 354.

Mandamus distinguished

Mandamus and "certiorari" rest on distinct and opposite principles. The former compels an unperformed ministerial duty, the latter reviews a performed judicial duty, while neither operates to control discretion. The former never goes to control judgment, while the latter never goes except to review and control judicial judgment. State ex rel. Rawlinson v. Ansel, 57 S. E. 185, 192, 76 S. E. 395, 11 Ann. Cas. 613.

Removes record only

The writ of "certiorari" in our system of jurisprudence brings up only the record proper of the tribunal to which it is addressed. It does not bring up the evidence on which the judgment of the trial court was founded. The office of a writ of certiorari is to give relief to an injured party in a cause when the trial court has acted without jurisdiction or in excess of its jurisdiction, or where it appears on the face of the record proper that the trial court rendered a judgment which it had no right in law to render. But the writ cannot be used as the substitute for an appeal or writ of error. State ex rel. Bentley v. Reynolds, 89 S. W. 877, 880, 190 Mo. 578 (citing State v. Kansas City, 14 S. W. 515, 89 Mo. 34; State ex rel. Harrison County Bank v. Springer, 35 S. W. 589, 134 Mo. 212; State ex rel. Kansas & T. Coal Ry. v. Shelton, 55 S. W. 1008, 154 Mo. 670, 50 L. R. A. 798; State ex rel. Ballew v. Woodson, 61 S. W. 252, 161 Mo. 444; State ex rel. Wabash R. Co. v. Bland, 67 S. W. 580, 168 Mo. 1).

"Certiorari" reviews only the legal aspect of facts appearing in the record. It does not permit an investigation into the matters outside of the record, or their consideration. Nor does it enable the court to give a full and complete hearing to all parties interested, and then by a proper mandate to carry its findings into effect. It is not the appropriate remedy to prevent anticipated wrong or injury. Bilsborrow v. Pierce, 112 N. W. 274, 275, 101 Minn. 271.

"The writ of 'certiorari' brings up nothing but the record of the tribunal to which it is directed and whose proceedings it is sought to review. It does not bring up the evidence taken by it, nor can such evidence be considered, though included in the return." School Dist. No. 2 v. Pace, 87 S. W. 580, 582, 113 Mo. App. 134 (citing Hannibal & St. J. R. Co. v. State Board of Equalization, 64 Mo. 294; State ex rel. Brennan v. Wallbridge, 62 Mo. App. 162).

As substitute for appeal

"Certiorari" cannot be used as a substitute for appeal, except in instances where the right of appeal has been unavoidably lost through no fault of the petitioner. It can only correct excess in jurisdiction, or an illegal proceeding, not reviewable otherwise, and like matters, and does not reach to the question of an alleged excessive punishment within limits of the penalty. Phillips v. State, 96 S. W. 742, 80 Ark. 200 (citing Burgett v. Apperson, 12 S. W. 559, 52 Ark. 213; McKay v. Jones, 30 Ark. 148; Carolan v. Carolan, 2 S. W. 105, 47 Ark. 511; Reese v. Cannon, 84 S. W. 793, 73 Ark. 605; Harris, Certiorari, § 44).

"Certiorari" is to give relief to an injured party when the court or a body charged to have acted has proceeded without jurisdiction or has exceeded its jurisdiction or has rendered a judgment or made an order not authorized by law; but this writ cannot be used as a substitute for appeal or writ of error. State ex rel. Smith v. Dykeman, 134 S. W. 120, 121, 153 Mo. App. 416.

"Certiorari" is a common-law writ, which issues, in the sound judicial discretion of the court, to an inferior court, not to take the place of a writ of error or an appeal, but to cause the entire record of the inferior court to be brought up for inspection in order that the superior court may determine from the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law. Seaboard Air Line Ry. Co. v. Ray, 42 South. 714, 715, 52 Fla. 634.

A "writ of certiorari" will not issue for the purpose of aiding a petition for a rehearing or for the purpose of correcting the record in any manner or form after decision on appeal, but under Burns' Ann. St. 1901, § 680, it will only issue to compel any inferior court, board, or officer exercising judicial functions, or other person, to certify to such court a full and complete transcript of the record and proceedings of any such tribunal, board, officer, or person, and the production of any paper, whenever it shall be necesary for the proper determination of any cause or proceeding pending before the Appellate Court. The writ cannot be used as a substitute for appeal. Ætna Life Ins. Co. v. Stryker, 73 N. E. 953, 76 N. E. 822, 78 N. E. 245, 38 Ind. App. 312 (citing Board of Com'rs of Marion County v. Center Tp., 2 N. E. 368, 7 N. E. 189, 105 Ind. 422, 444; Mansur v. Churchman, 84 Ind. 573).

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CERTIORARI BILL

"A 'certiorari bill' derives its name from a special writ of certiorari being prayed for the purpose of removing a cause already commenced in an inferior court of equity from that into the court of chancery. And the prayer of this bill is grounded upon a suggestion necessarily arising from one or some of the following circumstances: That by means of the limited jurisdictions of the court, or by reason that the cause is without the jurisdiction of the inferior courts, or that the witnesses live out of the jurisdiction, or that the defendants do and are not able by age or infirmity, or the distance of place, to follow the suit, or that upon some substantial reasons shown equal and impartial justice to the parties is not likely to be obtained in the inferior court—and for this purpose the bill should state the proceedings in the court below, the incompetency of that court to decide between and administer justice to the parties, and pray the writ of certiorari." Hyde v. Superior Court, 66 Atl. 292, 298, 28 R. I. 204 (quoting Harrison, Chan. pp. 100, 101).

CESSANTE RATIONE LEGIS, CESSAT ET IPSA LEX

The maxim, "Cessante ratione legis, cessat et ipsa lex," is especially true of rules grown up in jurisprudence. These rules are binding by authority of reason rather than by reason of authority. Hence, when the reason ceases, so also does the rule. Succession of Baker, 55 South. 714, 719, 129 La. 74, Ann. Cas. 1912D, 1181.

In Arkansas, where the common-law doctrine of livery of seisin is abolished by Kirby's Dig. §§ 736, 737, authorizing a conveyance of land whether held in possession or not, a deed executed by an original grantor after condition broken is equivalent to re-entry and is effectual to declare a forfeiture and to vest the title in the subsequent grantee; the case being a proper one for the application of the maxim "cessante ratione cessat ipsa lex." Moore v. Sharpe, 121 S. W. 341, 344, 91 Ark. 407, 23 L. R. A. (N. S.) 937.

"The maxim, 'Cessante ratione legis, cessat ipsa lex,' is of frequent application and is a sound rule of interpretation." It follows from applying this rule that a patient who, by failure to object to the testimony of physicians on the trial of a civil action, has waived his privilege cannot thereafter invoke the privilege on the trial of a criminal action against him. People v. Bloom, 85 N. E. 824, 826, 193 N. Y. 1, 18 L. R. A. (N. S.) 898, 127 Am. St. Rep. 931, 15 Ann. Cas. 932 (citing to quotation Whart. Max, 17, p. 49).

CESSATION FROM LABOR

Code Civ. Proc. § 1187, as amended by Laws 1897, c. 141, requiring the owner within 40 days after cessation from labor on any unfinished contract or unfinished structure to file a notice of cessation, giving the date on which cessation actually occurred, etc., relates to structures on which work ceases while in an unfinished condition, and continuous cessation from labor for 30 days sets in motion the requirement of notice, and where the owner files the notice of cessation the original contractor and other lien claimants have specified times within which to file their claims of liens. Robison v. Mitchel, 114 Pac. 984, 986, 159 Cal. 581.

CESSATION OF DEALINGS

"Cessation of the dealings," as used in Code 1891, p. 728, § 6, providing that "an action by one partner against his copartner for a settlement of the partnership accounts * * * may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after," means that after there has been a dissolution of the partnership more than five years must have elapsed before the institution of a suit, during which time there were no valid claims of debit or credit against or in favor of the firm, paid or received or outstanding. Smith v. Zumbro, 24 S. E. 653, 657, 41 W. Va. 623.

CESTUI QUE TRUST

"Cestuis que trust" are those for whose benefit others are seised of real or personal property. They are the real, substantial, and beneficial owners of an estate which is held in trust as distinguished from the trustee in whom the legal title is vested. Larkin v. Wikoff, 72 Atl. 98, 102, 75 N. J. Eq. 462.

CHAFER

As applied to hatch covers, a "chafer" is a third cover, ordinarily an old one, used for the purpose of protecting the others from wear and not with a view of affording additional security save as it may so serve. The Hyades, 118 Fed. 85, 86.

CHAIN

As ornament, see Ornament.

CHAIN DRIVE

See Sprocket Chain Drive.

CHAIN OF TITLE

See Regular Chain of Title.

It appearing that the chain of title to the several lots was the same from the gov-

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ernment down to 1863, at which time the chain was broken, the transfers of property in one subdivision constituting one chain of title and those in another subdivision separated from the first subdivision by a street constituting another chain, the lots did not have the same chain of title within the act, the ordinary meaning of the word "chain" being "identical," and the legislative intent being that the lots sought to be registered should either be one compact piece of property, or, if not, that all should have an identical chain of title, to be included in one application. Culver v. Waters, 93 N. E. 747, 748, 248 Ill. 163.

CHAIR

A dentist's chair is not exempt from levy and sale as a "chair sufficient for the use of the family," under an exemption statute. Burt v. Stocks Coal Co., 46 S. E. 828, 829, 119 Ga. 629, 100 Am. St. Rep. 203.

CHAIRMAN

As holding office of trust, see Office of Trust.

B. & C. Comp. § 3380, provides that all regular and special school meetings must be convened by a written call stating the objects of such meetings, signed by the chairman of the district board and district clerk, or a majority of the school board. Section 3388 provides that the director who has served the longest time shall act as chairman of the board meetings, and, in the absence of the chairman, the other members of the board in the order of their seniority may act as chairman. The statute does not expressly create the office of "chairman of the school board," but such office was impliedly recognized by section 3389, subd. 16, providing that school warrants must be drawn and signed by the chairman of the board, and subdivision 21 permitting the board to authorize the chairman to draw warrants for the payment of salaries, and subdivision 31 providing that all bonds issued shall be signed by the chairman of the board of directors, and section 3409 providing that meetings of the board may be convened by written notice issued on the order of the chairman. Held, that the various sections of the statute construed together recognized the permanent and separate existence of the office of "chairman of the board," and by section 3388 the oldest in service of the directors was chairman of the board, and hence a special meeting called under section 3380 signed by the next oldest member of the board was not signed by "the chairman of the board," as required thereby, and bonds issued at such a meeting were invalid. Riggs v. Polk County, 95 Pac. 5, 7, 51 Or. 509.

CHALK

Manufactures of, see Manufactures—Manufactured Articles.

"Chalk" is a soft mineral substance consisting almost entirely of carbonate of lime. "Whiting" is "chalk" which has been dried and afterwards ground, levigated, and again dried. United States v. Tiffany, 117 Fed. 367.

A witness may use to illustrate his meaning and the counsel to illustrate his case any "chalk," whether engraved or more roughly sketched, whether made with a pen, a pencil, a paint brush, a coal, or a piece of chalk. An engraving may be as good a chalk as anything, but it should not be attached to or contained in any book, nor should the jury be told from what book it was taken or that it ever was in any book, and nothing should be said about it only that it is to be used as a sketch or chalk to illustrate the case. Whether a plan or sketch may be shown to the jury as a chalk is within the discretion of the court. Ordway v. Haynes, 50 N. H. 159, 164.

"Chalk" as used in court practice, means a rough representation, such, for instance, as a witness might make in outline upon a blackboard in the presence of the jury as illustrating his evidence, and not arising to the dignity of a scientifically accurate representation. Everson v. Casualty Co. of America, 94 N. E. 459, 461, 208 Mass. 214.

CHALLENGE

Primarily the meaning of "challenge" is to call one out to answer for something. Thus in dueling "to call a man out" is synonymous with "to challenge" him. Other familiar examples of the use of the word are the challenge of a voter, a challenge by a sentry, or even the challenge of the accuracy of a statement. The matter common to these uses of the word is that of formally directing the attention of some one to a matter that requires his action or decision. In this sense the word is aptly descriptive of the procedure by which the attention of the court is called to the fact that, on account of old age or the like, a grand juror should be discharged from the public service. On the other hand, the use of the word that has grown up in law with respect to the petit jury is both technical and special, namely, "the demand of a party that a certain person shall not sit in trial upon him or his cause." This special meaning may apply in a measure to the case of a grand juror who is challenged upon common-law grounds, but, as has already been pointed out, the challenge of grand jurors upon statutory grounds, if sustained results, not as at common law in his refraining from sitting upon the case of the challenger, but in his abso-

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lute discharge from the public service. Too much stress, therefore, must not be laid on the mere employment of this word without regard to whether its context calls for its general meaning or for its special and technical sense. State v. Lang, 68 Atl. 210, 214, 75 N. J. Law, 502.

St. 1909, § 1269 (Russell's St. § 3190), imposes a punishment upon one challenging another to fight in single combat or otherwise, with a deadly weapon, and Const. § 239, prohibits one from holding office who shall directly or indirectly give a challenge to another to fight in single combat with a deadly weapon. Accused, while partially intoxicated, went up to another, and, drawing or partly drawing a gun, said: "God damn you, you started to draw a gun this morning, now, God damn you, shoot." Held that, since a duel was a combat with a deadly weapon fought under prescribed rules according to a precedent formal agreement without sudden heat or passion, accused's conduct did not amount to a challenge. Ward v. Commonwealth, 116 S. W. 786, 787, 132 Ky. 636, 19 Ann. Cas. 71.

CHALLENGE (In Practice)

See Peremptory Challenge; Principal Challenge.

An objection to the qualification of a juror is available only upon a "challenge." There are two kinds of "challenges," to the panel and to the individual juror, and, where a challenge is to the individual juror, it must be taken when he appears and before he is sworn. People v. Thayer, 115 N. Y. Supp. 855, 856, 61 Misc. Rep. 573 (quoting and adopting the definitions in Code Civ. Proc. § 1180; Code Cr. Proc. §§ 359, 369, 371).

Under B. & C. Comp. §§ 117–123, abolishing a challenge to the panel, defining a challenge as an objection to an individual juror, either peremptory or for cause, and declaring that a challenge for cause is either that the juror is disqualified from serving in any action or that he is disqualified from serving in the particular action on account of bias, a litigant cannot object to jurors summoned in the manner prescribed by law and accepted by the court as legal jurors, on the ground that the law is unconstitutional, for a jury, though selected in pursuance of a void law, is selected under color of law and is a de facto jury, and where the particular jurors so drawn are competent and qualified, a challenge cannot be interposed. State v. Ju Nun, 97 Pac. 96, 98, 53 Or. 1.

At the common law the "challenges" to jurors for affection or partiality were of two kinds: (1) "For principal cause;" (2) "to the favor." A challenge is called principal "because, if it be founded on truth, it standeth sufficient of itself, without leaving anything to the conscience and discretion of the triors." Relationship to one of the parties or interest in the subject-matter of the litigation furnish illustrations of grounds for challenges for principal cause. Challenge to the favor is when the party alleges any such exception against one or more of the jurors, which is not forthwith sufficient upon acknowledgment of the truth thereof, but rather arbitrable and considerable by the rest of the jurors. It showeth causes of the favor which must be left to the conscience and discretion of the triors, upon hearing their evidence, to find him favorable or not favorable. In this form of challenge probable circumstances of suspicion, such as great intimacy with one party, or strife or quarrels with the other, any acts or sayings indicating affection for one or malevolence towards the other, in short, anything teding to show a motive on the part of the juror to favor one party or wrong the other, may be alleged and proved. The question raised by this challenge was not that a juror had knowledge or opinions which would prevent his deciding the case according to the evidence, but it was that because of affection toward one party or of hatred toward the other, or because of some other similar motives, he would not decide the case according to the truth. Where several defendants were charged with bribery arising out of the same conspiracy, and the same evidence was relied on to sustain a conviction against each, jurors who had sat in the trial of certain of the conspirators previously indicted were subject to challenge for cause. People v. Mol, 100 N. W. 913, 914, 137 Mich. 692, 68 L. R. A. 871, 4 Ann. Cas. 960 (quoting and adopting definition in Co. Litt. 156b; Stephens v. People, 38 Mich. 739; State v. Sawtelle, 32 Atl. 831, 66 N. H. 508).

CHALLENGE FOR CAUSE

A "challenge for cause" is an objection to a particular juror and is of two kinds; general, to the effect that the juror is disqualified from serving in any case, and particular, that he is disqualified from serving in the case on trial. People v. Thayer, 115 N. Y. Supp. 855, 857, 61 Misc. Rep. 573 (quoting and adopting the definition in Code Cr. Proc. § 374).

A "challenge for cause" is an objection to a particular juror and is either general or special. General causes for challenge are conviction for felony, want of prescribed qualifications, unsoundness of mind, or such defect in the faculties as renders one incapable of performing the duties of a juror. Particular causes of challenge are bias and the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that he cannot try the issue impartially. Robinson v. Territory, 85 P. 451, 453, 16 Okl. 241.

A "challenge for cause" is an objection to a juror on the ground that he is not

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qualified under the provisions of the statute fixing the qualification of jurors, or upon some ground which, in the opinion of the court, renders him unfit to serve as a juror. When the objection is made upon a ground other than those mentioned in the statute, the exercise by the trial judge of his discretion in passing on such objection will not be revised unless it appears that his ruling has resulted in preventing a fair and impartial trial. Stone v. Pettus, 103 S. W. 413, 414, 47 Tex. Civ. App. 14.

Comp. Laws, par. 726, declares that a "challenge" to an individual juror is either peremptory or for cause. Pen. Code, § 910, defines the causes for which challenges to individual jurors may be made, using the term "challenge to an individual juror" as synonymous with "challenge for cause." Section 913 declares that challenges to individual jurors shall be tried by the court; and section 918 provides that challenges to the panel or to an individual juror shall be oral and shall be entered on the minutes of the court, together with the court's decision thereon. Comp. Laws, par. 714, as amended, declares that, when several defendants are tried together, they are not allowed to sever their challenges but must join therein, "except a challenge to an individual juror." Held that, where two defendants jointly indicted for murder in the first degree made no application for severance, as authorized by Pen. Code, § 925, they were only entitled to the number of peremptory challenges each would have been entitled to if separately tried. Booth v. Territory, 80 Pac. 354, 355, 9 Ariz. 204.

That a juror has an erroneous idea of the law governing the case does not make him subject to "challenge for cause," within Rev. St. 1898, § 3144, providing that a "challenge for cause" may be taken on the ground that a state of mind exists on the part of the juror which will prevent his acting without prejudice to the rights of a party; no disposition being shown by the juror to be governed by his own ideas rather than by the declaration of the court as to the law. Johnson v. Park City, 76 Pac. 216, 217, 27 Utah, 420.

CHALLENGE TO THE ARRAY

A "challenge to the array" is an objection to all the jurors collectively because of some defect in the panel as a whole. Bryan v. State, 52 S. E. 298, 124 Ga. 79.

CHALLENGES TO THE FAVOR

"All 'challenges to the favor' are grounded on some facts or circumstances showing a probability that the juror is favorable to the one party or the other but not amounting to ground of principal challenge. O'Donnell v. Weiler, 59 Atl. 1055, 72 N. J. Law, 142 (quoting State v. Spencer, 21 N. J. Law, 197).

A "challenge to the favor" or because a juror is "favorable" to a party "is when the party alleges any such exception against one or more of the jurors, which is not forthwith sufficient upon acknowledgment of the truth thereof but rather arbitrable and considerable by the rest of the jurors." "In this form of challenge probable circumstances of suspicion, such as great intimacy with one party, or strife or quarrels with the other, any acts or sayings indicating affection for one or malevolence towards the other, in short, anything tending to show a motive on the part of the juror to favor one party or wrong the other, may be alleged and proved." People v. Mol, 100 N. W. 913, 914, 137 Mich. 692, 68 L. R. A. 871, 4 Ann. Cas. 960 (quoting State v. Sawtelle, 32 Atl. 831, 66 N. H. 508).

CHAMBER

See Containing Chamber.

A deed, executed in 1818, granted a lot "with the store thereon standing, * * * with a privilege in the passage of the adjoining store for the purpose of passing and repassing to the chambers of the store conveyed"; both stores then being two-story structures. Long after the store conveyed was torn down by defendant and an office building erected on its site, with the same lateral dimensions and so that the second floor connected by a door with the passageway of the adjoining store building, which remained as it was at the time of the conveyance, with the intention of preserving the right of passageway through that building as appurtenant to the new building. Held, in view of the intention of the parties, as shown by the use of the word "chambers," which then commonly meant sleeping apartments, that the intention was not to grant a perpetual easement in the adjoining store for the benefit of such a building as that erected by defendant, so that the destruction of the building granted destroyed the easement in the adjoining building. Cotting v. City of Boston, 87 N. E. 205, 206, 201 Mass. 97.

An open space beneath an ore roasting furnace, supported by posts, is not a "chamber" within the terms of a previous patent for a furnace. Lanyon Zinc Co. v. Brown, 129 Fed. 912, 915, 64 C. C. A. 344.

CHAMBER BUSINESS

Though Laws 1895, c. 115, § 6, Comp. St. 1910, § 922, provides that the district court commissioners shall hear, try, and determine issues whenever an application shall have been made for a change of judge, a district court commissioner, under Const. art. 5, § 14, providing that the Legislature shall provide for the appointment by the several district courts of one or more district court commissioners, learned in the law, and with

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authority to perform such chamber business, in the absence of a district judge, or upon his written statement that it is improper for him to act, as may be prescribed by law, is without authority to determine on the merits the issues in an action where the judge has been disqualified; the expression "chamber business" referring to such proceedings as might be conducted by the judge at chambers, and not to the trial on the merits, and his judgment in such case is invalid for want of jurisdiction. Huhn v. Quinn (Wyo.) 128 Pac. 514, 516.

CHAMBERS

The "chambers" of a judge means the office or private room of a judge where parties are heard and orders made and other business transacted in matters which are not required to be done in open court. The chambers of a judge of the district court, when performing judicial acts in connection with the court of that district, must be in that district. Kirby v. Chicago, R. I. & P. Ry. Co., 116 Pac. 150, 151, 51 Colo. 82 (citing Rap. & L. Law Dict., Bouvier).

The term "chambers" is defined as the office or private rooms of a judge, where parties are heard, and orders made in matters not requiring to be brought before the full court, and where costs are taxed, judgments signed, and similar business transacted. Morehead v. Allen, 63 S. E. 507, 510, 131 Ga. 807.

The term "chambers" is thus defined, "The office or private rooms of a judge, where parties are heard, and orders made, in matters not requiring to be brought before the full court, and where costs are taxed, judgments signed, and similar business transacted;" and thus, "When a judge decides some interlocutory matter, which has arisen in the course of the cause, out of court, he is said to make such decision at his 'chambers.'" Under Const. art. 4, § 18, providing that the several judges of the Supreme Court shall have and exercise such power and jurisdiction, at chambers or otherwise, as may be directed by law, the General Assembly cannot confer on a judge of that court jurisdiction at chambers to grant or dissolve an injunction in a cause pending in another court. Pittsburgh, Ft. W. & C. R. Co. v. Hurd, 17 Ohio St. 144, 146 (quoting and adopting the definitions in Bur. Law Dict. and Bouvier's Law Dict.).

"Orders are often passed in 'chambers' and chambers proceedings had between the beginning of a term of court and its adjournment. Thus application for interlocutory injunctions, the appointment of ad interim receivers, and the like take place at chambers, although during term of court. Nor does the fact that the proceedings were entered on the minutes fix their status as having transpired in open court. Orders granted in vacation may likewise appear on the minutes. * * * 'When an order appears in the transcript of the record which could be regularly and properly granted by the superior court in term time only, and there is nothing to show that it was in fact granted at chambers or in vacation, the presumption is that it was granted in term.'" Morehead v. Allen, 56 S. E. 745, 747, 748, 127 Ga. 669 (citing Civ. Code 1895, §§ 3172, 4864; McGowan v. Lufborrow, 9 S. E. 427, 82 Ga. 523, 14 Am. St. Rep. 178; Skinner v. Roberts, 17 S. E. 353, 92 Ga. 366).

CHAMOTTE

The term "chamotte," as used in the arts, has a broader meaning technically than ordinary fire brick crushed, or fire clay, and means, when used to describe an element in a patented combination, a clay which has been burned to an extent which deprives it of further shrinkage on being again subjected to heat. Panzl v. Battle Island Paper & Pulp Co., 132 Fed. 607, 609.

The term "chamotte," as used in the arts and in the Panzl patent, No. 644,367, as an ingredient used in making an acid-resisting composition for lining pulp digesters, denotes a species of specially pure calcined clay, which must be silicate of alumina, and is not the equivalent of crushed fire brick, used in prior preparations, which may or may not have the chemical composition and properties of chamotte. Panzl v. Battle Island Paper Co., 138 Fed. 48, 50, 70 C. C. A. 474.

CHAMPERTY

See Maintenance (Of Suits).

"Champerty" at common law consisted in supporting or maintaining a suit for some one else in consideration of agreement to have a part of the thing in dispute, or some profit out of the result of the litigation, or an agreement to divide the receipts from the suit or action. Merchants' Protective Ass'n v. Jacobsen, 127 Pac. 315, 318, 22 Idaho, 636.

"Champerty" is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it. Gelo v. Pfister & Vogel Leather Co., 113 N. W. 69, 70, 132 Wis. 575 (citing 2 Words and Phrases, p. 1045).

"Champerty" is an affirmative defense and must be pleaded. Comstock v. Flower, 84 S. W. 207, 212, 109 Mo. App. 275 (citing Moore v. Ringo, 82 Mo. 468; Pike v. Martindale, 1 S. W. 858, 91 Mo. 268; Bick v. Overfelt, 88 Mo. App. 139).

"Champerty" is so closely allied to maintenance and possesses so many elements in common with it, and is so frequently considered and discussed together, that we can more readily and clearly understand the authorities if we briefly state the law of champerty in this same connection. Champerty is the species of which maintenance is the gen-

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us and is defined by Blackstone as "a bargain with a plaintiff or defendant campum partire to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." "Champerty" differs from maintenance in this: That in the latter the person assisting a suitor is to receive no part of the benefits resulting from the action, while in the former he agrees to assist in the prosecution of the suit, and as a consideration therefor to share subsequently in the possible fruits or proceeds of the litigation. It therefore necessarily follows that, if the offense in question does not amount to maintenance, there can be no champerty in it. The gist of the offense is the same in each, the difference being only in the mode of compensation." "The distinction between maintenance and champerty seems to be this: Where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but, where he stipulates to receive part of the thing in suit, he is guilty of champerty." "The doctrine of champerty and maintenance, which prohibits contracts for part of the thing in demand, was adopted as an auxilliary regulation to enforce the general common-law principle which prohibited the transfer of all rights of action. The power of influential persons to whom rights of action were transfetred in order to obtain their support and favor in suits brought to assert those rights was the cause of the rigid doctrine of the early common law; that rights of action cannot be assigned has in modern times been reversed; the reason for the doctrine has in a large measure ceased to exist, and its early stringency has been greatly relaxed." Champerty and maintenance in the main are one and the same and inseparable, and where the law of the one exists there exists the law of the other also. Breedon v. Frankfort Marine, Accident & Plate Glass Ins. Co., 119 S. W. 576, 589, 220 Mo. 327 (quoting Coke on Littleton, 368; Quigley v. Thompson, 53 Ind. 317, 318; citing Scobey v. Ross, 13 Ind. 117; Wheeler v. Pounds, 24 Ala. 472; Arden v. Patterson [N. Y.] 5 Johns. Ch. 44; Key v. Vattier, 1 Ohio, 132).

"Maintenance" is defined as an officious intermeddling in a suit that no way belongs to one by assisting either party, with money or otherwise, to prosecute or defend. The offense may be committed by stepping in after litigation has been begun, as by encouraging and aiding its origin. "Champerty" is generally treated in connection with "maintenance." The champertor has in view a profit to himself in a share of the spoils of the litigation. The maintainer is more of a voluntary intermeddler and stirs up the strife for the love of it. He is described as an officious intermeddler. In other words, he interferes where he has no business. Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co., 85 S. W. 930, 931, 110 Mo. App. 312 (citing Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314).

A contract between attorneys and their client, by which they agreed to procure the annulment of the marriage of the client and his wife and to settle her claim for alimony for a lump sum to be paid to them as attorneys and a conveyance of certain property to them, etc., was void for "champerty." Donaldson v. Eaton & Estes, 114 N. W. 19, 21, 136 Iowa, 650, 14 L. R. A. (N. S.) 1168, 125 Am. St. Rep. 275.

"Maintenance" is an officious intermeddling in a suit that in no way belongs to one by maintaining or assisting either party with money or otherwise, to prosecute or defend it. "Champerty" which is a species of maintenance is the unlawful maintaining of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it; the champertor agreeing to carry on the suit at his own expense. Where, however, the person promoting the suit of another has any interest in the subject-matter, he is justified in participating and is not guilty of officious intermeddling within the definition of "champerty" or "maintenance." Finlen v. Heinze, 73 Pac. 123, 127, 28 Mont. 548.

Champerty, "which is a species of maintenance, has been defined to be the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it; a bargain with a plaintiff or defendant campum partire to divide the land or other thing sued for between them if they prevail at law; the champertor agreeing to carry on the suit at his own expense." Where defendant in an injunction suit assigns to his attorneys, who have succeeded in securing a dissolution of a temporary injunction, his claim for damages on the injunction bond, consisting merely in his attorney's fees, the transaction is not objectionable as champertous. Lacey v. Davis (Iowa) 98 N. W. 366, 367 (quoting 6 Cyc. p. 850).

"Champerty" is a species of maintenance, being a bargain with the plaintiff or defendant to divide land, or other matter sued for, between them, if they prevail at law, whereupon the champertor is to carry the party suit at his own expense. It is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it. It is the aiding of a litigant with money to prosecute or defend his suit by a stranger having no interest, direct or remote, immediate or contingent, upon an agreement with the party in interest, whereby such stranger is to receive a part of the thing in dispute. Champertous contracts are unenforceable at common law. The purpose of the early Eng-

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lish law on the subject of champerty and maintenance was to check the power and influence of the great men felt in the administration of justice and who, by reason of such influence, would receive interests in questionable or latent titles and rights in land and carry on litigation to establish such pretended right or title to the oppression and injury of those justly entitled to the equal protection of the law. Although the growth of the law and the administration thereof have established an entirely different state of society at the present time, the common-law doctrine, with some restrictions, is still applied to champerty and maintenance, and a contract which expressly provides for the bringing of a suit to quiet title to the oil and gas covered by a lease theretofore executed, and stipulating that such suit shall be carried on at the cost and expense of one party, and stipulating for a division of the subject-matter in the suit between the parties thereto in case the suit is successful, is champertous. Mud Valley Oil & Gas Co. v. Hitchcock, 81 N. E. 111, 112, 113, 40 Ind. App. 105 (citing 2 Words and Phrases, p. 1047; Anderson's Law Dict.; Stotsenburg v. Marks, 79 Ind. 193; Quigley v. Thompson, 53 Ind. 317; Board of Com'rs of Bartholomew County v. Jameson, 86 Ind. 154; Cleveland, C., C. & St. L. Ry. Co. v. Davis, 36 N. E. 778, 37 N. E. 1069, 10 Ind. App. 342; Hart v. State ex rel. Rock, 21 N. E. 654, 24 N. E. 151, 120 Ind. 83, 85).

A contract for the purchase of real estate need not stipulate for a division in kind of the land to be recovered in order to make the contract champertous, but it is sufficient if the champertor and the party with whom he contracts are to share in the fruits of a recovery; "champerty" being a bargain with plaintiff or defendant in a suit for a portion of the land or other matters sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. Seward v. Camp Mfg. Co., 71 S. E 614, 616, 112 Va. 479.

"Champerty" is a species of maintenance whereby a stranger makes a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party suit at his own expense. Champerty is a species of maintenance which at common law was an indictable offense. Maintenance was an officious intermeddling in a lawsuit by a mere stranger without profit. Champerty involved an element of compensation for such unlawful interference by bargain for part of the matter in suit, or some profit growing out of it. Smith v. Hartsell, 63 S. E. 172, 174, 175, 150 N. C. 71, 22 L. R. A. (N. S.) 203 (citing and quoting Gilman v. Jones, 5 South. 785, 87 Ala. 691, 4 L. R. A. 113, and Torrence v. Shedd, 112 Ill. 466).

Where a contract for attorney's fees contingent on the amount to be recovered stipulates that the client shall not compromise or settle his claim without the consent of the attorney, it it champertous and voidable at the option of the client, and its illegality will avail as a defense in an action against a third party, based on the contract. Davy v. Fidelity & Casualty Ins. Co., 85 N. E. 504, 507, 78 Ohio St. 256, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694.

To render a grant "champertous" within Rev. St. (1st Ed.) pt. 2, c. 1, tit. 2, § 147, providing that every grant of land shall be absolutely void if at the time of the delivery thereof the land shall be in the actual possession of a person claiming under a title adverse to that of the grantor, the "actual possession" required by the statute must be shown by plain and unequivocal proof. Saranac Land & Timber Co. v. Roberts, 109 N. Y. Supp. 547, 556, 125 App. Div. 333.

There are two essential elements in every "champertous agreement": First, there must be an undertaking by one person to defray the expenses, in whole or in part, of another's suit; second, an agreement or promise on the part of the latter to divide with the former the proceeds of the litigation in the event the prosecution was successful. Brush v. City of Carbondale, 82 N. E. 252, 255, 229 Ill. 144, 10 Ann. Cas. 121.

An assignment of a recovery or part of a recovery in tort is not champertous, and is an enforceable contract. The doctrine of champerty has been annulled as to assignments of causes or parts of causes of action for advances to defray costs by Rem. & Bal. Code, § 2970, defining barratry as the willful maintenance of suits in which the offender has no interest. Weed v. Foster, 109 Pac. 123, 124, 58 Wash. 675.

Contingent fee

A contract is "champertous" where it is for attorneys' services, for which the attorneys agree to look solely to a certain percentage of the recovery for their compensation, without any right to recover for services rendered, either before or after the recovery against the client. Gargano v. Pope, 69 N. E. 343, 344, 184 Mass. 571, 100 Am. St. Rep. 575.

At expense of champertor

An agreement by an attorney to pay all or some of the court costs to accrue in a suit which he is employed to prosecute is "champertous." Comstock v. Flower, 84 S. W. 207, 212, 109 Mo. App. 275 (citing Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314).

"Champerty" is a species of maintenance whereby a stranger makes a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own ex-

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pense. Smith v. Hartsell, 63 S. E. 172, 174, 150 N. C. 71, 22 L. R. A. (N. S.) 203.

"At common law 'champerty' was an offense, and from the beginning champertous agreements were deemed to be contrary to public policy and unenforceable." An agreement of attorneys to carry on a litigation for a share of the amount to be recovered at their own costs and expense is champertous. Moreland v. Devenney, 83 Pac. 1097, 72 Kan. 471.

A contract between plaintiff and defendant, an attorney, which provides that in consideration of services rendered by plaintiff in procuring bonds of a county as described in a receipt, to be sued on by defendant in accordance with a contract, appended to the receipt, defendant agrees to pay plaintiff one-half of the fee accruing in accordance with its terms, it being understood that plaintiff "shall pay one-half of any and all reasonable expenses * * * that may be necessary and proper" to insure the successful prosecution of the suit, does not bind plaintiff to pay any part of the costs of a suit on the bonds and is "champertous" on its face, though the contract appended to the receipt stipulates that, in case a suit is defeated, the attorney will pay all the costs thereof. Kelerher v. Henderson, 101 S. W. 1083, 1087, 203 Mo. 498.

"Champerty" may be defined to be a bargain with plaintiff or defendant in a suit for a portion of the land or other matters sued for in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. The cases and text-writers are practically uniform in holding that a contract by an attorney to undertake and carry on litigation at his own risk or without cost to his client for a share of the recovery is contrary to public policy and void. Roller v. Murray, 59 S. E. 421, 422, 107 Va. 527.

One engaged in the business of auditing the books of public officers, and having no interest in the subject-matter of a proposed litigation, contracted to audit the books of a trustee of a township for a percentage of all moneys recovered from the trustee by the township, and to hold the township harmless from costs and expenses, and at the same time executed a bond conditioned on the performance of the contract. Held, that the contract and bond must be treated as inseparably connected, and, as so treated, the contract and bond were champertous and void; "champerty" being a species of maintenance, a bargain with plaintiff or defendant to divide land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry the party suit at his own expense. Lancaster Tp. of Wells County v. Graves, 96 N. E. 172, 173, 48 Ind. App. 499 (citing 2 Words and Phrases, p. 1047).

Maintenance by stranger without interest

Where a party has an interest, direct or remote, immediate or contingent, existing at the time an action is commenced, the right of such party to assist in maintaining the suit exists and may be exercised, for it is the aiding of a litigant by a stranger having no interest, direct or remote, immediate or contingent, on an agreement with the party in interest, whereupon such stranger is to receive a part of the thing in dispute, that constitutes champerty, so that a contract between two creditors of the same debtor to sue to set aside a conveyance by the debtor as fraudulent, each to pay one-half of the expense and to divide equally the amount collected, is not champertous, each creditor being interested in the subject-matter of the litigation because of having claims of equal standing against the debtor. Hotmire v. O'Brien, 90 N. E. 33, 34, 44 Ind. App. 694.

Purchase of litigation

Code Civ. Proc. § 74, prohibits attorneys from procuring retainers by offering or giving any valuable consideration therefor. Held, to prohibit an attorney from giving any consideration to a client for the purpose of obtaining his claim to bring suit thereon and from agreeing to pay to any agent out of the profits of cases for his services in inducing other persons to place their claims in the attorney's hands; such conduct being "champertous" and subjecting the attorney to removal from office and punishment as for a misdemeanor under section 75. In re Clark, 77 N. E. 1, 2, 184 N. Y. 222.

An agreement by an attorney for a contingent fee of 50 per cent. of the recovery, the attorney to advance all the court costs, is "champertous," within Code Civ. Proc. § 74, providing that an attorney shall not promise or give a valuable consideration to any person as an inducement to placing in his hands a demand of any kind for the purpose of bringing an action thereon. Taylor v. Enthoven, 88 N. Y. Supp. 138.

The purchase of a lawsuit by an attorney is "champerty." Slade v. Zeltfuss, 59 Atl. 406, 407, 77 Conn. 457.

CHANCE

See By Chance; Game of Chance; Last Clear Chance.
See, also, Hazard.

"Chance" is something that befalls; the result of unknown or uncertain forces or conditions. It is possibility, hazard, risk, or the result or issue of uncertain or unknown conditions or forces, neither understandingly brought about by the one's act nor pre-estimated by one's understanding. Stevens v. Cincinnati Times-Star Co., 73 N. E. 1058, 1060, 72 Ohio St. 112, 106 Am. St. Rep. 586.

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"'It is strictly and philosophically true in nature and reason that there is no such thing as "chance" or accident, it being evident that these words do not signify anything really existing, anything that is truly an agent or cause of any event; but they signify merely men's ignorance of the real and immediate cause.' But, though, nothing occurs in the world as a result of chance, the occurrence may be a matter of chance to the observer from his ignorance of antecedent causes or of the laws of their operation. If one is told to draw from a box of which he is informed simply that it contains black balls and white balls, it is to him a matter of equal chance whether he draws a black one or a white one, and this though in fact the box contains 99 of one kind and one of the other. Nor would the chances to him be at all changed if he were told that there were 99 of one kind and one of the other, unless he was told of which color the 99 were. Therefore that may be a matter of chance to one man which is not a matter of chance to another, and with different men the chances of the occurrence of any event may differ greatly. It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill, and judgment we are unable to foresee its occurrence or nonoccurrence, or the forms and conditions of its occurrence." People ex rel. Ellison v. Lavin, 71 N. E. 753, 754, 179 N. Y. 164, 66 L. R. A. 601, 1 Ann. Cas. 165.

"By the word 'chance,' as defined by Webster, is meant 'something that befalls, as the result of unknown or unconsidered forces; the issue of uncertain conditions; an event not calculated upon; an unexpected occurrence; a happening; accident, fortuity, casualty.'" A financial co-operative scheme whereby the fees and dues were to be returned to the members, and which was certain to involve a loss to every one interested as soon as the number of members ceased to increase, was a scheme for the distribution of money by lot or chance within the meaning of the provisions of U. S. Rev. St. § 3929, as amended by the Act Sept. 19, 1890, c. 908, 26 Stat. 465, and of section 4041, and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964, empowering the postmaster general to deny the privilege of the mails to persons engaged in certain prohibited enterprises. Public Cleaning House v. Coyne, 24 Sup. Ct. 789, 795, 194 U. S. 497, 48 L. Ed. 1092.

The word "hazard," as used in a statute forbidding any person to maintain any scheme or any lottery, scheme, or device for the "hazarding" of money or valuable thing, meant "chance," and the chance here referred to is that chance which is employed in connection with lottery schemes, where the attempt is to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event incapable of ascertainment or accomplishment by means of human foresight or ingenuity. If the result in a given transaction could be accomplished or foretold by the exercise of skill or foresight, its ascertainment would not be attributed to chance but to the exercise of skill or foresight, and consequently to design. Chance and design are exactly opposite, and the presence of either will exclude the other. Where design enters into a transaction, it immediately partakes of the nature of contract and will be governed by other principles. In the gaming sense there is no chance whatever where either party has means of knowing the result at the inception of the wager. There may be fraud, but not chance. The International Dictionary gives the general definition of chance as "the unknown or undefined cause of events that to us are uncertain or not subject to calculation; luck; fortune." 6 Cyc. p. 890, defines chance thus: "Possibility; hazard; risk; or the result or issue of uncertain and unknown conditions or forces neither understandingly brought about by one's act nor pre-estimated by one's understanding." Russell v. Equitable Loan & Security Co., 58 S. E. 881, 885, 129 Ga. 154, 12 Ann. Cas. 129.

"Curious results sometimes happen by chance, but when those results happen so largely along the lines of the purposes of those who have control of the supposed chance, it is not strange that outsiders are apt to feel that purpose, and not chance determined the result." (Per Brewer, J., dissenting.) Taylor v. Beckham, 20 Sup. Ct. 890, 903, 178 U. S. 584, 44 L. Ed. 1187.

Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery. It is a sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to that of the amount or value of that which he risks. It is a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished. However, it should not be concluded that the term "lot or chance" implies that, if any element of certainty or skill enters into the scheme, it therefore relieves it of its character as a lottery or scheme of chance. "Chance" is something that befalls; the result of unknown or uncertain forces or conditions. A guessing contest instituted by a newspaper company, by which persons are invited to deliver to the company 50 cents each, 24 cents of which being payment for a subscription to the newspaper and 26 cents for the privilege of making a guess upon the total vote for a state officer who is to be chosen at an approaching election, the guesser coming nearest to the actual total vote cast

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to receive a money prize from the fund equal to one-tenth thereof, and others next nearest to receive from the fund lesser money prizes, is within the condemnation of the statutes of Ohio against "lotteries" and "schemes of chance" and is an unlawful enterprise. And a similar scheme, involving the same amount of payment by each person, but differing from the former in that there is to be no subscription to a paper, and the prizes promised are definite amounts from $5,000 down to $2, is equally within the condemnation of the statute and unlawful. Stevens v. Cincinnati Times-Star Co., 73 N. E. 1058, 1060, 72 Ohio St. 112, 106 Am. St. Rep. 586.

CHANCE VERDICT

Under Rev. St. 1898, § 3292, relating to misconduct of the jury by a resort to the "determination of chance." The "determination of chance" must have been the means of inducing one or more jurors to assent to the verdict. A new trial may not be had on the ground that the jury resorted to the "determination of chance," unless it appear that the assent of one or more jurors was thereby obtained to the verdict. Midgley v. Bergerman, 83 Pac. 466, 467, 30 Utah, 17 (quoting and adopting definitions in Pence v. Mining Co., 75 Pac. 934, 27 Utah, 378).

CHANCERY

See Court of Chancery; Master in Chancery.
Suit in chancery, see Suit.

CHANCERY COURT

See Jurisdiction Originally Exercised by Chancery Court.

CHANCERY POWER

The appointment of a receiver is the exercise of "chancery power," within the Organic Act, § 9, providing that the Supreme and district courts shall possess chancery as well as common-law jurisdiction, and such power cannot be conferred on or exercised by the probate courts. Garrett v. London & Lancashire Fire Ins. Co., 81 Pac. 421, 15 Okl. 222.

CHANCERY RECEIVER

A "chancery receiver" is an indifferent person, appointed to hold property in litigation pending suit, who derives his authority from the court, and not from the parties, at whose instance he is appointed. He acts in behalf of no particular interest, but guards the rights of all, and, being a mere holder, his appointment does not change the title to the property in his charge, nor affect any lien. Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 728, 117 C. C. A. 503.

CHANDELIER

As ornamental fixture, see Ornamental Fixture.

CHANGE

See Necessary Changes; Plenty of Change; Substantial Change.
Any change increasing risk, see Any.
Any change in grade, see "Any."
Otherwise change, see Otherwise.

The word "change," as used in subdivision 17, § 3847, Comp. Laws 1897, implies the substitution of one thing for another, the giving up of all or a part of a line of road, and the provision of another railroad in lieu thereof. If no abandonment was contemplated, the words used should have been "addition," instead of "change." Territory v. Eastern Ry. of New Mexico, 110 Pac. 852, 853, 15 N. M. 591.

A vote at a school election "to move the school house onto the southeast corner" of a certain place is in effect a vote to change the school house site. Livesay v. Whitney, 81 S. W. 640, 641, 107 Mo. App. 475.

In condition

Construing Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 356, 30 Stat. 183, providing an increased duty on wool "changed in its character or condition for the purpose of evading the duty," held, that it is not necessary that there should be any mechanical or chemical change, disguising the quality or character of the wool; and that, where white and black Iceland wools, which had always been dealt in and imported separately in different bales, were imported mixed together in the same bale for the purpose of securing a lower rate of duty on the white wool, the wool had been changed in condition within the meaning of the law. Stone & Downer Co. v. United States, 147 Fed. 603, 605.

As failure to keep and maintain

The phrase "shall not be changed" is in effect the same as "shall keep and maintain." as the same are used in Rev. St. 1895, art. 4367, requiring railroads to keep and maintain their general offices, machine shops, and roundhouses at such places as the railroad has for a valuable consideration contracted to locate the same and providing that, if the same are located in a county which has aided the railroad by an issue of bonds in consideration of such location, then such location "shall not be changed." City of Tyler v. St. Louis Southwestern Ry. Co., 91 S. W. 1, 5, 99 Tex. 491, 13 Ann. Cas. 911.

In interest

See, also, Interest (In Property).

The word "interest," as used in a fire policy, relating to change of interest in the property insured, relates only to some lesser insurable interest therein than full title. Pomeroy v. Ætna Ins. Co., 120 Pac. 344, 346, 86 Kan. 214, 38 L. R. A. (N. S.) 142, Ann. Cas. 1913C, 170.

There is no "change in interest" in insured property, within the provision of a

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fire policy that such a change should make the policy void, where a real estate agent, having verbal authority merely, makes a contract of sale not in writing and gives a receipt for part of the purchase money, the balance to be paid if title proved good, and the owner executes a deed and gives it to the agent to deliver on payment of the balance of purchase money; the contract being within the statute of frauds and not enforceable. Moseley v. Northwestern Nat. Ins. Co., 84 S. W. 1000, 1001, 109 Mo. App. 464 (citing Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176, 85 Am. Dec. 553; Hoffmann v. Columbia, 76 Mo. App. 553; Walker v. Owen, 79 Mo. 563; Gibb v. Philadelphia Fire Ins. Co., 61 N. W. 137, 59 Minn. 267, 50 Am. St. Rep. 405; Germond v. Home Ins. Co. [N. Y.] 2 Hun, 540; Loventhal v. Home Ins. Co., 20 South. 419, 112 Ala. 108, 33 L. R. A. 258, 57 Am. St. Rep. 17; Arkansas Fire Ins. Co. v. Wilson, 55 S. W. 933, 67 Ark. 553, 48 L. R. A. 510, 77 Am. St. Rep. 129; Hough v. City Fire Ins. Co., 29 Conn. 10, 76 Am. Dec. 581).

The word interest in an insurance policy providing that it shall be void "if any change shall take place in the interest, title, or possession of the subject of insurance," applies only where insured owns and insures an interest less than title, and has no application where the insured owns the title. Garner v. Milwaukee Mechanics' Ins. Co., 84 Pac. 717, 718, 73 Kan. 127, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459.

Appointment of a receiver for a corporation is not ground for forfeiting a fire policy issued to the corporation, as a change in interest, title, or possession of the property insured, though Revisal 1905, § 1224, provides that title to property, shall vest in a receiver on his appointment. Southern Pants Co. v. Rochester German Ins. Co., 74 S. E. 812, 159 N. C. 78.

Where the condition in a fire policy is against any change in the title, there is no breach unless there is a change in the legal title. This doctrine cannot be applied "to a condition against any change of interest." The terms are not synonymous. The word "interest" is broader than the word "title," and includes ordinary legal and equitable rights. Hence, under a policy providing that it shall be void if any change takes place in the interest, title, or position of the subject of insurance, any material change in the interest of the insured in the subject of the insurance will avoid the policy. Excelsior Foundry Co. v. Western Assur. Co., 98 N. W. 9, 11, 135 Mich. 467, 3 Ann. Cas. 707.

A bankruptcy adjudication against insured, and a note by the referee in bankruptcy in his record of the name of the person whom he had selected as receiver to take charge of his property pending the appointment of a trustee, and an order appointing the receiver, and his qualification two days after the destruction of the property covered by the policy, did not constitute such a "change of interest" as to invalidate the policy, under a provision that it should be void if any change, other than by the death of the insured, should take place in the interest, title, or possession of the subject of insurance, etc., during the life of the policy. Fuller v. Jameson, 90 N. Y. Supp. 456, 457, 98 App. Div. 53.

Certain buildings and the furniture and fixtures in one of them were insured by plaintiff in defendant company. Plaintiff executed a mortgage on the insured property to a bank in another state purporting to secure a certain note, and on the same day executed a warranty deed to his sister, conveying the real estate on which the buildings stood for an expressed consideration, subject to the mortgage mentioned. The deed and mortgage were recorded, but in fact no consideration passed for either, and neither was ever in the possession of those in whose favor they were executed. A deed to the property was executed by plaintiff's sister on the same day and delivered to him; the object of the transactions being to avoid trouble relative to taxes on merchandise. Held, that there was no "change or diminution in the interest, title, or possession" of the property insured, within the meaning of a forfeiture clause in the policy, since no interest passed and no possession or right of possession was given, and the parties did not intend any such change. Cone v. Century Fire Ins. Co., 117 N. W. 307, 308, 139 Iowa, 205.

There is no change of interest in the insured property, which under a fire policy works for a forfeiture, where a contract for the price thereof is given, which amounts to a mere option, with rights of possession for experimental purposes, subject to a free access and management by the owner. Mackintosh v. Agricultural Fire Ins. Co., 89 Pac. 102, 104, 150 Cal. 440, 119 Am. St. Rep. 234.

In location of highway

Laws 1907, c. 201, § 16, provides that if after the changing, locating, or relocating of any public road, or opening and establishing any new public highway, any person be aggrieved, and he and the superintendent of roads cannot agree on the damages, if any, he may apply within six months after such change or opening and establishment of a new road for the assessment of damages. Held, that the word "change" refers not to a change contemplated and directed, but to a change completed, and that the word "establish" was used in the sense of "to found, prepare, make, institute, and confirm"; and hence an application to the clerk for an assessment of damages within six months after a change of a public road had been accomplished was in time. Bost v. Cabarrus County, 67 S. E. 1066, 1067, 152 N. C. 531.

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In timber contract

A contract for the cutting of timber into ties of specified dimensions and barrel staves and bolts for a specified compensation, which gives the owner of the land the right to direct how the timber shall be cut, and which stipulates that the owner reserves the right to "change" any part of the contract, does not give the owner the right to terminate the contract; the word "change" meaning to alter or make different. Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co. (Ark.) 143 S. W. 581, 582.

Of business

An accident policy providing that, if insured should change his business, he must immediately notify the company, and that, unless its board consented to the change, the policy upon the tenth day thereafter should terminate, means the substitution of one business for another as the usual business of insured, and does not refer to a casual or incidental resort to other activities for 30 days, where the business named in the policy was not abandoned, and insured expected within a few days of the accident to continue the same. Taylor v. Illinois Commercial Men's Ass'n of Chicago, 122 N. W. 41, 42, 84 Neb. 799.

Of domicile

To effect a change of domicile, there be an actual change of residence coupled with an intention to abandon the former domicile and to acquire another. Ætna Nat. Bank v. Kramer, 126 N. Y. Supp. 970, 971, 142 App. Div. 444.

To effect a change of domicile, there must be a residence in the new locality and intention to remain there. Eisele v. Oddie, 128 Fed. 941, 945.

The term "domicile" in its ordinary acceptation means a place where a person lives or has his home, and in a strict legal sense that is properly the domicile of a person where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. In order to effect a change of domicile, there must be an actual abandonment of the first domicile coupled with an intention not to return thereto, and a new domicile must be acquired by actual residence within another jurisdiction coupled with the intention of making the last acquired residence a permanent home. Holt v. Hendee, 93 N. E. 749, 752, 248 Ill. 288, 21 Ann. Cas. 202.

To effect a "change of domicile" there must be actual residence and intent to change. Residence, coupled with an intent to remain, establishes the domicile, notwithstanding a floating intention to return to another place at some future time. In re Titterington's Estate, 106 N. W. 761, 762, 130 Iowa, 356.

To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile, acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. People v. Moir, 69 N. E. 905, 907, 207 Ill. 180, 99 Am. St. Rep. 205 (citing Hayes v. Hayes, 74 Ill. 312).

A "change of domicile" cannot be effected by a mere intention in the mind to make the change unless it is accompanied by an actual change in the place of abode. The mere intention to acquire a new residence, without the fact of removal, avails nothing; neither does the fact of removal without the intention. Evidence of defendant's intention to take up his place of abode in a certain city, unaccompanied by acts calculated to carry such intention into effect, other than the placing of his wife in the home of her father in such city and his occasional visits to her, was insufficient to establish his residence in such city.' Sheehan v. Scott, 79 Pac. 350, 352, 145 Cal. 684 (quoting and adopting the definition in Pickering v. Cambridge, 10 N. E. 827, 144 Mass. 244).

While residence is largely a matter of intention, mere intention to change from one place to another, and making a trip of investigation, is not enough; but one must determine on some definite place to which to remove, and take some affirmative step toward transferring his personal effects, or toward settling himself in the new place. State ex rel. White v. Scott, 171 Ind. 349, 86 N. E. 409, 412.

To effect a change of domicile for the purpose of succession, there must be a change of residence and an intention to abandon the former domicile, and acquire another as the sole domicile. Length of residence alone does not effect a change, nor does intention alone do it. United States Trust Co. of New York v. Hart, 135 N. Y. Supp. 81, 82, 150 App. Div. 413.

Of grade

Any change in grade, see Any.

A "change of grade," within the meaning of Rev. St. 1898, § 282, making cities liable for damages to property in case the established grade of a street is changed after improvements have been made upon the property in conformity with the prior established grade, and providing that the right to recover damages for "change of grade" shall apply to all cases of improved property where grades have theretofore been determined upon and established and not carried into effect, includes a case where a grade of a street was established but was not carried into effect, and thereafter buildings were erected on property abutting on the street, and a city is liable as for a "change of grade" resulting in

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damage to the buildings and property. Kimball v. Salt Lake City, 90 Pac. 395, 396, 32 Utah, 253, 10 L. R. A. (N. S.) 483, 125 Am. St. Rep. 859.

A "change of the grade" of a street is an actual physical change in the surface thereof, and, where an established grade is changed after property has been improved according to the established grade without injuring or diminishing the value of the property, the city is not liable for changing the grade, and, where the city did work in altering the grade and then ceased operations for such length of time as to make it appear that the work was completed, the owner of abutting property would only be entitled to recover for the injury occasioned by what had been done. Meardon v. Iowa City, 126 N. W. 939, 941, 148 Iowa, 12.

Change in elevation of a street is a "change of grade" thereof, within Village Law, § 159, allowing lot owners to recover damages; the grade thereof, while not previously fixed by ordinance, having, for years been established by usage and common consent of the public. Hence the raising of a sidewalk is a "change of grade," within a statute allowing lot owners to recover damages in case of a change of grade. Nicholay v. Village of Newark, 130 N. Y. Supp. 1033, 1035.

Laws 1894, c. 147, as amended by Laws 1897, c. 664, authorizing the construction of a bridge with approaches extending along W. avenue to 134th street, and providing for payment of damages for change of grade for land taken and for damages sustained by owners fronting on the avenue between 132d and 133d streets, and authorizing the taking of land to widen the avenue between 133d and 134th streets, do not authorize the award of damages to owners of property abutting on the avenue in the block between 133d and 134th streets, where the avenue remains at the old grade, and in the center of it, as widened by acquisition of land, is the approach, though the same interferes with the easements of light, air, and access; the approach not being a "change of grade." People ex rel. City of New York v. Sandrock Realty Co., 134 N. Y. Supp. 427, 429, 149 App. Div. 651.

Of habitation

A decree that a grandmother be allowed to visit her grandchild at the father's house, and that upon request of the grandmother the child be required to spend seven successive days with her each month, is a "change of habitation" under the guise of visitation. Wofford v. Clark, 104 S. W. 1103, 84 Ark. 623.

Of intention

Where, after a person had made a written offer, he received no actual notice of an acceptance until after he had made a contract involving the subject-matter with another, the acceptance came too late to bind him, he having already signified his change of intention within Rev. Civ. Code, art. 1801, providing that a party proposing shall be presumed to continue in the intention which his proposal expressed, if, on receiving the unqualified assent of him to whom the proposal is made, he does not signify the change of his intention. Union Sawmill Co. v. Mitchell, 48 South. 317, 318, 122 La. 900.

Of occupation

"Occupation" is a term of broad significance and includes the trade, calling, profession, office, employment, or business by which one generally gets his living; and it is not incidental, recreatory, or even necessary suspension of the performance of regular duty which constitutes a "change of occupation" by one insured against accident. Everson v. General Accident Fire & Life Assur. Corp., Limited, of Perth, Scotland, 88 N. E. 658, 659, 661, 202 Mass. 169.

Of position

The bringing of a suit is not a "change of position" within the meaning of the law of estoppel, since a suit cannot create rights nor change the legal situation of the parties. Des Allemands Lumber Co. v. Morgan City Timber Co., 41 South. 332, 347, 117 La. 1.

Of possession

See Actual and Continued Change of Possession; Continued Change of Possession; Open, Notorious, and Continuous Change of Possession.

The title of P. L. 1906, p. 432, c. 228, entitled "an act to tax intestate's estates," etc., is sufficiently comprehensive to include the subject-matter of section 1, subd. 2, providing that a tax may be imposed when the "transfer" is by will of property within the state and decedent was a nonresident at death; the word "transfer" being used as synonymous with "change of possession." Dixon v. Russell, 73 Atl. 51, 53, 78 N. J. Law, 296.

Under St. 1893, § 2663, providing that every transfer of personal property made by a person having at the time a possession or control thereof, and not accompanied by an immediate delivery, and followed by an actual and continued "change of possession" of the things transferred, shall be conclusively presumed fraudulent and void against creditors and incumbrancers in good faith subsequent to the transfer, there must be an actual and substantial change of possession; the possession must be actual and exclusive and not concurrent. Where pledgees took possession of the property pledged, which consisted of a stock of goods, and opened them up for sale in a building rented by the debtors, and in the same name in which a mercantile business had been run and was being carried on by the debtors at another

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place, and allowed the debtors to buy new goods and place them in the stock, and all were being sold in the usual course of trade, and the money used in payment of freight on goods, rent of building leased by the debtors, and for shelving and counters, and other expenses of the store, and the remaining proceeds of the sales deposited in bank in the name of the debtors, and the debtors drew on the same by sight draft, and the remaining balance was never drawn out of the bank or asked for by the pledgees, there was no "change of possession" to sustain the pledge as against attaching creditors who merged their attachment into a mortgage given by the debtors. Jackson v. Kincaid, 46 Pac. 587, 590, 4 Okl. 554 (citing Stoddard v. Butler, 20 Wend. 507; Regli v. McClure, 47 Cal. 612; Waller v. Cralle, 47 Ky. [8 B. Mon.] 11; Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; Mead v. Noyes, 44 Conn. 487; Brunswick v. McClay, 7 Neb. 137; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779).

Of residence

As removal, see Remove—Removal.

When a person removes from his domicile in one state to establish a home for himself in another state or country, at a place well known, there is a "change of residence," and absence from the last domicile is that upon which the presumption of death must be built within the rule that a presumption of death is raised by the absence of a person from his domicile when unheard of for seven years. Gorham v. Settegast, 98 S. W. 665, 668, 44 Tex. Civ. App. 254.

Of terminus

A railroad company, having the right to locate a depot at a new site, had power to condemn land for the additional right of way required to elevate its tracks, in order that its trains might enter and depart from the depot; this not being a "relocation" of the right of way of the road, or a "change of its terminus." Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 87 N. E. 933, 937, 945, 239 Ill. 197.

Of title

Change in interest distinguished, see Change.

The title of P. L. 1906, p. 432, c. 228, entitled "An act to tax intestates' estates," etc., is sufficiently comprehensive to include the subject-matter of section 1, subd. 2, providing that a tax may be imposed when the transfer is by will of property within the state and decedent was a nonresident at death; the word "transfer" being used as synonymous with "change of title." Dixon v. Russell, 73 Atl. 51, 53, 78 N. J. Law, 296.

There is a change of "title," as well as of "interest" and "possession," within a fire policy declaring it void in case of any change in the interest, title, or possession of the insured property, where insured, the owner in fee of the insured property, makes a contract of sale of it, declaring that deed shall pass when final payment is made, and that the purchaser shall pay all taxes and assessments levied against the property subsequent to contract, and shall have the right to occupy the property before passing of title, as tenant of the seller, without pay, and the purchaser goes into possession and is not in default. Brighton Beach Racing Ass'n v. Home Ins. Co., 99 N. Y. Supp. 219, 221, 113 App. Div. 728.

CHANGE OF VENUE

Good cause for, see Good Cause.
Proceedings to secure, as within practice, see Practice (In Law).

The phrase "change of venue" has been used throughout the legislative history of the state to denote the removal of causes from one county to another county, and never removals from one court to another in the same county. Dudley v. Birmingham Ry., Light & Power Co., 36 South. 700, 702, 139 Ala. 453.

CHANGING

The word "changing," in Const. art. 5, § 26, prohibiting local or special laws locating or changing county seats, means removal of an established and permanent county seat. Laws 1909, c. 133, creating Lincoln county and providing that the town of Libby shall be the county seat until the county seat is designated, as provided, and that for the purpose of definitely fixing and creating a county seat the board of county commissioners shall insert on the ballots in the general election "for the county seat of Lincoln county," and the town receiving the largest number of votes shall be the county seat, contravenes the constitutional provision. State ex rel. Geiger v. Long, 117 Pac. 104, 105, 43 Mont. 401.

As used in the by-laws of a mutual benefit association, the phrase "changing the beneficiary" refers to the act of naming and specifying some other person or persons in the place of those previously designated. St. Louis Police Relief Ass'n v. Tierney, 91 S. W. 968, 974, 116 Mo. App. 447 (citing Hanson v. Minnesota Scandinavian Relief Ass'n, 59 Minn. 123–128, 60 N. W. 1091; Shryock v. Shryock, 70 N. W. 515, 50 Neb. 886).

CHANNEL

See Auxiliary Channel; Flood Channel; Known and Well-Defined Channel; Main Channel; Narrow Channel; Ship Channel; Widest Channel.

"Whether high or low the entire volume at any one time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its 'channel,' so that when swollen by rains and melting snows, it extends and flows over the

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bottom along its course (that is, its flood channel), as when by drought it is reduced to its minimum it is then in its low water channel." Cole v. Missouri, etc., Co., 94 Pac. 540, 541, 20 Okl. 227, 15 L. R. A. (N. S.) 268.

The middle line of a nonnavigable river at low-water mark is not the center of the channel which means the continuous course of deepest water, but is a line equally distant from all points on the opposite banks at right angles with the thread at low-water mark. Micelli v. Andrus, 120 Pac. 737, 740, 61 Or. 78.

The "channel" of a stream is the passageway between the banks through which the waters of the stream flow. It is the entire uninterrupted space occupied by water flowing between well-defined banks. This definition is broad enough to include a flow of water between an island and one of the banks of a stream. Morton v. Oregon Short Line Ry. Co., 87 Pac. 151, 153, 48 Or. 444, 7 L. R. A. (N. S.) 344, 120 Am. St. Rep. 827 (citing Farnham, Waters, § 417).

"The 'channel' of a stream in its larger sense is its bed from bank to bank; the hollow or course in which the water flows." Cities and Villages Act (Hurd's Rev. St. 1909, c. 24) § 1, subd. 30, which provides that the city council, or the president and board of trustees in villages, shall have power to deepen, widen, dock, cover, wall, alter, or change the channel of water courses, gives the right to change the entire bed of the stream, for to construe the word "channel" as meaning the deepest part or thread of the stream would not give effect to the words "alter or change." Village of Prairie du Rocher v. Schoening-Koenigsmark Milling Co., 93 N. E. 425, 426, 248 Ill. 57 (citing 2 Words and Phrases, p. 1059).

The "channel of a river" and the bed of a river ordinarily mean the same thing and are understood to describe that depression on the earth's surface in which the waters of the stream are confined and flow in its ordinary stages, unaffected by freshets or droughts. In boatmen's parlance it is the course over its bed over which the water is deepest and the navigation safest. This may be irrespective of the current or distance from the shore. In questions of geography or boundaries, however, the term is more generally used to designate the depression of a bed below the permanent banks, forming a conduit along which waters flow, and which may be at some times full and at others nearly, if not quite, dry. This is the sense in which it is commonly used in law, and it is the more obvious signification in connection with boundaries, inasmuch as it presents something of a permanent nature, or at least at all times visible, and when changed leaving traces of old landmarks. State v. Munice Pulp Co., 104 S. W. 437, 443, 119 Tenn. 47.

As boundary

The widest expanse of water which can reasonably be called a channel is what is meant by the words "widest channel" in Act Feb. 14, 1859, c. 11, 11 Stat. 383, admitting Oregon into the Union with the Columbia river as its northern boundary. State of Washington v. State of Oregon, 29 Sup. Ct. 631, 632, 214 U. S. 205, 216, 53 L. Ed. 969.

CHANNEL BARS

"Channel bars" are vertical iron bars extending from the roof to the ceiling of a building in front of an elevator shaft, designed to hold the fire bricks making the final wall of the shaft. Hartman v. Clarke, 93 N. Y. Supp. 314, 104 App. Div. 62.

CHAR

See Bone Char.

CHARACTER

See Chaste Character; Fiduciary Character; General Character; Good Character; Good Moral Character; Previous Chaste Character.

Respectable character, see Respectable.

The word "character" may denote either real character or reputed character. McQuiggan v. Ladd, 64 Atl. 503, 504, 79 Vt. 90, 14 L. R. A. (N. S.) 689.

In one sense "character" is what a person really is. In another sense "character" is measured and determined from reputation and is what a person is supposed or estimated to be. The character of a female under the age of 18 years and over the age of 16, within the statute defining rape as an assault where the female is over the age of 16 and under the age of 18 and of previous chaste character, is that condition actually existing, contradistinguished from a character by reputation. Marshall v. Territory, 101 Pac. 139, 144, 2 Okl. Cr. 136.

"Character" is a continuous quality not quickly changed or changeable. The character of a witness at the time of testifying, is that which affects his truthfulness; but his character at another time may well be considered as evidencing his character at the time of testifying. Where a witness has been removed from a place less than three years and has established no residence elsewhere, his "character" in that community is admissible. Lindsay v. Bates, 122 S. W. 682, 687, 223 Mo. 294 (quoting and adopting definition in 1 Greenl. Ev. § 461d1).

A witness, testifying to the general character of decedent in the community in which the latter lived, could also testify to such character in the community in which the witness lived, eight miles distant, though the witness lived in another state; "character" being the reputation one bears in the neighborhood in which he may reside or in which

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he is known. Pate v. State, 50 South. 357, 358, 162 Ala. 32.

"'Character' grows out of special acts but is not proved by them." Such discrimination between character or reputation and specific acts of falsehood is constantly made where the question is as to the veracity of a party or witness; but, on an issue as to a master's negligence in retaining a servant in his employ after he knows him to be unfit for the service, this distinction does not exclude previous specific acts of the servant indicating incompetency which were or should have been known to the master. Pittsburgh Rys. Co. v. Thomas, 174 Fed. 591, 594, 98 C. C. A. 437 (quoting Frazier v. Pennsylvania R. Co., 38 Pa. 104, 80 Am. Dec. 467).

As used in a street paving contract, providing that the city should not be estopped by certificates of officers showing the true amount and "character" of the work done under the contract, the word "character" was not entirely accurate to express the meaning of the parties, but a fair construction of the word as was used was that the city might show the true and correct kind of the work that had been done; that is, that the work done was not of the general kind required by the contract. Quinn v. City of New York, 45 N. Y. Supp. 7, 9, 16 App. Div. 408.

Under the McEnerney act (St. 1906 [Ex. Sess.] p. 76), providing for an action to establish title in case of loss of records, and providing, in section 5, that an affidavit of plaintiff, fully and explicitly setting forth the character of his estate, right, title, and interest or claim in and possession of the property, shall be filed with the complaint, an affidavit, alleging simple possession without describing its character, was sufficient to give the court jurisdiction to decide the action; the word "character" having no reference to possession. Soher v. Cabaniss, 119 Pac. 911, 912, 161 Cal. 548.

The seal of a corporation is a "character" within the meaning of section 197 of the New Jersey crimes act (P. L. 1898, p. 848), and the forgery of such seal with intent to injure any person or corporation constitutes a crime thereunder. United States v. Andem, 158 Fed. 996, 997.

An assault with intent to commit murder is an offense of the same "character" as murder, within Cr. Code, § 5016, subd. 3, providing that a juror may be challenged if within 12 months he has been indicted for an offense of the same "character." Charleston v. State, 32 South. 259, 133 Ala. 118.

As reputation

"Character" is sometimes used as synonymous with "reputation." People v. Van Gaasbeck, 82 N. E. 718, 720, 189 N. Y. 408, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745.

The word "character," when used in respect to the good or bad character of a defendant, means reputation, as distinguished from disposition. People v. Hinksman, 85 N. E. 676, 680, 192 N. Y. 421.

A person's character cannot be proved by asking a witness what kind of a man he is; the word "character," in legal parlance, being equivalent in meaning to the word "reputation." Peacock v. State, 73 S. E. 404, 10 Ga. App. 402.

The word "character" has a dual meaning, and may refer to a person's private life, about which the public may have no knowledge, or may mean the character that a person enjoys by reputation; and in libel actions "character" is synonymous with "reputation." Lydiard v. Daily News Co. of Minneapolis, 124 N. W. 985, 987, 110 Minn. 140, 19 Ann. Cas. 985.

"Character" is a fact which is proved by another fact; general reputation. It is not permissible to show character by evidence of particular facts. Feibelman v. Manchester Fire Assur. Co., 19 South. 540, 548, 108 Ala. 180.

The terms "character" and "reputation" are often used interchangeably, and where a witness testifies to knowledge gained from general repute, though the word "character" is used in the inquiry, there can be no error in receiving his testimony. Spain v. Rakestraw, 101 Pac. 466, 79 Kan. 758.

In Code, § 4614, providing that the general moral character of a witness may be proved to test his credibility, "character" is equivalent to general reputation. State v. Gregory, 126 N. W. 1109, 148 Iowa, 152.

Good general reputation for honesty, chastity, veracity, and like qualities is synonymous with "good character" as to those qualities, within the meaning of Cal. Pen. Code, § 268. The good character of a man is the estimation in which he is held in the community in which he resides. As stated in Anderson's Law Dictionary, the term "character" means: "The qualities impressed by nature or habit on a person, which distinguish him from other persons. These constitute his real character, while the qualities he is supposed to possess constitute his estimated character, or 'reputation.'" Under Pen. Code, § 268, requiring proof of the prosecutrix's previous chaste character in prosecutions for seduction, her reputation may be evidence of such character, as good general reputation for honesty, chastity, veracity, and like qualities is synonymous with good character as to these qualities within the meaning of the statute. Ex parte Vandiveer, 88 Pac. 993, 994, 4 Cal. App. 650.

Where the state attacked reputation of defendant, who was a witness, for truth and veracity, and defendant offered to prove that his "character" for truth and veracity was good, an objection on the ground that his "reputation," and not his "character," was

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involved, was improperly sustained, as the terms are frequently used without discrimination. State v. Tawney, 99 Pac. 268, 78 Kan. 855.

Reputation distinguished

A person's "reputation" and "character" are not the same. Reputation as evidence may tend to prove character; but a man may in fact have a good character while suffering from a bad reputation. Curtice v. Dixon, 68 Atl. 587, 589, 74 N. H. 386 (citing Bottoms v. Kent, 48 N. C. 160).

"'Character' signifies the reality, and 'reputation' merely what is reputed or understood from report to be the reality about a person or thing." Woodruff v. State, 101 N. W. 1114, 1118, 72 Neb. 815 (citing 6 Cyc. p. 892).

"Character" is what a man is, whereas reputation is what people say of him. People v. Montgomery, 68 N. E. 258, 260, 176 N. Y. 219,

Strictly speaking, the words "reputation" and "character" are not synonymous. "Character" is what a man or woman is morally, while "reputation" is what he or she is reputed to be. Reputation is the estimate which the community has or expresses of a person's character; and, if the reputation is bad, this is treated as evidence where general character is involved. Moore v. Dozier, 57 S. E. 110, 113, 128 Ga. 90 (citing Leverich v. Frank, 6 Or. 212, 213; 7 Words and Phrases, p. 6118).

The word "character," although frequently used as synonymous with "reputation," is what a person is, while reputation is what he is supposed to be; and when he is an habitual violater of the law, by keeping his saloon open at prohibited times, he is not a person of good moral character and well disposed to the good order of the county, so as to be entitled to naturalization. United States v. Hrasky, 88 N. E. 1031, 1032, 1033, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279 (citing 2 Words and Phrases, pp. 1061, 1065).

"It would be well if 'character' and 'reputation' were used distinctly. In truth, 'character' is what a person is; 'reputation' is what he is supposed to be. Character is in himself; reputation is in the minds of others. Character is injured by temptation and by wrongdoing; reputation by slander and libels. Character endures throughout defamation in every form but perishes when there is a voluntary transgression; reputation may last through numerous transgressions, but be destroyed by a single, and even an unfounded, accusation or aspersion." Harrison v. Lakenan, 88 S. W. 53, 58, 189 Mo. 581 (quoting and adopting definition in Webster's Dict. and citing State v. Gee, 85 Mo. 647; State v. Brooks, 5 S. W. 257, 330, 92 Mo. loc. cit. 557; State v. Hilsabeck, 34 S. W. 38, 132 Mo. loc. cit. 358; and State v. Hudspeth, 60 S. W. 136, 159 Mo. loc. cit. 200).

CHARACTER AND CIRCUMSTANCES OF INJURY

A notice that plaintiff was injured while walking upon the sidewalk of defendant city at the intersection of certain streets does not give notice of the "character and circumstances of the injury," as required by Rev. St. 1899, § 5724, requiring such notice as a prerequisite to a recovery. Lyons v. City of St. Joseph, 87 S. W. 588, 112 Mo. App. 681.

CHARCOAL

See Blood Charcoal.

CHARGE

See Clear of All Charges; Conventional Division of Charges; Fixed Charges; Free of All Charges; Having Charge of; Necessary Charges; Overcharge; Public Charge; Put in Charge; Reasonable Charge; Rent Charge; Small General Charge; Specially Charged; Take Entire Charge; Terminal Charge; Undercharges.

All other necessary charges, see All Other.

Primarily the word "charge" means a load, a weight, a burden, and does not embrace compensation. Sage v. Vinton County Com'rs, 92 N. E. 24, 25, 82 Ohio St. 186.

To "charge" is to lay on or impose as a load, tax, or burden; to fix or demand a price for a thing or service. The word as used in an alternative writ of mandamus, setting up that a railroad charges and has charged rates in excess of the rates prescribed by the railroad commissioners, cannot be said to be indefinite and indeterminate in meaning. State ex rel. Atty. Gen. v. Atlantic Coast Line Ry. Co., 37 South. 652, 656, 48 Fla. 114.

Where a pleader intends to allege or aver a fact, it is sufficient, although he "charges" such to be the truth. Johnson v. Helmstaedter, 30 N. J. Eq. 124, 125.

Immigration Act Feb. 20, 1907, c. 1134, § 19, provides that if the owner of a steamship shall make any "charge" for the return of any alien brought to the United States and not entitled to enter, or shall take any security from him for the payment of such charge, he shall be guilty of a misdemeanor. An indictment alleged that defendant steamship company at Bremen collected return passage money from proposed immigrants who were within the excluded classes, and that it afterwards brought them to New York, and knowing of their proposed deportation, holds the money as security for a charge to be made for deportation. Held, that the word "charge" as so used did not

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import a continuing act, but meant an overt act, by which the charging party manifested his purpose to demand the money charged from the person charged, excluding the subsequent relations which were consequences of the act, and that the indictment was therefore fatally defective for failure to allege that the forbidden "charge" was made with the intent to apply the amount so collected to the return of the aliens under deportation. Under Immigration Act Feb. 20, 1907, c. 1134, § 19, 34 Stat. 904, providing that if any shipowner shall make any charge for the return of any alien brought to the United States and not entitled to enter, or shall take any security from him for the payment of the charge of deportation, he shall be guilty of a misdemeanor, an indictment alleging that defendant at Bremen collected return passage from certain proposed immigrants who were within the excluded classes, and held the money as security for a charge to be made for deportation, did not charge the taking of the money as security within the United States, since to retain money taken in a foreign country was not a continuous repetition of the "taking" within the United States by reason of the fact that the aliens were brought to the United States and ordered deported because not entitled to enter. United States v. Nord Deutscher Lloyd, 186 Fed. 391, 394.

The centrifugals used in sugar factories for the purpose of forcing out the molasses or syrup from the mass of sugar are "charged" when they are loaded with sugar. Great Western Sugar Co. v. Pray, 158 Fed. 756, 757, 86 C. C. A. 112.

As control or regulation

The brakeman was in "charge or control" of the train within the meaning of the statute; it having been his duty to set the brakes, and he having the power to so control the train. Denver & R. G. R. Co. v. Vitello, 121 Pac. 112, 118, 21 Colo. App. 51.

Under a statute making a railroad company liable for injuries to its employés caused by the negligence of its yardmaster, engineer, or any other employer, who had "charge or control of any switch," a railroad is liable for injuries to a brakeman, caused by the collision of a switch engine with a train on which the brakeman was; the collision occurring at a station from which a spur track extended to certain quarries and being caused by the acts of the engineer of the switch engine and the yardmaster at the station, acting as brakeman in taking cars to the quarries. Albrecht v. Milwaukee & S. Ry. Co., 69 N. W. 63, 64, 94 Wis. 397.

A "person in charge of defendant's ways, works, and machinery" may or may not have authority to direct workmen, and whether he does or not will depend entirely on the authority given him by the master. In an action for injuries to a servant, where one of the essential facts upon which the complaint was based was a negligent assignment of plaintiff to work at a machine, which required an allegation that plaintiff was put to work at the machine by defendant, an allegation that plaintiff was negligently and carelessly taken from his common work, and that those in charge of defendant's ways, works, and machinery ordered him to operate the machine where he was injured, was insufficient; the phrase "a person in charge of defendant's ways, works, and machinery" not carrying the necessary inference that he was authorized to direct workmen by authority of the master. Holliday & Wyon Co. v. O'Donnell, 90 N. E. 24, 26, 44 Ind. App. 647.

A tower man, whose duty it was to move a switch, is a person in "charge or control of" a switch within a statute, providing that a railroad company shall be liable for injuries caused by the negligence of an employé in charge or control of a switch. Welch v. New York, N. H. & H. R. Co., 57 N. E. 668, 176 Mass. 393, 398.

Where defendant had set up and furnished the machinery in its factory which it agreed to maintain for the use of plaintiff's employer, it was "in charge" of the factory, within the meaning of Labor Law (Laws 1897, c. 415, § 81), imposing on the person "in charge" of the factory the duty of properly guarding the machinery, and it is liable for an injury to plaintiff due to its neglect to properly guard the machinery. Poole v. American Linseed Co., 103 N. Y. Supp. 1047, 1048, 119 App. Div. 136.

As a debt or liability

Testator made a residuary bequest to a nephew, declared that it was "charged" with an indebtedness due from the nephew's father, directed the executor not to enforce the collection thereof during the father's lifetime, and provided that, if the indebtedness exceeded the bequest, the same was to be made up to the other beneficiaries. Held that, on the indebtedness being less than the bequest, the executor should assign the indebtedness to the nephew; the testator intending that in making up the bequest the indebtedness should be debited as against the nephew's right and made a part of his interest. In re Bouck's Will, 113 N. W. 452, 453, 133 Wis. 161.

As lien or incumbrance

"Charge" is defined in Bouv. Law Dict. as "a lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies." Under Code Pub. Gen. Laws 1904, art. 16, § 83, providing that proceedings to enforce any charge or lien on lands shall be instituted in the county where such lands lie, etc.; the word "charge" means a lien, incumbrance, or

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claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies, and a bill to set aside a conveyance as in fraud of creditors is a claim to be satisfied out of the land or the proceeds thereof. Abramson v. Horner, 80 Atl. 907, 912, 115 Md. 232.

A "charge" on land signifies either a burden imposed by a testator in his will, or a lien or incumbrance which the purchaser may have, and for which, at common law or in equity, he would be entitled to hold the land as security; and so a proceeding by an administrator to sell land of his testator for the payment of unsecured claims is not a proceeding for the enforcement of a "charge" on land, and hence is not governed by Code, art. 16, § 83, providing that all proceedings for the partition of real estate, foreclosure of mortgages, or enforcement of liens or charges shall be instituted in the court of the county or of the city of Baltimore, where the lands lie. Cain v. Miller, 82 Atl. 1055, 1057, 117 Md. 45; People v. Marks, 135 N. Y. Supp. 523, 75 Misc. Rep. 404 (citing Words and Phrases).

In the law of real property "'charges' are always treated as charges in rem as well as in personam, unless the testator uses some other language which limits, restrains, or repels that construction." Also "a condition for the benefit of a person, without any expressed intention that its breach shall work a forfeiture of the estate, should be regarded as creating a trust or charge upon the land in such person's favor, to be enforced as other trusts and charges, and not as a limitation on the estate devised." Wood v. Ogden, 97 S. W. 610, 611, 121 Mo. App. 668 (quoting Sands v. Champlin, 1 Story, 376, 21 Fed. Cas. 339).

As receive

See Receive.

CHARGE (In Criminal Law)

See Act Charged; As Charged in the Information; Legal Charge of Crime; Legally Charged.
See, also, Arraign.

"'Charged with crime,' in legal parlance, means charged in the regular course of judicial proceedings. A man cannot be legally charged with crime when there is no jurisdiction to try him. The fact that he is so legally charged means that he is charged by an authority having a right to try him. The right to try means jurisdiction over the place where the crime has been committed and over the person who commits it." Ex parte Cheatham, 95 S. W. 1077, 1081, 50 Tex. Cr. R. 51 (quoting and adopting definition in Ex parte Morgan, 20 Fed. 308).

In Const. art. 4, § 2, providing for the extradition from one state to another of persons charged with crime, and Rev. St. § 5278, enacted for the carrying out of such constitutional provision, the term "charged with crime" is used in its broad sense and includes all persons accused of crime by legal proceedings; the charge continuing until such person has been tried and acquitted, or, if convicted, until the sentence imposed has been performed. Hughes v. Pflanz, 138 Fed. 980, 983, 71 C. C. A. 234 (citing In re Hope, 10 N. Y. Supp. 28; Drinkall v. Spiegel, Sheriff, 36 Atl. 830, 68 Conn. 441, 36 L. R. A. 486).

Where a person was legally charged under the laws of a sister state with an offense, and was legally convicted thereof under an information filed by the prosecuting officer of the sister state and such person subsequently fled to the state of Texas, the Governor of Texas properly issued his extradition warrant on a proper demand therefor; the word "charged," within Const. U. S. art. 4, § 2, and the federal statutes relating to extradition applying to persons convicted as well as to persons merely sought for the purpose of trial. Ex parte Bergman, 130 S. W. 174, 178, 60 Tex. Cr. R. 8.

The word "charged," in Const. art. 4, § 2, subd. 2, providing that "a person 'charged' in any state with treason, felony, or any other crime, who shall flee from justice and be found in another state, shall on demand of executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime," was used in its broad signification to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. A person against whom a complaint for a felony has been filed before a committing magistrate, who can only charge or hold for trial before another tribunal, is "charged" with the crime within the meaning of the Constitution, and of Rev. St. § 5278, providing for the extradition of persons "charged" with treason, felony, or other crime. In re Strauss, 25 Sup. Ct. 535, 537, 197 U. S. 324, 49 L. Ed. 774.

A fugitive from justice is "charged" with a crime, within the extradition law, only when he is charged lawfully by a person who has knowledge of its commission, or is possessed of information, which he states under oath, leading a reasonable and fair mind to infer its commission. People ex rel. Cornett v. Warden of City Prison of Brooklyn, 112 N. Y. Supp. 492, 493, 60 Misc. Rep. 525.

An indictment, whether good or bad as a pleading, which unmistakably describes every element of the crime of false swearing, as defined by Pen. Code Tex. 1895, art. 209, is a "charge" of crime within the meaning of Const. U. S. art. 4, § 2, par. 2, relating to interstate extradition. Pierce v. Creecy, 28 Sup. Ct. 714, 719, 210 U. S. 387, 52 L. Ed. 1113.

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The word "charged" as applied to criminal proceedings may have different meanings according to the text. It may mean the accusation which precedes the formal trial, or it may mean the responsibility for the crime itself, and, may be applicable to one who has been convicted and is serving a sentence. In common parlance, it signifies the formal commencement of a criminal proceeding, by filing or returning of the accusatory paper. State v. Ju Nun, 98 Pac. 513, 514, 53 Or. 1 (citing 8 Words and Phrases, p. 1069).

A "legal charge of crime," as contemplated by extradition statutes, means one made in that state having jurisdiction to try the offense and from which the fugitive fled. The word "charged," in 2 Ballinger's Ann. Codes & St. § 7017, declaring that, when any person shall be found within the state charged with an offense committed in another state, the court or magistrate may on complaint issue a warrant for his arrest, contemplates that the person arrested and delivered up committed the offense in another state and is in such state legally charged with crime. State v. White, 82 Pac. 907, 908, 909, 40 Wash. 560, 2 L. R. A. (N. S.) 563.

The words "charged with," as used in a statute providing that an accessory after the fact is one who, with knowledge that a crime has been committed, harbors or protects the person "charged with" or found guilty of the crime, cannot be said to have a well-known and established legal signification as applied to criminal offenses, but do not require that a judicial charge be then pending against the principal. The expression is sometimes used in a limited sense, including the accusation of a crime which precedes a formal trial. In a fuller and more accurate sense the expression includes also the responsibility for the crime. State v. Jones, 120 S. W. 154, 155, 91 Ark. 5, 18 Ann. Cas. 293 (quoting Drinkall v. Spiegel, 36 Atl. 830, 68 Conn. 441, 36 L. R. A. 486).

An indictment, whether good or bad as a pleading, which unmistakably describes every element of the crime of false swearing, as defined by Tex. Pen. Code 1895, art. 209, is a charge of crime within the meaning of Const. art. 4, § 2, par. 2, regulating interstate extradition. Pierce v. Creecy, 28 Sup. Ct. 714, 718, 210 U. S. 387, 52 L. Ed. 1113.

Rev. St. 1899, § 5273, provides that an information may be filed without a preliminary examination, whenever an offense shall be charged against any person at any time within 30 days immediately preceding the first day of a regular term of court of the county wherein such offense is charged to have been committed. Held, that the filing of the information constitutes the "charge," where there has been no prior proceeding, and that the 30 days are to be computed from the date of preferring the charge, and not from the date of the commission of the offense. Nicholson v. State, 106 Pac. 929, 930, 18 Wyo. 298.

The examination of witnesses before a grand jury need not be preceded by a presentment, indictment, or other formal "charge." In summoning witnesses before a grand jury it is sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the "charge" against such persons. Hale v. Henkel, 26 Sup. Ct. 370, 372, 201 U. S. 43, 50 L. Ed. 652.

CHARGE (To Jury)

See Additional Charge; General Charge; Written Charge or Instruction.
Abstract charge, see Abstract.
See, also, Instruction.

"Charging a jury" is stating the precise principles of law applicable to the case immediately in question. Oral statements made by the court to the jury with reference to the form of their verdict, which do not contain directions or instructions upon some question of law involved in the trial or comment on the evidence, are not instructions within the statute requiring instructions to the jury to be reduced to writing unless waived by the defendant. Douglas v. Territory, 98 Pac. 1023, 1024, 1 Okl. Cr. 583.

An oral charge taken down by a stenographer in the employ of both parties to report the proceedings is a charge in writing. Schon v. Modern Woodmen of America, 99 Pac. 25, 27, 51 Wash. 482.

The word "charged," as used in a holding that after a jury has been sworn and charged with the fate of the prisoner, it is too late to challenge any of its members, means when the prisoner has been placed in the hands of the jury for trial, which occurs when the jury is sworn and before indictment read or testimony heard, and not necessarily after the testimony in the case is heard or the law charged. When the jury has once been impaneled and charged with the trial of the prisoner, the discharge of the jury, unless by the consent of the prisoner, or in a case of legal necessity, will operate as an acquittal, and prevent his being again put on trial. Where, in a criminal case, after a jury was impaneled and sworn, the defendant arraigned, and the state and defendant announced ready for trial, the court, after asking them some questions, discharged two jurors over defendant's objection, one because of relationship to the defendant and the other because he had not been a resident of the county a sufficient time, the defendant was entitled to discharge on the ground of former jeopardy. Tomasson v. State, 79 S. W. 802, 803, 112 Tenn. 596 (quoting Ward v. State, 20 Tenn. [1 Humph.] 253; State v. Connor, 45 Tenn. [5 Cold.] 315).

Under Pen. Code 1910, § 1056, providing where the judge is requested to put his "charge" in writing "there are certain di-

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rections which the court may give to a jury, which do not fall within any fair definition of the word 'charge.' For example, suppose the evidence in a case to be over and the arguments of counsel concluded at a late hour in the day. The judge decides not to charge the jury until after supper. He turns to them and orally informs them of this purpose and instructs them not to enter upon a consideration of the case until they shall have received his charge, and commends to them those other observances which are ordinarily commended to the jury by the judge when they are being detained not in the presence of the court. Certainly such a direction as this would not be considered as part of the charge of the court, within the purview of the statute. Likewise, if the judge, having committed his charge to writing and being about to read it to the jury, should, prefatory to the reading of it, ask the jury to give him their careful attention. A number of similar directions can be conceived of which would in no fair sense be considered as a part of the charge, and which would not be violative of the letter or the spirit of the law, though orally given." But it is violative of the statute if the court gives to the jury any instructions not in writing as to how they shall consider the case to be submitted to them or how they shall make a verdict. Walker v. State, 72 S. E. 531, 532, 10 Ga. App. 85.

Oral statements made by the court to the jury, with reference to the form or character of their verdict, which do not contain instructions or directions upon some question of law involved in the trial, or comment on the evidence, are not within the statute requiring instructions or "charges" to be in writing. Sturgis v. State, 102 Pac. 57, 73, 77, 2 Okl. Cr. 362.

The word "charge," in a statute providing that the judge shall not charge juries with respect to matters of fact but might state the testimony at law, refers to the final summing up of the case by the judge to the jury containing his instructions to them after the evidence has all been heard and the arguments of counsel concluded. It is not intended to include any and every question and answer passing between the court and jury, but refers to the address made by the judge after the case had been closed when he comments upon the testimony or instructs the jury in any matters of law arising upon it. Partelow v. Newton & B. St. Ry. Co., 81 N. E. 894, 896, 196 Mass. 24 (citing Harris v. McArthur, 15 S. E. 758, 90 Ga. 216; Moore v. Columbia & G. R. Co., 16 S. E. 781, 38 S. C. 1, 31; Equitable Fire Ins. Co. v. Trustees C. P. Church, 18 S. W. 121, 91 Tenn. 135; Dodd v. Moore, 91 Ind. 522; Lehman v. Hawks, 23 N. E. 670, 121 Ind. 541; Sharp v. Hoffman, 21 Pac. 846, 79 Cal. 404, 408).

Under Const. art. 6, § 12, providing that judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law, an instruction that the testimony of accused should be weighed, like that of any other witness, but that the jury may consider his very great interest in the result, is erroneous; such an instruction clearly being a "charge with respect to matters of fact," although such an instruction would not, in every case, be reversible error, in view of Const. art. 6, § 22, providing that no cause shall be reversed for technical error when substantial justice has been done. Erickson v. State (Ariz.) 127 Pac. 754, 757.

CHARGE DOCKET

The clerk of the district court is under no legal obligation to keep a "general docket," and he has no personal interest in keeping such a docket, but the clerk's "charge docket" is a record in which the clerk has a vital interest, and the correctness of the entries in such docket is more or less assured by the fact that the litigants against whom the charges are entered have an interest in the matter of their correctness in conflict with that of the clerk. Fontelieu v. Fontelieu, 41 South. 120, 126, 116 La. 866.

CHARGEABLE

The language of a decree, declaring real estate, for the improvement of which plaintiff had made advances, "chargeable with the sums so advanced," refers to pecuniary advances and not to advances in the shape of personal services. Hodges v. Hodges, 9 R. I. 32, 34.

CHARGING LIEN

The lien which an attorney has upon any money in his hands belonging to his client is sometimes called a "charging lien." Holmes v. Waymire, 84 Pac. 558, 559, 73 Kan. 104, 9 Ann. Cas. 624.

An attorney's lien at common law in England upon the fund or judgment which he recovered, for payment as attorney was nominated a "charging lien." Imboden v. Renshaw, 76 S. W. 701, 705, 102 Mo. App. 173 (citing Stokes, Liens of Attorneys, p. 85, § 5).

An attorney's lien created by statute is a "charging lien" extending to all money or property of the client, including the judgment, and is perfected by verbal or written notice to the judgment debtor, if no special form of notice is required. A settlement of the judgment, with actual notice of the attorney's claim, will be set aside to enable him to satisfy his lien. Northrup v. Hayward, 113 N. W. 701, 702, 102 Minn. 307, 12 Ann. Cas. 341.

CHARITABLE

See Charity.

The word "charitable," as used in a residuary clause of a will disposing of the

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residue by giving it to the executors to distribute among such "charitable institutions, persons, or objects" as they deem fit, will be construed to qualify "persons" and "objects" as well as "institutions" in order to sustain the trust as a charitable one. Gill v. Attorney General, 83 N. E. 676, 197 Mass. 232.

"Charitable" in its usual sense means pertaining to almsgiving or relief of the poor, and in a legal sense "charity" has been defined as a gift to be applied lawfully, among other things, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, relieving their bodies from disease or suffering. In re Moore's Estate, 122 N. Y. Supp. 828, 831, 66 Misc. Rep. 116.

CHARITABLE BEQUEST

See Charity.

CHARITABLE CORPORATION

See, also, Charity.

While "charity" has a broad meaning, a "charitable corporation" is one whose principal aim is to benefit needy ones other than by improving their morals. In re McCormick's Estate, 127 N. Y. Supp. 493, 495, 71 Misc. Rep. 95 (citing 2 Words and Phrases, p. 1086).

CHARITABLE GIFT

See Charity.

CHARITABLE INSTITUTION

See, also, Charity.

An institution, organized under Pub. Acts 1855, p. 28, No. 20, providing that three or more persons who may desire to become incorporated for any charitable purpose may do so, the purpose of which is charitable, is a charitable society. Gallon v. House of Good Shepherd, 122 N. W. 631, 633, 158 Mich. 361, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387.

CHARITABLE PURPOSE

Used for charitable purpose, see Use—Used.

CHARITABLE SOCIETY

See Charity.

CHARITABLE TRUST

See, also, Charity.

A "charitable trust" is simply an indefinite or uncertain trust without a beneficiary. In re Shattuck's Will, 86 N. E. 455, 193 N. Y. 446 (quoting and adopting Levy v. Levy, 33 N. Y. 97).

Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity, all gifts for the relief and comfort of the poor, the sick, and the afflicted, and all gifts for the public convenience, benefit, utility, or ornament, and a "charity" in the legal sense may be defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, or by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life or otherwise lessening the burdens of government. Carter v. Whitcomb, 69 Atl. 779, 782, 74 N. H. 482, 17 L. R. A. (N. S.) 733.

A "charitable trust" is a gift for the benefit of an indefinite number of persons, either by bringing them under the influence of education or religion, or relieving them of disease, suffering, or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public or some class thereof. In re Lennon's Estate, 92 Pac. 870, 871, 152 Cal. 327, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024.

It is a distinguishing element of a charitable trust that it is a trust for an indefinite number of persons, and the gift of land to the "membership now existing and hereafter to exist" of an "unincorporated association or body of persons" for a charitable use is sufficiently certain as to the beneficiaries, and is valid. Peth v. Spear, 115 Pac. 164, 165, 63 Wash. 291.

CHARITABLE USE

Used for charitable purpose, see Use—Used.

See, also, Charity.

The words "charitable uses" include all gifts for general public use, independent of benevolent, educational, or religious purposes. Trustees of New Castle Common v. Megginson (Del.) 77 Atl. 565, 570, 1 Boyce, 361.

The law recognizes no purpose as charitable unless it is of a public character. If the donor merely intended to benefit specific individuals, the gift is not charitable, though the motive may have been to relieve poverty or accomplish some other purpose in reference to those particular individuals which would be charitable if not so confined; but if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion, or other purpose charitable within the meaning of the statute of Elizabeth without reference to any particular individuals and without giving any particular individuals the right to claim the funds, the gift is for a "charitable use." In re Shattuck's Will, 86 N. E. 455, 456, 193 N. Y. 446 (citing Tud. Char. and Mortmain [4th Ed.] 37; 2 Pom. Eq. Jur. [2d Ed.] § 1019; Sherwood v. American Bible Society, *40 N. Y. 561; Smith v. Havens Relief Fund Society, 90 N. Y. Supp. 168, 175, 44 Misc. Rep. 594–608; Attorney General v. Soule, 28 Mich. 153; Stratton v. Physio-Medical College, 21 N. E. 874, 149 Mass. 505,

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5 L. R. A. 33, 14 Am. St. Rep. 442; Haynes v. Carr, 49 Atl. 638, 70 N. H. 463; Fowl. Charitable Uses, p. 106).

CHARITY

See Public Charity; Purely Public Charity.

A gift to be applied consistently with existing laws for the benefit of an indefinite number of persons by bringing their hearts under the influence of education is a "charity." In re Kavanaugh's Will, 126 N. W. 672, 675, 143 Wis. 90, 28 L. R. A. (N. S.) 470.

A "charity" is a trust, an active express trust, though known to the English law distinctively as a public trust, and is subject to the provisions of the Revised Statutes abolishing all trusts except those specified. Levy v. Levy, 33 N. Y. 97, 134.

"Charity" is a gift to promote the welfare of others in need. Mason v. Zimmerman, 106 Pac. 1005, 1008, 81 Kan. 799.

"Charity" is defined by Lord Camden as a "gift to a general public use, which extends to the poor as well as to the rich." Kronshage v. Varrell, 97 N. W. 928, 930, 120 Wis. 161 (citing Perin v. Carey, 65 U. S. [24 How.] 465, 16 L. Ed. 701).

A "charity" is defined to be "a gift to a general use, which extends to the poor as well as the rich," and is not confined to mere almsgiving, or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man. New England Sanitarium v. Inhabitants of Stoneham, 91 N. E. 385, 387, 205 Mass. 335.

A charity, in the legal sense, is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification which includes the improvement and promotion of happiness. Little v. City of Newburyport, 96 N. E. 1032, 1033, 210 Mass. 414, Ann. Cas. 1912D, 425.

Personal Property Law (Consol. Laws 1909, c. 41) § 12, providing that no "gift" to charitable uses shall be invalid for indefiniteness or uncertainty of the persons designated as the beneficiaries, applies only to gifts for a public purpose, and not to gifts for the benefit of private institutions or individuals. In re Robinson's Will, 96 N. E. 925, 926, 203 N. Y. 380, 37 L. R. A. (N. S.) 1023.

"A 'charity,' in its legal sense, is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show that it is charitable in its nature." MacKenzie v. Trustees of Presbytery of Jersey City, 61 Atl. 1027, 1033, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227 (quoting and adopting definition in Jackson v. Phillips, 96 Mass. [14 Allen] 539, 566).

"A 'charity,' in a legal sense, is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government." In re Merchant's Estate, 77 Pac. 475, 477, 143 Cal. 537 (quoting and adopting the definition in Jackson v. Phillips, 96 Mass. [14 Allen] 539, which was approved in 2 Perry, Trusts, § 697).

Gifts to charitable uses have always received favorable consideration of the court. A testator who bequeathed all his property to his wife for life, she, after providing for her own wants, to give such amounts to testator's relations as she might think proper, and the balance to advance the cause of religion and promote the cause of charity in such a manner as the wife might think would be most conducive to carrying out testator's wishes, with authority to lease and sell property for the benefit of the estate, did not create a trust for a "charitable use" enforceable in equity. Hadley v. Forsee, 101 S. W. 59, 61, 203 Mo. 418, 14 L. R. A. (N. S.) 49.

A "charitable" or pious gift is one given for the love of God or for the love of your neighbor, in the catholic or universal sense, given from these motives and to these ends, free from stain or taint of any consideration that is personal, private, or selfish. More precisely, it is a gift to the general public use, extending to the poor as well as the rich. A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion by relieving their bodies from diseases, suffering, or constraint, by assisting them to establish themselves in life, or erecting and maintaining public buildings or works, or otherwise lessening the burdens of government. In order that there may be a good trust for a charitable use, there must be some public benefit open to an indefinite and vague number, the persons to be benefited to be uncertain and indefinite and to be selected or appointed to be the particular beneficiaries of the trust for the time being. A "charity" is any gift not inconsistent with existing laws, which is promotive of

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science or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or for the public convenience. Crow ex rel. Jones v. Clay County, 95 S. W. 369, 375, 196 Mo. 234 (citing Coggeshall v. Pelton [N. Y.] 7 Johns. Ch. 294, 11 Am. Dec. 471; Perin v. Carey, 65 U. S. [24 How.] 506, 16 L. Ed. 701; Hinkley's Estate, 58 Cal. 457; Missouri Historical Society v. Academy of Science, 8 S. W. 346, 94 Mo. 459; Chambers v. St. Louis, 29 Mo. 543).

Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity, all gifts for the relief and comfort of the poor, the sick, and the afflicted, and all gifts for the public convenience, benefit, utility, or ornament, and a "charity" in the legal sense may be defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, or by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life or otherwise lessening the burdens of government. Carter v. Whitcomb, 69 Atl. 779, 783, 74 N. H. 482, 17 L. R. A. (N. S.) 733.

The word "charity," as found in our decisions and statutes, is not to be taken in its widest sense denoting all the good affections which men ought to bear to each other, nor in its restricted and usual sense signifying relief to the poor, but is to be taken in its legal signification as derived chiefly from the statute of 43 Eliz. c. 4. Those purposes are deemed charitable which are enunciated in that act, or which by analogy are deemed within its spirit and intendment. Maine Baptist Missionary Convention v. City of Portland, 65 Me. 92, 93.

In a legal sense, a charity is a gift applied consistently with existing laws for the benefit of an indefinite number of persons by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. In re Centennial & Memorial Ass'n of Valley Forge, 83 Atl. 683, 684, 235 Pa. 206.

Testator's will provided that he desired his executors to divide the surplus among such charities as they might think well of with a suggestion as to a certain class of objects to which testator "would like" the money to be given. Held a valid "gift," within Laws 1893, c. 701, as amended by Laws 1901, c. 291, and to create a valid trust the suggestion being equivalent to a command so that the purpose of the gift was certain, leaving only the beneficiaries uncertain. Manley v. Fiske, 124 N. Y. Supp. 149, 150, 139 App. Div. 665.

A gift of a residue to an executor, to be distributed among "charitable" institutions, "persons," or "objects" in their discretion, is not void on the theory that a charitable person means a person devoted to charity, since the property passes directly to the executor, to be conveyed to the person in execution of the trust. Gill v. Attorney General, 83 N. E. 676, 197 Mass. 232.

Asylums and hospitals

That a public charitable hospital receives pay from a patient for lodging and care does not affect its character as a charitable institution, nor its rights or liabilities as such in relation to such a patient. Taylor v. Protestant Hospital Ass'n, 96 N. E. 1089, 1090, 1091, 85 Ohio St. 90, 39 L. R. A. (N. S.) 427.

A hospital organized under Laws 1899, c. 95, under which the directors and managers received no financial benefit, and which is not a business project, is a "charitable institution" and as such is not liable for the negligence of its ambulance driver, though such institution received compensation for some of its patients. Noble v. Hahnemann Hospital of Rochester, 98 N. Y. Supp. 605, 607, 112 App. Div. 663.

A home for aged women established in a city of the state which requires its beneficiaries to turn over to it the property they possess and which requires the payment of an established fee on their admission and not managed for profit is a charitable institution within Laws 1905, p. 432, c. 40, § 1. Carter v. Whitcomb, 69 Atl. 779, 783, 74 N. H. 482, 17 L. R. A. (N. S.) 733.

The Employés' Hospital Association of the Frisco Line, a corporation under the direct control of the St. Louis & San Francisco Railway Company, which undertakes to furnish medical treatment to employés of said railroad in consideration of monthly payments made by them, is not a "charitable institution," within the rule which exempts such institutions from liability for negligence. Phillips v. St. Louis & S. F. R. Co., 111 S. W. 109, 113, 211 Mo. 419, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742.

Legally "charity" has been defined as a gift to be applied lawfully, among other things, for the benefit of an indefinite number of persons by bringing their hearts and minds under the influence of education or religion, relieving their bodies from disease or suffering, etc. Though patients at the Craig Colony for epileptics work to grow food which may be sold by the state to furnish funds to purchase necessities to support the colony, it is conducted exclusively for "charitable and other purposes," within Tax Law, § 221, so that a legacy to it is exempt from the Transfer Tax. In re Moore's Estate, 122 N. Y. Supp. 828, 831, 66 Misc. Rep.

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116 (citing "charity," as defined in Words and Phrases).

An association established under Rev. St. 1899, c. 12, art. 11, providing for organization of benevolent, religious, scientific, etc., associations, the charter of which provides that its object shall be to conduct and control a certain hospital, to provide medical treatment free to the poor, and to train and educate nurses, which has no stock, and pays no dividends, but devotes any income from paying patients to the improvement and maintenance of the hospital, which receives persons free of charge for board even, when unable to pay, and furnishes other places, known as free institutions, with physicians, nurses, and medicines, gratuitously, is a "charity." Adams v. University Hospital, 99 S. W. 453, 456, 122 Mo. App. 675.

A corporation conducted a hospital, and its only source of income was from donations and receipts from patients who were able to pay for treatment received. It received all patients who applied, and gave free accomodations to all patients unable to pay, and the treatment of free cases was the same as that of pay patients, except that the free cases were accommodated in wards instead of in private rooms. Any regular medical practitioner was privileged to send patients to the hospital and treat them there, and the institution made no profits. Held, that the institution was within Hurd's Rev. St. 1905, c. 120, § 2, exempting from taxation "all property of institutions of public charity." German Hospital of Chicago v. Board of Review of Cook County, 84 N. E. 215, 216, 233 Ill. 246.

"An orphans' home," "a home for the friendless and orphan poor," or "an orphans' home for the friendless poor of all denominations," is a "charity" or "charitable use" within the general intent and scope of the statute of 43 Eliz. c. 4. Kemmerer v. Kemmerer, 84 N. E. 256, 258, 233 Ill. 327, 122 Am. St. Rep. 169.

A "charity" may be defined "as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. (Quoting Jackson v. Phillips, 96 Mass. [14 Allen] 539). A donation of land and buildings to a corporation organized for charitable purposes, to be used as a home for consumptives, constitutes a "charity" so as to exempt such land and buildings from taxation under the Constitution of Colorado exempting land and buildings used for charitable purposes from taxation. Bishop and Chapter of Cathedral of St. John the Evangelist v. Treasurer of City & County of Denver, 86 Pac. 1021, 1023, 37 Colo. 378.

Beneficial associations

Incorporated mutual benefit associations, such as a typographical society, which is open to all printers of the city in which it is located, or a teacher's association, open to all teachers, or a bank officers' association, open to all bank officers and clerks, are public, and not private, charities, though their benefits are limited to their own members; and a gift to them is a gift for a "charitable purpose," within the meaning of a will giving the residue of testator's estate to trustees, to be applied "to such charitable purposes" as to them may seem proper. Minns v. Billings, 66 N. E. 593, 183 Mass. 126, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420.

Benevolent synonymous

Though the word "benevolent" covers a wide field, its essential and substantial meaning is familiar and easily grasped. It is little, if any, more indefinite than the word, "charitable," and in many cases it has been held to have been synonymous with "charitable." In re Dulles' Estate, 67 Atl. 49, 50, 218 Pa. 162, 12 L. R. A. (N. S.) 1177.

"Charity" is a gift to promote the welfare of others in need; and "charitable," as used in constitutional and statutory provisions relating to exemptions from taxation, means intended for charity, and "benevolent" as used therein is entirely synonymous with "charitable." Mason v. Zimmerman, 106 Pac. 1005, 1008, 81 Kan. 799.

The words "benevolent" and "charitable" are nearly synonymous in meaning and as frequently used are entirely so, especially when applied to purposes or institutions. Kansas Masonic Home v. Board of Com'rs of Sedgwick County, 106 Pac. 1082, 1086, 81 Kan. 859, 26 L. R. A. (N. S.) 702.

In a bequest to be divided among such benevolent, charitable, and religious institutions and associations as might be selected by the testator's executors, the word "benevolent" should be construed as synonymous with "charitable," and a bequest was therefore not void for uncertainty. In re Murphy's Estate, 39 Atl. 70, 71, 184 Pa. 310, 63 Am. St. Rep. 802 (citing Domestic and Foreign Missionary Society's Appeal, 30 Pa. 435; Whitman v. Lex [Pa.] 17 Serg. & R. 88, 17 Am. Dec. 644; Saltonstall v. Sanders, 93 Mass. [11 Allen] 446; Rotch v. Emerson, 105 Mass. 431; Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334; Webst. Dict.).

"Charity" is defined as benevolence, any act of kindness or benevolence, and "charitable" is defined as pertaining to or characterized by charity, benevolence or kindness, and

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a gift to the board of park commissioners of a city for the purpose of erecting a drinking fountain for horses, and in connection therewith a life-size bronze statue of a certain horse, with an inscription thereon stating that it was donated by testator, and that the horse was the first to make a certain record, was a gift for charitable purposes within Inheritance Tax Law, § 2½, exempting such gifts from taxation. In re Graves' Estate, 89 N. E. 672, 673, 242 Ill. 23, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137.

Benevolent distinguished

"Benevolent" includes objects and purposes that are not "charitable." Van Syckel v. Johnson, 70 Atl. 657, 658, 80 N. J. Eq. 117.

"Benevolent" is wider than "charitable" in its legal signification. A trust for benevolent and charitable objects, as the trustee may select, is void as being indefinite and vague. Hegeman's Ex'rs v. Roome, 62 Atl. 392, 393, 70 N. J. Eq. 562.

Comp. Laws, §§ 8258–8263, as originally enacted, was entitled "An act to provide for the incorporation of benevolent societies," and authorized a corporation to provide for the relief of distressed members, the visitation of the sick, etc., and such other "benevolent and worthy purposes" and objects as affect the members of the corporation, and gave the corporation power to receive and enjoy property, and to sell, mortgage, and dispose of the same, provided that the proceeds arising from all estates and investments should be devoted exclusively to the benevolent purposes and objects of the corporation. Held, that the word "benevolent" has a much broader significance than the word "charity," and includes things which are in no sense charities, and refers to the kind intention of the donor rather than the condition of the donee, meaning in its broader sense liberality and generosity, though its meaning may be circumscribed by the circumstances, and, as used in the statutes, it denotes acts tending to relieve misfortune and confer a benefit on a needy member, though he may not be an actual object of charity, so that a conveyance by the society to all of its members was not a disposition for "benevolent purposes," and hence was beyond the powers of the society. German Corporation of Negaunee v. Negaunee German Aid Society, 138 N. W. 343, 345, 172 Mich. 650 (quoting 1 Words and Phrases, pp. 753–756).

Care of burial lot

A testamentary gift to a trustee to apply the income to the care of testator's burial lot, which became operative before the passage of Laws 1909, c. 218, authorizing trusts for the care of cemetery lots and classifying them with charitable uses, is not a "gift to a charitable use," within Laws 1893, c. 701, relating to gifts for charitable purposes. Driscoll v. Hewlett, 116 N. Y. Supp. 466, 467, 132 App. Div. 125, 91 N. E. 784, 198 N. Y. 297.

Cemetery associations

A cemetery corporation, selling lots to members of the public generally, is not a charitable or benevolent corporation within St. 1909, c. 490, pt. 1, § 5, cl. 3, exempting from taxation the property of "benevolent" and "charitable" institutions. Town of Milford v. Commissioners of Worcester County, 100 N. E. 60, 61, 213 Mass. 162.

A cemetery association, organized without capital stock under Acts June 17, 1852, to provide a place for the burial of the dead, with authority to sell burial lots and engaged in selling burial lots and maintaining a cemetery, is conducting a "business," and is not a "charitable" organization, and is liable for the negligence of its officers or agents, though it has maintained the cemetery without profit, and its officers have received no conpensation; there being nothing in the charter precluding the association from selling lots for profit or from paying salaries to its officers or dividends to its members. East Hill Cemetery Co. of Rushville v. Thompson (Ind.) 97 N. E. 1036, 1037.

Drinking fountain

"Charity" is defined as benevolence, any act of kindness or benevolence, and "charitable" is defined as pertaining to or characterized by charity, benevolence or kindness, and a gift to the board of park commissioners of a city for the purpose of erecting a drinking fountain for horses, and in connection therewith a life-size bronze statue of a certain horse, with an inscription thereon stating that it was donated by testator, and that the horse was the first to make a certain record, was a gift for charitable purposes within Inheritance Tax Law, § 2½ (Hurd's Rev. St. 1908, c. 120, § 367a), exempting such gifts from taxation. In re Graves' Estate, 89 N. E. 672, 673, 242 Ill. 23, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137.

Education

Under Gen. St. 1902, §§ 3990, 4026, a parochial school supported by private funds is a charitable institution, within Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, p. 750, c. 200, providing that no license, except the renewal of a license at the discretion of the county commissioners, shall be granted within 200 feet of any public or parochial school, nor shall one be granted in such proximity to a charitable institution as may be detrimental to the same. Appeal of Schusler, 70 Atl. 1029, 1030, 81 Conn. 276.

Special Laws January 13, 1854 (page 30), incorporating an institution of learning for instruction in science and literature, and providing that the income of the capital stock shall be appropriated only for the benefit of

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the institution, creates a "charitable institution," and it is not liable for the negligent acts of its officers or employés in preserving its grounds. Hill v. President and Trustees of Tualatin Academy and Pacific University, 121 Pac. 901, 904, 61 Or. 190.

A society having for its object the collection and preservation of historical and current accounts of events, persons, and inventions, etc., and all other materials of a similar character, connected with the interests of a certain town, is not a "charitable institution"; its object not possessing an educational character, and the collections of the society not necessarily being devoted to public use. In re Vineland Historical & Antiquarian Society, 56 Atl. 1039, 1040, 67 N. J. Eq. 730.

A trust to establish for the benefit of the public an art gallery for the advancement of education in art is a "charitable trust." (1909) Mason v. Bloomington Library Ass'n, 86 N. E. 1044, 1047, 237 Ill. 442, 15 Ann. Cas. 603 (citing Kemmerer v. Kemmerer, 84 N. E. 256, 233 Ill. 327, 122 Am. St. Rep. 169).

Gifts for the advancement of learning, science, and the useful arts, without any particular reference to the poor, are legally regarded as "charities." Godfrey v. Hutchins, 68 Atl. 317, 318, 28 R. I. 517.

A gift to a college will be construed to be a gift to a charitable use, within the meaning of Act April 26, 1855, § 11, relating to the execution of wills within one calendar month from testator's death, where it appears that the college in question was incorporated; that it included as one of its departments a school of theology; that the corporation was under the control of members of a particular denomination, although its management was not denominational, various denominations being represented in its faculty; that the college was not self-supporting, but was maintained by gifts, contributions of churches, tuition fees, and endowed scholarships; that young men were aided to the extent of their tuition bills, and to some, in their room bills, and to some loans were made to be repaid after graduation. And it is immaterial that there is no word in the will in connection with the gift, indicating a charitable purpose. In re Amole's Estate, 32 Pa. Super. Ct. 636, 637.

The term "charity," in its legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning or institutions for the encouragement of science and art. Under Const. § 170, providing that institutions of purely public charity and institutions of education not used or employed for gain, and the income of which is devoted solely to the cause of education, shall be exempt from taxation, the Kentucky Female Orphan School, a corporation the beneficiaries of which are female orphan children, though paid pupils are also received and the amount derived therefrom devoted solely to the maintenance of the school, is an institution of purely public charity. Trustees of Kentucky Female Orphan School v. City of Louisville, 36 S. W. 921, 924, 100 Ky. 470, 40 L. R. A. 119.

Eleemosynary synonymous

The word "eleemosynary" as used in Const. art. 20, § 9, forbidding perpetuities except for eleemosynary purposes, is synonymous with "charitable." In re Sutro's Estate, 102 Pac. 920, 922, 155 Cal. 727.

Library or museum

An institution is charitable within the meaning of the collateral inheritance tax act, the property and funds of which are divided to purposes which are charitable within the doctrine; that is, for such purposes as would support as valid the creation of a trust or gift. An association which collects and preserves a library of books open to general use would be a "charitable institution" under this act, but an association to collect and preserve history and current accounts or events, persons and inventions, scientific investigations, and photographs, drawings, models, and specimens and all other materials of a similar character connected with the interest of Vineland, though it appears that the collection is open to the public but that the estate is not bound to maintain the collection open to the public, is not a charitable institution; such a collection resembling a museum rather than a library in not performing any educational functions. In re Landis' Estate, 56 Atl. 1039, 1040, 66 N. J. Eq. 291.

A corporation was organized for the purpose of establishing and maintaining a library at a health resort. The Constitution presented with the petition for the organization recited that: "We whose names are annexed, desiring to form an association to organize a * * * library for own benefit, and that of * * * people who visit" the resort. Held, that the corporation was a "charitable trust"; the phrase "for our own benefit" not being understood as confined to the persons who signed the petition for a charter but intended to embrace all persons who should thereafter contribute to the support of the library. Fordyce & McKee v. Woman's Christian Nat. Library Ass'n, 96 S. W. 155, 156, 79 Ark. 550, 7 L. R. A. (N. S.) 485.

"Charitable trusts" include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire them applied. Property acquired by a corporation under a grant of Congress for the sole purpose of maintaining thereon a library for the benefit of its members and the public is not

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embraced by Sand. & H. Dig. § 3049, declaring subject to execution real estate whereof defendant or any person for his use is seised in law or equity. Woman's Christian Nat. Library Ass'n v. Fordyce, 86 S. W. 417, 419, 74 Ark. 621 (quoting and adopting definition in 2 Perry, Trusts, § 687).

Masonic societies

A masonic lodge is not a "charitable institution," within R. S. c. 6, § 6, pt. 2, exempting all property of such institutions from taxation. City of Bangor v. Rising Virtue Lodge No. 10, Free and Accepted Masons, 73 Me. 428, 441, 40 Am. Rep. 369.

A Masonic lodge, to which realty was devised to use the income for charity, the bylaws of which provided for a committee of charity whose duties were to dispense the benevolence of the lodge, and the lodge members of which pay an initiation fee and assessments and are not entitled to any pecuniary benefits from the lodge unless they become the objects of charity, which is rarely bestowed upon nonmembers, the lodge being engaged in no business for profit, issuing no stock, and its funds being first for lodge expenses and the remainder for charity, is a "charitable institution" within Code, § 1467, taxing all property which passes by law or inheritance other than to charitable, educational, or religious institutions. Morrow v. Smith, 124 N. W. 316, 318, 145 Iowa, 514, 26 L. R. A. (N. S.) 696, Ann. Cas. 1912A, 1183.

The upper story of a building owned by a masonic lodge, and certain furniture used exclusively for lodge purposes, together with $500 in a bank to the credit of the lodge used exclusively for charitable purposes, is exempt from taxation, under Const. art. 9, § 2, providing that property used exclusively for charitable purposes may be exempt, and Revenue Law (Laws 1903, p. 390, c. 73) § 13, providing that property used for religious and charitable purposes shall be exempt from taxation. Plattsmouth Lodge No. 6, A. F. & A. M. v. Cass County, 113 N. W. 167–170, 79 Neb. 463.

Moral reformation

An institution organized under Pub. Acts 1855, No. 20 (Comp. Laws 1897, §§ 8264–8270), providing that three or more persons who may desire to become incorporated for any charitable purpose may do so, the purpose of which is charitable, is a "charitable society." A corporation organized for the purpose of the moral reformation of girls and women, and the preservation in a state of purity of girls and women whose virtue is exposed to danger, which administers its funds according to rules of its own adoption, by methods of its own choosing, and shelters, clothes, feeds, and instructs the inmates, requiring of them such labor in return as they can perform, and whose buildings and premises are erected and arranged with the purpose of detaining those whom it desires to detain, it being the intention that girls confided to the institution should remain until discharged, may be treated as occupying the position of a public "charitable institution" administering a charitable fund. Gallon v. House of Good Shepherd, 122 N. W. 631, 633, 158 Mich. 361, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387.

Public charity

"In the first place, it may be laid down as a universal rule that the law recognizes no purpose as charity unless it is of a public character; that is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community. The distinction between a public purpose and one which is not public is often fine. * * * If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose in reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion, or other purpose, charitable within the meaning of the Statute of Elizabeth without reference to any particular individuals and without giving any particular individuals the right to claim the funds, the gift is charitable." Laws 1893, c. 701, § 1, as amended by Laws 1901, c. 291, provides that no gift for religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid on account of indefiniteness or uncertainty of the beneficiaries; but the title to the subject-matter of the gift shall vest in the trustee named in the instrument, applies to public and not private charitable gifts, and has reference to indefiniteness of beneficiaries, but not of the purposes for which the gift is made; that while the words, "religious" and "eleemosynary," in a will attempting to create a trust when used to designate institutions, may necessarily imply that the institutions are engaged in public and not private charitable work, the words "educational" and "institutions" have a broad significance and may refer as well to private as to public organizations or charities; and that, since the terms used are in the disjunctive, the invalidity of the provision as to educational institutions renders the entire gift invalid. In re Shattuck's Will, 86 N. E. 455, 456, 193 N. Y. 446 (quoting and adopting Tud. Char. and Mortmain [4th Ed.] 37).

A "charity" contemplates a public benefit, or the well-being of a community or a class, as contrasted with the beneficial use for private purposes, or for a private individual. To constitute a charity, the use must be public in its nature. Smith v. Hav-

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ens Relief Fund Soc., 90 N. Y. Supp. 168, 174, 44 Misc. Rep. 594.

Relief of the poor and sick

A donation to the poor of a certain locality is a gift for a "charitable purpose." Brookville Borough v. Startzell, 56 Atl. 938, 940, 207 Pa. 347.

The gift of an estate to executors in trust to sell and distribute the proceeds "to any institution for the benefit of the poor and suffering my executors may in their judgment give to any individual or person who in their judgment selected as poor and in need" is valid as a trust for charitable use within Personal Property Law (Consol. Laws 1909, c. 41) § 12. In re Davis' Will, 137 N. Y. Supp. 427, 77 Misc. Rep. 72.

A residuary bequest to the poor of Voorst, Gelderland, Netherlands, is for a "charitable purpose" either under the statute of charitable uses or independent of it. Klumpert v. Vrieland, 121 N. W. 34, 38, 142 Iowa, 434.

A bequest by a testator, who was a native of an island of the Kingdom of Norway, to a church congregation or parish of the island, which body was by the laws of that kingdom capable of receiving such bequests and administering such charitable trusts, of a sum of money to be invested and the income therefrom distributed annually "to worthy and needy servant girls and the widows and orphans of deceased sailors and fishermen who are not a public charge," and appointing the pastor and president of the county commissioners and county treasurer and their successors in office as trustees, constitutes a charitable trust, sufficiently definite as to the class of beneficiaries and as to the selection of the individuals who are to receive the charity to be valid and enforceable. In re Nilson's Estate, 116 N. W. 971, 972, 81 Neb. 809.

To constitute a "charity" the use must be public in its nature. A corporation formed to apply the income of money and property contributed or devised to it to the relief of poverty and distress, and generally to act in respect to any property received by deed or will for any charitable use or purpose, is a benevolent and charitable corporation within Laws 1848, c. 319, § 1, providing for associations for benevolent or charitable purposes. Smith v. Havens Relief Fund Society, 90 N. Y. Supp. 168, 174, 44 Misc. Rep. 594.

Religious purposes

A gift to a church eo nomine is a gift to a "charity." Sears v. Parker, 79 N. E. 772, 774, 193 Mass. 551, 9 Ann. Cas. 1200 (citing St. Paul's Church v. Attorney General, 41 N. E. 231, 164 Mass. 188, 197; Attorney General v. Union Society of Worcester, 116 Mass. 167, overruling Parker v. May, 59 Mass. [5 Cush.] 336; Old South Society in Boston v. Crocker, 119 Mass. 1, 20 Am. Rep. 299).

While "religious corporations" are in a sense corporations for charitable purposes, all "charitable corporations" are not "religious corporations." Baltzell v. Church Home & Infirmary of Baltimore City, 73 Atl. 151, 153, 110 Md. 244.

A testamentary gift for masses for the repose of souls of named persons and of the testator is a "charitable bequest," and valid as such, because according to the doctrine of the Catholic Church masses benefit the whole church as the prayers of the mass include all of the faithful, living and dead. In re Kavanaugh's Will, 126 N. W. 672, 675, 143 Wis. 90, 28 L. R. A. (N. S.) 470.

A society incorporated under a special act to promote evangelical religion by means of the Bible, the printing press, colportage, Sunday schools, and other appropriate ways, is not a "charitable corporation" within the provision of the transfer tax law, exempting property willed to such corporations. In re McCormick's Estate, 127 N. Y. Supp. 493, 495, 71 Misc. Rep. 95.

"It is well settled that a Christian church lawfully existing is a 'charity,' in the sense of St. 43 Eliz. c. 6" Gifts to charitable institutions may lapse, as well as gifts to natural persons. A bequest to a church for deaf mutes, of which the testatrix had been a member, and in the prosperity of which she had been greatly interested, does not show such a general charitable intention as to entitle a new church corporation, formed by consolidation of the legatee with another church, to take under the will, though the new corporation carried on the identical work which had been conducted by the legatee. Gladding v. St. Matthew's Church, 57 Atl. 860, 863, 25 R. I. 628, 65 L. R. A. 225, 105 Am. St. Rep. 904, 1 Ann. Cas. 537.

A corporation established to manage and apply a fund toward the support of a minister is not a "charitable institution" within a statute exempting the property of such institutions from taxation. Inhabitants of Gorham v. Trustees of Ministerial Fund, 82 Atl. 290, 292, 109 Me. 22.

The establishment of a mission for the preaching of the gospel is a "charitable purpose," within Acts 1885–86, c. 1233, § 1, providing that churches and all property of seminaries, asylums, hospitals, infirmaries, and colleges, and all other funds devoted to charitable purposes, shall be exempt from taxation. City of Louisville v. Werne (Ky.) 80 S. W. 224, 225.

A trust created by a deed conveying land to trustees of a Presbyterian church in trust for the use of the congregation of the church as a place of worship is not violated by a transfer to a Universalist church; any gift not inconsistent with law and promotive of

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the amelioration of the condition of mankind, or the diffusion of useful knowledge, being a "charity." Strother v. Barrow, 151 S. W. 960, 963, 246 Mo. 241.

A "charitable trust" is a gift for the benefit of an indefinite number of persons, either by bringing them under the influence of education or religion, or relieving them of disease, suffering, or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public or some class thereof. A bequest to a bishop to be expended in the saying of masses for the testator's soul is not a bequest to a charitable use within a statute restricting devises or bequests for charitable uses. In re Lennon's Estate, 92 Pac. 870, 871, 152 Cal. 327, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024.

Prior to Laws 1893, c. 701, in order to constitute a valid trust provision for a "charity," there must not only be a trustee but a beneficiary capable of being designated and who could enforce the trust provision. A bequest in trust to T., Protestant Episcopal Missionary Bishop of Utah and Idaho, his successors, etc., to erect a church within his episcopal jurisdiction as he or his successors should elect, with a further sum bequeathed to build a rectory for the rector of said church, was invalid prior to the laws of 1893 for its failure to designate a beneficiary. Mount v. Tuttle, 91 N. Y. Supp. 195, 196, 99 App. Div. 433.

A "charitable gift" in the legal sense is one which is within the principle and reason of the statute (43 Eliz. c. 4), although not expressly named therein, as an illustrative of which are gifts for the promotion of science, learning, and useful knowledge, gifts for bringing water into a town for building town houses, or otherwise improving a town or city. Except in a few states this statute is admitted to be the principal test of what, in law, are charitable uses, and many purposes not named in it have been held to be charitable when within the reason and spirit of the statute. Under this definition it was held that a testamentary provision requiring that, after the death of beneficiaries named, the executors should make over to the presiding bishop of a designated religious order one-half of the estate which such bishop shall receive in trust to expend the annual interest or income according to his discretion for the benefit of the members of such religious order, whether it be for public schools, parks, watering cities, acclimatizing foreign plants, or anything else whereby the members may be benefited, was a "charitable gift." Staines v. Burton, 53 Pac. 1015, 1016, 17 Utah, 331, 70 Am. St. Rep. 788.

In contributing to a church fund, one is performing a work of "charity," and it follows that the fund contributed to is a charitable fund. Bruce v. Central Methodist Episcopal church, 110 N. W. 951, 147 Mich. 230, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150.

Society for prevention of cruelty to children

Where testatrix died after Laws 1905, p. 827, c. 368, amending Transfer Tax Law, § 221, and providing that property devised to any "charitable, benevolent, or religious society" should be exempt from the provisions of the act, legacies to a Society for the Prevention of Cruelty to Children are not taxable. In re Moses' Estate, 113 N. Y. Supp. 930, 931, 60 Misc. Rep. 637.

Statutory trust distinguished

See Statutory Trust.

Temperance

The Woman's Christian Temperance Union falls within the class of benevolent charitable corporations exempted from payment of the transfer tax under Tax Law (Consol. Laws, c. 60) § 221. In re Moore's Estate, 122 N. Y. Supp. 828, 832, 66 Misc. Rep. 116.

Young Men's Christian Association

Where testatrix died after Laws 1905, p. 827, c. 368, amending Transfer Tax Law, § 221, and providing that property devised to any "charitable, benevolent, or religious society" should be exempt from the provisions of the act, legacies to the Young Men's Christian Association are not taxable. In re Moses' Estate, 113 N. Y. Supp. 930, 931, 60 Misc. Rep. 637.

A society composed of young women organized to extend spiritual, intellectual, social, and financial help to a Young Men's Christian Association of a city of the state whose purpose set forth in its charter is to improve the spiritual, intellectual, and social condition of the young men of the city, and whose property is exempt from taxation to a specified amount, is a charitable society within Laws 1905, p. 432, c. 40, § 1, on the assumption that its principal endeavor is to promote the spiritual and intellectual condition of young men without pecuniary gain or profit to itself. Carter v. Whitcomb, 69 Atl. 779, 783, 74 N. H. 482, 17 L. R. A. (N. S.) 733.

A Young Men's Christian Association was incorporated for "the improvement of the spiritual, mental, social and physical condition of young men," with a membership made up of active members with the exclusive right to vote and hold office, of associate members enjoying all other privileges, and limited members, not permitted to use the gymnasium and other means of amusement, together with sustaining members, and unlimited members, who paid certain fees annually for privileges; there being no religious test applied to associate members. The association work included services in different schoolhouses and churches at its own ex-

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pense, educational classes, charging a small fee, but never conducted at a profit, classes in rowing, swimming, etc.; and it also maintained a reading room open to the public, and held meetings for social purposes, public receptions, etc. It depended for support mainly upon subscriptions, derived no profit from its work, had no capital stock, and no paid officers, except a secretary. Held, that the association was a benevolent or charitable corporation, within St. 1909, c. 490, pt. 1, § 5, cl. 3, and that funds held in trust for it were exempt from taxation. Little v. City of Newburyport, 96 N. E. 1032–1034, 210 Mass. 414, Ann. Cas. 1912D, 425.

Young Women's Christian Association

Where testatrix died after Laws 1905, p. 827, c. 368, amending Transfer Tax Law, § 221, and providing that property devised to any "charitable, benevolent, or religious society" should be exempt from the provisions of the act, legacies to the Young Women's Christian Association are not taxable. In re Moses' Estate, 118 N. Y. Supp. 930, 931, 60 Misc. Rep. 637.

CHARITY (In Sunday Law)

Where a prisoner, in jail under a warrant charging a bailable offense, employs a lawyer to secure a bond, and the prisoner is released, a note given the lawyer for his services, including those rendered in procuring the bond, is valid, though executed on Sunday; the work being in the nature of a "work of charity," within the exception of Pen. Code 1910, § 416. Few v. Gunter, 72 S. E. 720, 10 Ga. App. 100.

CHARIVARI

As breach of the peace, see Breach of the Peace.

A "charivari" is defined by Webster as a mock serenade of discordant music, kettles, tin pans, etc., designed to annoy and insult. Where the members of the charivari party forcibly place a bride and groom in a wagon against their will and draw them up and down the streets, they are engaged in an act of unlawful violence, and the fact that they are good natured and intend no serious harm to any one is immaterial. City of Cherryvale v. Hawman, 101 Pac. 994, 995, 80 Kan. 170, 23 L. R. A. (N. S.) 645, 133 Am. St. Rep. 195, 18 Ann. Cas. 149.

CHARLIE

"Charlie" is a corruption of "Charles"; and the fact that a mortgage is signed "Charlie," instead of "Charles," will not take it out of the chain of title, so that a record thereof will not be notice to a subsequent purchaser. Styles v. Theo. P. Scotland & Co., 134 N. W. 708, 712, 22 N. D. 469.

CHARTER

See During Term of Charter; May Frame Charter; Power of Charter Amendment.

"A 'charter' is defined as an act of a legislative body creating a municipality or other corporation, and defining its power and privileges." Benedict v. City of New Orleans, 39 South. 792, 801, 115 La. 645.

"Charters" are not created by the act of the corporation or association but are granted by the sovereign power of the state. Burns v. Manhattan Brass Mut. Aid Society, 92 N. Y. Supp. 846, 847, 102 App. Div. 467 (quoting and adopting definition in Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409).

The use of the term "hire," like the word "charter," is not inconsistent with the idea of a covenant or agreement only for freighting accommodations. Grimberg v. Columbia Packers' Ass'n, 83 Pac. 194, 197, 47 Or. 257, 114 Am. St. Rep. 927, 8 Ann. Cas. 491.

As contract

See Contract.

As public act

See Public Act.

Of corporation

The word "charter," in the statement of the rule that a corporation possesses only those properties given it by its charter, refers to the law of the state authorizing the formation of the corporation. Myatt v. Ponca City Land & Imp. Co., 78 Pac. 185, 196, 14 Okl. 189, 68 L. R. A. 810.

Under Const. art. 12, § 2, prohibiting the General Assembly from passing special acts conferring corporate powers, etc., and section 6, permitting corporations to be formed under general laws which may be altered or repealed from time to time, the general laws under which a corporation is formed constitute its charter. Ozan Lumber Co. v. Biddie, 113 S. W. 796, 798, 87 Ark. 587.

The charter of a corporation formed under a general law consists of its articles of incorporation, taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of its charter. Traer v. Lucas Prospecting Co., 99 N. W. 290, 292, 124 Iowa, 107.

"The words 'chartered by law' are not to be understood as referring simply to corporations incorporated under special acts. A corporation which is organized under a general law is as much 'chartered by law' as one whose organization is provided for by special act." Lindsay & P. Co. v. Mullen, 20 Sup. Ct. 325, 329, 176 U. S. 136, 44 L. Ed. 400.

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Of municipal corporation

A "charter" is the municipal organic law, which no ordinance may override. Kemp v. City of Monett, 69 S. W. 31, 32, 95 Mo. App. 452.

The word "charter," as it is called, when used in connection with a municipal corporation, consists of the creative act and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise. City of St. Petersburg v. English, 45 South. 483, 487, 54 Fla. 585.

A "charter for municipal purposes" is an investing of the people of a place with the local government thereof, constituting an imperium in imperio, and the corporators and the territory are the essential elements. Grennan v. Carson, 107 Pac. 925, 929, 25 Okl. 730.

A municipal "charter" consists of the creative act and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise. Tommasi v. Archibald, 100 N. Y. Supp. 367, 372, 114 App. Div. 838 (quoting People v. Briggs, 50 N. Y. 553, 559).

"A municipal 'charter' is not only the measure of corporate powers but is also the beginning and the end of corporate life; and that life is a distinct, indivisible thing. When a charter is completely granted, a distinct corporate entity comes into being; and, when the charter is completely surrendered, the corporate entity ceases to exist. * * *" Malone v. Williams, 103 S. W. 798–812, 118 Ten. 390, 121 Am. St. Rep. 1002 (quoting and adopting the definition in Brinkley v. State, 67 S. W. 796, 108 Tenn. 475).

A municipal "charter" is the municipality's constitution enumerating and giving to it all the powers it possesses, unless other statutes are applicable to it, and the term applies to special acts creating cities adopted before the present Constitution and to the portions of the general municipal corporation act adopted under Const. art. 11, § 6, providing for particular classes of municipalities. Platt v. City and County of San Francisco, 110 Pac. 304, 308, 158 Cal. 74.

CHARTER PARTY

A "charter party" is nothing more than an agreement between the parties to a shipping contract, and it is to be construed in the same manner as any other contract. Auten v. Bennett, 76 N. E. 609, 611, 183 N. Y. 496, 5 Ann. Cas. 620.

As demise or affreightment

The word "chartering," in a charter party whereby the owner of a vessel agrees on the freighting and "chartering" thereof to the charterer for one voyage, does not necessarily mean a letting of the vessel by way of demise, but is equally consistent with the idea of a contract of affreightment. A charter party contained no technical words of demise, nor was the vessel let to hire. The charterer covenanted to "charter and hire." The owner provided the master. The charterer engaged the crew and bound himself to pay all port charges and labor bills and provisions during the voyage and to "deliver" the vessel in port of destination to the owner, and agreed to employ the vessel only in lawful trade. The master's wages were included in monthly payments to be made for the charter. The first payment was to be made on the day of the "acceptance" of the vessel by the charterer. The owner agreed to place the vessel at a wharf selected by the charterer, at which time, the vessel being safely moored, the charter should "commence," and if the vessel was not so delivered the charterer might cancel the charter. Held that, though the words "charter and hire" and "acceptance" and "deliver" indicated a demise, they were not inconsistent with a contract of affreightment merely, and, in view of the absence of words of demise and the presumption against a demise, the charter party must be construed as one of affreightment only. Grimberg v. Columbia Packers' Ass'n, 83 Pac. 194, 195, 47 Or. 257, 114 Am. St. Rep. 927, 8 Ann. Cas. 491.

CHARTREUSE

"Chartreuse" is a highly esteemed tonic cordial obtained by the distillation of various aromatic plants, especially nettles growing on the Alps. It derives its name from the celebrated monastery of the Grande Chartreuse in France where it is made. (Cent. Dic.) A. Bauer & Co. v. Order of Carthusian Monks, Convent la Grande Chartreuse, 120 Fed. 78–80, 56 C. C. A. 484.

The word "Chartreuse" is the French term for a kind of building (that is, a Carthusian monastery); but for American commercial purposes it means, and long has meant, a certain drinkable manufactured by that branch of the Carthusian order living near Grenoble in La Grande Chartreuse (that is, the monastery occupied by the Father Superior). Baglin v. Cusenier Co., 156 Fed. 1016, 1017.

The cordial known as "Chartreuse," imported from France, is a liquor within the provision for a reduced rate of duty on brandies or other spirits, in the reciprocal commercial agreement between the United States and France. (Proc. May 30, 1898, 30 Stat. 1774). Nicholas v. United States, 122 Fed. 892, 893.

CHASING

"Chasing" is a technical term, and relates to the cutting of bricks in a building for wiring. M. B. Foster Electric Co. v. Phi Gamma Delta Club, 120 N. Y. Supp. 809, 810.

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CHASTE

"Chaste" is defined as "pure from all unlawful commerce of sexes; applying to persons before marriage, it signifies pure from all sexual commerce, undefiled." State v. Kelley, 90 S. W. 834, 838, 191 Mo. 680 (quoting and adopting definition in 6 Cyc. p. 978).

Under a statute defining statutory rape on females under the age of 18 not previously unchaste, a girl under the age of 18 who has had intercourse prior to that with which the prisoner stands indicted is not "chaste." Bailey v. State, 78 N. W. 284, 285, 57 Neb. 706, 73 Am. St. Rep. 540.

If first intercourse was accomplished by force on the part of the defendant and against the will of the prosecutrix, she was thereby debauched in a physical but not in a moral sense and was still "chaste," within the meaning of the statute (Code 1896, § 5503), so that seduction might be predicated of a second act accomplished with her consent, induced by promise of marriage. Pope v. State, 34 South. 840, 841, 137 Ala. 56.

The words "chaste and virtuous," in an instruction, on a trial for seduction, that chastity means virtue, and that the woman must have been "chaste and virtuous" at the time she was seduced, to justify a conviction, mean that the woman was virtuous in the sense that she was chaste, and not that she possessed all the cardinal virtues. Kerr v. United States, 104 S. W. 809, 811, 7 Ind. T. 486.

A chaste female is one who has never had sexual intercourse, who yet retains her virginity. Marshall v. Territory, 101 Pac. 139, 143, 2 Okl. Cr. 136.

The general rule of law seems to be, from the weight of authority, that although a woman may at one time have lapsed from physical chastity, if it appears affirmatively that she has reformed and at the time of the offense maintained a habit of sexual virtue, she may be deemed "chaste" within the meaning of the law, so that an invasion of that virtue under a promise of marriage may serve in greater or less degree to enhance the damages she would suffer by the breach. Salchert v. Reinig, 115 N. W. 132, 136, 135 Wis. 194.

"A 'chaste female' is one that has never had sexual intercourse, who yet retains her virginity. A 'virtuous female' is one who has not had sexual intercourse unlawfully, out of wedlock, knowingly and voluntarily." Marshall v. Territory, 101 Pac. 139, 2 Okl. Cr. 136. Whatever may be the language which one may choose to define a female of previously chaste character, it certainly cannot be contended that one who, moved by lewd desire and libidinous impulse, submits herself to the carnal embrace of a man from November to July whenever the time and the place are opportune is a female of such a character on the 30th day of June. It is argued by the state that, as to the appellant, the prosecutrix is exempt from this requirement of the law; that, being the author of her undoing, he cannot take advantage of his own wrong and hide himself under the cloak of this statutory requirement, as a shield for his protection. Such an argument is purely a sentimental one, and, although it may be abhorrent to the moral sense to permit a man to protect himself with the shield of his own wrong, we are dealing with a legal question, and not one of sentiment nor morals; and, in order to find a man guilty of such an offense as the one named in this information, we must first find a female who can in all its essentials measure up to the requirement of the law charged to be violated. The test of virtue in a woman is a personal and physical test, and when, by reason of her voluntary sin, she has lost her virginal purity, it matters not who contributed to that loss; she is no longer chaste. It is not a sound argument to say that the prosecutrix in this case was immune from rape as to all other men, but not from appellant. The statute makes no such distinction; neither can we. As is said in Shirwin v. People, 69 Ill. 55: "The right of the accused to defend must be as broad as that of the prosecution to criminate." Such we believe to be the reasoning of the law. Its authority will be found in similar cases to which we will now refer. State v. Dacke, 109 Pac. 1050, 1051, 59 Wash. 238, 30 L. R. A. (N. S.) 173.

CHASTE CHARACTER

See Previous Chaste Character.

"Chaste character," in connection with seduction, does not mean reputation, but actual personal chastity. State v. Preuss, 127 N. W. 438, 439, 112 Minn. 108.

"The words 'chaste character' are held to mean actual personal virtue, and not reputation, and require evidence of specific acts of lewdness for impeachment." Woodruff v. State, 101 N. W. 1114, 1119, 72 Neb. 815.

CHASTITY

See Unchaste—Unchastity.
Previous chastity essential to seduction, see Seduce—Seduction.

"Chastity" is that virtue which prevents the unlawful commerce of the sexes, and "unchastity" is the reverse of this. Lysacker v. Bemidji Pioneer Pub. Co., 130 N. W. 850, 851, 114 Minn. 179; Woodruff v. State, 101 N. W. 1114, 1118, 72 Neb. 815 (citing 6 Cyc. p. 978).

CHASTISEMENT

See Lawful Chastisement.

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CHATELAINE PURSE

Not dutiable as articles commonly known as jewelry, see Articles Within Tariff Act.

CHATTEL

Any goods or chattels, see Any.
Goods and chattels, see Goods.

The word "chattel," when applied to a mortgage of chattels, is of no special significance and is a comprehensive term, including every species of property which is not real estate or a freehold. A vessel is a "chattel," and a mortgage thereof a "chattel mortgage," within a policy of insurance thereon that it shall be void if the subject of insurance be personal property and be or become incumbered by a chattel mortgage. Gilchrist Transp. Co. v. Phenix Ins. Co., 170 Fed. 279, 282, 95 C. C. A. 475.

Coin and money

An indictment for larceny which alleges that defendant stole "$26, * * * current money of the value of * * * of the goods and chattels of" a person named, sufficiently alleges the ownership of the property, though "current money" is improperly described as "goods and chattels," as when such description is disregarded the charge remains that defendant stole the "current money, of the value of * * * dollars, of" the person named. State v. King, 51 Atl. 1102, 1103, 95 Md. 125.

Crops

Growing crops are "chattels" not susceptible of manual delivery until harvested and are not in the possession or under the control of the vendor, within the meaning of the statute requiring an immediate delivery and continued change of possession. Rosenberg Bros. & Co. v. Ross, 93 Pac. 284, 286, 6 Cal. App. 755.

Fixtures

The rules for ascertaining whether an article is a "chattel" or an irremovable "fixture" are as follows: "(1) Real or constructive annexation of the article in question to the realty. (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." Incorporated Town of Ozark v. Adams, 83 S. W. 920, 921, 73 Ark. 227 (quoting Choate v. Kimball, 19 S. W. 108, 56 Ark. 55; citing Bemis v. First Nat. Bank, 40 S. W. 127, 63 Ark. 625; Monticello Bank v. Sweet, 43 S. W. 500, 64 Ark. 502; Markle v. Stackhouse, 44 S. W. 808, 65 Ark. 23; Tenniswood v. Smith, 82 S. W. 834, 72 Ark. 500).

Horse

A horse is a "chattel." McVeigh v. Ripley, 58 Atl. 701, 702, 77 Conn. 136.

Jewelry

A "chattel" is defined to be every species of property, movable or immovable, which is less than a freehold. A ring, though an article of personal adornment, is property which may be the subject of a chattel mortgage. Salabes v. J. Castelberg & Sons, 57 Atl. 20, 21, 98 Md. 645, 64 L. R. A. 800 (quoting Bouv. Law Dict.).

Land certificate

An unlocated land certificate is a "chattel," title to which may pass by parol sale and delivery. Duren v. Bottoms (Tex.) 129 S. W. 376, 377.

Mortgages and securities

Whether notes and mortgages are "goods" within Tax Law, § 92, authorizing the sale of goods and chattels for taxes, or not, they are unquestionably "chattels." Blain v. Irby, 25 Kan. 499, 500 (Webster's Dict.; Bouv. Law Dict.; and Abbott's Law Dict.).

Oxen

An averment in an indictment that defendant by false pretenses obtained two oxen from prosecutor was an averment of obtaining by false pretenses a "chattel," within Rev. Code 1852, amended to 1893, p. 967, § 1, providing that if any person shall by any false pretenses obtain from any other person any chattel, with intent to cheat any person of the same, he shall be guilty of a misdemeanor, etc., and, no averment of the value of the chattel being required, proof thereof, if averred, was unnecessary. State v. Holden (Del.) 79 Atl. 215, 216.

Stocks

At common law, corporate shares were not subject to attachment or levy, not being considered as a "chattel" or debt. Fowler v. Dickson (Del.) 74 Atl. 601, 605, 1 Boyce 113 (citing Foster v. Potter, 37 Mo. 525).

CHATTEL INTERESTS

A lease to a corporation for 99 years creates an interest in land, usually termed a "chattel interest," being less than a freehold. Brown v. Schleier, 118 Fed. 981, 984, 55 C. C. A. 475.

"A lease for a thousand years is considered only an 'estate for years,' and the lessee has only a 'chattel interest,' which by the common law goes into the hands of his executor or administrator at his decease." Orchard v. Wright-Dalton-Bell-An-

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chor Store Co., 125 S. W. 486, 497, 225 Mo. 414, 20 Ann. Cas. 1072 (quoting 1 Swift Dig. p. 87.

CHATTEL MORTGAGE

A chattel mortgage is merely a lien in this state, and does not transfer title, and hence, under the rule that the offspring belongs to the mother, the increase of sheep mortgaged belong to the mortgagor, unless the increase was also mortgaged. Ayre v. Hixson, 98 Pac. 515, 519, 53 Or. 19, 133 Am. St. Rep. 819.

Civ. Code, § 3815, providing that a mortgage is a lien upon everything that would pass by a grant of the property, does not apply to the natural increase of domestic animals by procreation; and hence a "chattel mortgage" on cattle does not cover calves in gestation when the mortgage was executed. Demers v. Graham, 93 Pac. 268, 270, 36 Mont. 402, 14 L. R. A. (N. S.) 431, 122 Am. St. Rep. 384, 13 Ann. Cas. 97.

A "chattel mortgage" is a conditional sale of personal property as security for the payment of a debt or the performance of some other obligation. Odom v. Clark, 60 S. E. 513, 514, 146 N. C. 544.

"A 'mortgage of chattels' is a conditional sale thereof, whereby the legal title is vested in the mortgagee subject to the right of the mortgagor to perform the conditions imposed by the mortgage. Upon violation of such conditions, the title of the mortgagee becomes absolute. and he is entitled to take and hold possession of the mortgaged chattels for the purpose of sale, according to the terms of the mortgage subject to the right of the mortgagor to redeem pending sale." Hurt v. Hubbard, 92 Pac. 908, 41 Colo. 505.

The purchase price of an article may be secured either by a condition in the contract, by which the title is reserved in the vendor until the price is paid, or by a "chattel mortgage" given back to the vendor by the purchaser. While the object to be accomplished by either form of security is substantially the same, the rights of the parties under the two forms of security are materially different, and it is frequently of importance to determine whether the paper constitutes a "conditional sale" or a "mortgage." Tweedie v. Clarke, 99 N. Y. Supp. 856, 858, 114 App. Div. 296.

Liens upon personalty similar to mortgage liens upon real property, are "chattel mortgages." Bank of Woodland v. Pierce, 77 Pac. 1012, 1013, 144 Cal. 434.

"A 'chattel mortgage' is a conveyance of the legal title to the property mortgaged, subject to be defeated upon the payment of the debt secured at a day fixed, and upon default this title becomes absolute, and the mortgagor has no right, save the equity of redemption, which a court of equity alone can enforce." Schaffer v. Castle, 91 S. W. 35, 6 Ind. T. 244.

A chattel mortgage, covering a stock of merchandise, where the mortgagor remains in possession, and has the usual right of redemption, creates a lien only, and does not pass title, and is not a sale, exchange, or assignment within the meaning of said act, and is therefore not within the inhibition of said statute. Noble v. Ft. Smith Wholesale Grocery Co., 127 Pac. 14, 17, 34 Okl. 662.

The essentials of a chattel mortgage are the existence of a debt, legal liability, or obligation, and an intention to secure the same by some form of conveyance. Wasey v. Whitcomb, 132 N. W. 572, 580, 581, 167 Mich. 58.

An instrument which conveys no personal property and which names no debt upon the failure to pay which the same may be foreclosed by the mortgagee, and which is silent as to the amount of any mortgage debt, is not a "chattel mortgage." State v. Cordray, 98 S. W. 1, 2, 200 Mo. 29, 9 Ann. Cas. 1110.

Under Sayles' Ann. Civ. St. 1897, art. 3327, providing that all reservations of title to or property in chattels as security for the purchase money thereof are chattel mortgages, notes, for the purchase price of rails. which reserved the title to the seller, though possession was given to the purchaser, were chattel mortgages. Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co. (Tex.) 144 S. W. 343, 345.

An instrument which conveys personalty as security for the payment of money is a "chattel mortgage," within Wilson's Rev. & Ann. St. 1903, §§ 3578, 3583, providing that a mortgage of personal property is void as against creditors of the mortgagor unless the original or a copy be filed in the office of the register of deeds, etc. Thompson v. Crosby, 82 Pac. 643, 645, 16 Okl. 316.

Where there is an indebtedness, and the effect of contemporaneous writings executed by the debtor and creditor is merely to transfer the property of the debtor to the creditor for the purpose of securing the debt and to leave in the debtor a right to all that remains after the debt is paid, it constitutes a "chattel mortgage." Hastings v. Fithian, 60 Atl. 350, 351, 71 N. J. Law, 311.

A mortgage of a vessel is a "chattel mortgage," within a policy of insurance on the vessel stipulating that it shall be void if the subject of insurance be personal property and be or become incumbered by a chattel mortgage. Gilchrist Transp. Co. v. Phenix Ins. Co., 170 Fed. 279, 282, 95 C. C. A. 475.

A "chattel mortgage" is an instrument by which specific personal property is hypothecated for the performance of an act

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without the necessity of a change of possession. A lease of a building, containing a clause giving a lien for the rent on the lessee's chattels in the building, is not within the statute requiring a copy of a chattel mortgage to be delivered to the mortgagor. Kennedy v. Hull, 85 N. W. 223, 224, 14 S. D. 234.

A mortgage was given by a silk manufacturing company to secure an issue of bonds, by virtue of a resolution of its board of directors authorizing a mortgage upon "the mill property, * * * its boilers, engines, buildings, stacks, silk winding, spinning, reeling, and quilling machinery, dynamos and electric light plant." The mortgage described the real estate and property above enumerated, and also "fixtures, materials, and all other property on the said above-described premises situate, * * * to have and to hold all and singular the above-described real and personal properties," etc. The boilers, engines, and machinery described were a part of the silk manufacturing plant, and were all attached to the real estate by being set in concrete or brick, or by lag screws attaching them to the floor. The mortgage was not recorded as a chattel mortgage, as required by the law of New Jersey, where the property was situated. Held, that under the law of New Jersey it was not a "chattel mortgage," within the meaning of a provision of an insurance policy covering the machinery and personal property in the mill making it void in case the personal property insured should be incumbered by a chattel mortgage. Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co., 185 Fed. 54, 58, 107 C. C. A. 274.

Assignment distinguished

See Assignment.

Bill of sale

A bill of sale conveying the grantor's stock of goods, fixtures, storehouse, and lot, as security for money loaned, was, in fact, a chattel mortgage, within Kirby's Dig. Ark. § 5396, declaring that a mortgage shall be a lien only for the time it is filed for record. In re Reynolds, 153 F. 295, 296, 297 (citing Bryan v. Hobbs, 83 S. W. 341, 72 Ark. 635; Land v. May, 84 S. W. 489, 73 Ark. 415; Sharp v. Fleming, 88 S. W. 305, 75 Ark. 557; James v. Mallory, 89 S. W. 472, 76 Ark. 514).

Conditional sale distinguished

See Conditional Sale.

As conveyance

See Conveyance.

Pledge distinguished

A "chattel mortgage" is a present transfer of title to mortgaged property, with a defeasance, so that, upon payment of the debt or performance of the obligation secured, the title to the property reverts to the mortgagor; while a "pledge" is a transfer of the possession of personalty, not the title, as security for the performance of some act by the pledgor, with provisions for sale of the property or other disposition thereof by the pledgee upon the pledgor's default. Palmer v. Mutual Life Ins. Co. of New York, 130 N. W. 250, 252, 114 Minn. 1, Ann. Cas. 1912B, 957.

A transaction whereby neither an absolute nor a defeasible title to personalty is transferred by the owner but only possession with the power to sell if default is made in the payment of the note secured is not a "mortgage" but a pledge. Grand Ave. Bank v. St. Louis Union Trust Co., 115 S. W. 1071, 1074, 135 Mo. App. 366.

As preference

See Preference.

As sale

See Sale.

Vendor's lien

Reservation of title to a chattel sold and delivered, as security for the purchase money thereof, is but a "chattel mortgage" and does not give a vendor's lien. Parlin & Orendorff Co. v. Davis' Estate (Tex.) 74 S. W. 951, 952.

An instrument, reciting a sale of a drug stock and fixtures in the storeroom and the retention of a vendor's lien for the unpaid portion of the purchase price, and binding the vendees to keep the stock up to its present standard and not permit it to run down, and stipulating that, if the notes are not paid when due, the vendor may take possession and sell sufficient of the stock in the usual conduct of the business to pay the mortgage and default, is a "chattel mortgage," though it denominates the lien retained a vendor's lien. Fleisher Bros. v. Hinde, 99 S. W. 25, 27, 122 Mo. App. 218.

CHATTELS PERSONAL

"Chattels real" include estates for years, at will, by sufferance, and various interests of uncertain duration. They are to be distinguished from things which have no concern with the land, such as mere movables and rights connected with them, which are "chattels personal," and also from a "freehold," which is realty. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S. W. 486, 493, 225 Mo. 414, 20 Ann. Cas. 1072.

CHATTELS REAL

At common law a term for years created by lease was a "chattel real." Springfield Southwestern R. Co. v. Schweitzer, 151 S. W. 128, 131, 246 Mo. 122.

A leasehold interest is merely a "chattel real." Townsend v. Boyd, 66 Atl. 1099, 1101, 217 Pa. 386, 12 L. R. A. (N. S.) 1148.

A chattel real at common law was an interest annexed to or growing out of real estate, as a term for years, having the character of immobility, which denominated it

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real, while other chattels proper are movable; but they were regarded as personal property and went to the personal representative upon death, and not to the heir. Comer v. Light, 93 N. E. 660, 663, 175 Ind. 367.

"'Chattel real' is defined in 22 Am. & Eng. Enc. Law (2d Ed.) as 'an estate in land other than one for life or inheritance.' In 2 Tucker's Com. p. 305, it is said that chattels real are such as concern or savor of the realty; as terms for years in land, wardships in chivalry (while military tenures subsisted), the next presentation to a church, estates by a statute merchant, statutes staple, elegit, or the like. They are called real chattels, as being interests issuing out of or annexed to real estate, of which they have one quality, immobility, but want the other, viz., a sufficient legal indeterminate duration; and this want it is that constitutes them chattels. The utmost period for which they can last is fixed and determinate either for such a space of time certain or until such a particular sum of money be raised out of such a particular income, so that they are not equal in the eye of the law to the lowest estate of freehold, viz., a lease for another's life. A lease for years of land is a real chattel whether it be for one or a thousand years, provided there be a certainty about it, and a reversion or remainder in some person." Harvey Coal & Coke Co. v. Dillon, 53 S. E. 928, 930, 59 W. Va. 605, 6 L. R. A. (N. S.) 628.

"Chattels real" include estates for years, at will, by sufferance, and various interests of uncertain duration. They are to be distinguished from things which have no concern with the land, such as mere movables and rights connected with them, which are "chattels personal," and also from a "freehold," which is realty. Orchard v. Wright-Dalton-Bell-Anchor Store Co., 125 S. W. 486, 493, 225 Mo. 414, 20 Ann. Cas. 1072.

A term for years is a "chattel real," under Civ. Code, §§ 761, 765, dividing estates in real property into estates of inheritance, estates for life, for years, and at will, and declaring that estates for years are chattels real, under Code Civ. Proc. §§ 17, 671, and Civ. Code, § 14, defining real property as coextensive with lands, tenements, and hereditaments, and including chattels in a definition of personalty, and making a judgment a lien on all the real property of a judgment debtor not exempt from execution owned by him at the time or afterwards acquired, a judgment is not a lien on a leasehold estate acquired by the debtor under a lease executed subsequent to the judgment. Summerville v. Stockton Milling Co., 76 Pac. 243, 246, 142 Cal. 529.

A lease for a term of years is a "chattel real." It conveys an interest in the land, and, while it has many of the attributes of personalty, it is treated in many respects as real estate; and the rule that a corporation to acquire and hold real estate cannot be organized embraces all interests in real estate, including leaseholds. People v. Shedd, 89 N. E. 332, 335, 241 Ill. 155 (citing First Nat. Bank of Joliet v. Adam, 28 N. E. 955, 138 Ill. 483; Knapp v. Jones, 32 N. E. 382, 143 Ill. 375.

A lease of real estate for 10 years was a "chattel real," as provided by Real Property Law (N. Y. Laws 1896, p. 563, c. 547) § 23, and was not therefore the proper subject of a chattel mortgage. In re Fulton, 153 Fed. 664, 666.

Though a leasehold interest in land is for some purposes treated as personalty, generally it is considered a "chattel real" and is real estate within Incorporation Act (Hurd's Rev. St. 1905, c. 32, §§ 1, 26), prohibiting the organization of corporations to hold real estate. Imperial Bldg. Co. v. Chicago Open Board of Trade, 87 N. E. 167, 169, 238 Ill. 100 (citing First Nat. Bank of Joliet v. Adam, 28 N. E. 955, 138 Ill. 483; Knapp v. Jones, 32 N. E. 382, 143 Ill. 375).

As personal property

See Personal Property.

As real property

See Real Property.

CHAUFFEUR

A "chauffeur" is one who operates and propels an automobile. State v. Swagerty, 102 S. W. 483, 486, 203 Mo. 517, 10 L. R. A. (N. S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725.

The business of one who operates and propels an automobile along the public highways, called a "chauffeur," is a business attendant with such dangers, and requires a degree of scientific knowledge upon which others must rely, that the Legislature may properly impose conditions on its exercise. Christy v. Elliott, 74 N. E. 1035, 1040, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

In an action for injuries to a pedestrian struck by an automobile, proof that defendant admitted his ownership of the automobile, and that the chauffeur in charge thereof was his chauffeur, was prima facie proof that plaintiff received injury through the negligence of defendant's servant while acting within the scope of his employment, and the burden of proof was shifted on defendant to show that the chauffeur was not acting for him at the time; the word "chauffeur" involving the idea of one having charge of or operating an automobile. Shamp v. Lambert, 121 S. W. 770, 773, 142 Mo. App. 567.

CHEAT

"Cheating" may embrace civil fraud for which one is amenable to a civil and not a

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criminal action, and may offend the laws of morality without being legally cheating. Cheating is not actionable by the common law, unless spoken of the plaintiff in relation to his profession or business, or unless it be by false pretenses or tokens. A charge that members of an organization were thieves, robbers, that one of them had cheated the organization out of $2 in connection with the purchase of a liquor license, is not actionable per se. Yakavicke v. Valentukevicius, 80 Atl. 94, 96, 84 Conn. 350, Ann. Cas. 1912C, 1264.

The word "defraud," in Rev. St. 1899, § 2009, punishing every person who, with intent to injure or "defraud," shall falsely forge, relates to injury to property or property rights, and an indictment alleging that accused, with intent to "cheat and defraud," forged an instrument was not insufficient because of the word "cheat"; it being of similar import to the word "injure" in the statute and not repugnant to the word "defraud." State v. Harroun, 98 S. W. 467, 470, 199 Mo. 519.

Crime imported

Under Code Cr. Proc. §§ 275, 276, providing that an indictment shall contain a concise statement of the act constituting the crime, etc., and prescribing the form of indictment, an indictment charging the defendants conspired, by procuring the presentation and allowance of fraudulent claims against a city, to cheat and defraud the city, and alleging that, in pursuance of the conspiracy, defendants prepared in the name of a third person a false claim against the city and procured the allowance of the same, etc., charges a violation of Pen. Code, § 168, providing that, where two or more persons conspire to cheat another out of property by any means which are in themselves criminal, or which if executed would amount to a cheat, they shall be guilty of a misdemeanor, since the means alleged were of a felonious character, within the purview of the section, and were such as if executed would amount to a cheat, which is such a fraud as will affect the public, such a deception that common prudence and care are not sufficient to guard against it. People v. Miles, 108 N. Y. Supp. 510, 517, 123 App. Div. 862.

Defendant while present in a lodge room, having charged members of the organization to be thieves and robbers, and being requested to point out to whom he referred, stated he could tell "two of those thieves and robbers," and, pointing to plaintiff, said: "There is one. He cheated the club out of $2 in connection with the purchase of the liquor license." Held that, since the specification did not sustain the charge that plaintiff was a thief, the words at most imputing to him not a crime, but an act of cheating, which was no more than to charge that plaintiff tricked or outwitted the club, they were not actionable per se, under the rule that words to be so actionable must charge a crime involving moral turpitude, or subject the offender to infamous punishment. Yakavicke v. Valentukevicius. 80 Atl. 94, 96, 84 Conn. 350, Ann. Cas. 1912C, 1264.

The offense of cheating and swindling consists of some false pretense, device, or contrivance fraudulently made with intent to deceive another so successfully accomplished that the other is in fact deceived thereby and suffers loss. Foster v. State, 68 S. E. 739, 740, 8 Ga. App. 119.

The giving of a second mortgage on personal property without disclosing the existence of a first mortgage, where no representation of the nonexistence of the first mortgage is made, is not "cheating and swindling" within any special section of the Penal Code of 1895, nor general section 670, declaring any person using any deceitful means or artful practice other than those mentioned in that Code, by which an individual or the public is defrauded, guilty of a misdemeanor. Griffin v. State, 60 S. E. 277, 3 Ga. App. 476.

The offense of "cheating by false pretenses" under Code, § 5041, is the obtaining from another, designedly and by false pretense, or by any privy or false token, and with intent to defraud, any money, goods, or property, etc., and is complete only as the wrongful act affects property rights of some third person, and to charge the crime it is necessary to expressly allege the name of that person. State v. Clark, 119 N. W. 719, 721, 141 Iowa, 297.

It is the general holding that neither the common law nor the statutes of the several states defining the crime of "cheating by false pretenses" apply to real estate. Code, § 5041, providing that if any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, "or other property," he shall be punished, etc., does not apply to false pretenses for the purpose of acquiring real estate. State v. Eno, 109 N. W. 119, 120, 131 Iowa 619, 9 Ann. Cas. 856.

The essential requisites in the offense of cheating and swindling by false representations are: (a) That the representations were made; (b) that they were knowingly and designedly false; (c) that they were made with intent to deceive and defraud; (d) that they did deceive and defraud; (e) that they related to an existing fact or past event; (f) that the party to whom the false statements were made, relying on their truth, was thereby induced to part with his property. Goddard v. State, 58 S. E. 304, 305, 2 Ga. App. 207.

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CHECK

See Bank Check; Bankers' Check; Bogus Check; Certified Check; Claim Check; False Checks; Pay Check; Time Check.
Payment of, see Payment.
Raising a check, see Raise.

"Checks" are negotiable instruments both at common law and under the express provisions of Ky. St. 1903, § 478. Boswell v. Citizens' Savings Bank, 96 S. W. 797, 799, 123 Ky. 485.

A check is an instrument by which a depositor seeks to withdraw funds from a bank, and, as between the drawer and the payee, is evidence of indebtedness, and equivalent to the drawer's promise to pay. Camas Prairie State Bank v. Newman, 99 Pac. 833, 834, 21 L. R. A. (N. S.) 703, 128 Am. St. Rep. 81, 15 Idaho, 719.

The usual business carried on by banks is to receive moneys on deposit from persons who desire a safe place to keep their funds, and a convenient place from which they can, when needed, be withdrawn, and to loan money to persons who desire to borrow it. According to the usual custom of such banks, the money deposited by a customer of the bank would be entered to his credit and, when the depositor desired to withdraw from the bank any or all of the funds so deposited and carried to his credit, he would draw an order on the bank for the amount of money desired. This order is commonly called a "check." Chadwick v. United States, 141 Fed. 225, 228, 229, 72 C. C. A. 343.

Criminal Code 1902, § 358, which makes it an offense, unless otherwise provided by special contract, to offer to any farm laborer at the time when his wages are due and payable by agreement as compensation for labor, checks known as plantation checks, payable at some future time or in his shop or store in lieu of lawful money, expressly declares that the word "checks" shall not be construed so as to prohibit the giving of checks on any of the authorized banks of deposits or issue in, this state. Johnson, Lytle & Co. v. Sparton Mills, 47 S. E. 695, 703, 68 S. C. 339, 1 Ann. Cas. 409.

A "check" is simply a written order of a depositor to his bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the bank has paid or permitted itself to pay it. But after the bank has paid, or placed itself under obligation to comply with, the order, the drawer's power to revoke is at an end. It is no defense to an action by a depositor against a bank that it paid his check; payment having been after notice from him not to pay it. The depositor may prove a verbal notice, though afterwards on the request of the teller he reduced the notice to writing. People's Savings Bank & Trust Co. v. Lacey, 40 South. 346, 347, 146 Ala. 688 (quoting Morse, Banking [4th Ed.] § 398; Zane, Banks, p. 261, § 153; National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; and other cases).

"A 'check,' being simply a written order of a depositor to his banker to make a certain payment out of his funds, is executory and of course revocable at any time before the bank has paid it or committed itself to its payment. * * * The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder except under the drawer's directions, until, by virtue of those directions, it assumes some obligation to the holder; up to that time the latest order from the drawer governs." Pease & Dwyer v. State Nat. Bank, 88 S. W. 172, 173, 114 Tenn. 693 (quoting and adopting definition in Kahn v. Walton, 20 N. E. 203, 46 Ohio St. 205).

A "check" is usually defined to be a draft or order on a bank for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, and payable instantly on demand; and it is an evidence of indebtedness, and, as between drawer and payee, is equivalent to the drawer's promise to pay, though the drawer may not be bound absolutely until payment has been duly demanded of the bank and refused. Brown v. Cow Creek Sheep Co. (Wyo.) 126 Pac. 886, 890.

For certain purposes a bank "check" is regarded as a simple contract. For example, the statute of limitations as to simple contracts in writing applies to checks. Whether a check is a specialty or not under Civ. Code 1895, § 3634 et seq., it is such an instrument as is by common law negotiable and as to which a consideration will be presumed. Purcell v. Armour Packing Co., 61 S. E. 138, 141, 4 Ga. App. 253 (citing 2 Words and Phrases, p. 1111; Haynes v. Wesley, 37 S. E. 990, 112 Ga. 668, 81 Am. St. Rep. 72).

As used in Laws 1901, p. 166, § 2, prohibiting the conduct of games of chance for money, "checks," credits, or any representative of value, or for any property or thing whatever, "checks" includes all kinds of articles embraced under that designation. The expression "any representative of value," together with these words, leave nothing of any of the classes of property enumerated. Hence a nickel in the slot machine, involving in its operation the element of chance as to whether the player obtained in cigars more or less than the value of his money, was prohibited by such statute. State v. Woodman, 67 Pac. 1118, 1120, 26 Mont. 348.

Leaving blank the name of the payee of a check gives to any bona fide holder for value implied authority to fill the blank with his own name or that of a third person, and so, likewise, where all that was re-

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quired to make a check out of a forged instrument delivered by defendant in payment was the insertion of the name of the payee, the delivery constituted the transferee defendant's agent with authority to fill in the blank with its own name; and a claim that the instrument was not a check or an instrument for the payment of money within the meaning of Pen. Code, § 476 when passed by defendant, is without merit. People v. Gorham, 99 Pac. 391, 392, 9 Cal. App. 341.

As appropriation or assignment of money

Under Rev. St. 1908, §§ 3177v, 3177z, declaring that a "check" is a bill of exchange drawn on a bank, payable on demand, and providing that a check does not operate as an assignment, and the bank is not liable to the holder until it accepts or certifies the check, a "check" for part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn, but the transfer of a certified check is an equitable assignment of money to meet it, and the bank making the certification is liable therefor to the holder. Blake v. Hamilton Dime Savings Bank Co., 87 N. E. 73, 75, 79 Ohio St. 189, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684, 16 Ann. Cas. 210.

A "check" is an absolute appropriation of so much of the funds of the drawer in the hands of the bank as is called for by the instrument, so that after notice to the bank it cannot be withdrawn by the drawer, the money becoming the absolute property of the holder; and this notwithstanding the drawer may afterwards deliver another check to an innocent person without notice of the first one, who by first presenting his check may defeat the claim of the first check holder, the title to the amount represented by the check as between the maker and the payee, passing to the latter, so that the taxable balance of the maker may properly be reduced by outstanding unpaid checks. Commonwealth v. Kentucky Distilleries & Warehouse Co., 116 S. W. 766, 769, 132 Ky. 521, 21 L. R. A. (N. S.) 30, 136 Am. St. Rep. 186, 18 Ann. Cas. 1156 (citing Lester & Co. v. Givens & Co., 71 Ky. [8 Bush] 357; Weinstock v. Bellwood, 75 Ky. [12 Bush] 140; Merchants' Nat. Bank v. Robinson, 31 S. W. 136, 97 Ky. 552, 28 L. R. A. 760; Columbia Finance & Trust Co. v. First Nat. Bank, 76 S. W. 156, 116 Ky. 364; Farmers' Bank & Trust Co. of Stanford v. Newland, 31 S. W. 38, 97 Ky. 464; Deatheridge v. Crumbaugh, 8 Ky. Law Rep. 592; Rosenbaum & Co. v. Lytle & Co., 8 Ky. Law Rep. 607).

"A 'check' on the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment." Pease & Dwyer Co. v. State Nat. Bank, 88 S. W. 172–174, 114 Tenn. 693 (quoting and adopting the definition in Florence Mining Co. v. Brown, 8 Sup. Ct. 531, 534, 124 U. S. 391, 31 L. Ed. 424).

A check given by a depositor upon a bank is a mere direction to the bank to pay a certain sum of money to the person named therein, and by the giving of such check the amount of the same does not become the property of the payee of the check nor place such fund beyond the control of the depositor. Kaesemeyer v. Smith, 123 Pac. 943, 947, 22 Idaho, 17, 43 L. R. A. (N. S.) 100.

A "check" is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee and gives the payee no right of action against the drawer nor any valid claim to the funds of the drawer in his hands. Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank, 69 Atl. 280, 281, 220 Pa. 1, 15 L. R. A. (N. S.) 519 (citing Harrisburg Nat. Bank's Appeal, 10 Wkly. Notes Cas. 41).

Bill of exchange distinguished

A "check" is a bill of exchange, sometimes defined as an inland bill of exchange, and is "property"; it being capable of beneficial ownership. Citing Words and Phrases, vol. 2, p. 1109. State v. Fraley (W. Va.) 76 S. E. 134, 135, 42 L. R. A. (N. S.) 498.

A "check" is a bill of exchange drawn on a bank, payable on demand. Columbian Banking Co. v. Bowen, 114 N. W. 451, 452, 134 Wis. 218 (quoting and adopting definition in Negotiable Instruments Law [Laws 1899, c. 356, § 1684—1]).

A bank "check" is a bill of exchange, within the meaning of Gen. Stat. 1901, § 548, providing that an acceptance of a bill of exchange written on paper other than the bill shall not bind the acceptor except in favor of a bona fide holder of the paper. First Nat. Bank of Atchison v. Commercial Sav. Bank, 87 Pac. 746, 74 Kan. 606, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281 (citing Eakin v. Citizens' State Bank, 72 Pac. 874, 67 Kan. 338).

A bank "check" is a bill of exchange within the statute providing that no one shall be charged as an acceptor of a bill of exchange unless the acceptance is in writing, etc. Interstate Nat. Bank v. Ringo, 83 Pac. 119, 122, 72 Kan. 116, 3 L. R. A. (N. S.) 1179, 115 Am. St. Rep. 176.

A check is a bill of exchange upon a bank or banker, payable on demand without interest. Hobart Nat. Bank v. McMurrough, 103 Pac. 601, 24 Okl. 210.

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Negotiable Instruments Law, § 185, provides that a "check" is a "bill of exchange" drawn on a bank payable on demand. National Bank of Commerce in St. Louis v. Mechanics' American Nat. Bank, 127 S. W. 429, 433, 148 Mo. App. 1; Van Buskirk v. State Bank of Rocky Ford, 83 Pac. 778, 35 Colo. 142, 117 Am. St. Rep. 182.

Under Rem. & Bal. Code, §§ 3516, 3575, a check is a bill of exchange. State v. Garland, 118 Pac. 907, 910, 65 Wash. 666.

A "check" constitutes a demand on the bank for the payment of the amount of money designated in the check from the funds of the drawer on deposit in the bank. If there are no funds on deposit, the check amounts to a request for credit and becomes an overdraft. Under Civ. Code, § 3254, a check is a bill of exchange and is negotiable. Whether regarded as a demand or a request, it is always the written instrument on which the payment of a sum mentioned therein is founded and is the foundation of any suit growing out of the payment of such money or the refusal to pay the check. A check implies a promise that the money is in the bank with which to pay it, and that if the money is not there the drawer of the check will repay the money to the bank, and therefor the promise implied by the check is a contract in writing, and the statute of limitations governing written instruments to pay money applies to a check. Du Brutz v. Bank of Visalia, 87 Pac. 467, 469, 4 Cal. App. 201 (citing Bancroft v. San Francisco Tool Co., 52 Pac. 496, 120 Cal. 228; Long v. Straus, 6 N. E. 123, 7 N. E. 763, 107 Ind. 94, 57 Am. Rep. 87; Meherin v. Saunders, 63 Pac. 1084, 131 Cal. 681, 54 L. R. A. 272).

Under Rem. & Bal. Code, §§ 3516, 3575, defining a "bill of exchange" as an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a specified sum, to order or bearer, and defining a "check" as a bill of exchange drawn on a bank payable on demand. a certificate of deposit properly indorsed by the depositor is a "check" within an information charging larceny of a check by means of false pretenses. State v. Garland, 118 Pac. 907, 910, 65 Wash. 666.

Where an instrument for the payment of the price of a shipment of iron was drawn by the seller on the buyer, who resided in a foreign country, and, with the bill of lading attached, was indorsed for discount, it was a foreign bill of exchange, and not a check. under Negotiable Instruments Law, §§ 210, 321 (Laws 1897, pp. 745, 756, c. 612), defining a bill of exchange as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the addressee to pay on demand, or at a fixed or determinable time, a certain sum of money to order or to bearer, and defining a check as a bill of exchange, drawn on a bank, payable on demand. Amsinck v. Rogers, 93 N. Y. Supp. 87, 91, 103 App. Div. 428.

Deposit presumed

"A 'check' is an order on a bank purporting to be drawn on a deposit of funds. It presupposes that the drawer has money in the hands of the banker subject to his order at any time on demand." McKnight v. Bank of Acadia, 38 South. 172, 173, 114 La. 289 (quoting and adopting definition in 1 Rand. Com. Paper, § 8).

A "check" is defined as a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand. Farmers' Bank of Nashville v. Johnson, King & Co., 68 S. E. 85, 86, 134 Ga. 486, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242.

A "check is defined as a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money, to a certain person therein named, or to him or his order or to bearer, and payable instantly on demand. An instrument certified by a national bank reciting that, on the failure of the drawers to comply with the building contract, the drawers agreed to pay plaintiff surety company, which had become surety on the drawer's construction bond, any amount such surety would become legally liable to pay on the bond, not exceeding a specified sum, otherwise the check to be void and held for naught, is not a certified check drawn in the ordinary course of business. Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas, 106 S. W. 782, 784, 48 Tex. Civ. App. 301 (quoting and adopting definition in 2 Daniel, Neg. Inst. § 1566).

A check is an order on a bank purporting to be drawn upon a deposit of funds. State v. Hammelsy, 96 Pac. 865, 866, 52 Or. 156, 17 L. R. A. (N. S.) 244, 132 Am. St. Rep. 686.

A bank "check" is not an "obligation for the payment of money," within the legal meaning of such term as used in Rev. St. § 5451, providing for the punishment of bribery of United States officers. The definitions of the word "check," as given in 1 Bouv. Law Dict. 225, 1 Abb. Law Dict. 214, 2 Daniel, Neg. Inst. (4th Ed.) § 1566, Bishop, Stat. Cr. (2d Ed.) p. 299, § 328, and People v. Howell (N. Y.) 4 Johns. p. 301, do not support the proposition that a "check" is an "obligation for the payment of money" within the meaning of the statute. The definitions of the word "obligation," as found in 2 Bouv. Law Dict. 254, Wharton's Law Dict., 2 Abb. Law Dict. p. 193, Strong v. Wheaton (N. Y.) 38

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Barb. 616, Crandall v. Bryan (N. Y.) 15 How. Prac. 48, Rippon's Ex'rs v. Townsend's Ex'rs (S. C.) 1 Bay, 445, Basehore v. Rhodes, 85 Pa. 44, are not sufficiently broad to cover the case of a "check." A "check" is a representation by the drawer that he has money on deposit with the drawee subject to his order. The law implies a consideration for the check, and a promise on the part of the drawer to pay the amount of the check in case it is not paid or accepted by the bank or banker on which it is drawn. The giving of a check is not the creation of an obligation but is merely the admission by the drawer of the existence of an obligation to pay a certain sum of money. If payable to bearer or to the order of the payee, it is negotiable and passes by delivery or indorsement, but the check imposes no obligation on the drawee to pay the same, at least as between the drawee and payee; but if the bank refuses to pay the check, having funds with which to pay the same, the payee cannot maintain an action in law or in equity against the bank unless the bank has accepted the check. A check is neither a draft or bill of exchange, although it has many of the features of a bill of exchange and some of the features of a draft. It is not a bond or a promissory note. It is not a contract, for it contains no promise by the drawer to any person. United States v. Green, 136 Fed. 618, 645, 650 (citing Bull v. First Nat. Bank, 8 Sup. Ct. 62, 123 U. S. 110, 111, 31 L. Ed. 97; Merchants' Nat. Bank v. State Nat. Bank, 77 U. S. [10 Wall.] 604, 19 L. Ed. 1008; Chapman v. People, 39 Mich. 357, 359; In re Richter, 100 Fed. 295, 297; U. S. v. Royall, 3 Cranch, C. C. 618, 27 Fed. Cas. 906; Elsasser v. Haines, 18 Atl. 1095, 52 N. J. Law, 10; Sinton v. Carter County, 23 Fed. 535, 537, 538; Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; Bull v. First Nat. Bank, 8 Sup. Ct. 62, 123 U. S. 110, 111, 31 L. Ed. 97; People v. Howell [N. Y.] 4 Johns, 296, 301).

A check is but a request to another to pay to the payee the sum named therein out of funds supposed to be deposited with the drawee to meet the check. If the drawee does not comply with the request, the funds are still there and the debtor still owes the money; the drawer of the check being the principal debtor, and not a surety, like an indorser. Williams v. Braun, 112 Pac. 465, 466, 14 Cal. App. 396.

As money

See Money.

As obligation

See Obligation.

Payable on demand or presentment

A "check" is an order to pay the holder a sum of money at the bank upon which it is drawn on presentment of the check and demand for the money. Parker-Fain Grocery Co. v. Orr, 57 S. E. 1074, 1075, 1 Ga. App. 628.

A "check" is defined by Wilson's Rev. & Ann. St. 1903, § 3703, as a "bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest." Checks, as a rule, are used in paying obligations that are due, and take the place of the cash itself; and, while a check is not an assignment of the fund against which it is drawn until accepted by the drawee, the law recognizes that the funds are placed in the bank for the purpose of paying checks drawn by the depositor on the bank; and hence the law requires one holding a check to use reasonable diligence in presenting it for payment. School Dist. No. 57, Logan County, v. Eager, 91 Pac. 847, 848, 19 Okl. 235.

Under Negotiable Instrument Law, § 126, defining a bill of exchange, section 185, p. 246, declaring that a check is a bill of exchange drawn on a bank and subject to the law applicable to a bill of exchange, section 143, p. 238, providing that a check need not be presented for acceptance, and section 189, p. 246, providing that a bank is not liable to the holder until it accepts or certifies it, a drawee of a check is not liable to the holder until it accepts or promises to pay it in writing. Van Buskirk v. State Bank of Rocky Ford, 83 Pac. 778, 35 Colo. 142, 117 Am. St. Rep. 182.

A gift of one's check is incomplete until the check has been paid or accepted by the bank, for a "check" is a mere order to the payee to draw the amount called for, and, when given without consideration, it may be revoked by the maker so long as it remains unacted on in the hands of the payee. Foxworthy v. Adams, 124 S. W. 381, 382, 136 Ky. 403, 27 L. R. A. (N. S.) 308, Ann. Cas. 1912A, 327.

As payment

See Payment.

As personal property

See Personal Property.

As property

See Property.

As specialty

See Specialty.

CHEMICAL

Public Health Law, § 197, provides that all pharmaceutical preparations shall be of a quality, established by the United States Pharmacopœia, and that every proprietor of a place where "drugs, medicines or chemicals" are sold shall be responsible for the quality of "drugs, chemicals or medicines." Section 199 provides that the provision shall not apply to the sale by merchants of cream of tartar, and other enumerated articles, except as herein provided. Held, that the enumerated articles not sold as drugs or medicines need not conform to the standard

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prescribed by the Pharmacopœia for medicines, though the seller of such articles, if adulterated, may be subject to other statutory penalties; the word "chemicals" in the statute being limited to chemicals used as medicines or drugs. State Board of Pharmacy v. Gasau, 88 N. E. 55, 57, 195 N. Y. 197.

CHEMICAL COMPOUND

Glycerophosphate of lime, though occasionally dispensed medicinally, is almost always used with other drugs in preparing elixirs. Held, not a "medicinal preparation," but a "chemical compound," within Tariff Act July 24, 1897, c. 11, § 1, Schedule A, pars. 3, 67, 30 Stat. 151, 154. A. Klipstein & Co. v. United States, 167 Fed. 535, 536, 93 C. C. A. 67.

A dry, antiseptic preservative, consisting of an intimate mechanical mixture of boracic acid and borax, the former being the more valuable component, is an article not enumerated in Tariff Act July 24, 1897, § 1, c. 11, 30 Stat. 151, either as "boracic acid," under paragraph 1, Schedule A, § 1, c. 11, 30 Stat. 151, as "chemical compounds," under paragraph 3, Schedule A, § 1, c. 11, 30 Stat. 151, or as "borax" or "borate material," under paragraph 11, Schedule A, § 1, c. 11, 30 Stat. 152, and is subject to an assessment at the same rate of duty as boracic acid under said paragraph 1, by virtue of section 7, 30 Stat. 205, which prescribes that on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable, if composed wholly of the component material thereof of chief value. Berth Levi & Co. v. United States, 126 Fed. 420, 421.

The article known as "carbolineum," or "carbolineum Avenarius," which consists of dead oil modified by the action of chlorine gas, is dutiable under the provision in paragraph 15, Schedule A, § 1, c. 11, Tariff Act of July 24, 1897, 30 Stat. 152, for "preparations of coal tar, not colors or dyes and not medicinal, not specially provided for," and is not dutiable under the provision for "chemical compounds," in paragraph 3 of said act (30 Stat. 151), or free of duty as "dead or creosote oil," under paragraph 524 of said act (Free List, § 2, c. 11, 30 Stat. 197). Downing v. United States, 123 Fed. 1000, 1001.

Bone-size substitute, consisting of chemical starch, dextrin, magnesium chloride, and silica, which is used for stiffening the backs of fabrics, is not a preparation fit for use as starch, under paragraph 285, Schedule G, § 1, Tariff Act July 24, 1897, 30 Stat. 173, c. 11, but is a chemical compound, under paragraph 3, Schedule A, 30 Stat. 151. United States v. B. P. Ducas & Co., 149 Fed. 253, 254.

The term "coal tar preparations" is more specific than the term "chemical compounds." Lysol, a coal tar preparation, is dutiable under paragraph 15, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152, providing for preparations of "coal tar * * * not medicinal," rather than under paragraph 3, Schedule A, § 1, c. 11, of said act, covering "chemical compounds." United States v. Lehn, 124 Fed. 87, 89.

"Gaduol," an extract of cod liver oil, which, in the form in which imported is not prepared for the use of the apothecary or physician, and which is not dispensed in that form, is not a "medicinal preparation," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 67, 30 Stat. 154, but is dutiable as a "chemical compound" under paragraph 3 of said act (30 Stat. 151, c. 11, § 1, Schedule A). United States v. Merck & Co., 136 Fed. 817, 69 C. C. A. 472; Merck & Co. v. United States, 126 Fed. 438, 439.

The provision for "chemical compounds" in Tariff Act July 24, 1894, c. 11, § 1, Schedule A, par. 2, does not include herbs immersed in alcohol. United States v. Stone & Downer Co., 171 Fed. 293.

Extract of nutgalls, an article which is made by grinding nutgalls, digesting the powder in water, and filtering to remove impurities, a chemical being added as a preservative without working any chemical change, is not dutiable as tannin or tannic acid, under paragraph 1, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 151, nor as a chemical compound under paragraph 3, Schedule A, § 1, c. 11, 30 Stat. 151, but either directly or by similitude as "drugs, such as * * * nutgalls, * * * advanced in value or condition." under paragraph 20, Schedule A, § 1, c. 11, 30 Stat. 152. W. N. Proctor & Co. v. United States, 139 Fed. 586, 588.

CHEMIST

"Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession. * * * [One] is none the less a chemist, and none the less occupied in the practice of his profession because he * * * limits himself to that particular branch, which is to be applied in the course of the scientific manufacture of sugar, any more than a lawyer would cease to practice his profession by limiting himself to any particular branch thereof or a doctor by confining his practice to some specialty which he particularly favored and was eminent in." United States v. Laws, 16 Sup. Ct. 998, 163 U. S. 266, 267, 41 L. Ed. 151.

CHEROKEE TRIBE OR ANY BAND THEREOF

The phrase "Cherokee Tribe or any Band thereof," as used in Act Cong. July 1, 1902,

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c. 1375, § 68, 32 Stat. 726, conferring jurisdiction to adjudicate any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, means the Cherokee people as a people or any band thereof, and not the Cherokee nation as a body politic. United States v. Cherokee Nation, 26 Sup. Ct. 588, 599, 202 U. S. 101, 50 L. Ed. 949.

CHERRIES

As edible fruit, see Edible Fruit.

CHERRY JUICE

The article known as "marasque water" or "eau de marasque," which is produced by distilling the juice of crushed cherries diluted somewhat with water used in the distilling process, is not dutiable as cherry juice, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 299, 30 Stat. 174, but as an unenumerated manufactured article under section 6, 30 Stat. 205. Leerburger Bros. v. United States, 141 Fed. 1023.

CHEST

"An indictment charging theft of one certain trunk or chest containing various articles of clothing, jewelry, etc., is bad for uncertainty in the description of the property stolen. The words 'trunk' and 'chest' are not synonymous." State v. Collett, 75 Pac. 271, 272, 9 Idaho, 608 (citing Potter v. State, 39 Tex. 388).

CHICKENS

Any useful fowl, see Any.
As personal property, see Personal Property.
As valuable things, see Valuable Thing.

A complaint, alleging that accused stole chickens of a specified value, charges the larceny of "poultry," punishable by Gen. St. 1902, § 1211; the word "chickens" meaning poultry, and the word "poultry" including domestic fowls, generally or collectively, reared for the table or for their eggs or feathers. Town of Wolcott v. Stickles, 82 Atl. 572, 573, 85 Conn. 322.

CHICKEN COOP

As building, see Building (In Criminal Law).

CHICKEN HOUSE

As house, see House.

"A chicken or hen house is a building which is of a permanent and substantial kind and is well known in communities where poultry is raised as the building in which chickens and other poultry are housed." Indictment for burglary of a chicken or hen house need not allege that the house was specially made to keep such goods, merchandise, or other valuable things. Lucas v. State, 39 South. 821, 144 Ala. 63, 3 L. R. A. (N. S.) 412.

CHIEF

CHIEF COUNSEL

Pending a suit by the United States against a disbursing officer to recover misappropriations, it was stipulated that, in consideration of a payment to a receiver of all money and property which the defendants had not conveyed or disbursed, to bona fide purchasers and were able to pay over, there should be paid, from the property so surrendered, fees of the receiver, the fees, traveling and other expenses of defendants' chief counsel and of his attorney, the amount to be fixed and allowed by the court, the fee of his attorney for representing him in any criminal prosecution, expenses of an accountant, etc. Held that, under such stipulation, a reasonable allowance for defendants' chief counsel, both on an appeal to the Circuit Court of Appeals and to the Supreme Court of the United States, together with their expenses therein, should be allowed out of the fund, and that two attorneys appearing and prosecuting the appeal to the Circuit Court of Appeals and two other attorneys appearing and prosecuting the appeal to the Supreme Court of the United States should be considered as "chief counsel," within the stipulation. United States v. Stone, 187 Fed. 577, 580, 109 C. C. A. 267.

CHIEF DEPUTY

Acts 29th Gen. Assem. c. 27, § 2, providing that a sheriff shall appoint one or more deputies, from whom he shall require a bond, the appointment and bond to be approved by the officers having the approval of the principal's bond, and the salary of the chief deputy to be paid by the sheriff out of the compensation allowed him under the preceding section and of other deputies to be paid by the county, requires that there shall be a deputy, and, when only one deputy is provided for, he is necessarily the "chief deputy" whose compensation is to be paid by the sheriff. Bodenhofer v. Hogan, 120 N. W. 659, 661, 142 Iowa, 321, 134 Am. St. Rep. 418, 19 Ann. Cas. 1073.

Under Code Supp. 1907, § 510b, requiring the sheriff of each county to appoint a deputy, conferring power on the board of supervisors to fix a greater number, and providing that in all counties the "chief deputy" shall be paid by the sheriff, and all other deputies by the county, the one deputy whom the sheriff is required to appoint is the "chief deputy" for whose compensation the sheriff, and not the county, is liable, though such "chief deputy" is the only deputy. Culver v. Fayette County, 120 N. W. 627, 628, 142 Iowa, 269.

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CHIEF OFFICER

A director, by or through the authority of his office, is not a "chief officer" or "managing agent" of a domestic corporation, within the meaning of section 5604, Comp. Laws 1909; hence service of summons on the corporation cannot be had by the delivery of a copy of the summons to such director. Oklahoma Fire Ins. Co. v. Barber Asphalt Paving Co., 125 Pac. 734, 736, 34 Okl. 149.

A return on a summons against a corporation that the president was absent from the county, and that the officer served was "the secretary and treasurer, and chief officer in charge of the business," without reciting that the service was made at defendant's business office, as required by Rev. St. 1899, §§ 995, 996, when the president or other chief officer cannot be found, does not show that the writ was served in the manner prescribed by the statute, though it states that the secretary and treasurer is the chief officer, which is a mere conclusion of the sheriff; a "chief officer" of a corporation being one who has charge and control of its business, and not one who is charged with the performance of other and subordinate duties. Stanley v. Sedalia Transit Co., 117 S. W. 685, 686, 136 Mo. App. 388.

CHIEF OF DEPARTMENT

The officer of chief engineer is created by Ky. St. 1903, § 2810, empowering the board of public works in cities of the first class to appoint a chief engineer, and the officer is a "chief of a department" under the control of the board of public works and removable by it without notice and without cause. Parsons v. Breed, 104 S. W. 766, 768, 126 Ky. 759.

CHIEF OF POLICE

As member of police force, see Member.
As peace officer, see Peace Officer.
As police officer, see Police Officer.
As state officer, see State Officer.

The city of Janesville was incorporated under Laws 1882, p. 702, c. 221. Chapter 2, § 2, provided that one of the officers of the city should be a city marshal. Chapter 3, § 18, gave him all the powers of constables, and also required him to enforce all laws, ordinances, etc., and to perform such duties as the city council should direct. Chapter 12, § 46, provided that no general state law contravening the provisions of the charter should be construed as repealing or amending it, unless such purpose was expressly stated. St. 1898, § 959–40, provided that cities of the third class, however incorporated should have a board of fire and police commissioners, and section 959–41 requires the chief of police to be appointed by the board of police and fire commissioners, and prohibits any appointment on the police force without the board's approval. The general charter law, St. 1898, § 925–259, provides that the city marshal shall be known as such or as captain or chief of police in the discretion of the council, and shall command the police officers, etc., and in a number of cities of the third class operating under special charters the chief police officer is called the "city marshal" and in others "chief of police." Janesville is a city of the third class. Held, that the term "chief of police" in section 959–41 meant the head of the police force, and that section, by authorizing the board of police and fire commissioners to appoint a chief of police, took away the power of the city council to appoint a city marshal. State ex rel. Brown v. Appleby, 120 N. W. 861, 862, 139 Wis. 195.

CHILD—CHILDREN

See Colored Child; Deceased Child; Die Leaving Children; Die Leaving No Children; Die Without Children; Grandchild; Illegitimate Child; Lawful Child; Legitimate Child; Neglected Child; Only Children; Our Children; Poor Children; Posthumous Child; School Children; Stepdaughter; Stepfather; Their Children.
Adopted child as lawful heir, see Lawful Heirs.
Any child or children, see Any.
Any deceased child, see Any.
Every child, see Every.
Exposure of child, see Exposure.
Incorrigible child, see Incorrigible.
Minor children, see Minor.
Other children, see Other.
Pretermitted child, see Pretermitted.
Said children, see Said.
Such child, see Such.
Surviving children, see Survive—Surviving—Survivor.

Anderson's Law Dict. says that of the word "child" the primary definition is an infant, this in a popular sense; that the next allowable use in meaning is "one of tender years, a young person, a youth"; that the next allowable use of the word is as meaning "a legitimate descendant in the first degree," and the next is "a legitimate descendant in any degree; but in this case 'children' is the word used; offspring, issue, or descendants generally" the author commenting thus: "While the word 'children' will include grandchildren, the presumption of law is against such construction." Keeney v. McVoy, 103 S. W. 946, 954, 206 Mo. 42.

"The ordinary, popular, and legal sense of the word 'children' embraces only the first generation of offspring, and for it to be extended further there must either be something in the context showing that a larger signification was intended, or the person using it must know that there neither is, nor can afterwards be, any person to whom the term can be applied." Crawley v. Kendrick, 50 S. E. 41, 44, 122 Ga. 183, 2 Ann. Cas. 643.

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The rule that the words "child" or "children" will be taken to refer to "issue" or descendants of the first degree, and to exclude descendants of a more remote degree, is not inflexible, as the term will be given a wider signification and include issue, however remote when reason demands it. Pfender v. Depew, 121 N. Y. Supp. 285, 286, 136 App. Div. 636.

Descendants

Descendant as including, see Descendant.

The term "children" includes only lineal descendants. Dungan v. Kline, 90 N. E. 938, 940, 81 Ohio St. 371 (citing Turley v. Turley, 11 Ohio St. 173).

Grandchildren

The word "children" does not include grandchildren. Simpson v. Adams, 106 S. W. 819, 821, 127 Ky. 709.

The word "children" in its natural and usual sense does not include a grandchild. Varick v. Smith, 61 Atl. 151, 154, 69 N. J. Eq. 505; Succession of Roder, 46 South. 697, 698, 121 La. 692, 15 Ann. Cas. 526 (citing Curtis v. Hewins, 52 Mass. [11 Metc.] 294).

Issue

The word "children" is often used interchangeably and as synonymous with issue. In re Duckett's Estate, 63 Atl. 830, 832, 214 Pa. 362.

As legal representative

See Legal Representative.

Legitimate children

The word "child," in the absence of any facts or circumstances indicating the contrary, means legitimate offspring. Tillery v. Tillery, 46 South. 582, 155 Ala. 495 (citing 2 Words and Phrases, pp. 1123, 1124). Landry v. American Creosote Works, 43 South. 1016, 1018, 119 La. 231, 11 L. R. A. (N. S.) 387 (quoting and adopting definition in Webster's Dict., and citing Enfant Natural, 12 Laurent [2d Ed.] § 456).

As person

See Person.

As personal representative

See Personal Representative.

As servant

See Servant.

Stepchildren

The primary sense of "children" is offspring, and that is the sense of relationship in which it is rightly used when the question of relationship is involved, and cannot be properly held to include stepchildren. Houston v. McKinney, 45 South. 480, 481, 54 Fla. 600.

CHILD—CHILDREN (In Conveyances)

Adopted children

The phrase "children and heirs of the body" of a certain person, when used to designate the grantees in a deed, was used in the sense of issue of the body, and did not include an adopted child of such person. Adams v. Merrill, 85 N. E. 114, 118, 45 Ind. App. 315.

After-born child

In litigation involving the estate of D.'s father, certain property was decreed to stand and remain as the sole and separate property of D.'s wife and their children, who were not parties to the suit, nor shown to be interested in the estate. This was construed as rather in the nature of a voluntary conveyance from D. of an interest in his father's estate than as a judgment between the parties determining disputed claims of right. Held that, although D. at that time had only one child, the use of the plural word "children" did not change the well-established rule of construction that a voluntary conveyance by a person to his wife and their children vests the property in the wife and the children then in being, and that after-born children take no interest therein. Dix v. Bigham, 58 S. E. 571, 572, 124 Ga. 1067.

Child by former marriage

The words "widow or infant child or children," as used in the statute providing that certain articles should be exempt from distribution and sale, and should be set apart to the "widow or infant child or children," referred to the infant child or children of the intestate, and did not include his wife's infant children by a former marriage. Howland's Adm'r v. Harr, 97 S. W. 358, 359, 123 Ky. 732.

Child by future marriage

A deed of property in trust for the wife of the grantor for life, with remainder to her "children," inures to the benefit of children of the grantee by a subsequent marriage to another person after divorce from the grantor. Pettit v. Norman, 82 S. W. 622, 623, 119 Ky. 777.

Children living only

A trust deed directing that on the death of the grantor's daughter the property shall go to her "children and their descendants, if any such survive her," is not void as contrary to the rule against "perpetuities"; the words "'children' and their descendants," employed in the deed, referring to those surviving at the time of the death of the daughter. Cribbs v. Walker, 85 S. W. 244, 247, 74 Ark. 104.

Grandchildren

The word "children" in a deed in the nature of a testamentary disposition of the grantor's property cannot be made to include

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grandchildren, unless there is something in the instrument showing such intention. Frosch v. Monday, 34 App. D. C. 338, 351. Land was conveyed to a father to hold in trust and pay the income to a daughter for life, and then to the daughter's daughter for life, after which the property was to be sold and the proceeds divided among four other designated children of the trustee and the children of the first life beneficiary representing the mother. It was further provided that in case of death of any of the four named children before that of the life beneficiaries the heirs of the deceased child should take the parent's share per stirpes. Held, that the word "children," in the provision of the deed giving the second life tenant's children a fifth of the fund, could not be regarded as extending to grandchildren. Train v. Davis, 98 N. Y. Supp. 816, 819, 49 Misc. Rep. 162.

Generally the word "children" does not include grandchildren, and the word is to be construed according to its ordinary and popular signification, designating the immediate offspring. As used in a deed conveying a life estate to a named person, with the remainder to a class designated as "such child or children, they being the heirs of her body that she (the life tenant) may leave in life," indicates plainly that the word "children" therein used includes only the first generation of offspring, and does not include grandchildren. Smith v. Smith, 61 S. E. 114, 130 Ga. 532, 124 Am. St. Rep. 177 (citing White v. Rowland, 67 Ga. 546, 44 Am. Rep. 731).

Heirs

Children," as used in a granting clause, to a specified person and to his children and assigns forever means "heirs." Chew v. Kellar, 71 S. W. 172, 174, 171 Mo. 215 (citing Rines v. Mansfield, 9 S. W. 798, 96 Mo. 394).

Where it is apparent from a deed that the word "children" therein is used in the sense of heirs, the word "children" will be read as meaning "heirs" and construed as a word of limitation, and not of purchase. Virginia Iron, Coal & Coke Co. v. Dye, 142 S. W. 1057, 1058, 146 Ky. 519.

The word "children" is one of purchase. Occasionally it has been held the equivalent of the word "heirs," but only where it was the manifest intention of the grantor that it should be so construed. Brown v. Brown, 101 N. W. 81, 82, 125 Iowa, 218, 67 L. R. A. 629.

The word "children" in a deed will be read as meaning "heirs," and construed as a word of limitation, and not of purchase, where it is apparent from the deed that the word "children" is used in the sense of "heirs," as where they are used interchangeably. Kelly v. Parsons (Ky.) 127 S. W. 792, 793.

While the word "children" as a rule is used as a word of purchase, it is frequently used as a synonym for "heirs," and this may always be shown by or deduced from a consideration of the whole instrument. Wilson v. Shumate, 113 S. W. 851, 852, 130 Ky. 663.

Where a grantor conveyed certain land to the grantee and to the children of her body begotten, to have and to hold to the use of the grantee during her natural life, and after her death to the use of the children of her body begotten in fee tail forever, he clearly intended to create an estate tail, and must have used "children" in the sense of "heirs," and the grantee took an estate during her life, and her surviving daughter took the remainder in fee simple. Dick v. Ricker, 78 N. E. 823, 824, 222 Ill. 413, 113 Am. St. Rep. 426.

A deed from a husband to a wife, made in consideration of money which her father had advanced to her and which her husband had received, conveying both land and personal property, provided that the grantor "has given, granted, * * * and * * * does give, grant, * * * with general warranty title (for the sole and separate use and benefit of herself and her child or children, free from the control and debts of the party of the first part, with power in her to dispose of the same by will or otherwise), unto the party of the second part her child or children and assigns forever." Held that, as the entire consideration moved from her, the words "child or children and assigns forever" were used in the sense of heirs and assigns, and she took a fee simple thereunder. Hughes v. Saffell, 119 S. W. 804, 806, 134 Ky. 175.

The caption of a deed stated the grantee as "trustee for C. and her children." The granting and habendum clauses stated him as "trustee for C., her heirs and assigns." The warranty was to "C., her heirs and assigns." Held that, in view of the exclusive use of the words "heirs" and "assigns" in all the parts of the deed which conveyed or warranted the estate, the word "children" in the caption, which was merely descriptio personæ of the grantee, was used by the grantors in the sense of "heirs," and the deed conveyed an equitable fee-simple estate to C. Wilson v. Shumate, 113 S. W. 851, 853, 130 Ky. 663.

A deed recited that the grantor had sold to the grantee, "his children and assigns forever," all the grantor's interest in certain land. Held, that under the common law the deed conveyed a mere life estate rather than one in fee or fee tail, but in effect conveyed a fee under Rev. St. 1899, § 4590, dispensing with the necessity of using the word "heirs" or words of inheritance in the creation of a fee simple, and in view of the fact that there were no words signifying a life estate and remainder. Tygard v. Hartwell, 102 S. W. 989, 990, 204 Mo. 200.

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Where the caption of a deed recited that it was made between the grantors and the grantee "and his children," and the habendum recited that the grantors would warrant and defend the title unto the grantee "and his children forever," but the granting clause recited a conveyance to the grantee without any words of inheritance or mention of the children, the term "and his children forever" should not be construed as heirs, and the deed conveyed to the grantee merely a life estate, with remainder to his children, born and to be born. Hall v. Wright, 87 S. W. 1129, 1133, 121 Ky. 16.

The words "children" and "issue" in a deed will not be read as meaning "heirs," where not to do so will carry into effect the lawful intention of the grantor that the grantee take only a life estate, and his children living at his death the remainder, while to do so would defeat such intention. Hopkins v. Hopkins, 122 S. W. 15, 17, 103 Tex. 15.

The caption of a deed made the grantee named party of the second part. The granting clause conveyed to the party of the second part "and his children." The habendum clause read "unto the party of the second part, his heirs," etc. Held, that the grantee acquired the fee-simple title, for the word "children" was used in the sense of "heirs." Kelly v. Parsons (Ky.) 127 S. W. 792, 793.

As words of purchase

The primary and technical meaning attached to the word "children" is one of purchase. Xander v. Easton Trust Co., 66 Atl. 759, 760, 217 Pa. 485.

The word "children" is ordinarily a word of purchase, and not a word of limitation, and in synonymous with "heirs of the body." Sechler v. Eshelman, 70 Atl. 910, 911, 222 Pa. 35.

"Children" is a word of purchase and not of limitation, except in cases where the context shows unmistakably that it was used in the sense of "heirs." Speight v. Askins, 102 S. W. 74, 75, 118 Tenn. 749.

The word "children" is not a word of limitation, excepting in very rare instances, as in the case of Dillard v. Yarboro, 57 S. E. 841, 77 S. C. 227, where it was held that under the circumstances therein mentioned the word "children" must be construed to mean "heirs of the body." Williams v. Gause, 65 S. E. 242, 243, 83 S. C. 265.

"It is true that prima facie 'children' is a word of purchase, and not of limitation, and, uncontrolled by the context, must be so construed. But where it is clear that it is used in the sense of 'heirs,' or 'heirs of the body,' it must be so construed." Hastings v. Engle, 66 Atl. 761, 762, 217 Pa. 419.

In a trust deed providing that the income of land should be paid for the maintenance of the grantor's wife and children during her life, and that on her death the trustee should convey the land to the children and heirs of the wife, the word "children" was the controlling word, and it being the word of purchase, and not of limitation, the rule in Shelley's Case did not apply, and the wife took only a life interest. Cowell v. Hicks (N. J.) 30 Atl. 1091.

A conditional conveyance of land to the grantee "during her natural life, and at her death to her children or to their lineal descendants," and providing that, if the conditions are performed, at the death of the grantee the title was to vest absolutely in "the lineal descendants of the grantee," did not vest a fee in such grantee under the rule in Shelley's Case, since the word "children" was a word of purchase, and not of limitation, and it being the grantor's manifest intent to convey only a life estate, such word would not be construed as equivalent to the word "heirs." Brown v. Brown, 101 N. W. 81, 82, 125 Iowa, 218, 67 L. R. A. 629.

A deed conveying to B. certain described premises, to have and to hold said premises to B. "and his children," and containing a general warranty, gives B. a life estate, with remainder to his children, born and to be born; the word "children" being a word of purchase, and not of limitation. Brumley v. Brumley, 89 S. W. 182, 183, 28 Ky. Law Rep. 231.

The distinction between a grant to A. for life and remainder to her "heirs" and a grant to A. for life with remainder to her "children" is marked in the application of the rule in Shelley's Case. Tiffany, in his work on the Modern Law of Real Property (paragraph 25), in substance says that a deed to A. and his children cannot, at common law, convey an estate tail; and the word "children" can have no effect as a word of limitation defining the interest A. is to take, and must take effect, if at all, as a word of purchase, generally giving the children of A. living at the time of the grant a joint estate with A. in the property; but generally a devise to A. and his children, while there is a presumption that the word "children" is one of purchase, and not of limitation, it is not a conclusive presumption, depending upon whether the context shows that the word was used in the sense of heirs of the body. He furthermore says that in some cases the word "children" in a conveyance to A. and his children is construed as a word of purchase, giving the children a remainder, and not joint interests with A. But he further says: "By the weight of authority, such a conveyance, without any indication of an intention to the contrary, gives joint interests to A. and the children then living." So that in his view the question is more or less controlled by the intention of the grantor, to be gathered from the instrument. Where a deed to a daughter contains a provision in the habendum clause that it is expressly agreed by the grantee in accepting this deed that she will not sell,

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convey, or incumber, or in any manner dispose of the same, but to retain the same for the use of herself and "her children" forever, the term "her children" is descriptio personæ, and as such may at once indicate the objects and limit the scope of the gift, and become of purchase. Hubbird v. Goin, 137 Fed. 822, 837, 70 C. C. A. 320.

A deed to one and his "children," to have and to hold to him and his children, conveys to him a fee simple, and not merely an estate for life. Viley v. Frankfort & C. Ry. (Ky.) 51 S. W. 173, 174.

Where a deed created a trust for the benefit of a wife for life with a fee to her children and heirs of her body on her death, the word "children" is a word of limitation; and, on the death of the husband, the wife took an estate tail, which, by the act of 1855 (P. L. 368), was enlarged into an estate in fee simple. Wilson v. Heilman, 68 Atl. 674, 675, 219 Pa. 237.

CHILD—CHILDREN (In Criminal Law)

As minor child

The statute making the assault of a "child" an aggravated assault, as applied to a male, means one not above the age of 14 years. Thompson v. State, 80 S. W. 623, 624, 46 Tex. Cr. R. 412.

Under the statute making an assault upon a child an aggravated one, boys over 14 and girls over 12 are not children. Wilman v. State, 141 S. W. 110, 111, 63 Tex. Cr. R. 623.

Juvenile courts have no jurisdiction over minors, or of offenses against minors, over 17 years of age. A minor over the age of 17 years is not considered a "child" in the sense of section 9, Act 83 of 1908, which defines such children as those "17 years of age and under." State v. Lanassa, 51 South. 688, 125 La. 687.

As quick child

The word "child," as used in Pen. Code 1895, § 81, declaring that any person who shall administer to any woman pregnant with a child any medicine, etc., with intent to destroy such child, shall be punished, etc., means an unborn child, so far developed as to be ordinarily quick, so far developed as to move or stir in the mother's womb. Sullivan v. State, 48 S. E. 949, 950, 121 Ga. 183; Barrow v. State, 48 S. E. 950, 951, 121 Ga. 187.

As referring to relationship

An accusation charging the abandonment of a child, as punishable under the terms of Pen. Code 1895, § 114, is sufficient, if the name of the accused denotes a person of the masculine gender, and if the child alleged to have been abandoned is described as his child. In the absence of proof to the contrary, the inference in authorized that a child described in relation to a named man as his child, is not merely a child committed to his custody, but is the "offspring" of his body and lawfully begotten. Rimes v. State, 67 S. E. 223, 7 Ga. App. 556.

As under age of puberty

A female ceases to be a "child" and becomes a woman at the age of puberty within the meaning of the statute defining rape. Blackburn v. State, 22 Ohio St. 102, 110.

A child is a young person at any age less than maturity, but most commonly one between infancy and youth, and in laws for the protection of children it means generally the young under the age of puberty, which has never been fixed, either by the laws of nature or man, and depends upon sex, climate, and race. A girl 14 years of age is presumptively a child within Pen. Code 1895, § 708, providing punishment for cruelty to children. Stone v. State, 57 S. E. 992, 1 Ga. App. 292 (citing Stand. Dict. and Black's Law Dict.).

Legitimate children

An illegitimate daughter is a child within Ky. St. § 1219 (Russell's St. § 3681), providing punishment for whoever shall have carnal intercourse with his or her child, etc. Cecil v. Commonwealth, 131 S. W. 781, 782, 140 Ky. 717, Ann. Cas. 1912B, 501.

CHILD—CHILDREN (In Insurance)

Children living only

While a benefit certificate speaks from the death of the insured, it is not a testamentary disposition, since the proceeds do not become a part of the estate of insured and are not subjected to the payment of debts or costs of administration, so that the statute of descent does not apply thereto and require the children of a child of the insured, who predeceased him and who was a beneficiary to be made parties to an action on the policy. Martin v. Modern Woodmen of America, 97 N. E. 693, 694, 253 Ill. 400, Ann. Cas. 1913A, 299.

A beneficiary is vested with no right in an insurance certificate which will pass by descent upon his demise before the insured, so that, though an insurance policy is payable to the wife and "children" of the insured, the death of one of the children before the death of the deceased does not render the children of that child necessary parties to an action on the policy. Martin v. Modern Woodmen of America, 97 N. E. 693, 694, 253 Ill. 400, Ann. Cas. 1913A, 299.

Grandchildren

The word "children," in an insurance policy, ordinarily means a descendant of the first degree, and is never extended to include grandchildren, except where there is something in the policy showing an intention to so extend its meaning, or where it is necessary to render the instrument effective. Martin v. Modern Woodmen of America, 97

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N. E. 693, 694, 253 Ill. 400, Ann. Cas. 1913A, 299.

The term "children" expresses the immediate offspring of parents, and does not include grandchildren. Where the beneficiaries of an insurance policy were designated as the surviving "children" of the insured and others, such designation did not include the grandchildren. Succession of Roder, 46 South. 697, 698, 121 La. 692, 15 Ann. Cas. 526 (citing Turner v. Ivie, 52 Tenn. [5 Heisk.] 223, 230; Gadsden v. Poaug [S. C.] 2 Bay, 293, 305).

CHILD—CHILDREN (In Statutes)

The word "child." as used in Ann. Code 1892, § 1545, providing for the descent of property between husband and wife, means such child as shall have a right under the law to share in the estate of his intestate father, and does not include children who have been portioned off and have released their interest in the estate. Norfleet v. Callicott, 43 South. 616, 618, 90 Miss. 221.

B. & C. Comp. § 5216, permits females 15 years old to marry, and section 5228 prohibits issuance of a marriage license without the parent's consent if the female is under 18. The juvenile act provides that it shall apply only to children under 18, and makes it a misdemeanor to endeavor to induce a child to do anything tending to cause him to become delinquent. Held that, on marriage of a child between 15 and 18 years of age with parental consent, he loses his legal status as a "child" within the juvenile act. State v. Eisen, 99 Pac. 282, 283, 53 Or. 297.

Adopted children

P. S. 2936, subd. 1, provides that the estate of an intestate shall descend in equal shares to his "children," or the legal representatives of deceased children, and subdivision 2 provides that, if the deceased is a married person and leaves no "issue," the surviving husband or wife, if such survivor does not take dower or testamentary provision, shall be entitled to one-half of the estate of deceased forever if it does not exceed $2,000, otherwise the $2,000 and one-half of the remainder, etc. Held, that the word "children," as used in subdivision 1, and the word "issue," in subdivision 2, were not limited to natural children, but included as well children by adoption. In re Walworth's Estate, 82 Atl. 7, 12, 85 Vt. 322, 37 L. R. A. (N. S.) 849.

The heirs of an adopted child will inherit, through it, a share of the estate of the deceased adopting parent; the statute relating to descents, in the use of the word "children," not limiting the right of inheritance to children by blood. Gray v. Holmes, 45 Pac. 596, 598, 57 Kan. 217; Power v. Hafley, 85 Ky. 671, 4 S. W. 683.

Adults

An "adult" is not a "child" entitled to bring an action for wrongful death, under Civ. Code § 3828, nor is he a "child" entitled to share in the distribution of the proceeds of such action, under section 3829. Griffith v. Griffith, 57 S. E. 698, 699, 128 Ga. 371.

Code 1886, § 2367, providing for the adoption of children, uses the word "child" in the sense of relationship, and not of infancy; and hence one 26 years of age is subject to adoption. Sheffield v. Franklin, 44 South. 373, 374, 151 Ala. 492, 12 L. R. A. (N. S.) 884, 125 Am. St. Rep. 37, 15 Ann. Cas. 90.

After-born child

"The word 'children' used in the statute as to descent and distribution, includes a posthumous child. Such child is entitled to share equally with other children of the deceased." State ex rel. Niece v. Soale, 74 N. E. 1111–1113, 36 Ind. App. 73 (quoting and approving Nelson v. Galveston, H. & S. A. Ry. Co., 14 S. W. 1021, 78 Tex. 625, 11 L. R. A. 691, 22 Am. St. Rep. 89).

Child en ventre sa mere

In a statute providing that if any person shall administer to any woman pregnant with child any drug or shall use any instruments, with intent to destroy the child, such person, shall, in case the death of such child or mother be thereby produced, be guilty of manslaughter, the term "in case of the death of such child," which constitutes the consummation of the crime, equally with the death of the mother, would seem to mean the death of the fœtus either before or after quickening. State v. Atwood, 102 Pac. 295, 297, 54 Ore. 526.

Children living

Statute of Descent (Hurd's Rev. St. 1909, c. 39) § 11, which provides that the issue of a devisee or legatee who has predeceased the testator shall be entitled to the estate of such devisee or legatee, but that, in case there is no issue, the estate which would have passed shall be considered intestate property, cannot be invoked to determine whether or not children of a child of an insured, who was a beneficiary under the policy and who predeceased the insured, need be made parties in an action on the policy, since under such a construction the shares of other children who were beneficiaries, who died childless, would by the terms of the statute, be intestate property. Martin v. Modern Woodmen of America, 97 N. E. 693, 694, 253 Ill. 400, Ann. Cas. 1913A, 299.

Collateral heirs

A son-in-law is not a "child," within Laws 1896, c. 545, §§ 60, 62, providing that an application to adjudge a person a lunatic may be made by the child of the alleged

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lunatic, and a son-in-law has no more authority to make the petition than a stranger. Washer v. Slater, 73 N. Y. Supp. 425, 427, 67 App. Div. 385.

Under the Kansas statute relating to descent (Gen. St. 1889, c. 33, §§ 20, 21, 29), which by Act Cong. Feb. 8, 1887 (24 Stat. 389, c. 19), is made to govern descent of lands allotted in severalty to the members of certain tribes in Indian territory, providing that where an intestate leaves neither husband, wife, nor issue, his estate shall go to his parents, and if they are dead it shall be disposed of in the same manner as if they or either of them had outlived intestate and died in the ownership and possession of the portion thus falling to their share, and that "children of the half blood shall inherit equally with children of the whole blood," the word "children" will be construed as meaning "kindred." Finley v. Abner, 129 Fed. 734, 736, 64 C. C. A. 262.

Ky. St. § 2071, provides that an adopted child shall be capable of inheriting as though he were the child of the petitioner. Section 1393, subsec. 1, provides that when a person dies intestate his real estate descends, first, to his "children" and their descendants. Section 1401 of the same chapter, limiting section 1393, provides that if an infant having title to real estate derived by gift, devise, or descent from one of its parents dies without issue such estate shall descend to that "parent" and his or her "kindred," and, if none, then to the other parent and his or her kindred. And section 460 declares that the common-law rule that statutes in derogation thereof should be strictly construed does not apply to such revision, but that its provisions are to be liberally construed with a view to promote its object. Held, that the purpose of the limitation was to prevent the estate of the parent from being distributed to strangers to his blood; that the word "kindred" in section 1393 was not necessarily confined to blood relations, but might include a relation in law, as an adopted child, and that the word "children" in subsection 1 was not necessarily confined to children born in lawful wedlock, but might include children by adoption; that within section 1401 the foster parent of an adopted child was a "parent"; and hence that an adopted child inheriting from his parent was on the same footing as a natural child, so that where he inherited from his foster father, and then died in infancy without issue, the estate went back to the father's kindred, to the exclusion of his natural mother. Lanferman v. Vanzile, 150 S. W. 1008, 1011, 150 Ky. 751.

Grandchildren and other descendants

The word "children," in either the popular or the technical sense, does not include grandchildren, and where used in a statute it must be construed to mean only descendants of the first degree, unless it is apparent from the context that a broader meaning was intended. Starrett v. McKim, 119 S. W. 824, 90 Ark. 520.

Under Const. art. 16, § 52, securing homestead rights to minor children after the death of their parents, the word "children" does not include grandchildren. Clements v. Maury, 110 S. W. 185, 188, 50 Tex. Civ. App. 158.

Grandchildren are not children, within Rev. St. 1879, art. 1653, declaring that community property goes to the surviving spouse, if the deceased spouse had no "child or children." Ross v. Martin, 140 S. W. 432, 433, 104 Tex. 558.

The word "children," in Kirby's Dig. § 2709, providing that, where a husband dies leaving a widow and no children, the widow shall be endowed in fee simple with a half of the real estate as against collateral heirs, etc., includes descendants in any degree, and the widow of a husband leaving grandchildren is not entitled to a half of the real estate of the husband's lands. Starrett v. McKim, 119 S. W. 824, 825, 90 Ark. 520.

Statute of Descent (Hurd's Rev. St. 1901, c. 39), § 11, providing that whenever a devisee or legatee in any will being a child or grandchild of the testator shall predecease the testator and no provision shall be made for such contingency the issue of such devisee or legatee shall take such estate devised or bequeathed as the devisee or legatee would have taken had he survived the testator, applies to a devise to a class, as well as to devisee in name, so that, where one of testator's sons died before testator, the son's children were entitled to his share under a provision of the will devising the remainder of the property to testator's "children" as their absolute property in fee simple to be equally divided between them. Rudolph v. Rudolph, 69 N. E. 834, 837, 207 Ill. 266, 99 Am. St. Rep. 211.

The right of action against a person who causes damage to another "in case of death shall survive in favor of the minor children" of the deceased. Act No. 71, p. 94, of 1884. Minor grandchildren, under the statute, cannot recover damages for personal injuries to their grandfather, resulting in his death. Children are descendants in the first degree. Grandchildren are descendants in the second degree. "Children," under the codal definition, may include "grandchildren." But "minor" children do not include grandchildren who are minors, or those who are of age, or any other descendants more remote. Walker v. Vicksburg, S. & P. R. Co., 34 South. 749, 750, 110 La. 718.

The words "minor children" used in a statute providing for the setting apart of a

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homestead to the widow or minor children, does not include grandchildren; the term "children" including grandchildren only when it is used in the sense of issue or descendants. Wilkins v. Briggs, 107 S. W. 135, 140, 48 Tex. Civ. App. 596 (citing 7 Cyc. p. 126).

Ordinarily "children" include only descendants of the first degree and not descendants of children, and the rule is different where the intention to use the word in a broader sense and more extended signification appears from the context of the instrument in which it is employed, where the word appears to have been employed as nomen collectivum, or synonymous with a word of larger import, such as "issue," or "descendants," or where such interpretation is required by reason and justice. Applying these rules to the construction of Code 1896, § 1462, providing that personalty of an intestate is to be distributed in the same manner as his real estate and according to the same rules, except that the widow if there are no "children" is entitled to all, or if but one child, one-half, etc., the words "child" and "children" mean the child or children represented in the distribution of the estate, whether living or represented by descendants. Phillips v. Lawing, 43 South. 494, 495, 150 Ala. 186 (citing 7 Cyc. pp. 126, 127).

The word "children," in Rev. St. 1899, § 2944, providing that, where a husband shall die leaving a "child or children" or other descendants, the widow, if she has a "child or children," by such husband living, may elect to take a child's share in the real estate of the husband, when considered in connection with section 4160, requiring words of statutes to be taken in their ordinary sense, etc., and sections 2933, 2946, 2939–2941, and 2944, relating to dower, includes grandchildren, and the widow of one dying seised of land leaving a child of a deceased child of the widow and decedent is entitled to take a child's share. Keeney v. McVoy, 103 S. W. 946–955, 206 Mo. 42.

The common-law rule that the word "children" does not include grandchildren has been modified in Kentucky by statute. Ky. St. § 2064, provides: "A devise to children embraces grandchildren when there are no children, and no other construction will give effect to the devise." This provision is a part of the statute abrogating the common-law rule as to survivorship among devisees, and applies to all instruments in the nature of a testamentary disposition. Harrington v. Gibson, 60 S. W. 915, 916, 109 Ky. 752.

Issue

Under Rev. St. 1871, c. 67, relating to the adoption of children, the term "child" has a broader significance than issue, and an adopted child must be regarded as the child of the adopting parents, not by birth, but by law, and is entitled to the proceeds of a policy of insurance payable to the assured, his executors, administrators, or assigns, for the benefit of his widow; if not, otherwise for the benefit of his surviving children. Virgin v. Marwick, 55 Atl. 520, 521, 97 Me. 578.

Legitimate children

The statute giving a right of action for the death of a mother to her children embraces her illegitimate children. Galveston, H. & S. A. Ry. Co. v. Walker, 106 S. W. 705, 706, 48 Tex. Civ. App. 52.

It is a rule of construction that the word "child," or "children," or any other terms of kindred, when used in a statute, mean legitimate children or kindred only. Jackson v. Hocke, 84 N. E. 830, 831, 171 Ind. 371.

"It is a well-recognized rule of construction that prima facie the word 'child' or 'children,' when used in a statute, means legitimate child or children, and that bastards are not within the meaning of the terms; and, therefore, where parents are given the right of action for the death of a child, such action cannot be maintained by a parent for the death of a bastard." McDonald v. Southern Ry., 51 S. E. 138, 139, 71 S. E. 352, 2 L. R. A. (N. S.) 640, 110 Am. Rep. 576 (quoting and adopting definition in 13 Cyc. p. 337).

Acts 1884, p. 94, No. 71, authorizing an action by a parent for the death of his child, gives a right to sue for damages to the mother of a legitimate child only. Lynch v. Knoop, 43 South. 252, 118 La. 611, 8 L. R. A. (N. S.) 480, 118 Am. St. Rep. 391, 10 Ann. Cas. 807.

Under 1 Ballinger's Ann. Codes & St. § 4624, providing that an illegitimate child shall be an heir to the person acknowledging himself as his father in writing before a competent witness, but that he cannot claim, as representing his father, any part of the estate of the father's kindred, unless his parents intermarry, and his father acknowledge him and adopt him into his family, such illegitimate, being so acknowledged, is entitled to an allowance from his father's estate as his "child" under section 6219, providing that when a person shall die leaving a widow and a minor child or children, they shall be entitled to remain in possession of the homestead, and if the head of the family in his lifetime has not complied with the provisions of the law relative to the acquisition of a homestead, the widow, child, or children may comply with such provisions, and shall be entitled on such compliance to a homestead as provided by law for the head of the family, and that the same shall be set aside for the use of the widow, child, or children, and shall be exempt from all claims for the payment of any debt, and

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shall be for the use and support of such widow, child, or children. and shall not be assets in the hands of the administrator, though his parents did not intermarry. In re Gorkow's Estate, 56 Pac. 385, 388, 20 Wash. 563.

Under Shannon's Code, § 4163, providing that an intestate's lands shall descend equally to all the sons and daughters, and that if an intestate dies "without issue" his lands shall descend equally to his brothers and sisters of the whole or half blood, born before his death, or afterwards, construed with section 5411, declaring that an adopted "child" shall have all the privileges of a legitimate child, with capacity to inherit and succeed to the estate as the applicant's heir or next of kin, a duly adopted child, left by a nonresident intestate, owning land in this state, under the rule of comity has the status of a legitimate "child" in this state to the extent that the foreign adoption law is similar to the local law, and is capable of succession to real property, so that his foster parent does not die without issue. Finley v. Brown, 123 S. W. 359, 363, 122 Tenn. 316, 25 L. R. A. (N. S.) 1285.

Sayles' Ann. Civ. St. 1897, art. 2046, requiring the setting aside for the widow and minor "children" and unmarried daughters all exempt property, etc., does not secure to an unmarried illegitimate daughter of decedent a right to occupy the homestead; the word "children" referring alone to legitimate children. Hayworth v. Williams, 116 S. W. 43, 45, 102 Tex. 308.

The words "child," "children," "brother," or "sister," in Burns' Ann. St. 1908, §§ 2992, 2993, 2996, relating to descent, mean legitimates only, so that on the death of an intestate leaving neither children nor other descendants, nor husband, father, or mother, but a brother of the full blood, and the descendants of two illegitimate half-brothers, the surviving brother took the entire estate. Truelove v. Truelove, 86 N. E. 1018, 1020, 172 Ind. 441, 27 L. R. A. (N. S.) 220, 139 Am. St. Rep. 404.

Act Cong. June 28, 1898, c. 517, § 16, 30 Stat. 501, authorizing any citizen of the Five Civilized Tribes to hold possession of such amount of agricultural or grazing land as would be his just and reasonable share of the lands of his nation or tribe, and to which his wife and minor children were entitled, and to continue to use and occupy the same and receive the rents until allotment to him, by the word "children" means legitimate children alone, and does not authorize any such citizen to hold lands as a prospective allotment for an illigitimate child. Walker v. Roberson, 97 Pac. 609, 611, 21 Okl. 894.

The word "children," as used in Code 1907, § 3754, prescribing the descent and distribution of real and personal property, means legitimate children only having inheritable blood. Williams v. Witherspoon, 55 South. 132, 133, 171 Ala. 559.

"Child of the person killed," as used in the civil damage act of 9 & 10 Vict. c. 93, meant legitimate child only. Bowerman v. Lackawanna Min. Co., 71 S. W. 1062, 1063, 98 Mo. App. 308.

Code Pub. Gen. Laws 1904, art. 93, § 133, provides that the illegitimate child or children of any female may take real or personal estate from their mother as if born in lawful wedlock. Article 46, § 30, declares that where an illegitimate child shall die, leaving no descendants or brothers or sisters, or the descendants of such brothers and sisters, then the mother shall inherit, and, if she be dead, the mother's heirs at law shall inherit the estate of such child as if such child had been born in lawful wedlock. Article 46, § 27, provides that, if any father or mother entitled to take by inheritance shall be dead, the child or children of such father or mother shall take by representation. Held, that an illegitimate child was the "child" of its mother within section 27, and hence, where the mother of an illegitimate child was dead, he was entitled to inherit as an heir of the mother's deceased sister. Barron v. Zimmerman, 83 Atl. 258, 117 Md. 296.

The word "children," when used in a statute, means "legitimate children," unless the contrary be expressed. Under Merrick's Rev. Civ. Code La. 1900, art. 2315, giving the surviving father and mother, or either of them, an action for the death of a minor child, and article 3556, cl. 8, providing that natural children, though recognized, make no part of the children properly so called, unless legitimized, neither the mother nor administrator of a bastard not legitimized can maintain an action for his death. Runt v. Illinois Cent. R. Co., 41 South. 1, 88 Miss. 575.

"The decisions are unanimous that, in the absence of statutory provisions modifying the common law with respect to illegitimate children, the words 'issue,' 'child,' or 'children,' found in a will or statute, whether qualified by the word 'lawful' or not, are to be construed as only those who are legitimate, and if others are intended this must be deduced from the language employed, without resort to extrinsic facts. This is on the ground that at the common law a bastard child had no inheritable blood, was kin to no one, could have no ancestor, nor be an heir, and could have no heirs, save those of his own body. But this rule has been greatly modified by the enactment of statutes ameloriating his condition, and in different degrees conferring the rights of legitimate children. The bastard was nullius filius mainly in the matter of inheritance. In

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many other respects his status was the same as others. He could not marry within the levitical degrees, and was held to be within the act requiring the consent thereto of parent or guardian. His settlement was that of his mother." In a will providing for the distribution of an income to the lawful issue of testator's children, the words "lawful issue" mean children, and include only the lawful children of testator's children, and an illegitimate child would not share in the income, although recognized by its father. Brisbin v. Huntington, 103 N. W. 144, 147, 128 Iowa, 166, 5 Ann. Cas. 931.

As minor child

The rights of action given by B. & C. Comp. St. § 34, to a father for the injury or death of a child, is limited in its scope of operation to the minority of such child; that is to say, that the term "child" is used as indicative of a minor, and not with reference to one who has attained to the age of majority. Schleiger v. Northern Terminal Co., 72 Pac. 324, 326, 43 Or. 4.

Negro child

The word "children," in the statutes providing for the education of the "children" within the territory, includes colored children, as well as white. School Dist. No. 71, Oklahoma County, v. Overholser, 87 P. 665, 667, 17 Okl. 147.

As referring to relationship

Under the statute casting the descent of property, using the word "children" and providing that children of half blood shall inherit equally with those of the whole blood, the relationship of parent and child determines the right of inheritance, and the divorce of the parents does not affect this relationship. No matter who may have the child for purposes of nurture, it is still the child of its father, though he has been deprived of its custody by a decree of divorce. McIntyre v. Gelvin, 95 Pac. 389, 390, 77 Kan. 779.

CHILD—CHILDREN (In Wills)

The word "children" must be read in its ordinary sense, unless there be some word or expression within the will to show that testator used it in a broader sense. Where testator gave one-fifth of his estate in trust for his brother, with a provision that on the brother's death the property should be divided among the brother's children or grandchildren, but, if he left neither, then to the children of testator's sisters, "the child or children of each to take an equal portion" thereof, the gift in remainder was to the children of each sister as a class by representation. In re Keogh, 98 N. Y. Supp. 433, 435, 112 App. Div. 414.

Where testator devises stock in trust for his daughter, one of the trustees being also an executor, and by another item directed that the executors should hold it, together with other stock, the dividends of which are disposed of by the will, until a designated time, in the meantime paying the dividends and profits to each of said "legatees," and provides that, if any of the legatees die before such time without children, the dividends so bequeathed to each legatee, as well as the stock, shall be distributed among his surviving children, the words "legatees" and "children" are used interchangeably, and as to that item of the will synonymously, so that the dividends are payable directly to the beneficiary of the trust, and not to the executors as trustees. Lamar v. Harris, 48 S. E. 932, 933, 121 Ga. 285.

The word "child" includes all the immediate offspring, male and female, of the parents. Where testator devised his real estate to his four sons for life, subject to his wife's dower, giving each an undivided one-fourth, and the remainder in fee to their respective sons, and by his codicil providing that, as his second son had died leaving a sufficient estate for his children, he revoked the devise made to him and his children, and devised his share to his three surviving sons and their children for the like estate mentioned in the will. The codicil revoked the devise of the remainder to the grandsons of the testator, and vested it in the children of the three sons named in the codicil. In re Tibby's Estate, 56 Atl. 1126, 1127, 207 Pa. 643.

A husband of a deceased child cannot claim a share of testator's property under a clause of the will providing for an equal division of his property among all his "children." Nelson v. Nelson (Ind.) 72 N. E. 482, 485.

"Where there are no immediate children to whom the term can apply, or where it is manifest from other words in the will that it was used in the broad sense of issue or descendants, it may be construed to include grandchildren, stepchildren, illegitimate children, or descendants, however remote." In re Sander's Estate, 105 N. W. 1064, 1066, 126 Wis. 660, 5 Ann. Cas. 508 (quoting and adopting definition in Re Scholl's Will, 76 N. W. 616, 100 Wis. 650).

A child not of testator's blood, whom he designated in his will as "an adopted daughter" and "my daughter," was not entitled to take with children of testator's blood under a direction in a codicil dividing certain money in a bank among all "his children." In re Hughes' Estate, 73 Atl. 1061, 225 Pa. 79.

Adopted children

Where, when testator made his will and died, his granddaughter was a young unmarried woman, one afterwards adopted by her was not her child, within the will giving to the granddaughter a life estate, and providing that on her death the property

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should be divided among her "children" and the heirs of any of her children who should have died, and empowering her, in case she left no children or descendants of children, to dispose of the property by will, and providing that if she died childless, or having no heirs by right of representation, and making no will, the remainder should go to testator's nephew by marriage. Lichter v. Thiers, 121 N. W. 153, 156, 157, 139 Wis. 481.

A will created a trust fund for the benefit of testator's widow, and directed that at her death it should be divided among his sons, and that, if any of them should die before the widow, his share should go to his children, if any; otherwise to testator's other children. One of testator's sons, who died before the widow, had no children when the will was made, but then occupied the relation of stepfather to four children, one of whom he afterward adopted. Laws 1873, c. 830, as amended by Laws 1887, c. 703, in force when the will was made, provided that an adopted child should not sustain the legal relation of child to the adopting parent with respect to the passing of property dependent upon the person adopting dying without heirs. Held, that the adopted stepchild was not included under the designation "children" in the provision that the share of any child dying before the widow should go to his children. In re Hopkins, 92 N. Y. Supp. 463, 102 App. Div. 458 (citing Wetmore v. Parker, 52 N. Y. 450, 463; Rogers v. Rogers, 47 N. E. 452, 153 N. Y. 343).

Pub. St. 1882, c. 164, § 7, declares that an adopted child shall be deemed, for the purposes of inheritance, and all other legal consequences of the natural relation of parent and child, the child of the parents by adoption, as if he had been born in lawful wedlock, except that he shall be incapable of taking property expressly limited to the bodies of his adopted parents, or property from the lineal or collateral kindred of such parents, by the right of representation. Held, that where testator created a trust for the benefit of his two sons, the income to be used for the support of them and their families and in the event of their decease, leaving lawful issue, for the support of such issue until the termination of the trust, and on the death of both of the sons to distribute one-half of the trust res to the "children then living" of each, etc., an adopted child of one of the sons took the same interest she would have taken as if she were a child of his body. In re Olney, 63 Atl. 956, 957, 27 R. I. 495.

Where one makes provision for his own "child or children," by that designation, he should be held to have included an adopted child, since he is under obligation to make provision for such child; but when in a will provision is made for "a child or children" of some other person than the testator, an adopted child is not included, unless other language in the will makes it clear that he was intended to be included. Hence where a testator devises property to his own child by blood, and then over to the child or children of that child, if any, otherwise to others of the testator's blood, a child of the latter by legal adoption only is not included and takes nothing under the will, even though adopted before the making of the will. In re Woodcock, 68 Atl. 821, 822, 103 Me. 214, 125 Am. St. Rep. 291.

Under a will describing a legatee as testator's nephew, and referring to his own children as his "oldest daughter" and his "second daughter," and directing that after the death of his wife the estate should be equally divided between "our children or their heirs," such nephew is not entitled to share in the residuary estate, though from the time he was 11 years old he had been treated as an adopted child, though never formally adopted. Hamlin v. Stevens, 69 N. E. 118, 119, 177 N. Y. 39.

An adopted child or a beneficiary under a will does not take under a provision in the will giving the income of a certain sum to the beneficiary for life, and upon his death "leaving a child or children" surviving giving the principal to such child or children, Laws 1896, c. 272, providing that "as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen." The phrase also "in common parlance imports a child or children born in lawful wedlock, and not a child or children whose filial relation arises solely out of an adoption." In re Leask, 90 N. E. 652, 654, 197 N. Y. 193, 27 L. R. A. (N. S.) 1158, 134 Am. St. Rep. 866, 18 Ann. Cas. 516.

After-born children

Where a testator's daughter has one child living at the date of the will that the will makes a devise to "her child or children" does not indicate that children born after testator's death are included in the devise. Toher v. Crounse, 107 N. Y. Supp. 990, 997, 57 Misc. Rep. 252.

Where a legacy is given to a class as the "children" of a person, and no period is fixed for the distribution of the legacy, it is to be considered as due at the testator's death, and none but children born or begotten previously to that time are entitled to share in it. Chasmar v. Bucken, 37 N. J. Eq. 415, 418.

"Children," as ordinarily used in devises, is a word of personal description, and, so far as designation goes, differs in no way from the mention of individuals by name. It is not a word of limitation, but is employ-

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ed in contradistinction to "issue" and "heirs of the body," and a devise to testator's son by name and to his children gives a life estate to the son and an estate in remainder to his children living at testator's death, subject to be opened to let in after-born children. Forest Oil Co. v. Crawford, 77 Fed. 106, 109, 23 C. C. A. 55.

Where property was devised to one for life, with remainder to her children, the remainder vested in the children as a class on the death of the testator, the class being subject to open on the birth of another child, the word "children" being sufficient to include those born after the death of the testator, as well as those then living. May v. Walter's Ex'rs (Ky.) 97 S. W. 423, 425.

Children living

A bequest to B. and her children is a bequest to a class consisting of B. and such of her children as survive the testator. Davis v. Sanders, 51 S. E. 298, 299, 123 Ga. 177.

If there be any question that be regarded as incontrovertibly settled in the construction in the matter of wills or testamentary papers, it is that an immediate gift to children simpliciter, without additional description, means a gift to the children in existence at the death of the testator, provided there be children then in existence to take. The word "heirs" may be construed in a will, to arrive at the intention of the testator, as descriptive of a class of beneficiaries and in the sense of the word "children"; the two words being used synonymously by those unlearned in the law. Wyman v. Johnson, 59 S. W. 250, 252, 68 Ark. 326.

The expression "until the youngest of the children shall attain the age of 25 years," in a will devising property in trust until the youngest of several grandchildren shall become 25 years old, when they shall take the property in fee simple, limits the trust to the time when the youngest of the grandchildren living at testator's death shall become 25 years old or die before reaching that age, and the will is not void as offending the statute of perpetuities. Coston v. Coston, 103 N. Y. Supp. 307, 308, 118 App. Div. 1.

The words children "then living," or "if they shall leave such issue," or those "then living," or the "survivors," indicate an intention to limit the gift to those living at a certain time, but such words are not construed to limit the remainder of such children only as should survive the life tenant; the rule being that where the estate is given to the life tenant, with remainder to the children of the life tenant, the estate vests at once on the birth of each child, subject to letting in after-born children, and this without regard to the question whether or not the child survives the life tenant. In re Wetherill's Estate, 63 Atl. 406, 407, 214 Pa. 150.

Where by the twelfth clause of his will testator gave a sixth of the residue of his estate to trustees, the net income to be paid a daughter for life, and on her death leaving "children" to be paid to them equally during their lives, and as they should successively die the property to be distributed among their lineal descendants according to the right of representation, but if she died without "children or lineal descendants," the property to go to his surviving children, one part in fee to two sons, one part to trustees for another son, and one part to trustees for each of his surviving daughters, and a sixth part of the residue was given to each of his other children, like trusts being created for his two other daughters, a similar trust for a son, and the two other sons receiving their shares in fee, and another clause provided that the daughters could take no part in fee, except certain legacies, and that at the death of the last survivor the whole of the legacies in trust to them, except the parts which their children or lineal descendants might be entitled to, should be divided between the sons, the words "children" and "children or lineal descendants" as used in the twelfth clause, relate to a definite failure of issue at the daughter's death, creating in her only a life estate, and not to an indefinite failure of issue, so as to create in her an estate tail, and hence on her death without issue the two sons took their shares in such sixth part in fee, and the rest passed to trustees on the declared trusts for the other son. Stone v. Bradlee, 66 N. E. 708, 710, 183 Mass. 165.

A provision of the will that, in the event of any of testator's sons dying intestate and unmarried, the share or shares of such son shall go to all testator's surviving children in equal proportions, refers to the children of testator who may be in existence at the time such death occurs. Ridgely v. Ridgely, 59 Atl. 731, 734, 100 Md. 230.

Where testatrix gave her sister-in-law a house and lot in fee simple, and the will provided that, in the event that the sister-in-law should die before the will took effect, the property should be divided between the children of certain persons, it meant children living at the death of the testatrix, and not them and such others as might be born thereafter. Barker v. Barker, 135 S. W. 396, 143 Ky. 66.

Grandchildren and other descendants

The word "children," when used in a will, is rarely held to be synonymous with "heirs," or "bodily heirs," and generally does not embrace grandchildren. Thomas v. Thomas, 53 South. 630, 633, 97 Miss. 697.

The term "children," in designating testamentary beneficiaries, does not include grandchildren or other than immediate descendants in the first degree of the person

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named as ancestor, in the absence of a showing of contrary intent. Lich v. Lich, 138 S. W. 558, 561, 158 Mo. App. 400.

The word "children" has sometimes been held to include grandchildren, as where it can fairly be seen from the context that such was the intention of the testator as exhibited in his will. Lawrence v. Phillips, 71 N. E. 541, 542, 186 Mass. 320.

The word "children" in a will does not include grandchildren, unless it appears from the context to have been so intended by testator, or unless such meaning is necessary to carry out his manifest intent. In re Long's Estate, 77 Atl. 924, 928, 228 Pa. 594.

Where testator made a devise over to his "children who shall then be living," the term "children" cannot be enlarged to include grandchildren, where there is nothing in the context to authorize such enlargement. Frank v. Frank, 111 S. W. 1119, 1123, 120 Tenn. 569.

The general rule is that, where there are children who fully answer the description of the word "children" in a will, and where confining the bequest to them will satisfy the whole apparent design of testator, grandchildren or more remote descendants may not share with them, because, in the ordinary use of the word, "children" does not include grandchildren, though, where there is any reason to suppose that such was the intention of testator, "children" may be construed as meaning "issue." Boston Safe Deposit & Trust Co. v. Nevin, 98 N. E. 1051, 1053, 212 Mass. 232.

Where testator made a devise to the children of his two sisters and his brother, "each of the above families to share equally," the word "children" is not thereby enlarged so as to include grandchildren. Fulghum v. Strickland, 51 S. E. 294, 295, 123 Ga. 258.

The word "children" does not, in its settled and usual signification, include grandchildren, though it is sometimes used to include them. In construing wills, it will not be construed to include them unless something in the context shows that to be testator's intention, or unless the provision will be inoperative without such construction. Feit's Ex'rs v. Vanatta, 21 N. J. Eq. 84, 85.

Grandchildren cannot take under bequest in a will to "children" as a class, unless there is something in the will to indicate such an intention. Where a will provides that the balance of testator's property not disposed of shall be "equally divided between all of my children," it was the evident intent that the grandchildren should take nothing under such clause, where provision was made for them in a prior item of the will. Lyon v. Baker, 50 S. E. 44, 122 Ga. 189.

Grandchildren of decedent were not "children," and do not stand for or represent "children," in the sense in which that word is used in Burns' Ann. St. 1908, § 285, giving a right of action for death, and providing that the damages shall inure to the benefit of the children, if any, or next of kin. Pittsburgh, C., C. & St. L. R. Co. v. Reed, 88 N. E. 1080, 1083, 44 Ind. App. 635.

"The word 'children,' in common parlance, does not include grandchildren or any others than the immediate descendants in the first degree of the first person named as ancestor." A bequest "to the children of my wife and myself" was not a bequest to the testator's grandchildren, but to the children of his wife and himself. Schneider v. Hellbron, 101 N. Y. Supp. 152, 154, 115 App. Div. 720 (quoting and adopting definition in Palmer v. Horn, 84 N. Y. 516, 521, and citing Matter of Truslow, 35 N. E. 955, 956, 140 N. Y. 599, 603; Matter of Kimberly, 44 N. E. 945, 150 N. Y. 90).

"Nothing is better settled in the law of wills than that the term 'children' does not include grandchildren or more remote descendants, unless there is something in the will to show that the word was used in a broader sense. This is not based on any technical rule of law; on the contrary, it is founded on the ordinary meaning of the word and the presumption that the testator has used the word in its ordinary sense." Pimel v. Betjemann, 76 N. E. 157, 158, 183 N. Y. 194, 2 L. R. A. (N. S.) 580, 5 Ann. Cas. 239.

Testator gave his residuary estate to his executors, in trust to divide the same into five parts, and to pay the income of one share to a daughter or to her children for the support of the daughter and children, and provided for a division of the corpus at a designated time, and that a one-fifth share should go to the "children" of the daughter "living at the time of such division." Held, that the word "children" did not include grandchildren, since the term "children" does not include "grandchildren" unless the intention of testator discloses the contrary, and only the children of the daughter living at the time of the division of the corpus could participate in the distribution. Hurlbert v. Gerow, 132 N. Y. Supp. 842, 845, 148 App. Div. 378.

"It is a matter of common knowledge that in ordinary conversation and affairs of life the word 'child' is commonly used to designate a son or daughter, a male or female descendant of the first degree. It is safe to say that, standing alone, it is never understood to mean grandchildren." A testator bequeathed money to designated grandchildren, and then declared that the residue of his estate should go "to such of the children of my own blood begotten as shall survive me." The word "children," as used in the residuary clause, did not include grandchildren. Brown v. Brown, 98 N. W. 718, 722,

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71 Neb. 200, 115 Am. St. Rep. 568, 8 Ann. Cas. 632.

Under the clause of a will giving the residue of the estate to executors in trust to divide in five equal shares, and pay annually the income of one to A., or to her children, for the support and maintenance of herself and children, as the executors may think best, A. dying, and thereafter one of her children dying, leaving a child, the income goes to her surviving children only; the word "children" not including grandchildren, unless there is something in the will to show that the word is used in the broader sense. Baker v. Gerow, 126 N. Y. Supp. 277, 281.

By the fifth clause of his will testator gave the residue of his estate to his executors in trust to divide into five equal shares, and pay annually the income, one share to A. (his daughter) or to her children, for the "support and maintenance" of herself and children, as the executors may think best; one share to M. (another daughter); one share to each of his daughters R. and S; and one share to his son H. By the sixth clause he provided that the principal of the residue should be divided, 20 years after his death, or on the death of the survivor of R. and S., if before that time, one-fifth to R. and one-fifth to S., or to such person or persons as they shall appoint by will; and, in case one of R. and S. shall decease leaving no lawful issue and no will, then the survivor to receive the share of both; one-fifth to M., if she be living at the date of the division; one-fifth to the child or children of A. living at the time of such division: one half of one-fifth share to H., and to his children, provided such children or H. be living at the time of such division; and the other half of said share to R. and S., share and share alike. By the seventh clause he directed the executors out of the principal of the shares directed to be held in trust for "my children," in addition to the payment of income provided, to pay each year $1,000 of the principal of said shares to each of "my children." Held that, in view of the sixth clause naming as beneficiaries of the trust the children of H. and A. living at the time of the final distribution of the estate the word "children" in the seventh clause is used in a broad sense, and includes the children of H. and A., as well as of testator; so that advancements of principal, under the seventh clause, after the deaths of H. and A., go not to their estates, but to those who, as each advancement is made, answer the description of their surviving children. Id.

Where each of the daughters of testator had children living at the date of his will, whereby, subject to life estates for the daughters, the residue was given to the children of the daughters, the word "children" must be given its primary legal meaning, and did not include testator's remoter descendants. Carpenter v. Perkins, 74 Atl. 1062, 1064, 83 Conn. 11.

The word "children," as used in a will, means descendants in the first degree, and does not include grandchildren, in the absence of satisfactory evidence that such was the intent of the testator. Davies v. Davies, 112 N. Y. Supp. 157, 158, 59 Misc. Rep. 104.

Where the word "children" is used in a will, its simple and primary meaning is to be accepted, when it can be so understood; and it cannot be held to include grandchildren, unless it is necessary to do so to give effect to the words of the will or the evident intent of the testator. Eddy v. Mathewson, 78 Atl. 506, 507, 32 R. I. 53.

Ky. St. § 4841, has changed the common-law rule of construction of the word "children," so as to embrace grandchildren unless a different construction is required by the will. Where testator left an estate to his wife for life then to be divided between his children then living, but one child died before testator, leaving issue, such issues were entitled to such child's share. Ruff v. Baumbach, 70 S. W. 828, 829, 114 Ky. 336 (citing Renaker v. Lemon, 62 Ky. 212; Dunlap v. Shrieve's Ex'rs, 63 Ky. [2 Duv.] 334; Chenault's Guardian v. Chenault's Ex'rs, 11 S. W. 424, 88 Ky. 84).

In its primary sense the word "children" expresses the relation of parent and child and does not extend to grandchildren or descendants, and when used in a will it is, prima facie, used in its natural and primary meaning; but a more extended meaning may be given it where it will prevent intestacy and where the language of the will indicates that testator used the word in its more extensive meaning. Dilts v. Clayhaunce, 62 Atl. 672, 674, 70 N. J. Eq. 10.

Heirs

Heir as including children, see Heir.
Heirs of the body as including children, see Heirs of the Body.
Legal heirs as including children, see Legal Heirs.

Deeds and wills are often so constructed that the term "children" would be properly interpreted as "heirs" or "heirs of the body" when they mean children; but these are not the primary meaning of the terms, and such construction depends upon the instrument evincing an intention. Where testator devised lands to his daughter for life, with remainder over to his other children, on the death of the life tenant without issue, after surviving all the rest of testator's children, the grandchildren of testator, as his heirs at law, were entitled to the estate as reversioners. Rosenau v. Childress, 20 South. 95, 96, 111 Ala. 214.

A testator bequeathed all his personal property to his wife, and devised his real estate to her for life and then provided that

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all the residue of the estate should, upon the decease of his wife, go to his children equally, and "to their children forever." At the time the will was made two of testator's children had no children. Held, that under Hurd's Rev. St. 1903, c. 30, § 13, providing that every estate in lands granted or devised shall be deemed a fee, if a less estate be not limited by express words, etc., the word "children," as last used in the will, meant heirs generally, and not natural offspring, and hence testator's children took a fee, and not a life estate. Strawbridge v. Strawbridge, 77 N. E. 78, 79, 220 Ill. 61, 4 L. R. A. (N. S.) 948, 110 Am. St. Rep. 226.

"The term 'children' is primarily a word of purchase, and is not to be construed as equivalent to 'heirs,' in the absence of other words or circumstances showing it to have been used in that sense; but where there are other words in the will showing that the word 'children' was used in the sense of 'heirs,' the word will be construed as a word of limitation, equivalent to 'heirs.'" Dick v. Ricker, 78 N. E. 823, 824, 222 Ill. 413, 113 Am. St. Rep. 426 (quoting and adopting definition in Strawbridge v. Strawbridge, 77 N. E. 78, 79, 220 Ill. 61, 63, 4 L. R. A. [N. S.] 948, 110 Am. St. Rep. 226).

The word "children" in a will, does not ordinarily mean "heirs," or "heirs of his body," so as to bring the devise under the operation of the rule in Shelley's Case, unless the context of the will leaves no doubt of such intention. The word "heirs" is a word of limitation, and not of purchase; and, when used in a will, its legal intendment is to designate a class of persons who are to take in succession, from generation to generation, and the law effectuates this purpose by declaring a fee to pass to the first taker, or, as it is sometimes expressed, by giving a life estate to the first taker and a limitation in fee to himself. The words "sons," "daughters," "child," and "children" are not technical, legal terms, to which a fixed and determined meaning must be given, regardless of the sense in which they are employed; but they are flexible and subject to construction, to give effect to the intention of the testator. The rule in Shelley's Case often defeats the clearly expressed intention of the testator. In a devise to one for and during his natural life, with remainder to his heirs in fee, the inexorable rule of the common law, from which courts cannot escape without legislative aid, requires them to set at naught the clearly expressed intention and decide that the testator gave a fee-simple title to the first taker, although he expressly limited it to a life estate by apt words. When, however, the testator has used other words, such as "child" or "children," the rule in Shelley's Case has no application, and the court is left free to adopt a construction which will carry into effect the intention of the testator. It is true the intention, when discovered, may lead to the same result as is reached under the rule in Shelley's Case, where the word "heirs" is used; but, if this be so, it is because the intention is carried out by adopting such construction. It will never be so construed to defeat the intention, as may follow from the rigor of the rule in Shelley's Case. Connor v. Gardner, 82 N. E. 640, 644, 230 Ill. 258, 15 L. R. A. (N. S.) 73 (citing Kales, Future Interests, § 129; Schaefer v. Schaefer, 31 N. E. 136, 141 Ill. 337; Strawbridge v. Strawbridge, 77 N. E. 78, 220 Ill. 61, 4 L. R. A. [N. S.] 948, 110 Am. St. Rep. 226).

Where a father or mother devises property to a son, daughter, or blood relation, using the language "to him and his children forever," the word "children" will be construed to mean heirs, and the children held to take no interest in the property devised. If the devise, however, is to a blood relation and his children, and the word "forever" is not used following the word "children," the devise will pass a life estate only to the parent, and a fee to the children, as is also the effect of a devise by a husband to his wife and her children. A bequest of the residue of testator's estate to his daughter and "her children forever" vested the daughter with the fee; the word "children" being used in the sense of "heirs," as a word of inheritance and not of purchase. Naville v. American Mach. Co., 140 S. W. 559–561, 145 Ky. 344 (citing Moran v. Dillehay, 71 Ky. [8 Bush] 434; Hood v. Dawson, 33 S. W. 75, 98 Ky. 285; Lachland's Heirs v. Downing's Ex'rs, 50 Ky. [11 B. Mon.] 34; Williams v. Duncan, 17 S. W. 330, 92 Ky. 125).

A devise to a son "and his children" is within the rule laid down in one of three lines of cases: First, that the parent takes a joint estate in fee simple with the children then born or thereafter to be born; second, that the parent takes a life estate with remainder to the children; third, that the word "children" is used in the sense of "heirs"—this construction being adopted only in those cases where, upon consideration of the whole will, it is evident that the words were used as words of limitation and not of purchase. A will devising to a son "and his children" 250 acres of land gave him a fee-simple, and not a life estate, especially in view of other devises showing that testator knew what language to employ in giving a life estate, and in view of a clause restraining alienation of the various tracts devised, and in view of a provision requiring the son to pay $4,200 to his brothers and sisters. Harkness v. Lisle, 117 S. W. 264, 266, 132 Ky. 767.

Testator, by the eleventh clause of his will, bequeathed certain lands to the heirs of his brother A., naming his three children, and giving to each an undivided one-third. He then, in the same clause, bequeathed to the

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"surviving heirs" of the brother an undivided half interest in certain live stock, provided that if either of the "above-named children" should die without issue before testator's death the share of such child should go to the survivors, and if any should die childless such share should revert to the survivors; it being testator's intention that his estate should descend to the heirs of his own blood, except the property devised to his wife. He thereafter bequeathed all the residue of his estate, one-third to C. and his heirs, and one-third, share and share alike, to the surviving heirs of the brother referred to in the eleventh clause. Held, that the two clauses should be construed together, and that the words "surviving heirs" were used synonymously with the words "surviving children," and hence did not include the granddaughter of such brother, so as to entitle her to share under the residuary clause. Dunshee v. Dunshee, 96 N. E. 298, 300, 251 Ill. 405.

Heirs of body

Heirs of the body as including children, see Heirs of the Body.

The word "children," as used in a will whereby a testator gave all his estate to his wife for life, and at her death the proceeds to his sons and daughters during their lives, and after the death of either of them he gave "to their child or children, should they leave any children at their death, the share held by my sons and daughters at the time of his or her death, but, should neither of my sons or daughters leave no heirs, then their share is to be divided between all of my grandchildren, share and share alike," meant "heirs of the body," and the testator's children took an estate in fee tail, which was enlarged by the statute into a fee simple. In re Vilsack's Estate, 57 Atl. 32, 33, 207 Pa. 611.

Testator devised his estate in trust for his daughter "and the heirs of her body," and provided that in case she died without "children" the estate should go to persons named. Held to create an estate tail in the daughter, converted by the statute into a fee simple, subject to the defeasance under which the estate would pass on her death without children; the words "and the heirs of her body" being words of limitation, and the word "children" being synonymous with "issue" or "heirs of her body." Watkins v. Pfeiffer, 92 S. W. 562, 563, 29 Ky. Law Rep. 97.

The word "children" in a will does not ordinarily mean "heirs of his body," so as to bring a devise under the operation of the rule in Shelley's Case, unless the context of the will leaves no doubt of such intention. Connor v. Gardner, 82 N. E. 640, 644, 230 Ill. 258, 15 L. R. A. (N. S.) 73.

Issue

Issue as including children, see Issue (Descendants).

In a devise to testator's nephew and to his children, providing that, if the nephew die without legal issue, the property is to go to the heirs of testator's father, the use of the phrase "legal issue" does not require the word "children" to be construed as though it were "issue"; "children" being prima facie a word of purchase, and not of limitation, and being properly so construed in such a devise. Chambers v. Union Trust Co., 84 Atl. 512, 514, 235 Pa. 610.

If it is apparent from the reading of a will that the testator has used the words "heirs," "issue," and "children" interchangeably or synonymously, the court is warranted in construing them in like manner, so as to carry out the testator's intention. Stisser v. Stisser, 85 N. E. 240, 241, 235 Ill. 207 (citing Gannon v. Peterson, 62 N. E. 210, 193 Ill. 372, 55 L. R. A. 701; Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589; Leiter v. Sheppard, 85 Ill. 242).

A testamentary trust which authorized the trustee upon the last beneficiary's death to pay over the remainder of the trust fund to the children of the beneficiary, if she left children, but if she died without issue, then to her heirs at law, used the word "children" in its ordinary meaning, and as synonymous with the word "issue." Russell v. Hartley, 78 Atl. 320, 324, 83 Conn. 654.

Legal heirs

Legal heirs as including children, see Legal Heirs.

Legatee

Legatee as including child, see Legatee.

Legitimate children

The word "children," when used in a devise, includes illegitimate children, if consistent with testator's intent. Harrell v. Hagan, 60 S. E. 909, 911, 147 N. C. 111, 125 Am. St. Rep. 539.

At common law, the word "children" means legitimate issue, and testator is presumed to have so used it Kemper v. Fort, 67 Atl. 991, 995, 219 Pa. 85, 13 L. R. A. (N. S.) 820, 123 Am. St. Rep. 623, 12 Ann. Cas. 1022.

"The decisions are unanimous that, in the absence of statutory provisions modifying the common law with respect to illegitimate children, the words 'issue,' 'child,' or 'children,' found in a will or statute, whether qualified by the word 'lawful' or not, are to be construed as only those who are legitimate, and if others are intended this must be deduced from the language employed, without resort to extrinsic facts. This is on the ground that at the common law a bastard child had no inheritable blood, was kin to no one, could have no ancestor, nor be an heir, and could have no heirs, save those of his own body. But this rule has been greatly modified by the enactment of statutes amel-

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iorating his condition, and in different degrees conferring the rights of legitimate children. The bastard was nullius filius mainly in the matter of inheritance. In many other respects his status was the same as others. He could not marry within the levitical degrees, and was held to be within the act requiring the consent thereto of parent or guardian. His settlement was that of his mother." In a will providing for the distribution of an income to the lawful issue of testator's children, the words "lawful issue" mean children, and include only the lawful children of testator's children, and an illegitimate child would not share in the income, although recognized by its father. Brisbin v. Huntington, 103 N. W. 144, 147, 128 Iowa, 166, 5 Ann. Cas. 931.

An illegitimate child who has been acknowledged by his father, and whose grandfather referred to him as his grandson, and on one occasion expressed an intention of giving him a share in his estate, is entitled to share in a devise by the grandfather to the "children" of the father, as being within the intention of testator, even conceding that the marriage of his father and mother did not legitimate him for all purposes. Harness v. Harness (Ind.) 98 N. E. 357, 359.

"Generally in the construction of a will a gift to 'children' will be held to apply to legitimate 'children' only. Nevertheless, a gift to 'children' has been held to include illegitimate children in a case where, from the expressions in the will, and from the state of the testator's family at the date of the will, the probability that he intended them to take was deemed sufficiently strong." A will left an undivided fractional portion of testatrix's estate "to the children or issue" of a deceased brother. The brother had but one child of his body, and she had died, leaving children, some time prior to testatrix's death; but he also had a legally adopted daughter, who had assumed his name and been invested by the Legislature with rights of inheritance. Testatrix had always treated and regarded this adopted daughter as one of her brother's children, called her "niece," and introduced her to other people as her own niece, and was in turn addressed by the child as "aunt." Held, that the adopted child was included in the will as one of the 'children' of the deceased brother. In re Truman, 61 Atl. 598, 599, 27 R. I. 209.

A will gave to testator's executors and trustees portions of his estate in trust, the use and income for the benefit of his daughter during her life, and at her death the principal for the benefit of her surviving children, and, if she should leave none, then for the benefit of testator's other children. Prior to the execution of the will the daughter had joined a semireligious and sociological society whose members rejected the prevalent ideas of the marriage relation, and contracted an alliance with a man who became the father of her only child, whom she left surviving, and who was born prior to the execution of the will. Testator knew, before the execution of the will, of the illicit alliance which his daughter had formed, and knew that the child was illegitimate and that he was her only child. Held, that testator intended that the remainder of the share of his estate should go to the then living illegitimate child, or to any other illegitimate children that might be the fruit of his daughter's irregular relationship, and the then living illegitimate child took title to the estate of which his mother during her lifetime received the income. Tuttle v. Woolworth, 77 Atl. 684, 688, 74 N. J. Eq. 310.

Where a man married a woman having an illegitimate child, and thereafter had seven children, and died leaving his whole estate to his wife for life and on her death to be divided "among her 'children' and mine," the illegitimate child took nothing under the will. Bealafeld v. Slaughenhaupt, 62 Atl. 1113, 1114, 213 Pa. 565.

Stepchildren

A testator who had been twice married left several children by his first wife surviving him, and also children by his second wife. In making final disposition of his estate, the will proceeds, "I desire to give to my first children all my negroes," and, after making specific the devise to them of other property, "I desire that my present wife and her children shall have my homestead, containing 400 acres, to remain undivided for her and their benefit during widowhood." After giving to his wife certain personalty, he further directs the balance sold, and the proceeds equally divided among all of his children, "without distinction," and that "all my notes and accounts shall be collected, and the proceeds equally divided between my children, without distinction." The last wife, at the time of her marriage to the testator, was a widow, and had one child, who survived the testator. Held, that such child was not entitled to share with testator's children by his last wife in the devise of the estate made to them. Blankenbaker v. Snyder (Ky.) 36 S. W. 1124, 1125.

Testatrix gave a fund to trustees, the income to be paid to a certain person, after his decease to his wife for life, and after her decease the principal to be distributed among the "children" of said person and wife. At the time the will was executed, both beneficiaries of the trust were in the service of testatrix, and had been for many years, both before and after their marriage. Held, that "children" of the husband by a former marriage were not entitled to share in the distribution of the fund on the death of both beneficiaries. Crapo v. Peirce, 72 N. E. 935, 936, 187 Mass. 141.

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As creating tenancy in common

Where lands are devised to a woman and her children, she having children living at the time of the devise, the word "children" must be taken as a word of purchase according to its natural import, and the children take a joint estate with the mother in the land devised. Jones' Ex'rs v. Jones, 13 N. J. Eq. 236, 237.

As word of limitation

S. bequeathed to her grandsons J. and W., an amount of money, her will providing that, if either of them died leaving no child or descendant surviving him, the share he received under this will was to go to his surviving brother, and if both should die leaving no child or descendants, then to be equally divided between testatrix's children. Held, that the words "child" and "descendants," in the connection in which they occur, are not words of purchase creating an estate in a class designated, but are words of limitation which limit or describe the estate given. Daniel v. Lipscomb, 66 S. E. 850, 852, 110 Va. 563.

Where, in a devise of an estate with remainder over, the words "heirs of the first taker" are used, as well as the word "children," the word "children" would be construed as a word of limitation; the ultimate gift over to the heirs of the first taker in default of children indicating a general intent that the estate should descend to the devisees' heirs. Cook v. Councilman, 72 Atl. 404, 407, 109 Md. 622.

Prima facie the word "children" as used in a will is a word of purchase and not of limitation. It will not be construed as a word of limitation unless there is found in the will an intention so to use it. Manning v. Bader, 73 Atl. 939, 940, 224 Pa. 575.

As word of purchase

Unless it is necessary to effectuate the manifest intention of a testator, the word "children" is a word of purchase. Jabine v. Sawyer (Ky.) 78 S. W. 140, 141.

The word "children" is a word of purchase, and not of limitation, and describes the persons who take. Where a testator devised real estate to his son and to his children, with a direction that the son should pay certain legacies, the son acquired only a life estate, and the children of the son living at the testator's death took the estate in remainder. Crawford v. Forest Oil Co., 57 Atl. 47, 53, 208 Pa. 5.

A devise to the son and daughter of testatrix of her whole estate for their life, and after death "to their children (my grandchildren), i. e., the share devised to my son to go to his children, and the share devised to my daughter to go to her children," gives to the son and daughter estates for life, with remainder to their children; the word "children" being a word of purchase, and not a word of limitation. Shields v. Aitken, 84 Atl. 662, 664, 236 Pa. 6.

In a devise over of all testator's property to his daughter "and her children for their use and benefit forever," the word "children," being followed by the word "forever," is equivalent to "heirs," and is a word of inheritance, and not of purchase, so that the daughter took a fee-simple estate. Dicken v. Dicken, 152 S. W. 258, 259, 151 Ky. 438, 43 L. R. A. (N. S.) 276.

Where a will devised property to be equally divided among testator's three daughters, "and then to their children, forever," the word "children" is not used as a word of limitation, in the sense of "heirs," but is a word of purchase. Interior & W. V. R. Co. v. Epling, 73 S. E. 51, 52, 70 W. Va. 6.

Generally the words "child and children" prima facie are words of purchase and not of limitation; but where a remainder, even where these words are used, is to go to the general or lineal heirs as pointed out by law, they are synonymous with "heirs of the body," and the estate for life in the first taker is enlarged to a fee or into an estate tail by implication, so that a devise to a daughter and at her death to her children or issue in fee simple gives the daughter an estate in fee simple. Pifer v. Locke, 55 Atl. 790, 791, 205 Pa. 616.

Where one of testator's daughters had children at the date of the will, and all of them had children at testator's death, the word "children" in a devise to the daughters "and their children" is a word of purchase, not of limitation, unless different intent plainly appear in the will. Wills v. Foltz, 56 S. E. 473–477, 61 W. Va. 262, 12 L. R. A. (N. S.) 283 (citing and distinguishing Martin v. Martin, 44 S. E. 198, 52 W. Va. 389; Graham v. Graham, 4 W. Va. 320, 323; Merryman v. Merryman, 19 Va. [5 Munf.] 440; Moon v. Stone's Ex'r, 60 Va. [19 Grat.] 130; Hinton v. Milburn's Ex'rs, 23 W. Va. 166; Ball v. Payne, 27 Va. [6 Rand.] 73; Gaskins v. Hunton, 23 S. E. 885, 92 Va. 528; Fitzpatrick v. Fitzpatrick, 42 S. E. 306, 100 Va. 552, 93 Am. St. Rep. 976; Nickell v. Handly, 51 Va. [10 Grat.] 336; Lindsey v. Eckels, 40 S. E. 23; Wallace v. Dold's Ex'rs, 30 Va. [3 Leigh] 258; Stace v. Bumgardner, 16 S. E. 252, 89 Va. 418; Wilmoth v. Wilmoth, 12 S. E. 731, 34 W. Va. 426; Pack v. Shanklin, 27 S. E. 389, 43 W. Va. 304; Barksdale v. White, 69 Va. [28 Grat.] 224, 26 Am. Rep. 344; Ross' Ex'r v. Kiger, 26 S. E. 193, 42 W. Va. 402; Collins v. Feather, 43 S. E. 323, 52 W. Va. 107, 61 L. R. A. 660, 94 Am. St. Rep. 912; Kent v. Kent, 55 S. E. 564, 106 Va. 199).

The word "children," as used in a will, is a word of purchase, and not of limitation, and will not be construed as a word of limita-

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tion, unless there is found in the will an intent so to use it. Manning v. Bader, 73 Atl. 939, 940, 224 Pa. 575.

Testator gave a certain farm to W. and his children forever, but if W. shall die leaving no children the farm was devised to J. Held, that W. took a fee simple, to be defeated only in case he died without children; the words "his children forever" being words of limitation and not of purchase, creating an estate tail, which by statute was made fee simple. Hood v. Dawson, 33 S. W. 75, 76, 98 Ky. 285.

Under a will giving personal and real property to testator's wife, to go at her death to "my son and his children," the son takes but a life estate, with remainder to his children; the word "children" being used as a word of purchase, and not of limitation. Smith v. Smith, 85 S. W. 169, 171, 119 Ky. 899, 27 Ky. Law Rep. 362.

Where land is devised to testator's two sons "in trust to make their living, and to their children after them," the word "children" is one of purchase and not of limitation, and the devise creates an estate for life in the sons, with remainder to their children in fee. Emerick v. Emerick, 68 Atl. 183, 184, 219 Pa. 187.

The word "children" is a word of purchase and not of limitation, and therefore, where property is devised or conveyed to a woman and her children, the children take as joint tenants with the mother, when there is nothing to show a contrary intention. But where there are other words in the will or deed showing that the word "children" was used in the sense of "heirs," as where they are followed by the word "forever," and in other parts of the instrument the words "children" and "heirs" are used interchangeably, the word "children" will be used as meaning heirs, and construed as a word of limitation, and not of purchase. This construction is adopted only to effectuate the intention of the maker when there is enough on the face of the instrument to show that he used the word "children" in the sense of "heirs." On the other hand, the word "heirs" will be read as synonymous with "children," and construed as a word of purchase, when necessary to effectuate the intention of the grantor in the deed. An exception to the above rule has been made in a deed or will from the husband to his wife and children. In a deed, the consideration of which was paid by H., and the parties to which were R. of the first part and H. of the second part, the words "and her children" in the granting and habendum clauses to "H. and her children" will be construed to be words of purchase, so that H. will take a life estate only, and her children the remainder. McFarland v. Hatchett, 80 S. W. 1185, 1186, 118 Ky. 423.

CHILDREN FOREVER

In a devise over of all testator's property to his daughter "and her children for their use and benefit forever," the word "children," being followed by the word "forever," is equivalent to "heirs," and is a word of inheritance, and not of purchase, so that the daughter took a fee-simple estate. Dicken v. Dicken, 152 S. W. 258, 259, 151 Ky. 438, 43 L. R. A. (N. S.) 276.

CHILD'S PART

As used in the statute permitting a widow to elect to take a "child's part" in her deceased husband's estate, imports as large a share as any child has. It means the part or share of the estate to be apportioned among the children by the existing laws, after the widow's dower and debts of the estate were satisfied, and is a varying share or proportion, to be determined by the number of the children, with the addition of the widow. If one child only was left and a widow, both would be regarded as children to take an equal part. If two children and a widow, a child's part would be a third. Benedict v. Wilmarth, 35 South. 84, 88, 46 Fla. 535, 4 Ann. Cas. 1033 (citing Davis v. Duke, 1 N. C. 526).

CHILDBIRTH

As personal ailment, see Personal Ailment.

CHILDHOOD

"Childhood" or the state of being a child is the condition or time from infancy to puberty. Sheffield v. Franklin, 44 South. 373, 374, 151 Ala. 492, 12 L. R. A. (N. S.) 884, 125 Am. St. Rep. 37, 15 Ann. Cas. 90 (citing Webster's Dict.).

CHILDLESS

In a will by a wife leaving property to her husband and others if she should die "childless," the word "childless" did not mention an after-born child, within the meaning of Ky. St. § 4847, providing that if any person die leaving a child, or his wife with child, leaving a will made when such person had no child living, wherein any child he might have is not mentioned, the will shall be construed as if the devises had been limited to take effect in the event that the child should die under the age of 21 and without issue. Knut v. Knut (Ky.) 58 S. W. 583, 584.

CHILLED THE BIDDING

The term "chilled the bidding" is applied to the act of preventing competition at a judicial sale, and the act may consist in falsely telling prospective buyers that the land offered for sale is greatly incumbered. Nodine v. Richmond, 87 Pac. 775, 783, 48 Or. 527.

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CHINA

See Decorated China; Undecorated China.

CHINESE

As white person, see White Person.
Entry of Chinese, see Enter—Entry (Under Immigration Laws).

CHINESE LABORER

The term "laborer," as used in the statutes describing the class of Chinese who are not privileged to enter the United States, includes master mechanics and tradesmen, such as blacksmiths, cabinetmakers, tailors, and shoemakers, who receive orders, and cut and make up materials in such forms and of such dimensions as their customers require, and it also includes a restaurant keeper. In re Ah Yow, 59 Fed. 561, 562.

It has been held that a Chinese person engaged in keeping a restaurant and lodging house is a "laborer"; that a Chinese person whose occupation was that of a laundryman is a laborer within the meaning of the Chinese exclusion laws; that a Chinese person owning an interest in a mercantile firm, but not engaged in conducting it, who is also a cook in a restaurant, of which he is part owner, is a laborer and not a merchant under such laws; and that a Chinaman who, from the date of his landing in this country, works in a laundry, although he also has an interest in a mercantile business, is a laborer. Act Cong. Nov. 3, 1893, c. 14, 28 Stat. 7, amending Act May 5, 1892, c. 60, 27 Stat. 25, "to prohibit the coming of Chinese persons into the United States," does not restrict the meaning of the word "laborers" as used in the prior acts, so as to enlarge the privileged classes. United States v. Yee Gee You, 152 Fed. 158, 159, 160, 81 C. C. A. 409.

"Laborer," as defined by Act Cong. May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8, means both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, and laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. Where a Chinese person, arrested as unlawfully within the United States at the time of his arrest, was working as a servant in a boarding house, and since coming to the United States had worked as a cook and deliveryman in a store in which he had no interest, he was properly found to be a "laborer." Mar Sing v. United States, 137 Fed. 875, 876, 70 C. C. A. 213.

Chinese Treaty Nov. 17, 1880, 28 Stat. 826, and Act May 6, 1882, c. 126, 22 Stat. 58, in aid thereof, provided for the exclusion of Chinese laborers, and the Geary act (Act Cong. May 5, 1892, c. 60, 27 Stat. 25) defined "Chinese laborers" to include both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrying, and those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. Held, that a Chinese person owning a $500 interest in a general merchandise store, but operating a fruit farm as a tenant and selling the fruit grown thereof by his own labor, was a "laborer," and not entitled to enter or remain in the United States. Lew Quen Wo v. United States, 184 Fed. 685, 687, 106 C. C. A. 639.

A Chinese person of a reputable character, who has resided in this country for 19 years, and who is the proprietor of two laundries, which he conducts, is not a "laborer," in contemplation of the Chinese exclusion laws, if he labored himself; it being only incidentally. United States v. Kol Lee, 132 Fed. 136, 137.

Where a Chinese merchant for a year prior to his return to China did no manual labor, except that for a short time he assisted in pickling shrimps and going in wagons to deliver them to customers in connection with the business of a shrimp company, in which he was a partner, such work did not amount to the doing of "manual labor" not necessary in the conduct of his business, within the Chinese exclusion act, depriving him of the right to re-enter the United States on his return. Ow Yang Dean v. United States, 145 Fed. 801, 804, 76 C. C. A. 365.

A Chinese seaman, a member of the crew of a vessel calling temporarily at the port of New York, was not a "laborer" or a "Chinese person" within Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 9, 25 Stat. 478, providing that the master of any vessel who shall knowingly bring within the United States on such vessel and land or attempt to land, or permit to be landed, any Chinese laborer, or other Chinese person, in contravention of the act, shall be guilty of a misdemeanor and punished, etc. United States v. Jamieson, 185 Fed. 165, 166.

The fact that a Chinese laborer was a minor 19 or 20 years old at the time of the passage of the registration acts did not exempt him from the duty of registering thereunder. United States v. Joe Dick, 134 Fed. 988, 990.

CHIP

According to the Century Dictionary and other standard lexicographers, the word "chip" is defined as "wood, coarse straw, palm leaves, or similar material split into thin chips and made by weaving into hats and bonnets." A contention of an importer of baskets that "chip" is an article produced from a piece of willow or other appropriate wood, which is split into two or more parts

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by an instrument called a splitter, after which each of the pieces so produced is passed through a shaver, which removes the pith adhering to the split willow, and that on leaving the second instrument or machine the shaved pieces are passed through a chipper, which removes the rough edges and produces a clean and flat wooden material, cannot be sustained, and baskets so manufactured do not come within the word "chip," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 449, 30 Stat. 193. Theodore Ollesheimer & Bros. v. United States, 154 Fed. 167, 168.

CHIROPRACTIC—CHIROPRACTOR

See Practice of Medicine and Surgery.
As embraced within statute regulating practice of medicine, surgery, and osteopathy, see Practice of Medicine, Surgery, and Osteopathy.

"Chiropractic" means, primarily, hand manipulation, and the word is applied to a system of healing that treats disease by manipulation of the spinal column. State v. Gallagher, 143 S. W. 98, 99, 101 Ark. 593, 38 L. R. A. (N. S.) 328; State v. Johnson, 114 Pac. 390, 391, 84 Kan. 411, 41 L. R. A. (N. S.) 539.

A "chiropractor" is one versed in the science of "chiropractics," said to be a system of adjusting the cause of disease without drugs, based on a thorough knowledge of the nervous system. Swarts v. Siveny (R. I.) 85 Atl. 33, 34.

CHISEL

See Cold Chisel.

CHLORAL HYDRATE

"Chloral hydrate" and "salol" are medicinal preparations which contain no alcohol as a component part, but in the preparation of which alcohol is sometimes used, and which may, and in some cases are, manufactured by other processes without the use of alcohol. They are dutiable under Tariff Act July 24, 1897, c. 11, par. 67, 30 Stat. 154, subjecting to a certain duty "medicinal preparations containing alcohol or in the preparation of which alcohol is used." United States v. Schering, 123 Fed. 65, 66.

CHLOROFORM

Administering chloroform as surgery, see Surgery.

CHOCK

A "chock" in a pile driver is a piece of wood horizontally placed on a platform of the frame, a short distance below the top, and intended to remain far enough under the follower to prevent it from going below it in case of accident, or providing the engine and ropes attached did not hold it in place. Swanson v. Oakes, 101 N. W. 949, 93 Minn. 404.

Pieces of timber commonly used by blast furnace companies to sketch or "chock" hot pots and hold them in position on inclined tracks on slag piles while they cool are a part of the "plant" used in the master's business. Sloss-Sheffield Steel & Iron Co. v. Mobley, 36 South. 181, 185, 139 Ala. 425.

CHOICE

See Domicile of Choice; Strictly Choice.

"Choice" is defined as "meriting preference; having special excellence; select; precious." Where a seller offered to sell "nice" potatoes, an order of purchase requiring "choice" potatoes did not amount to an acceptance. Brophy v. Idaho Produce & Provision Co., 78 Pac. 493, 495, 31 Mont. 279 (quoting Standard Dictionary).

Where defendants offered to sell plaintiff two cars "choice" potatoes at a specified price, an acceptance requiring the potatoes to be strictly choice did not constitute a variance from the terms of the offer, in view of evidence that there was no difference between the grade "choice" and "strictly choice" potatoes. Ennis Brown Co. v. W. S. Hurst & Co., 82 Pac. 1056, 1059, 1 Cal. App. 752.

CHOP

In the manufacture of corn meal for culinary purposes the corn is first kiln-dried, then cracked or ground between rollers, and afterwards bolted. A product made by the same rollers, but set farther apart, so as not to crush the grain so finely, and with the corn not kiln-dried and the product not bolted, but merely passed between the rollers and then loaded in the cars, and variously known as "cracked corn," "chop," or "coarse meal," was not in the ordinary acceptation of the term "meal," and was properly distinguished from meal in schedule rates for shipping. State ex rel. Crandall v. Chicago, B. & Q. R. Co., 101 N. W. 23, 24, 72 Neb. 542.

CHOSE

CHOSE IN ACTION

Contents of chose in action, see Contents.
See also, Right Arising Out of an Obligation; Right in Action.

"Choses in action" are a species of intangible property, following the domicile of the owner for purposes of taxation. Ellis v. People, 65 N. E. 428, 429, 199 Ill. 548.

Cal. Civ. Code, § 953, defines a "chose in action" as the right to recover money or other personal property by judicial proceeding.

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Driscoll v. Driscoll, 77 Pac. 471, 474, 143 Cal. 528.

The phrase "chose in action," in Rem. & Bal. Code, § 191, permitting any assignee of a "chose in action" for the payment of money to sue in his own name, though the assignor has an interest in the thing assigned, means the right to recover a debt, demand, or damages on a cause of action ex contractu, or for a tort connected with contract, which cannot be enforced without recourse to an action, and a cause of action against a building association to recover money paid under a contract on the ground of fraud is assignable. Conaway v. Co-operative Home Builders, 117 Pac. 716, 718, 65 Wash. 39 (quoting Black's Law Dictionary [2d Ed.] p. 198; 32 Cyc. p. 669).

The term "choses in action" may be used either in the broad sense of all rights of action, whether ex contractu or ex delicto, or in the narrower, but more general, sense as referring to assignable rights of action ex contractu, and perhaps ex delicto, for injuries to property, but not for personal injuries. Gibson v. Gibson, 43 Wis. 23, 32, 28 Am. Rep. 527.

The term "chose (or thing) in action" is used in contradiction to a chose or thing in possession. It is used when the title to the money or property (the thing) is in one person and the possession is in another. Higbee v. State, 104 N. W. 748, 749, 74 Neb. 331.

"Property" in one sense may mean a chose in action. A "chose in action" in one sense may be any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract. Womach v. City of St. Joseph, 100 S. W. 443, 446, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (citing Black's Law Dict.).

Judiciary Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, declares that the federal courts shall not have cognizance of any suit, except on foreign bills of exchange, to recover the contents of any promissory note or other "chose in action" in favor of any assignee or any subsequent holder, if such instrument be payable to bearer, or be not made by any corporation, unless such suit might have been prosecuted in such court to recover the contents if no assignment or transfer had been made. Complainant B. B., a citizen of West Virginia, entered a partnership with defendant and G., both residents of New York, for the exploitation of gas land and the construction and operation of a carbon plant; G. agreeing to drive the gas well on the land of complainant B. B., defendant to construct and operate the plant, the proceeds to be divided, one-third to complainant B. B., one-half to defendant, and one-sixth to G. G. thereafter assigned his interest to complainant J. B., a citizen of West Virginia, whereupon complainants sued defendant in the federal court for dissolution of the partnership and for an accounting. Held, the term "chose in action" was sufficiently broad to cover the right of complainant J. B., whether by his purchase he became a partner, or whether his right of action was limited to compensation for drilling a well out of profits earned by defendant; and hence, since G. could not have maintained an action against defendant in the federal court for such relief, such court had no jurisdiction of the joint action by G.'s assignee and his co-complainant. Brown v. Beacom, 174 Fed. 812, 814, 98 C. C. A. 520.

Breach of contract

Under Civ. Code, § 953, providing that a "thing in action" is a right to recover money or other personal property by a judicial proceeding, the right to recover damages from a common carrier for breach of a contract is "property." Justis v. Atchison, T. & S. F. Ry. Co., 108 Pac. 328, 329, 12 Cal. App. 639.

After breach a covenant of warranty becomes a mere chose in action, and no longer runs with the land. De Long v. Spring Lake Beach Imp. Co., 66 Atl. 591, 592, 74 N. J. Law, 250.

Claim for money

A suit by the assignee of an oral contract to recover a sum of money due thereon is one to recover the contents of a "chose in action," within the meaning of section 1 of the Judiciary Acts of March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, 25 Stat. 433, and a federal court is without jurisdiction of such suit, unless it is shown by the record that it could have been maintained in such court by the assignor. Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 119, 66 C. C. A. 179.

Debt distinguished

The terms "chose in action" and "debt" are synonymous. A "chose in action" is the right of a creditor to be paid, while a "debt" is the obligation of the debtor to pay. As said by Prof. Minor: "The chose in action, or right of the creditor, is a personal right which adheres to him wherever his situs may be. It may for some purposes be his legal situs (or domicile); for others, his actual situs. Just as, in the case of tangible chattels, though the title thereto follows the owner, and its transfer will be regulated by the law of the owner's situs, yet his transferee's ability to enforce that title may be in the exceptional cases determined by a different system of law, should the chattels be actually situated elsewhere. So, also, in the case of debts, though the right to enforce them follows the owner (the creditor), and his transferee is therefore to be governed by the law of his situs, yet his or his transferee's ability to enforce that right may depend up-

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on another jurisdiction and system of law, if he has to resort to another state to sue the debtor." Smead v. Chandler, 76 S. W. 1066, 1068, 71 Ark. 505, 65 L. R. A. 353.

Dower

The term "chose in action" implies a right of possession which may be demanded by action, and the term is properly applied to a widow's right to dower, which is consummate. Sherman v. Hayward, 90 N. Y. Supp. 481, 484, 98 App. Div. 254 (citing Gillet v. Fairchild [N. Y.] 4 Denio, 80; 2 Williams, Ex'rs, p. 1; Winfield. Words and Phrases; Aikman v. Harsell, 98 N. Y. 186).

As equitable assets

See Equitable Assets.

As estate

See Estate.

As goods

See Goods.

Judgment

Code 1907, § 4157, provides that a judgment, when filed for record in the probate office, shall be a lien on the property of defendant in the county, subject "to levy and sale under execution." Section 4091 provides that executions may be levied on personal property of defendant, except "things in action." Held, that, where one had obtained judgment, his judicially declared rights were in the nature of "things in action," within section 4091, and the judgment was not subject to a lien created by recording in the probate office a judgment against him. Canterbury & Gilder v. Marengo Abstract Co., 52 South. 388, 389, 166 Ala. 231, 139 Am. St. Rep. 30 (citing 2 Words and Phrases, p. 1144 et seq.).

A judgment is a "chose in action" upon which at common law the judgment creditor could maintain an action of debt. Hamilton v. City of New York, 73 Atl. 1, 2, 82 Conn. 208.

A judgment for the recovery of money, while not assignable by statute, so as to vest the legal title in the assignee, is nevertheless a "chose in action," subject to sale and equitable assignment. Brown & Bro. v. Lapp (Ky.) 89 S. W. 304, 305.

A "chose in action" is a personal right, not reduced to possession, but recoverable by a suit at law. A judgment upon which no execution could now issue, and which must be collected, if at all, by a new suit, is a "chose in action" within a statute authorizing assignees of choses in action not negotiable to maintain actions thereon in their own name. Wood v. Decoster, 66 Me. 542, 544 (quoting and adopting the definition in 2 Kent's Comm. pt. 5, p. 351).

"A 'judgment' is not a negotiable instrument or writing; it is a mere chose in action; the doctrine of caveat emptor applies to the purchaser thereof. If such purchaser desires warranty beyond what is so implied, as above stated, he must see to it that he gets it in express terms." Hinkley v. Champaign Nat. Bank, 75 N. E. 210, 212, 216 Ill. 559.

Life insurance policy

A policy of life insurance is a "chose in action," even before the death of the insured. Perry v. Tweedy, 57 S. E. 782, 783, 128 Ga. 402, 119 Am. St. Rep. 393, 11 Ann. Cas. 46 (citing Steele v. Gatlin, 42 S. E. 253, 115 Ga. 929, 931, 59 L. R. A. 129).

An insurance policy is a "chose in action," and may be transferred by delivery without writing. Stewart v. Gwynn, 82 N. E. 1000, 1001, 41 Ind. App. 320.

A policy of life insurance is a "chose in action"—a promise to pay money upon a given contingency. Doty v. Dickey (Ky.) 96 S. W. 544, 547.

"A life policy is a 'chose in action.' It may be assigned or otherwise disposed of as other choses, subject to the condition that the assignee must have an insurable interest in the life of the insured, must be related by blood or marriage, and be so situated that the assignee or beneficiary has a pecuniary interest in the prolongation of the life of the insured rather than its early termination." Lockett v. Lockett (Ky.) 80 S. W. 1152, 1153.

A life insurance policy is a "chose in action," and when a man makes a policy payable to his representatives or to his estate the policy passes to his personal representative. McLean v. Martin, 45 South. 295, 296, 155 Ala. 208 (citing 1 Cooley's Briefs, Insurance, 84; McLean v. Williams, 42 S. E. 485, 116 Ga. 257, 59 L. R. A. 129; St. John v. American Mut. Life Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Hutson v. Merrifield, 51 Ind. 24, 19 Am. Rep. 722, 725; Ionia County Sav. Bank v. McLean, 48 N. W. 159, 160, 84 Mich. 625).

Negotiable instruments

A negotiable instrument is a "chose in action," and may be assigned either before or after maturity, with or without indorsement. Beall v. Russell, 134 N. Y. Supp. 633, 634, 76 Misc. Rep. 244.

Personal injury

Where a woman suffers a tortious personal injury, impairing or destroying her earning capacity, the cause of action arising therefrom becomes a "chose in action" within the meaning of Civ. Code 1910, § 2993, and a part of her separate estate, notwithstanding her subsequent marriage, though the damages which under the law she would have been entitled to recover as a result of the tort may include compensation for loss of earning capacity, which the after-acquired husband would have been entitled to enjoy if it had not been previously destroyed by

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the tort. Wrightsville & T. R. Co. v. Vaughan, 71 S. E. 691, 696, 9 Ga. App. 371.

Code 1907, § 3765, provides that the surviving husband of a woman who dies intestate shall be entitled absolutely to half the personalty of her separate estate. Section 4486 provides that all property of a wife, held by her previous to her marriage, is her separate property. Section 2486, giving to the administrator a right of action for negligence causing death, provides that the damages recovered shall not be liable for the debts of the deceased, and shall be distributed according to the statute of distributions. Held, the right of action being expressly vested in the administrator alone, so as not to be assignable, which right is inseparable from the idea of property, and the action by the administrator being more as an agent to effect the legislative policy to prevent homicide, and as trustee of any recovery, than as the representative of deceased in reducing property of the estate to possession, that, where a widow remarried and died pending a suit by the administrator of the first husband to recover for his death, the surviving second husband was not entitled to share in the subsequent recovery, the wife having had no "property" right in the cause of action, within the meaning of the statutes of distribution, her interest being merely personal, especially in view of Code 1907, § 2, defining "personal property" as money, goods, chattels, things in action, and evidences of debt; the use of the phrase "things in action," in connection only with assignable property, indicating the legislative intent that it shall have a similar meaning. Holt v. Stollenwerck, 56 South. 912, 913.

As personal property

See Personal Property.

Promissory note

"Notes are 'choses in action'—that is, things which must be recovered by action at law—and, like all other things in action, they may be assigned and the title will pass without indorsement." First Nat. Bank v. Moore, 137 Fed. 505, 507, 70 C. C. A. 89 (quoting Younker v. Martin, 18 Iowa, 143).

As property

See Property.

Right of entry

"A right of entry is not * * * an 'estate' in any just and legal sense of the word. Neither is it a 'thing in action'; for it does not depend upon any right to sue, but may be enforced by a mere entry. Indeed, a right of action and a right of entry are often used in contradistinction to each other." Inglis v. Sailor's Snug Harbour, 28 U. S. (3 Pet.) 99, 180, 7 L. Ed. 617.

Right to recover possession

A corporation executed a mortgage to defendant, which included all after-acquired bills receivable, debts, demands, choses in action, etc. Thereafter defendant converted bonds belonging to the corporation. After such conversion, the mortgage was foreclosed. Held, that the term "choses in action" in the mortgage did not include the corporation's right of action against defendant for its own conversion; and hence the attempted release to defendant of such claim by the purchaser on foreclosure did not bar an action therefor. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 85 N. E. 801, 804, 193 N. Y. 92.

The right to retake possession of personalty, to which title is reserved by the seller, is a "chose in action" and hence must be assigned in writing. Swann Davis Co. v. Stanton, 67 S. E. 888, 889, 7 Ga. App. 668.

Stock

Stock in a corporation is a "chose in action," and the certificates are the evidence of its existence and of its amount. Allen-West Commission Co. v. Grumbles, 129 Fed. 287, 290, 63 C. C. A. 401.

Torts

The term "choses in action," in a mortgage by a corporation which included all after-acquired choses in action, did not include causes of action arising out of a tort committed in dealing with the bonds which the mortgage was given to secure. MacDonnell v. Buffalo Loan, T. & S. Deposit Co., 85 N. E. 801, 804, 193 N. Y. 92.

CHOUSE

In an action against a carrier for injury to live stock from delay in transportation, an allegation in the petition that the injury resulted from "delay, rough handling, and that the horses were choused around while at T.," was not broad enough to admit testimony that at one of the stations defendant's servants "hammered and knocked around and put four bolts in the back end of the car," and that the noise and hammering made the horses restless and nervous," since the word "choused" means no more than a trick, a sham, or a cheat. Gulf, C. & S. F. Ry. Co. v. Peacock (Tex.) 128 S. W. 463, 466.

CHRISTIAN

CHRISTIAN NAME

The statute requiring a writ to be endorsed with the "Christian and surname" is complied with by indorsing the surname and the initials of the Christian name. Clark v. Paine, 28 Mass. (11 Pick.) 66, 67.

By the common law since the Norman Conquest, a legal name has consisted of one "Christian name," or that which is given one after his birth or at baptism, or is afterwards assumed by him in addition to his family name, and of one "surname," or family name, which is that derived from the common name

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of his parents, or borne by him in common with other members of his family. Schaffer v. Levenson Wrecking Co., 81 Atl. 434, 82 N. J. Law, 61.

CHRISTIAN SCIENCE

"Christian Science" is a form of mental therapeutics. It is not the practice of medicine, and is not included within the act regulating the practice of medicine. Bennett v. Ware, 61 S. E. 546, 549, 4 Ga. App. 293 (citing State v. Mylod, 20 Atl. 753, 20 R. I. 632, 41 L. R. A. 428).

CHRISTIANITY

As part of common law

"It is * * * said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that state, as found in its constitution of government." Vidal v. Girard, 43 U. S. (2 How.) 198, 11 L. Ed. 205.

CHRISTMAS

Gen. Laws 1909, c. 123, § 2, provides that no license granted shall authorize any person to sell any spirituous and intoxicating liquors on Sunday, or on any election day, etc., or on Christmas Day. Gen. Laws 1909, c. 201, § 5, provides that the 25th day of December in every year, or, when it falls on the first day of the week, then the day following, shall be a holiday, etc., thus making the legal holiday "Christmas" the 26th day of December when the 25th falls on Sunday. Held, that Christmas Day as defined in the latter statute, will govern Christmas Day in the statute for the regulation of the sale of intoxicating liquors, and saloons must remain closed on the 26th. In re Pothier, 78 Atl. 346, 347, 31 R. I. 565.

Gen. Laws 1909, c. 123, § 25, provides that boards of aldermen may by giving 24 hours' notice, etc., require saloons to remain closed during the hours of any holiday not specifically mentioned in section 2 of this chapter. Section 2 provides that saloons shall be closed on Christmas Day, and Christmas Day under Gen. Laws 1909, c. 201, § 5, is the 26th of December when the 25th falls on Sunday. Held, that the former statute has no application with regard to "Christmas" when it falls on Sunday. In re Pothier, 78 Atl. 346, 347, 31 R. I. 565.

CHROMOLITHOGRAPH

As pictorial illustrations, see Pictorial Illustrations.

CHRONIC

"Chronic" inebriety is the same as habitual drunkenness. Leavitt v. City of Morris, 117 N. W. 393, 395, 105 Minn. 170, 17 L. R. A. (N. S.) 984, 15 Ann. Cas. 961.

Acts 1909, p. 637, authorizing the State Board of Medical Examiners to revoke a license to practice medicine for publicly advertising special ability to treat or cure chronic and incurable diseases, is not invalid because of indefiniteness, for chronic and incurable diseases are specifically named and discussed in medical works, and are known to physicians possessing a sufficient knowledge of their profession to practice medicine; the word "chronic" being the antithesis of acute, and a "chronic and incurable disease" being generally understood to be one of long standing and unyielding to treatment. State Medical Board of Arkansas Medical Society v. McCrary, 130 S. W. 544, 546, 95 Ark. 511, 30 L. R. A. (N. S.) 783, Ann. Cas. 1912A, 631.

The State Board of Medical Examiners, in proceedings to revoke a license to practice medicine on the ground that the holder thereof has publicly advertised a special ability to treat or cure chronic and incurable diseases, in violation of Acts 1909, p. 637, may consult standard medical works naming and discussing chronic and incurable diseases, as an aid to the memory and understanding of the members of the board, but not as evidence of what are chronic and incurable diseases. Id.

CHRYSAROBIN

"Chrysarobin" is dutiable as a drug advanced in value, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20 (30 Stat. 152), and not as a medicinal preparation, under paragraph 68 (30 Stat. 154). Levi v. United States, 140 Fed. 126.

CHUCK

A "chuck" is a device which serves to hold a drill in place. Ripley v. Cochiti Gold Mining Co., 76 Pac. 285, 12 N. M. 186.

CHUCK-A-LUCK

As gambling device, see Gambling Device.

CHURCH

See Feeble Churches; Gift to Church; Incorporate Church.

Exclusively used as a church, see Exclusively Used.

A church is "a religious congregation, comprising all those who worship together in one church." The more general definition is "the district in which such worshipers live." A deed to trustees, to be held in trust for "Trinity Parish, in the town of Moundsville, in the county of Marshall, in the state of West Virginia," does not create a valid trust, as the trust attempted to be created is

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void for uncertainty, as well to the beneficiaries as to the purpose of the trust, for there is nothing to indicate that the words "Trinity Parish" mean a church. Weaver v. Spurr, 48 S. E. 852, 856, 56 W. Va. 95.

A gift in trust for the repair of a "church," in the modern sense of that word as a place for public worship, open to everybody and established for the promotion of religion and morality among all people, whether regularly connected with its ecclesiastical organization or not, is a charity. Chase v. Dickey, 99 N. E. 410, 415, 212 Mass. 555.

A portion of a building in the business district of a city, which had been previously occupied as a flour and feed store, leased by a religious order incorporated as the Reorganized Church of Jesus Christ of the Latter Day Saints, did not constitute a "church," within Pub. Acts 1909, No. 291, § 37, providing that no license shall be issued to establish a new saloon within 400 feet from the front entrance of a church, etc. Starks v. Presque Isle Circuit Judge, 139 N. W. 29, 173 Mich. 464, 43 L. R. A. (N. S.) 1142.

As the building

A "church" means a building set apart for religious worship. Liquor Tax Law (Laws 1896, c. 112) § 24, subd. 2, prohibiting the issue of a certificate when a building used exclusively as a "church" is within 200 feet thereof, does not apply to a building used for occasional entertainments incidental to the church, and the subsequent use of the building for public worship does not invalidate a certificate granted before such use. In re Rupp, 106 N. Y. Supp. 483, 484, 55 Misc. Rep. 313 (quoting and adopting the definition in Webst. Dict. Unab.).

As legal personality

See Legal Personality.

As public charity

See Public Charity.

As religious corporation

A gift in trust to "the First Church of Christ, Scientist," for the promotion of the "religion of Christian Science as taught by me," when construed in connection with the term "church," which imports an organization for religious purposes, and the allegations of a bill, admitted by demurrer, that the church existed as a religious society, with a large membership, and that it was organized by the testatrix for the promotion of the doctrines of Christian Science, which doctrines were ascertainable from books published by the testatrix, was not indefinite as to its object. Glover v. Baker, 83 Atl. 916, 930, 76 N. H. 393.

The very term "church" imports an organization for religious purposes, and property given to it eo nomine, in the absence of all declaration of trust or use, must, by necessary implication, be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God. Bruce v. Central M. E. Church, 110 N. W. 951, 952, 147 Mich. 230, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150.

The word "church" as used in the law of Maryland is synonymous with the corporate entity holding title to the property of the society. A devise of land to the vestry of a church, to be used for such church purposes as the rector of the church should direct, was not a devise in trust, but gave the vestry the fee. Doan v. Vestry of Parish of Ascension of Carroll County, 64 Atl. 314, 316, 103 Md. 662, 7 L. R. A. (N. S.) 1119, 115 Am. St. Rep. 379.

As a place for worship only

The word "church," as used in P. L. 1905, p. 42, c. 21, providing that no licenses to sell intoxicants shall be granted in any new place within 200 feet of a church, schoolhouse, etc., will not include a place where religiously inclined persons meet for Bible study, etc. Emmons v. Supreme Conclave Improved Order Heptasophs, 63 Atl. 871, 6 Pennewill (Del.) 115.

CHURCH PROPERTY

The term "church property," as used in 2 Starr & C. Ann. St. 1896, c. 120, § 2, cl. 2, exempting from taxation all church property actually and exclusively used for public worship, where the land (to be of reasonable size for the location of the church building) is owned by the congregation, means the church, defined by Webster to be a building set apart for Christian worship, and a lot of reasonable size for its location, and does not include camp-meeting grounds, used by several congregations for public worship, but the title to which, instead of being in any religious congregation, is in a corporation organized under the statute relating to the formation of corporations not for pecuniary profit. People ex rel. Breymeyer v. Watseka Camp-Meeting Ass'n, 43 N. E. 716, 717, 160 Ill. 576.

CHURCH SESSIONS

The constitution of the Cumberland Presbyterian Church creates certain church courts and declares that the government of the church has to be exercised in some certain and definite form by various courts in regular gradation. These courts are called "church sessions," "presbyteries," etc. The jurisdiction of each is defined by the constitution; the "church session" having jurisdiction of a single church. Mack v. Kime, 58 S. E. 184, 195, 129 Ga. 1, 24 L. R. A. (N. S.) 675.

CHURN

Agricultural Law, § 41, prohibits the sale of any oleaginous substance not made from

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pure milk or cream, as a substitute for butter under any brand, device, or label bearing words indicative of cows or the product of the dairy, and the use of terms indicative of processes in the dairy in making or preparing butter. Held, that the sale of oleomargarine in cartons inscribed with the words "Purity Oleomargarine," "churned by the Capital City Dairy Co.," "We are the only exclusive first quality churners in the U. S.," etc., violated the statute; the word "churn" in its primary and ordinary meaning conveying to the mind one of the processes of making butter, and being a term indicative of processes in the dairy in making or preparing butter, as used in the statute. People v. Griffin, 128 N. Y. Supp. 946, 947, 71 Misc. Rep. 568.

In rock blasting, the act of striking with a drill is designated "churning." McKane v. Marr & Gordon, 63 Atl. 944, 966, 79 Vt. 13.

CHUTNEY

The article commercially known as "chutney," which consists of various fruits preserved with sugar and spices, is dutiable as "fruits preserved," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171, rather than as "edible fruits * * * prepared," under paragraph 262, 30 Stat. 171. Park & Tilford v. United States, 164 Fed. 910, 911.

CIDER

As used in Rev. St. c. 29, § 40, declaring that "cider," when kept for sale as a beverage, is declared to be intoxicating, is not limited to apple juice which has become fermented, though that is perhaps technically the correct definition of the word which is popularly and universally known to include apple juice when it first comes from the cider press, so that cider, when kept for tippling purposes or for sale as a beverage, is within the statute, though it may be unfermented and nonintoxicating in fact. State v. Frederickson, 63 Atl. 535, 537, 101 Me. 37, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, 8 Ann. Cas. 48.

Where the law prohibits or regulates the sale of cider by name, without any qualifying word, it applies to all cider, without regard to its intoxicating qualities. Commonwealth v. Goodwin, 64 S. E. 54, 56, 109 Va. 828 (citing Commonwealth v. Dean, 80 Mass. [14 Gray] 99; State v. Roach, 75 Me. 123; State v. Spalding, 17 Atl. 844, 61 Vt. 505).

As ale
See Ale.

As beer
See Beer.

As brandy
See Brandy.

As intoxicating liquor
See Intoxicating Liquor.

As malt liquor
See Malt.

As spirituous liquor
See Spirituous Liquor.

As wine
See Wine.

CI-DEVANT OFFICER

The terms "retired officer," and "ex-officer," and "ci-devant officer" are synonymous, implying that he is no longer an "officer" in the proper sense of the term. Reed v. Sehon, 83 Pac. 77, 79, 2 Cal. App. 55.

CIGAR

As drug, see Drug.

CIGARETTE

Rolling cigarette as manufacture, see Manufacture.

"Nor is it essential that they [cigarettes] shall have been formally recorded in written history or science to entitle courts to take judicial notice of them." Austin v. Tennessee, 21 Sup. Ct. 132, 141, 179 U. S. 367, 45 L. Ed. 224.

Under the rule that, where a statute relating to a certain commodity designated it by a word certain and definite in its significance or extent, other commodities not described by the word, but by other designation, and understood by a large part of the community not to fall within the meaning of the word, are not covered by statute, St. 1898, § 4608f (Sanborn's Supp. 1906; Laws 1905, p. 143, c. 82), outlawing "cigarettes," used the word to designate a well-known, recognized, and definite article, consisting of tobacco of a peculiar kind, distinguished by its light color and mildness, rolled in a paper wrapper, and does not include an article consisting of a cylindrical roll of cigar leaf tobacco; the leaves being cut in strips the length of the roll, rolled in a section of wrapper leaf tobacco, and this kind of article being generally known as a cigar at the time of the passage of the act. Goodrich v. State, 113 N. W. 388, 390, 133 Wis. 242, 14 Ann. Cas. 932.

CINCHONA BARK

See Salts of Cinchona Bark.

CINDER PIT

A pit extending under a railroad track in a roundhouse, for the purpose of cleaning out engines, is called a "cinder pit." Mullin v. Northern Pac. R. Co., 80 Pac. 814, 38 Wash. 550.

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A "cinder pit" is an excavation beneath the rails, about 3½ feet deep, and walled up, into which the cinders are dropped, and from thence removed. The rails are laid upon posts and beams over the pit. Stauning v. Great Northern R. Co., 93 N. W. 518, 519, 88 Minn. 480.

CINEMATOGRAPH FILMS

As photograph, see Photograph.

CIRCUIT

See Locally Closed Circuit; Metallic Circuit; Taken Up from the Circuit; Working Circuit.

Ground circuit, see Ground.

CIRCUIT COURT

A "circuit court" is a court of general jurisdiction. Rudisell v. Jennings, 77 N. E. 959, 38 Ind. App. 403.

"The 'circuit court' is a constitutional court of record, having general jurisdiction over common-law actions inter partes and proceedings therein according to the course of the common law." Five-mile Beach Lumber Co. v. Friday, 66 Atl. 901, 902, 75 N. J. Law, 175.

The Circuit Courts of the United States are courts of general jurisdiction, corresponding in a general way as to their general authority with the state and District Courts, and full faith and credit must be given to their records and proceedings. Dunseth v. Butte Electric Ry. Co., 108 Pac. 567, 570, 41 Mont. 14, 21 Ann. Cas. 1258.

Rev. St. 1899, § 4161, provides that, whenever the term "circuit court" is used in any law general to the whole state, the same shall be construed to include "courts of common pleas" unless such construction would be inconsistent with the evident intent of such law or of some law especially applicable to courts of common pleas. Such section does not apply to Rev. St. 1899, p. 2579, granting power to the judge of the Cape Girardeau court of common pleas to issue injunctions returnable to the "circuit court"; the act being special. Oliver v. Snider, 75 S. W. 591, 593, 176 Mo. 63.

CIRCUIT JUDGE

Laws 1880, c. 292, confers power to appoint commissioners in condemnation proceedings upon the circuit court or the judge thereof. Laws 1905, c. 295, confers on the superior court for Lincoln county jurisdiction equal to and concurrent with the circuit court of that county in "all civil actions and proceedings at law and in equity," with an immaterial exception and confers express authority to issue all commissions provided by law, and provides that, whenever a statute shall mention the "circuit judge," the words shall be deemed to apply to the judge of the superior court for Lincoln county. St. 1898, § 2594 divides remedies in courts of justice into "actions" and "special proceedings"; the latter embracing all remedies other than actions, under the direct provisions of section 2596. Held, that inasmuch as the words "at law and in equity" embrace all exercise of judicial or quasi judicial power of courts, whether conferred by statute, common law, or equitable rules, the expression "all civil actions and proceedings at law and in equity" is extensive and general, rather than restrictive and particular, and confers on the superior court or the judge thereof the same power to appoint commissioners in condemnation proceedings as is possessed by circuit courts or judges. Wisconsin River Imp. Co. v. Pier, 118 N. W. 857, 859, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

CIRCULAR

In Act April 1, 1907 (Laws 1907, p. 326), making it unlawful for any liquor dealer in the state to in any manner, through agents, circulars, posters, or newspaper advertisements, solicit orders for the sale of intoxicating liquors in any territory where it would be unlawful to grant a license to make such sales, written or printed matter which is intended to be issued to a great number of persons or for general circulation is a "circular," whether issued in the form of a memorandum book, or some other form. Hancock v. State, 133 S. W. 181, 182, 97 Ark. 38 (citing 2 Words and Phrases).

CIRCULAR SAW PLATES

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 141, 30 Stat. 162 for "steel circular saw plates," includes plates that resemble circular saw plates in size, shape, general finish, and general quality of steel, though imported for other uses. Hermann Boker & Co. v. United States, 168 Fed. 573, 574.

CIRCULATION

See General Circulation.

CIRCUMSPECTION

See Ordinary Circumspection.

CIRCUMSTANCES

See Character and Circumstances of Injury; Extraordinary Circumstances; Inquire into the Circumstances; Like Circumstances; Same Circumstances; Special Circumstances.

Mitigating circumstances, see Mitigate—Mitigation.

Other circumstances, see Other.

Similar circumstances, see Similar.

In an action for personal injuries caused by alleged ejection from a passenger train,

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the jury was instructed that if the brakeman pushed plaintiff through the door and onto the platform for the purpose of protecting plaintiff from violence, and with no purpose to eject him from the train, plaintiff could not recover, and that plaintiff was not required to show that the brakeman actually threw him from the train, but that if the evidence showed that the brakeman wrongfully put him out of the car, and for that reason he fell from the platform, it would amount to an ejectment, and that it would be sufficient that the act was wrongful, if it appeared that the brakeman was endeavoring to remove plaintiff under the circumstances claimed, and that to put one off a train under such circumstances was a wrongful act. The majority of the court held that such instructions were erroneous. Deemer, C. J. (dissenting opinion), said that there was no room for any confusion in the use of the words "circumstances claimed," and "such circumstances," as found in the instruction, since defendant simply denied that it ejected plaintiff while it was in motion; so that there could be no doubt as to what was meant by the words "circumstances claimed" and "such circumstances," since in another instruction the court told the jury just what was claimed, and in so doing he followed the agreement and concession made by counsel, and that ordinarily, when a court refers to the claims of the parties, it has reference to the pleadings, unless it indicates some other source. Battis v. Chicago, R. I. & P. Ry. Co., 100 N. W. 543-549, 124 Iowa, 623.

The word "circumstances" in the requested instruction that the innocence of defendant must be presumed by the jury till the case against him is proved in all its material circumstances is not an apt word to express the meaning to make the charge a good one. Such word can hardly be considered as the equivalent of the word "elements." Bailey v. State, 53 South. 296, 300, 168 Ala. 4; Id., 53 South. 390, 168 Ala. 4.

The word "circumstances," as used in an instruction in an action against a carrier for injuries to a passenger, to the effect that if the jury found that plaintiff was injured, that the accident could not have happened under ordinary circumstances, had defendant exercised the utmost care, a presumption of negligence was raised, and that the burden was on defendant to rebut it, and to that end defendant must prove that, as to the matters which the circumstances indicated were the cause of the accident, defendant and its employés exercised that high degree of care which the law required of them, merely had reference to the claim made by plaintiff as to the manner in which the accident happened, and the instruction was not erroneous on the theory that it was left uncertain as to what circumstances the jury might consider. Fitch v. Mason City & C. L. Traction Co., 100 N. W. 618, 620, 124 Iowa, 665.

CIRCUMSTANTIAL EVIDENCE

"Circumstantial evidence" is where, some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved, so as readily to gain the assent of the mind from the mere probability of its having actually occurred. It is the inference of a fact from other facts proved, and the fact thus inferred and assented to by the mind is said to be presumed or taken for granted until the contrary is proved. This is what is called "circumstantial evidence," and it is adopted the more readily in proportion to the difficulty in proving the fact by direct evidence. State v. Tyre, 67 Atl. 199, 205, 6 Pennewill (Del.) 343.

"Circumstantial evidence" is evidence of facts and circumstances which, when established, lead the mind to certain conclusions or inferences taken therefrom. Knickerbocker v. Worthing, 101 N. W. 540, 544, 138 Mich. 224.

"Circumstantial evidence" in a criminal case is the proof of such facts or circumstances connected with or surrounding the commission of the offense charged as tends to show the guilt or innocence of accused. State v. Marren, 107 Pac. 993, 1000, 17 Idaho, 766.

Where the fact in controversy must be inferred from other facts proved, the fact is shown by "circumstantial evidence." State v. Blackburn, 75 Atl. 536, 541, 7 Pennewill (Del.) 479.

Where "circumstantial evidence" is relied on to prove guilt, it is essential that the circumstances be proved to the jury's satisfaction beyond a reasonable doubt; that they be consistent with the theory of guilt and inconsistent with any other reasonable theory except guilt. State v. Tilghman, 63 Atl. 772, 774, 6 Pennewill (Del.) 54.

"Circumstantial evidence" may be relevant, even though of very slight probative value. State v. Blackburn (Del.) 75 Atl. 536, 541, 7 Pennewill (Del.) 479; Gary v. State, 67 S. E. 207, 7 Ga. App. 501.

The court having charged: "Circumstantial evidence" is legal evidence, but it must be of such a character and nature as to exclude every reasonable hypothesis other than that the prisoner is guilty. The circumstances not only must all be in harmony with the guilt of the accused, but they must be of such a character that they cannot be true, in the nature of things, and the accused be innocent"—a charge, specially requested, that "in a murder case circumstantial evidence must be received with great caution," is properly refused. State v. Le Blanc, 41 South. 105, 106, 116 La. 822.

"Circumstantial evidence" is where, some facts being proved, another fact follows as a natural conclusion from the facts actually proved, and it is the inference of a fact

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from other facts proved, and the fact thus inferred and assented to by the mind is taken for granted until the contrary is proved; but, to justify a conviction on circumstantial evidence, the evidence must be satisfactory, and of such significance and force as to produce conviction in the minds of the jury of the guilt of accused beyond a reasonable doubt. State v. Roberts (Del.) 78 Atl. 305, 310.

The evidence was entirely "circumstantial" where no witness saw decedent killed, and there was no direct and positive evidence as to how, when, where, or by whom he was killed, and the only evidence as to defendant's guilt was the circumstances surrounding the killing. State v. Samuels, 67 Atl. 164, 166, 6 Pennewill (Del.) 36.

"Circumstantial evidence" is proof of certain facts and circumstances in a certain case, in which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind. Crime may be proved by "circumstantial evidence" as well as by direct testimony of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other and the guilt of the defendant and inconsistent with any reasonable theory of innocence. State v. Shelton, 122 S. W. 732, 738, 223 Mo. 118.

"The term 'evidence' includes not only that offered on the part of the government, but that also offered for the defense. * * * 'Direct evidence' is that which immediately points to the question at issue. It is positive in its character. It often depends upon the credibility and intelligence of the witnesses who testify to a knowledge of the facts. It may also be documentary in character. 'Indirect' or 'circumstantial' evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed, and from which the jury may infer the fact. 'Direct' and 'circumstantial' evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is 'direct.' 'Circumstantial evidence' is composed of facts which raise a logical inference as to the existence of the fact in issue." United States v. Greene, 146 Fed. 803, 824.

The testimony of eyewitnesses detailing the acts of accused and the inferences which can legally be drawn therefrom are direct and not circumstantial evidence, within Rev. St. 1908, § 1624, providing that no person convicted of murder in the first degree on "circumstantial evidence" shall suffer the death penalty. Proof of the commission of acts by accused which tend to prove specific intent is direct proof of such intent, within Rev. St. 1908, § 1609; and the proof is not circumstantial, within section 1624, prohibiting the imposition of the death penalty on a conviction on "circumstantial evidence." Wechter v. People, 124 Pac. 183, 185, 53 Colo. 89.

Great latitude is to be allowed in the reception of "circumstantial evidence," including all evidence of an indirect nature; whether the inferences afforded by it be drawn from prior experience, or be a deduction of reason from the circumstances of the particular case or of reason aided by experience and the competency of a collateral fact to be used as the basis of legitimate argument, is not to be determined by the exclusiveness of the inferences it may afford relative to the litigated fact, but it is enough if it may tend even in a slight degree to elucidate the inquiry or to assist, though remotely, to a determination properly founded on truth. White v. State, 52 South. 805, 806, 59 Fla. 53.

"Circumstantial evidence" is the evidence of certain facts from which are to be inferred the existence of other material facts, bearing upon the question at issue or fact to be proved. Such evidence is legal and competent, and, when of such character as to exclude every reasonable doubt of a defendant's innocence, is entitled to as much weight as direct evidence. When a conviction is sought on "circumstantial evidence," it must not only be shown by preponderance of evidence that the facts are true, but they must be such as are absolutely opposed upon any reasonable ground of reasoning to the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of his guilt. State v. Aspara, 37 South. 883, 890, 113 La. 940.

"Circumstantial evidence" consists in reasoning from known or proved facts to establish facts which are inferred to exist; but the facts relied upon to establish the inferred facts must be proved by direct evidence, or admitted, and may not themselves be inferred from other facts. Evansville Metal Bed Co. v. Loge, 85 N. E. 979, 981, 42 Ind. App. 461.

In a criminal case, an instruction: "Evidence is of two kinds, direct and circumstantial. 'Direct evidence' is where a witness testifies of his own personal knowledge of the main fact, or facts, to be proven. 'Circumstantial evidence' is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts, which usuallly and reasonably follow according to the common experience of mankind. Crime may be proven by circumstantial evidence, as well as by direct testimony of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendants, and inconsistent with any reasonable theory of their innocence"—sufficiently charged on circumstantial evidence. State v. Hillman, 127 S. W. 102, 103, 142 Mo. App. 510.

An instruction that evidence is of two kinds, direct and circumstantial, and that

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direct evidence is when a witness testified directly of his own knowledge of the main fact or facts to be proven, and that "circumstantial evidence" is proof of certain facts and circumstances in a certain case from which the jury may infer other and connected facts which usually and reasonally follow according to the common experience of mankind, is correct. State v. Gatlin, 70 S. W. 885, 888, 170 Mo. 354.

Conclusiveness

Where guilt depends wholly upon "circumstantial evidence," it is error not to instruct, if the facts are consistent wih innocence, to acquit. Middleton v. State, 66 S. E. 22, 23, 7 Ga. App. 1.

"Evidence" is none the less effective because it is circumstantial, if it be consistent, connected, and conclusive. Circumstantial or presumptive evidence is receivable in both civil and criminal cases; but where evidence is circumstantial the jury must be fully satisfied, not only that the circumstances are consistent. with the prisoner's guilt, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that of guilt. State v. Samuels, 67 Atl. 165, 166, 6 Pennewill (Del.) 36.

"Circumstantial evidence" is a kind of evidence wholly different from evidence consisting of the direct and positive testimony of eyewitnesses. It is no stronger than the weakest link in the chain. It is inferior in cogency and effect to "direct evidence." The fallacy of the declaration that "circumstances cannot lie" lies in the fact that whether the facts constituting the chain of circumstances existed depends on the truthfulness of the witnesses deposing to the facts. There may be ten links in the chain of circumstantial evidence offered to convict a defendant. Each one of these links or circumstances is testified to by witnesses; and the difference, therefore, is, where the question is whether the defendant committed the homicide, that if the testimony be direct, the killing may be established by the clear testimony of a single eyewitness, whereas, if the evidence be circumstantial, a number of witnesses necessarily must be examined to make out every link in the chain, every circumstance in the series, before the jury will be warranted in deducing from the circumstances the conclusion that the defendant did the killing. A statement by the court to the jury, therefore, that circumstantial evidence is as good as any other kind of evidence, is tantamount to telling the jury that there is no difference between the nature of circumstantial evidence and the nature of direct testimony, and is therefore wholly misleading and erroneous. Haywood v. State, 43 South. 614, 90 Miss. 461.

A request to charge in a criminal case that "circumstantial evidence" is "wholly inferior in cogency, force, and effect to direct evidence" was properly refused. Gordon v. State, 41 South. 847, 849, 147 Ala. 42 (citing Mickle v. State, 27 Ala. 20; Faulk v. State, 52 Ala. 415; Bland v. State, 75 Ala. 574; Thornton v. State, 21 South. 356, 113 Ala. 43, 59 Am. St. Rep. 97).

On a prosecution for murder, an instruction defining "circumstantial evidence," and stating that the evidence in the case, though circumstantial, was competent, and if it was of such a character as to exclude every reasonable theory or hypothesis other than that of defendant's guilt, beyond a reasonable doubt, it should be given the same weight as direct evidence of the fact alleged, and that "circumstantial evidence, when competent, and when complete and satisfying to your minds, * * * is entitled to the same weight that direct evidence is," was not improper. State v. Coleman, 98 N. W. 175, 180, 17 S. D. 594 (quoting and adopting definition in Sackett's Instructions to Juries, and citing and adopting Schoolcraft v. People 7 N. E. 649, 117 Ill. 277; United States v. Reder, 69 Fed. 965; Carlton v. People, 37 N. E. 244, 150 Ill. 181, 41 Am. St. Rep. 346; 1 Greenl. Ev. [13th Ed.] § 13a).

Nature of facts constituting

"'Circumstantial evidence' consists of the suspicious facts or circumstances which surround a case, but which lack the direct or positive character." State v. Collins, 62 Atl. 224, 226, 5 Pennewill (Del.) 263.

Proof by "circumstantial evidence" consists in proof of a fact by proof of surrounding conditions from which existence of the principal fact may be deduced. Fritz & Groh v. St. Louis, I. M. & S. R. Co., 148 S. W. 74, 78, 243 Mo. 62.

"'Circumstantial evidence' is the proof of collateral facts and circumstances from which the mind arrives at the conclusion that the main fact sought to be established in fact existed." Buckler v. Kneezell (Tex.) 91 S. W. 367, 370.

CIRCUS

Under Sayles' Ann. Civ. St. 1897, art. 5049, subd. 23, imposing a license tax on circuses wherein equestrian or acrobatic feats are exhibited, a Wild West show, portraying actual incidents that had happened in the West, and lacking most of the essentials which by common understanding a present-day circus includes, is not a "circus." State v. Cody (Tex.) 120 S. W. 267, 268.

Under Rev. Code 1852, amended to 1893, p. 56, c. 117, § 1, providing that no person, etc., without having first obtained a proper license therefor, shall be engaged in, etc., any trade, that is to say, exhibiting circuses, etc., and section 5 providing that every building, etc., where theatrical performances are exhibited, shall be deemed a "circus" within the

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meaning of this act, one maintaining a moving picture show must procure a license; the word "theatrical" meaning of or pertaining to a theater or scenic representation resembling the manner of dramatic performers. State v. Morris, 76 Atl. 479, 480, 1 Boyce (Del.) 330.

CITATION

"Notice" and "citation" are not synonymous. A citation is a writ of the court, addressed to an officer of the court, and commands him to do certain things. Service by publication is a citation, and therefore may be resorted to by a justice of the peace. Inasmuch as the powers of the justice of the peace in this respect are derived from the statute, and as by no provision of the statute is that court expressly authorized to acquire jurisdiction over a defendant by issuance and service of notice as provided by statute for district and county courts, we must hold the power wanting, unless "notice" and "citation" are synonymous terms. Carpenter v. Anderson, 77 S. W. 291, 293, 33 Tex. Civ. App. 484.

A "citation" in its general character is a summons. Under Code Civ. Proc. § 1327, authorizing the filing of a petition within one year after the probate of a will to contest it, and section 1328, prior to the amendment of 1907, requiring the issuance of a "citation" to named parties, without specifying the time therefor, one who files, three days before the expiration of a year after the probate of a will, a petition to revoke the probate, but who does not, for more than six months thereafter, take any steps to issue "citation," is prima facie guilty of want of diligence, authorizing the dismissal thereof on motion of the executor. Focha v. Focha's Estate, 97 Pac. 321, 322, 8 Cal. App. 576.

CITED

The word "cited," as used in Civ. Code, art. 3518, has been construed to mean any kind of judicial notice which brings home to the defendant knowledge of the demand instituted against him, such as notice of seizure and sale in executory proceedings, or seizure and notice under execution of a twelve-months bond. King v. Guynes, 42 South. 959, 960, 118 La. 344 (citing Cloutier v. Lemée, 33 La. Ann. 305).

Rev. St. 1909, § 322, relating to the collateral inheritance tax, provides that the probate judge of the court having jurisdiction of an estate shall appoint an appraiser to fix its valuation, and that the appraiser shall give notice by mail as to persons having an interest in the property, including the collector of revenue, and section 329 authorizes the state auditor to engage counsel to represent the county collector in proceedings in which he is cited as a party under the preceding section. Section 8057 requires words and phrases to be taken in their ordinary and usual sense; technical words and phrases having a peculiar and appropriate meaning in law to be understood according to their technical import. Held, that while the word "cited," in its technical sense, denotes a writ issuing out of a court to notify a party interested in a cause of action of proceedings therein, it also means notification of legal proceedings, and hence, despite section 8057, the term in this case must be understood as referring to written notice by mail, and consequently the state auditor may hire counsel where the collector is notified by mail of proceedings to enforce the collateral inheritance tax. State ex rel. Curators of University of Missouri v. Walker, 144 S. W. 866, 867, 240 Mo. 708 (citing 2 Words and Phrases, p. 1164).

CITIZEN

See Controversy between Citizens of Different States and Citizens of State and Foreign Subjects; Foreign Citizen or Subject.

Citizen or Resident of Territory or District of Columbia as citizen of a state, see State.

A "citizen" is one who owes allegiance to the state, and he has a right to reciprocal protection from it. In re Rousos, 119 N. Y. Supp. 34, 36.

"A 'citizen' is one who, as a member of a nation or of the body politic of a sovereign state, owes allegience to and may claim reciprocal protection from its government." To be a citizen one must be "a member of an independent political society and as such subject to its law and entitled to its protection in the enjoyment of civil or private rights." There is no such thing as a citizen of a county; a county being a mere subdivision of a state, with bodies executing functions assigned to them by the sovereign in process of government, but not themselves sovereign. A person may be a citizen of a state or of the Union, because they are sovereign. As used in Acts 1905, c. 32, p. 363, re-enacted in Code 1899, c. 32, § 24, giving courts of equity jurisdiction to restrain and abate liquor nuisances on a bill filed by "any citizen of any county," it means only a resident; the statute being intended to protect residents, no matter whether they be aliens or citizens, against illegal liquor selling. Devanney v. Hanson, 53 S. E. 603, 604, 60 W. Va. 3.

The word "citizen" has come to us from the Roman law, where it designated a person who had the freedom of Rome and could exercise the legal and civil privileges of the Roman government. Webster defines "citizen" as a person, native or naturalized, who has the privilege of voting for public officers, and who is qualified to fill public offices in the gift of the people; also either native-

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born or naturalized persons who are entitled to full participation in the exercise and enjoyment of so-called private rights. Bouvier says "citizen," in American law, is one who, under the Constitution and law of the United States, has a right to vote for representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people; that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. It is held in Nebraska that a "citizen," as used in its Constitution, means a person who is an American "citizen" by birth, or a person of foreign birth who has been naturalized. The Constitution of the United States provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. There are, then, two classes of citizens; one of the United States, and one of the state. One class of citizenship may exist in a person without the other, as in the case of a resident of the District of Columbia. Foreigners who have merely declared an intention to become citizens of the United States since the ratification of the Constitution of 1901, but have not perfected their naturalization, cannot register or vote, nor are they citizens of the state within the fourteenth amendment to the federal Constitution, defining federal and state citizenship. Gardina v. Board of Registrars of Jefferson County, 48 South. 788, 790, 791, 160 Ala. 155.

The noun "citizen" has been defined to be one who enjoys the freedom and privileges of a city; a freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises; an inhabitant of a city; a townsman; a person, native, or naturalized, of either sex, who owes allegiance to a government and is entitled to reciprocal protection from it; one who is domiciled in a country, and who is a citizen, though neither native nor naturalized, in such a sense that he takes his legal status from such country. In English law, the term means an inhabitant of a city; the representative of a city, in Parliament. In American law, a citizen is one who, under the Constitution and laws of the United States, has a right to vote for representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people; one of the sovereign people; a constituent member of the sovereignty, synonymous with the people; a member of the civil state, entitled to all its privileges. A person may be a citizen for commercial purposes, and not for political purposes. Greenough v. Board of Police Com'rs of Town of Tiverton, 74 Atl. 785, 787, 30 R. I. 212, 136 Am. St. Rep. 953.

Aliens

Under Act Aug. 13, 1888, c. 866, providing that no civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant, an alien, though a resident in a state, can maintain a suit against a citizen of the United States only in the district of defendant's residence. Miller v. New York Cent. & H. R. R. Co., 147 Fed. 771, 772.

The federal statutes which provide that, when jurisdiction of a federal court is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant, does not apply to aliens. Hall v. Great Northern Ry. Co., 197 Fed. 488, 489.

Under the statute (Rev. St. 1908, § 2116) providing that no person shall be entitled to a divorce, unless he shall have been a bona fide resident and citizen of the state for one year before the commencement of the action, an alien who in good faith has made the state his home for more than a year, and has no residence elsewhere, is a resident and "citizen" of the state. Sedgwick v. Sedgwick, 114 Pac. 488, 490, 50 Colo. 164, Ann. Cas. 1912C, 653.

Children of American parents born abroad

Rev. St. U. S. § 1993, provides that all children born out of the jurisdiction of the United States, whose fathers were at the time of their birth citizens of the United States, are citizens thereof, and the fourteenth amendment to the federal Constitution declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof are "citizens of the United States." Held, that the Constitution is merely declarative of existing rights, and under the statute a child born in a foreign country, but whose father was at the time of his birth a citizen of the United States, is a citizen thereof. Buckley v. McDonald, 84 Pac. 1114, 1115, 33 Mont. 483.

Children of resident alien

Rev. St. § 2172, provides that the children of persons who have been duly naturalized, being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as "citizens" thereof; and the naturalization law (Act June 29, 1906, c. 3592, § 4, cl. 6, 34 Stat. 596), provides that, when any alien who has declared his intention to become a citizen dies before he is actually naturalized, the widow and minor children of such alien may, by complying with the other provisions of the statute, be naturalized without any declaration of intention. Applicant was born in England, where his father died, and his mother was again mar-

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ried to an alien, who emigrated to the United States when applicant was about 4 years of age. When the applicant was about 17 years old and residing with the stepfather as a member of his family, the stepfather made a declaration of intention, but died without having been naturalized. Held, that the applicant was entitled to naturalization on the strength of his stepfather's declaration. In re Robertson, 179 Fed. 131, 132.

As a man is a "citizen" of the country to which his father owes allegiance, it was incumbent on one alleging in an election contest that a voter was not a citizen of the United States to show that such voter's father was not a citizen thereof during his son's minority. Savage v. Umphries (Tex.) 118 S. W. 893, 909.

As citizen of state

A phrase describing one as "a citizen of Franklin county, Tennessee," sufficiently describes him as a citizen of the state and a resident of the county. Gruetter v. Cumberland Telephone & Telegraph Co., 181 Fed. 248, 255.

Corporation

A corporation is not a "citizen" in the ordinary meaning of the term as used in an indictment against it. United States Board & Paper Co. v. State, 91 N. E. 953, 956, 174 Ind. 460.

A corporation cannot be considered a "citizen," inhabitant, or resident of a state in which it has not been incorporated for the purpose of determining federal jurisdiction. Fribourg v. Pullman Co., 176 Fed. 981, 983.

A corporation is not a "citizen," within Const. art. 2, § 18, providing that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens. Chicago, R. I. & P. Ry. Co. v. State, 111 S. W. 456, 460, 86 Ark. 412.

A corporation is not a "citizen," within Const. U. S. Amend. 14, as to the abridgment of privileges and immunities of citizens. Mutual Mfg. Co. v. Alspaugh, 91 N. E. 504, 505, 174 Ind. 381; Same v. Hauenstine, 91 N. E. 959, 174 Ind. 757; In re Speed's Estate, 74 N. E. 809, 811, 216 Ill. 23, 108 Am. St. Rep. 189; Chicago, R. I. & P. Ry. Co. v. State, 111 S. W. 456, 460, 86 Ark. 412; Kirven v. Virginia-Carolina Chemical Co., 145 Fed. 288, 292, 76 C. C. A. 172, 7 Ann. Cas. 219; Merchants' Nat. Bank v. Ford, 99 S. W. 260, 262, 124 Ky. 403; Mutual Mfg. Co. v. Alspaugh, 91 N. E. 504, 505, 174 Ind. 381; State v. Louisville & N. R. Co., 51 South. 918, 921, 97 Miss. 35, Ann. Cas. 1912C, 1150; Continental Life Ins. & Inv. Co. v. Hattabaugh, 121 Pac. 81, 84, 21 Idaho, 285; Western Turf Ass'n v. Greenberg, 27 Sup. Ct. 384, 386, 204 U. S. 359, 51 L. Ed. 520; Ulmer v. First Nat. Bank of St. Petersburg, 55 South. 405, 407, 61 Fla. 460; Taylor v. Same, 55 South. 408, 61 Fla. 460.

A corporation is not a "citizen" of a state within Const. U. S. art. 4, § 2, securing to citizens of each state the privileges and immunities of the citizens of the several states. In re Speed's Estate, 74 N. E. 809, 811, 216 Ill. 23, 108 Am. St. Rep. 189; Attorney General v. Electric Storage Battery Co., 74 N. E. 467, 188 Mass. 239; State v. Louisville, etc., R. Co., 51 So. 918, 921, 97 Miss. 35, Ann. Cas. 1912C, 1150; Ætna Ins. Co. v. Brigham, 48 S. E. 348, 349, 120 Ga. 925; Humphreys v. State, 70 N. E. 957, 962, 70 Ohio St. 67, 65 L. R. A. 776, 101 Am. St. Rep. 888, 1 Ann. Cas. 233 (quoting 10 Cyc. p. 150; Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529; Tatem v. Wright, 23 N. J. Law, 429; Ducat v. Chicago, 77 U. S. [10 Wall.] 410, 19 L. Ed. 972); Chicago, R. I. & P. Ry. Co. v. State, 111 S. W. 456, 460, 86 Ark. 412; In re Speed's Estate, 74 N. E. 809, 811, 216 Ill. 23, 108 Am. St. Rep. 189; Commonwealth v. Gregory, 89 S. W. 168, 170, 121 Ky. 256; Merchants' Nat. Bank v. Ford, 99 S. W. 260, 262, 124 Ky. 403.

A foreign corporation is not a "citizen" within the meaning of article 4, § 2, Const. U. S. Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co., 188 Fed. 585, 596, 110 C. C. A. 383; State ex rel. Atlantic Horse Ins. Co. v. Blake, 144 S. W. 1094, 1096, 241 Mo. 100, Ann. Cas. 1913C, 1283; In re Avery's Estate, 92 N. Y. Supp. 974, 979, 45 Misc. Rep. 529.

A corporation is a mere creature of local law, incapable of having legal existence beyond the limits of the sovereignty creating it, and must be treated as a citizen of the state creating it, within the meaning of the provision of the federal Constitution extending judicial power in federal courts to controversies between citizens of different states. Lemon v. Imperial Window Glass Co., 199 Fed. 927, 931.

It is settled that a corporation is a "citizen" of the state creating it, for the purposes of federal jurisdiction. A corporation cannot change its residence or "citizenship." It can have its legal home only at the place where it is located by or under the authority of its charter. Garrett & Co. v. Bear, 56 S. E. 479, 144 N. C. 23.

A foreign insurance company engaged in business in New York by permission of the insurance department is, so far as any litigation is concerned, a "citizen" of New York. Webster v. Columbian Nat. Life Ins. Co., 116 N. Y. Supp. 404, 131 App. Div. 837.

The word "citizens" is a descriptive word; no broader, to say the least, than "people." A corporation is a citizen of a state for purposes of jurisdiction of the federal courts, and as a citizen it may locate mining claims under the laws of the United

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States, and is entitled to the benefit of the Indian depredation acts. Hale v. Henkel, 26 Sup. Ct. 370, 383, 201 U. S. 43, 50 L. Ed. 652.

A state corporation is a citizen of the United States, within the meaning of Act March 3, 1887, c. 376, § 5, 24 Stat. 557, conferring upon such citizens who are bona fide purchasers from a railway company of land excepted from its grant the right to purchase the same from the government. Ramsey v. Tacoma Land Co., 25 Sup. Ct. 286, 287, 196 U. S. 360, 49 L. Ed. 513.

While a corporation is not a "citizen" within the meaning of the federal Constitution, yet it is a "person" within its terms. Southern R. Co. v. Greene, 49 South. 404, 409, 160 Ala. 396.

A corporation originally incorporated in the Indian territory under the Arkansas statutes which were put in force therein by the act of Congress of February 18, 1901 (31 Stat. 794, c. 379), became an Oklahoma corporation when that state was admitted to the Union, and must be regarded for jurisdictional purposes as a "citizen" of that state. Shulthis v. McDougal, 32 Sup. Ct. 704, 706, 225 U. S. 561, 56 L. Ed. 1205.

A foreign corporation is not a "citizen" within the meaning of the Constitution, and a state statute forbidding foreign insurance corporations from doing business within the state in violation of the state law does not conflict with the Constitution of the United States. Noble v. Mitchell, 17 Sup. Ct. 110, 111, 164 U. S. 367, 41 L. Ed. 472.

While, under Act March 3, 1887, c. 373, § 4, 24 Stat. 554, as amended by Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436, national banks are deemed "citizens" of the states where located for the purposes of federal jurisdiction, yet, when a right is asserted by a national bank under authority of the law of its creation, the determination of such right involves a federal question, of which a federal court has jurisdiction, without regard to citizenship, if the requisite amount is involved. Larabee v. Dolley, 175 Fed. 365, 384.

"It is now held by the English courts that a foreign corporation, by establishing an office in England and carrying on business there, is to be considered as a resident of England, and may be sued in its courts." Under the system prevailing in this country, corporations are regarded as citizens of the state in which they are created, but in other states are regarded as foreign corporations, and their right to transact business therein is subject to such conditions and restrictions as the Legislatures of those states may prescribe. The residence of a corporation is within the state in which it is created, and, so long as it confines the exercise of its corporate powers within the state, it is beyond the reach of the process of courts of other states. Jameson v. Simonds Saw Co., 84 Pac. 289, 290, 2 Cal. App. 582.

A foreign corporation, though a person, under Statutory Construction Law, § 5, is not a "citizen," within the provision of the United States Constitution that citizens of each state shall be entitled to the privileges and immunities of citizens of the several states. In re Avery's Estate, 92 N. Y. Supp. 974, 979, 45 Misc. Rep. 529.

St. 1898, § 1770b, requiring foreign corporations to file articles with the Secretary of State before doing business in the state, and that every contract relating to property within the state shall be void unless such provisions are complied with, is constitutional, as such corporation is not a "citizen" of any state within Const. U. S. art. 4, § 2, and hence has no right to exercise its franchise in another state than that of its creation except on such terms as each state may impose. Independent Tug Line v. Lake Superior Lumber & Box Co., 131 N. W. 408, 409, 146 Wis. 121.

A corporation organized under the laws of any one of the United States is in contemplation of law a "citizen" and "resident" of the state in which it is incorporated. Act March 3, 1887, c. 373, 24 Stat. 552, as corrected and amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433, provides for the removal of causes in which there shall be controversy between citizens of the state and foreign states, citizens, or subjects; and section 2 declares that all such suits may be removed to the Circuit Court of the United States for the proper district by the defendant or defendants therein being "nonresidents" of that state. Held that, where defendant was an alien insurance corporation, it was a nonresident of California within such act, though it had a branch office within the state for the transaction of business. Baumgarten v. Alliance Assur. Co., 153 Fed. 301, 302, 303, 304 (citing Shaw v. Quincy Min. Co., 12 Sup. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; Miller v. Eastern Oregon Gold Min. Co., 45 Fed. 348; Gilbert v. New Zealand Ins. Co., 49 Fed. 884, 15 L. R. A. 125; Barrow S. S. Co. v. Kane, 18 Sup. Ct. 526, 170 U. S. 100, 42 L. Ed. 964; In re Keasbey & M. Co., 16 Sup. Ct. 273, 160 U. S. 229, 40 L. Ed. 402; Howard v. Gold Reefs of Georgia, 102 Fed. 657; Shattuck v. North British & Mercantile Ins. Co., 58 Fed. 609, 7 C. C. A. 386).

A domestic corporation, organized to manufacture and deal in intoxicating liquors, spirits, etc., is a "citizen resident of the state," within Gen. Laws 1896, c. 102, § 2, providing that the town council of the several towns and boards of commissioners may grant liquor licenses to such citizens resident within the state, for the manufacture and sale of liquor, as they deem proper. Greenough v. Board of Police Com'rs of Town of

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Tiverton, 74 Atl. 785, 787, 30 R. I. 212, 136 Am. St. Rep. 953.

A charitable corporation created by decree of the Spanish crown to operate in Porto Rico is not a "citizen" of the United States within the meaning of Act March 2, 1901, c. 812, § 3, 31 Stat. 953, extending the jurisdiction of the district court for Porto Rico to controversies where the parties or either of them are citizens of the United States, but since the enactment of Act April 12, 1900, c. 191, 31 Stat. 77, establishing a civil government for Porto Rico, is, if a citizen of any country, a citizen of Porto Rico. Martinez v. La Asociacion de Señoras Damas Del Santo Asilo de Ponce, 29 Sup. Ct. 327, 328, 213 U. S. 20, 53 L. Ed. 679.

A joint-stock company, though a legal entity, and suable in the name of its president under state laws, is not a corporation, and cannot be deemed to have citizenship for the purpose of removing actions against it to the federal courts. Saunders v. Adams Express Co., 136 Fed. 494, 495 (citing Chapman v. Barney, 9 Sup. Ct. 426, 129 U. S. 677, 32 L. Ed. 800; Great Southern Fire Proof Hotel Co. v. Jones, 20 Sup. Ct. 690, 177 U. S. 449, 44 L. Ed. 842; Thomas v. Ohio State University, 25 Sup. Ct. 24, 195 U. S. 207, 49 L. Ed. 160; Boatner v. American Express Co., 122 Fed. 714).

Declaration of intention

An alien's declaration of his intention to become a citizen of the United States did not make him a citizen, he having never taken out his naturalization papers. Wallenburg v. Missouri Pac. Ry. Co., 159 Fed. 217, 218.

Indian

"The words 'member' or 'members' and 'citizen' or 'citizens' shall be held to mean members or citizens of the Choctaw or Chickasaw Tribe of Indians in Indian Territory not including freedmen," under Act July 1, 1902, c. 1362, 32 Stat. 641, § 3. Frame v. Bivens, 189 Fed. 785, 788.

The relationship of guardian and ward existing between the United States and an Indian of the Osage Tribe in Oklahoma is not affected by the mere fact that such Indian may be a citizen of the United States and of the state. Mosier v. United States, 198 Fed. 54, 57, 117 C. C. A. 162.

The Indians of a tribe are not citizens; and, though not treated as independent foreign nations, they are not subject to jurisdiction of the state to the same extent as its citizens. Seneca Nation of Indians v. Appleby, 89 N. E. 835, 836, 196 N. Y. 318.

Crimes committed by one Indian upon the person of another within the limits of the Tulalip Reservation, in the state of Washington, are not excepted from the exclusive jurisdiction of the federal courts, under Act March 3, 1885, c. 341, § 9, 23 Stat. 385, because both parties hold patents from the United States, issued under the authority of the treaty with the Omahas of March 16, 1854 (10 Stat. 1043), and the treaty of Point Elliott of January 22, 1855 (12 Stat. 927), and are therefore, by virtue of Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 388, citizens of the United States. United States v. Celestine, 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195.

The distinction between different classes of "citizens" was recognized by the Cherokees in the difference in their intermarriage law as applied to the whites and to the Indians of other tribes, by the provision in the intermarriage law that a white man intermarried with an Indian by blood acquires certain rights as a citizen, but no provision that if he marries a Cherokee citizen not of Indian blood he shall be regarded as a citizen at all, and by the provision that if, once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all his rights as a citizen; and the same distinction between citizens as such and citizens with property rights has also been recognized by Congress in enactments relating to other Indians than the five Civilized Tribes, as to which see Act Aug. 9, 1888, 25 Stat. 392, c. 818; Act May 2, 1890, 26 Stat. 96, c. 182; and Act June 7, 1897, 30 Stat. c. 3. Red Bird v. United States, 27 Sup. Ct. 29, 34, 203 U. S. 76, 51 L. Ed. 96.

As inhabitant

The word "inhabitants" in its political sense means "citizens." In re Silkman, 84 N. Y. Supp. 1025, 1034, 1038, 88 App. Div. 102.

The words "inhabitant," "citizen," and "resident" mean substantially the same thing, and one is an "inhabitant," "resident," or "citizen" of the place where he has his domicile or home. A man's residence is his home or habitation, where that residence is fixed, and at a particular place, and he does not entertain a present intention of removing therefrom. To constitute a domicile but two elements are necessary, the act and the intention. Stevens v. Larwill, 84 S. W. 113, 118, 110 Mo. App. 140 (citing State ex rel. Lowe v. Banta, 71 Mo. App. 32; Greene v. Beckwith, 38 Mo. 384; Johnson v. Smith, 43 Mo. 499; Tiller v. Abernathy, 37 Mo. 196).

An averment that the parties are "inhabitants" or "residents" of different states is not equivalent to an averment that they are "citizens." Wood v. Mann, 1 Sumn. 578, 30 Fed. Cas. 447, 448.

The word "inhabitant" is equivalent to the word "citizen" as used in U. S. Comp. St. 1901, p. 587, § 740, providing that, when a state contains more than one district, every suit not of a local nature in the Circuit or District Courts thereof against a single defendant, inhabitant of such state, must be

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brought in the district where he resides, and is used to avoid the incongruity of speaking of citizens of anything less than a state when the word "inhabitant" applies to a citizen of any district in a state which was divided into more than one district. Firestone Tire & Rubber Co. v. Vehicle Equipment Co., 155 Fed. 676, 678 (citing Galveston, H. & S. A. Co., 14 Sup. Ct. 401, 151 U. S. 496, 38 L. Ed. 248).

Levee district

A levee district, such as that created by Acts 1909, p. 660, creating levee district No. 2, in Jackson county, is not within Const. art. 2, § 18, prohibiting the granting to any citizen or class of citizens privileges which shall not belong to all citizens upon the same terms, since a levee district is a governmental agency, and not a "citizen," and its powers are public duties, and not a grant of privileges. St. Louis, I. M. & S. Ry. Co. v. Board of Directors of Levee Dist. No. 2, Jackson County (Ark.) 145 S. W. 892, 896.

Naturalized citizen

Where the term "Mexican" or "Spaniard" or other similar designation of nationality is used in a statute, it includes naturalized "citizens" as well as those who are native-born. Ruis' Hevis v. Chambers, 15 Tex. 586, 589.

Negro

The term "citizens of the United States," as used in Const. art. 2, § 1, providing that every male citizen of the United States of the age of 21 years and upward, excepting paupers, etc., having his residence established in the state for the term of three months next preceding any election shall be an elector for governor, senators, and representatives in the town or plantation where his residence is established, includes free colored persons of African descent. Opinions of the Justices, 44 Me. 505, 515.

People synonymous

See People.

As person

See Person.

Personal representative

The personal representative of a nonresident deceased, having qualified as such in this state, was a "citizen" of the state for purposes of the action, and as bearing on the question of removal of the cause. Lemon's Adm'r v. Louisville & N. R. Co., 125 S. W. 701, 702, 137 Ky. 276.

As resident

The word "residence" may refer either to a fixed and settled abode or to one merely of some duration; hence a statement of an applicant for insurance that his residence was in Kansas was not necessarily a declaration that he was a "citizen" of that state. Kroge v. Modern Brotherhood of America (Mo.) 105 S. W. 685, 687.

An averment in a pleading that plaintiff is a resident of a particular state is not equivalent to one that he is a "citizen" of that state, and is insufficient to give a federal court jurisdiction, where that is dependent on diversity of citizenship. Board of Trustees of Mohican Tp., Ashland County, Ohio, v. Johnson, 133 Fed. 524, 66 C. C. A. 592.

State

A proceeding before the state board of control to determine water rights in a river as between various claimants under authority conferred by Or. Laws 1909, p. 319, is, in effect, a proceeding on behalf of the state, through an administrative or executive board, to have the rights of the various claimants determined, and the state, which is not a "citizen" within the removal statutes, being, in effect, a party to the proceeding, it was not removable to the federal court under Judicial Code, § 24. In re Silvies River, 199 Fed. 495, 503.

A suit by a state to recover taxes on property omitted from taxation brought against nonresidents is not removable to the federal court, as there was no diversity of citizenship; a state not being a "citizen" within U. S. Comp. St. 1901, p. 509.—Darnell v. State, 90 N. E. 769, 772, 174 Ind. 143.

A state is not a "citizen," within the meaning of the Constitution or the acts of Congress; hence the federal Circuit Court cannot take cognizance of a case instituted by a state against a corporation of another state as one presenting a controversy between citizens of different states. Minnesota v. Northern Securities Co., 24 Sup. Ct. 598, 601, 194 U. S. 48, 48 L. Ed. 870 (citing Postal Telegraph Cable Co. v. Alabama, 15 Sup. Ct. 192, 155 U. S. 482, 487, 39 L. Ed. 231).

Town

"Citizens," as used in a statute amending the charter of a railroad and directing that the road build its line to or near a city named, and that a certain amount of the expense of building the road should be paid by the town, or the citizens thereof, refers to the people of the town, and both "citizens" and "town" as used in that statute are synonymous. Macon & B. R. Co. v. Gibson, 11 S. E. 442, 445, 85 Ga. 1, 21 Am. St. Rep. 135.

As voter

"Citizen" and "elector" are not synonymous, for the qualifications of a voter are prescribed by the laws of the different states. In re Rousos, 119 N. Y. Supp. 34, 36.

The word "citizen," as used in a statute to denote the persons who may sign petitions for change of school district boundaries, means an elector. School Dist. No. 11 v. School Dist. No. 20, 39 S. W. 850, 851, 63 Ark. 543.

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Woman

Where a woman was born a "citizen" of the United States, she did not lose her citizenship by marrying an alien, at least so long as she continued to reside in the United States. Wallenburg v. Missouri Pac. Ry. Co., 159 Fed. 217, 219.

CITIZEN OF SPAIN

A corporation created by a decree of the Spanish crown for charitable purposes, and limited in its field of operations to Porto Rico, does not continue, after the ratification of the treaty of peace between the United States and Spain, to be a citizen or subject of Spain, within the meaning of Act March 2, 1901, c. 812, § 3, 31 Stat. 953, extending the jurisdiction of the District Court of the United States for Porto Rico to controversies where the parties or either of them are citizens or subjects of a foreign state. Martinez v. La. Asociacion de Señoras Damas Del Santo Asilo de Ponce, 29 Sup. Ct. 327, 328, 213 U. S. 20, 53 L. Ed. 679.

CITIZEN OF SWEDEN

The alienage of the plaintiff is sufficiently alleged to sustain the jurisdiction of a federal Circuit Court by an averment in the complaint that the plaintiff now is, and for more than one year last past has been, a resident of Washington and a "citizen of Sweden," although at the time that the action was brought Sweden was under a monarchial form of government, since the designation "citizen of Sweden" could only have been intended as a statement of the nationality of the plaintiff, viz., the country to which he bore allegiance. C. H. Nichols Lumber Co. v. Franson, 27 Sup. Ct. 102, 104, 203 U. S. 278, 51 L. Ed. 181.

CITIZENSHIP

See Diverse Citizenship.
Certificate of, see Certificate of Citizenship.

A fundamental right inherent in "state citizenship" is a privilege or immunity of that citizenship only. Privileges and immunities of "citizens of the United States," on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Twining v. New Jersey, 29 Sup. Ct. 14, 18, 211 U. S. 78, 94, 53 L. Ed. 97.

An allegation in a declaration, that plaintiff complains of "the Chicago Lumber Company, who is a citizen of the state of Illinois, defendant in this suit," is an allegation of the "citizenship" of the corporation as one incorporated under the laws of Illinois, within the act of Congress conferring jurisdiction. Chicago Lumber Co. v. Comstock, 71 Fed. 477, 480, 18 C. C. A. 207.

To make "citizenship," the two elements of residence and the intention that such residence shall be permanent must concur. Where complainant alleged in his bill in a federal court that he was a citizen of North Carolina, and it was shown without contradiction that he was a native of that state, that his home, where his wife and family resided, had always been there, and that he visited them frequently and always voted there in national elections, the presumption of his citizenship in that state was not overcome by proof that for several years he had been, for a large part of the time, in Georgia, where the suit was brought, in connection with his business there in different places, that he took part in a political meeting there as member of a local committee, and that on one occasion he registered and voted there at a primary, especially since the Georgia statute requires apparently only residence and the payment of taxes to entitle any citizen of the United States to vote. Gaddie v. Mann, 147 Fed. 955, 956.

The leading purpose in the adoption of the fourteenth and fifteenth amendments to the federal Constitution, the former defining "citizenship" by declaring "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," and the latter securing to citizens of the United States the right to vote, was to secure to persons of African descent the full enjoyment of the privileges of citizens, including the right to vote; and the federal courts have jurisdiction of a suit by such person against the officers of a state to restrain them from acting under a statute claimed to violate said amendments by abridging or denying such privileges. The statutes of South Carolina (Gen. St. 1882) relating to the registration of voters constitute an unreasonable restriction on the right of suffrage and are in violation of the federal Constitution. Mills v. Green, 67 Fed. 818, 828.

"Citizenship" does not carry with it the right on the part of the citizen to dispose of land which he may own in any way he sees fit, without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent on, citizenship. Neither does it detract from the dignity of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived for the time being of the right to alienate it. Williams v. Steinmetz, 82 P. 986, 989, 16 Okl. 104.

"Citizenship," essential to confer federal jurisdiction, cannot depend entirely on birth, but may be changed from one state to another, or to a foreign country, by change of residence. Hammerstein v. Lyne, 200 Fed. 165, 170.

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Domicile distinguished

"Citizenship" and "domicile" are not the same thing. Neither necessarily controls the other. The matter of domicile is ordinarily of private concern only. Citizenship is a matter of public concern, over which the government assumes, in some degree, control. It is in its nature continuous, and, once established, is presumed to continue until the contrary is shown. A change of domicile, merely, does not effect a change of allegiance. To overcome the presumption of the continuance of the allegiance once established, evidence of an actual removal or a continued residence abroad, with a fixed purpose to throw off and terminate the former allegiance, must be produced. State v. Jackson, 65 A. 657, 660, 79 Vt. 504, 8 L. R. A. (N. S.) 1245.

"Domicile" and "citizenship" are substantially synonymous terms in most cases, but there is a marked distinction between "domicile" and "residence"; the term "residence" indicating a place of abode, whether permanent or temporary, while "domicile" denotes a fixed permanent residence, to which, when absent, one has the intention of returning, and when there has been an actual removal with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces on him the character of a citizen of the state where he has chosen his domicile, although he may have formerly declared that he nevertheless considered himself a citizen of the state he had left. Harding v. Standard Oil Co., 182 Fed. 421, 423, 424.

To constitute "citizenship" of a state in relation to the federal Judiciary Act, there must be residence within the state and an intention that the residence shall be permanent. State citizenship means the same thing as "domicile" in its general acceptation. Marks v. Marks, 75 Fed. 321, 324.

Residence distinguished

"Residence" is not equivalent to "citizenship." Yocum v. Parker, 130 Fed. 770, 771, 66 C. C. A. 80.

"Citizenship" and "residence" are not synonymous terms. A person may reside in one state and be a citizen in another. An allegation, in a petition for removal of a suit pending in the state court to the federal court, that defendant is a citizen of a state other than that in which the suit is pending, is not equivalent to an allegation that he is a nonresident of that state, and does not show his right to a removal. Irving v. Smith, 132 Fed. 207.

"Citizenship" and "residence" are not convertible terms. "Citizenship" is a status or condition, and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become such citizen by mere residence. The residence and the intent must coexist and correspond; and though, under ordinary circumstances, the former may be sufficient evidence of the latter, it is not conclusive, and the contrary may always be shown; and when the question of citizenship turns on the intention with which a person has resided in a particular state, his own testimony, under ordinary circumstances, is entitled to great weight on the point. Eisele v. Oddie, 128 Fed. 941, 945.

An averment of the "residence" of a plaintiff is not equivalent to one of "citizenship," and does not give a circuit court jurisdiction, where it is dependent on diversity of citizenship. Sanbo v. Union Pac. Coal Co., 140 Fed. 713, 714, 72 C. C. A. 24.

The terms "residence" and "citizenship" are not equivalents. An allegation in a complaint that plaintiff is a "bona fide resident" of a certain state is not one of his "citizenship" in such state, and is not sufficient to give a federal court jurisdiction on the ground of diversity of citizenship. Koike v. Atchison, T. & S. F. Ry. Co., 157 Fed. 623, 624 (citing Marks v. Marks [C. C.] 75 Fed. 321; Wolfe v. Hartford, etc., Ins. Co., 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; Horne v. Hammond Co., 155 U. S. 393, 15 Sup. Ct. 167, 39 L. Ed. 197; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914).

A distinction is to be observed between "citizenship" and "residence" for the purpose of suit. The question of suability and jurisdiction is not so much one of citizenship as of finding. If a citizen of one state is found, for the purpose of the lawful service of judicial process, in another, he may ordinarily be sued there. A partnership may be sued in any county in which one of the partners has such a residence as will confer upon the courts of that county jurisdiction over his person, regardless of the place of his citizenship. J. B. Pyron & Son v. Ruohs, 48 S. E. 434, 436, 120 Ga. 1060 (quoting Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 10, 26 L. Ed. 643; Williams v. East Tennessee, V. & G. Ry. Co., 16 S. E. 303, 90 Ga. 519, 522).

"Citizenship" carries with it the idea of connection or identification with the state, and a participation in its functions, and, as such, implies much more than "residence." "Citizenship" as used in the removal laws and the jurisdiction statute of 1875 means "residence" with the intention of permanently remaining in a particular place. Harding v. Standard Oil Co., 182 Fed. 421, 425.

CITY

See Election in City; Incorporated City or Town; Justice of the Peace in the City; Money of the City; Property Within the City.

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Any city, see Any.
Presentation of claim against city, see Present—Presented—Presentation.
Such cities, see Such.

Politically and socially, a "city" is an aggregation of people. Cunningham v. City of Seattle, 84 Pac. 641, 642, 42 Wash. 134.

A "city" is a mere intangible thing, existing only in legal contemplation; it could not itself use the franchise, and can act only through its governing body, the board of trustees. A grant of a franchise, in terms, to the city, would be, in effect, a grant to the body having the power to use it. Davoust v. City of Alameda, 84 Pac. 760, 763, 149 Cal. 69.

"The 'city' is a miniature state, the council is its legislature, the charter is its constitution; thus as an exercise of legislative power pursuant to a proper delegation of authority, an ordinance of a city stands on the same general footing as an act of the Legislature." Pittsburgh, C., C. & St. L. Ry. Co. v. Hartford City, 85 N. E. 362, 364, 170 Ind. 674, 20 L. R. A. (N. S.) 461 (quoting and adopting the definition in Citizens' Gas & Min. Co. v. Town of Elwood, 16 N. E. 624, 626, 114 Ind. 332, 336).

A "city" is a corporation as well as a political and governmental subdivision and agency. Street v. Varney Electrical Supply Co., 66 N. E. 895, 896, 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. Rep. 325.

An affidavit to compel plaintiff to give security for costs, under Code Civ. Proc. § 3268, as amended by Laws 1904, c. 524, authorizing defendant in an action in the City Court of New York to require security for costs from plaintiff if the latter is a nonresident, is insufficient, where it fails to allege that plaintiff has no office either in the borough of the Bronx or in the borough of Manhattan, but alleges merely that he resides in Brooklyn, and has no office in the borough of Manhattan, regardless of whether the word "city," as used in the Code, is governed by New York City charter (section 1345, c. 466, Laws 1901), defining the word "city" so as to include the entire city, of five boroughs, and not merely the original city, as it existed prior to the consolidation. Pelz v. Roth, 92 N. Y. Supp. 263, 264, 46 Misc. Rep. 419.

Section 4935 of the Rev. Codes, which provides: "In any civil action or proceeding wherein the state or the people of the state, is a party plaintiff, or any state officer, in his official capacity, or on behalf of the state, or any county, or city, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state or the people thereof, or any officer thereof, or of any county, or city; but on complying with the other provisions of this Code, the state, or the people thereof, or any state officer acting in his official capacity, or any county or city, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this Code"—applies to villages organized under the laws of this state governing the organization of cities and villages. Trueman v. Village of St. Maries, 123 Pac. 508, 509, 21 Idaho, 632.

"Cities" are deemed voluntary corporations, and, while they exercise political functions, it is considered that their charters are granted, not so much with a view to the interests of the public, as for the private advantage of their citizens. James v. Trustees of Wellston Tp., 90 Pac. 100, 101, 105, 18 Okl. 56.

Const. §§ 109, 135, 143, vesting the judicial power in designated courts, and authorizing the establishment of a police court in each "city and town," and declaring that all laws inconsistent with the Constitution shall cease on its adoption, repeal so much of the charter of the district of Clifton as provides for a police court thereof; the words, "city and town" referring to cities and towns classified by section 143. Morris v. Randall, 112 S. W. 856, 857, 129 Ky. 720.

As county

See County.

Municipal corporation imported

The initiative provision of the charter of Los Angeles (St. 1903, p. 572) authorizing direct legislation by the citizens, is authorized by Const. art. 11, § 11, providing that any county, "city," town, or township may make and enforce within its limits certain regulations; the term "city" not meaning some board or officers of the city, but the municipality, or the people in their organized condition as a body politic. In re Pfahler, 88 Pac. 270, 271, 150 Cal. 71 (citing 1 Dill. on Mun. Corp. [3d Ed.] §§ 21, 40).

As party beneficially interested

See Beneficially Interested.

As place

See Place.

As political subdivision of state

Political subdivision within constitutional provision, see Political Subdivision.

"A 'city' is a creation of the Legislature, a subordinate agency of the state, which exercises only such power as the Legislature confers, and for such period of time as the Legislature in its discretion determines." Wulf v. Kansas City, 94 Pac. 207, 209, 77 Kan. 358.

"A 'city' is a branch, a subordinate agent, of the state government, vested with grave and important powers of state government delegated to it by the state." Bryant v. Logan, 49 S. E. 21, 22, 56 W. Va. 141, 3 Ann. Cas. 1011.

A "city" is only a political subdivision of the state, made for the convenient ad-

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ministration of the government. It is an instrumentality with powers more or less enlarged, according to the requirements of the public, which may be increased or repealed at the will of the Legislature. State v. Aberdeen, 74 Pac. 1022, 1024, 34 Wash. 61.

"The 'city' is an arm or branch of the state government, and in the administration of its public affairs it acts as an agent of the state, and no property held by it for a purely public or governmental purpose is subject to taxation any more than the public property of the state itself is subject to taxation." A sinking fund created to liquidate the bonded debt incurred by a city in the purchase of a waterworks system is but so much taxes collected to liquidate a debt, incurred for a public purpose, notwithstanding it is invested in interest-bearing stocks and bonds, and is exempt from taxation under Const. § 170, providing that public property for public purposes shall not be taxed. Commonwealth ex rel. Albritton v. Lebanon Waterworks Co., 112 S. W. 1128, 1129, 130 Ky. 61.

"Cities" are territorial subdivisions of the state, created as public corporations for convenience in administration of government, and they exercise only the powers which have been conferred expressly or by necessary implication, and they have a twofold character, the one governmental and the other private; and in the former they execute the functions and possess the attributes of sovereignty delegated by the Legislature, while in the latter they are clothed with the capacities of a private corporation, and may claim its rights and immunities, and are subject to its liabilities. Higginson v. Slattery, 99 N. E. 523, 524, 212 Mass. 583, 42 L. R. A. (N. S.) 215.

A "city" is but the political subdivision of the state, and is given power to maintain a waterworks system for the purpose of promoting the comfort, health, and safety of its inhabitants as the agent of the state. Commonwealth v. City of Covington, 107 S. W. 231, 232, 128 Ky. 36, 32 Ky. Law Rep. 837, 14 L. R. A. (N. S.) 1214; Same v. City of Newport, 107 S. W. 232, 32 Ky. Law Rep. 820.

Under Act Cal. April 19, 1856 (St. 1856, p. 145), commonly known as the "consolidation act," which provided that the corporation known as the "City of San Francisco" shall "remain and continue to be a body politic and corporate in name and fact, by the name of the City and County of San Francisco," such corporation in matters of government, must be regarded as a city, while geographically it is one of the legal subdivisions of the state and in that respect is a county. Kahn v. Sutro, 46 Pac. 87, 89, 114 Cal. 316.

"A 'city' is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the Legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the Legislature only exercises a power through its subordinate agent, which it could exercise directly; and it does this, only in another way, when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent." City of Worcester v. Worcester Consol. St. Ry. Co., 25 Sup. Ct. 327, 330, 196 U. S. 539, 49 L. Ed. 591 (quoting and adopting the definition in New Orleans v. Clark, 95 U. S. 644, 654, 24 L. Ed. 521, 522).

"A 'city or incorporated town' not only bears a property or private relation to the state, but it also bears a political relation thereto. In its political relation it is merely an agency of the state." Where it holds a street for the benefit of the public, the Legislature can direct the manner in which it shall exercise its control. Harder's Fireproof Storage & Van Co. v. City of Chicago, 85 N. E. 245, 251, 235 Ill. 58, 14 Ann. Cas. 536 (quoting the definition in Cicero Lumber Co. v. Town of Cicero, 51 N. E. 758, 762, 176 Ill. 9, 22, 42 L. R. A. 696, 68 Am. St. Rep. 155).

Town distinguished

Town as including city, see Town.

A town is not a "city" within the statute authorizing the adoption of children upon the consent of the mayor of the "city" where the child is living, so that the adoption proceedings were invalid where the consent was given by the mayor of a "town." Anderson v. Blakesly (Iowa) 136 N. W. 210, 211.

The word "city," as used in the proviso found in Laws 1899, c. 143, § 1, declaring that in any school township containing a "city" of 800 inhabitants or more, and which is not organized as an independent school district, the residents in said school township, outside the city limits, may separate themselves from the city and organize a distinct school township, by presenting to the county superintendent of schools a sufficient petition, does not include incorporated towns or villages. Plummer v. Borshein, 80 N. W. 690, 691, 8 N. D. 565.

CITY ATTORNEY

The "city attorney" is the general law officer of the municipality, and it is his duty to attend to all legal business of the city, except prosecutions in the police court. City of Bowling Green v. Gaines, 96 S. W. 852, 853, 123 Ky. 562.

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Acts 1905, p. 111, § 2, requires one, about to sue a city, village, etc., for personal injuries to within six months, etc., file in the office of the "city attorney" (if there be one), and also in the office of the city clerk, a written statement, giving the name of the person injured, the date and place where the accident occurred, etc. Section 3 provides that, if the notice is not filed, the suit shall be dismissed and the action be forever barred. Held, that the city or village attorney referred to must be a licensed attorney having an office or place of business, and where a village has no such attorney the notice may be served on the village clerk. Donaldson v. Village of Dieterich, 93 N. E. 366, 367, 247 Ill. 522.

Employment as "city attorney" includes services rendered in connection with a special tax matter and compensation as city attorney covers such services, and the city collector may not contract with him for additional compensation for services in such matter. Edwards v. City of Kirkwood, 142 S. W. 1109, 1110, 162 Mo. App. 576.

Where an attorney was paid the salary of city attorney and referred to himself as the successor in office of the preceding city attorney, that he failed to take the oath of office, notwithstanding Rev. St. 1909, § 9323, providing that, where an appointee fails to take the oath of office, his office shall be deemed vacant, did not prevent him from being a de facto officer, so as to preclude a claim of additional compensation for services in a special tax matter, rendered pursuant to a contract with the city collector. —Id.

As executive officer

See Executive Officer.

As judicial officer

See Judicial Officer.

As ministerial officer

See Ministerial Office—Officer.

CITY CLERK

As town clerk, see Town Clerk.

CITY COUNCIL

Member of city council, see Member.

The words "city council" usually mean the whole "city council"; that is to say, both branches when there are two, and one branch when there is but one branch. Attorney General v. Douglass, 80 N. E. 581, 195 Mass. 35.

A "city council" is a miniature General Assembly, and their authorized ordinances have the force of laws passed by the Legislature of the state. Kersey v. Terre Haute, 68 N. E. 1027, 1029, 161 Ind. 471 (citing Taylor v. Corondelet, 22 Mo. 105).

The term "city council," in Denver City Charter (Laws 1893, c. 78), requiring an ordinance directing the erection of a storm sewer to be passed by a two-thirds vote of the council, and providing that a majority of the members-elect of each board shall be a quorum to transact business, and that no action of either board except an adjournment shall have force unless a majority of the members-elect vote in favor thereof, means a quorum of each branch; and a two-thirds vote of each of such quorum, provided such vote constitutes a majority of all the members-elect to the branch in which such vote is taken, is sufficient. City of Denver v. Rubidge, 116 Pac. 1130, 1132, 51 Colo. 224.

CITY COURT

The words "city court," used in Acts 1899, p. 48, purporting to confer authority upon the judge of a city court to preside in another city court when the judge of the latter court is disqualified, are used in their constitutional sense, and apply only to city courts from which a direct bill of exceptions lies to the appellate court. Georgia, F. & A. R. Co. v. Sasser, 60 S. E. 997, 998, 130 Ga. 394 (citing Wells v. Newton, 28 S. E. 640, 101 Ga. 141).

The act creating the city court of Sylvania (Acts 1902, p. 170) makes it a "city court" within the meaning of that term as used in the Constitution, as construed in Welborne v. State, 40 S. E. 857, 867 (1), 114 Ga. 793. Mock v. Waters, 65 S. E. 579, 6 Ga. App. 608.

The municipal court of the city of Chicago is a "city court" within the terms of the Appellate Court and Practice Acts, since the Legislature does not derive power to create that court from Const. art. 4, § 34, providing that, if the General Assembly shall create municipal courts in the city of Chicago, the jurisdiction and practice of such courts shall be the same as the General Assembly shall prescribe, but from the authority conferred in the Constitution to create courts in and for cities and incorporated towns. People v. Cosmopolitan Fire Ins. Co., 92 N. E. 922, 924, 246 Ill. 442.

The municipal court of Chicago, while within the generic name of "city court," belongs to a specific class different from the city courts established under the general city court act (Hurd's Rev. St. 1908, c. 37, §§ 240–263), and is created, not as part of the judicial department of the state at large, but as a local court of the city to administer the law within the city, and hence while the court is in a class by itself and the Legislature may provide for the review of its judgments in its discretion, yet the laws relating to other courts must apply uniformly to the practice in such court, so as to make their operation the same under similar conditions. People v. Hibernian Banking Ass'n, 92 N. E. 305, 307, 245 Ill. 522.

The term "city courts" in Justices' Code, § 1, limiting the jurisdiction of justices of the peace in counties where city court are

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established, does not include the county court of Douglas county, and the jurisdiction of justices in that county was not affected by that provision. McDougle-Craig & Co. v. Greenlees, 108 Pac. 827, 82 Kan. 440.

There is no substantial or material difference between the terms "city court" and "municipal court." Miller v. People, 82 N. E. 521, 523, 230 Ill. 65.

CITY DATUM

A "city datum" is a certain monument or object, of a permanent character, which has been adopted by the municipality as a base or starting point for the grades and levels of the municipality. Chicago Consol. Traction Co. v. Village of Oak Park, 80 N. E. 42, 44, 225 Ill. 9.

CITY ENGINEER

Decision, see Decision.

CITY GOVERNMENT

"City government" usually means the mayor, board of aldermen, and common council of a city. Grace v. Board of Health of City of Newton, 135 Mass. 490, 494.

CITY IMPROVEMENT FUND

Code, § 894, authorizes any city to levy an "improvement fund tax" to pay for street improvements. Section 830 provides for payment of street improvements out of the "city improvement fund." Held, that both statutes refer to the same fund, and contracts for paving which provide for payment of difference between amount due for paving and amount raised by special assessments out of the "paving fund" and "general paving fund" refer to the fund specified in the statutes. Corey v. City of Ft. Dodge, 111 N. W. 6, 8, 133 Iowa, 666.

CITY JUSTICE OF THE PEACE

As inferior court, see Inferior Court.

CITY LIMITS

See Within the Limits.

CITY LOT

One town or city lot, see One Lot.

Rev. Codes, § 4466, declaring that no lease of any city lot for more than 25 years shall be valid, applies only to city lots as such, and does not affect section 4465, providing that no lease of agricultural lands for a longer period than 10 years shall be valid; the term "city lot" meaning a lot within the limits of a city, regardless of its other characteristics, while the term "agricultural lands" is descriptive of the nature of the land itself, and does not necessarily mean acre property. Lerch v. Missoula Brick & Tile Co., 123 Pac. 25, 28, 45 Mont. 314.

CITY OFFICER

See, also, Municipal Officer.

Assembly

A member of a municipal assembly is a city officer. State v. Kelly, 77 S. W. 996, 997, 103 Mo. App. 711.

Board of health

The secretary of a city board of health is an "officer," within the act for the incorporation of cities, approved March 14, 1867 (Laws 1867, c. 15, § 52), declaring that no "city officer" shall be in any manner interested in any contract with the city, and a contract made in violation thereof to be void, and hence a contract, between a city and the secretary of the board, whereby the secretary is to care for smallpox patients, is void, unless such an emergency exists that it would be manifestly unjust to delay action in order to comply with the strict requirements of the statute. City of Greenfield v. Black, 82 N. E. 797, 798, 42 Ind. App. 645.

Election commissioner

The office of election commissioner of St. Louis being created by act of the Legislature, the incumbents being appointees of the Governor, and their functions applying to all elections (Rev. St. 1899, § 7223), such a commissioner is not a "city officer," so as to prevent the corporation of which he is president making a contract with the city, under City Charter, art. 4, § 10, providing that city officers shall not be interested in a contract with the city. State v. Meier, 69 S. W. 668, 669, 96 Mo. App. 160.

Improvement board

Ordinances authorizing the president of the improvement board and the city comptroller each to "designate an assistant, clerk or other subordinate" to do clerical work, do not create new offices as authorized by St. Louis City Charter, art. 4, § 45; the appointees not being "city officers," but clerks or assistants to the officer appointing them. State ex rel. Skrainka Const. Co. v. Reber, 126 S. W. 397, 398, 226 Mo 229.

Justice of the peace

By Sess. Laws 1901, p. 109, c. 107, providing that precinct officers are one justice of the peace and one constable, and that cities of the first class shall not be divided, but shall be deemed one precinct for the purpose of electing a justice and constable, justices of the peace in cities of the first class are precinct officers, and not merely "city officers"; and the fact that the territorial boundaries of their precinct are coextensive with the city does not render them city officers, and, as a class by themselves, subject to special legislation. Love v. Liddle, 72 Pac. 185, 187, 26 Utah, 62.

Marshal

The marshals provided for in each division of the city court of Kansas City, Kan., by Laws 1905, c. 193, are not "city officers," and women are not qualified voters in the

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election of such officers. Fee v. Richardson, 107 Pac. 789, 790, 82 Kan. 190.

Overseer of poor

The overseer of the poor elected under P. L. 1902, p. 284, § 2, to perform the duties prescribed by section 19 of the act, is a "city officer," within the meaning of section 7 of the act, providing that any city officer may be removed from office by resolution of the council for good cause shown on complaint, notice, and hearing. Barlow v. Atlantic City, 78 Atl. 11, 80 N. J. Law, 510.

Police officer

A janitor of a police station, who was removed by the police commissioners, was not protected from removal by St. 1885, c. 266, § 5, providing that officers and boards of the city of Boston may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," since the police commissioners were not "officers" and did not constitute a "board of the city of Boston," but were appointed by and were responsible to the Governor of the commonwealth. Sims v. Police Com'r for City of Boston, 79 N. E. 824, 825, 193 Mass. 547 (citing Commonwealth v. Plaisted, 19 N. E. 224, 148 Mass. 375, 383, et seq., 2 L. R. A. 142, 12 Am. St. Rep. 566; Phillips v. City of Boston, 23 N. E. 202, 150 Mass. 491, 494).

A policeman is not strictly a state officer, nor is he a "municipal officer" or servant of a city in which his duties are to be performed, and is therefore not within Const. art. 16, § 6, limiting the terms of office of municipal officers to two years. The term "municipal officer," as used in Const. art. 16, § 6, limiting the terms of office thereof to two years, means "city officers"; the word "municipal" having its origin in the idea of a free town or city, and in its popular use is applied to cities, though in its general meaning it embodies the idea of local self-goverment, as distinguished from centralized government. "Municipal" may either refer to a town or a city. State v. Edwards, 99 Pac. 940, 941, 946, 38 Mont. 250 (quoting and adopting definition in 5 Words and Phrases Judicially Defined, p. 4618.)

CITY PROPERTY

It is sometimes difficult to determine whether property is "city property" and as such taxable for local improvements, or whether it is rural, and the fact that land within city limits is altogether used for agricultural purposes does not exempt it from assessment. Duker v. Barber Asphalt Paving Co. (Ky.) 74 S. W. 744, 745 (citing Smith, Mun. Corp. § 1236; Barber Asphalt Co. v. Garr [Ky.] 73 S. W. 1106).

The words "city property," in Portland City Charter, providing that the "city council shall have the custody and management of all city property," etc., include all property to which the city has title, and not simply what is taken or purchased for municipal purposes. Libby v. City of Portland, 74 Atl. 805, 807, 105 Me. 370, 26 L. R. A. (N. S.) 141, 18 Ann. Cas. 547.

CITY PURPOSE

The construction of a bridge across the Mississippi river for rail and general travel is a legitimate public "city purpose," and a proper public improvement, though a portion thereof be beyond the city's corporate limits. Haeussler v. St. Louis, 103 S. W. 1034, 1040, 205 Mo. 656.

The establishment and maintenance of a fountain, at the intersection of two principal and much traveled streets, for quenching the thirst of animals using the streets, is a "city purpose," and a water company, under a contract with the city which requires it to furnish water to the extent of 12,000,000 gallons every six months free of charge for city purposes, cannot collect from said city for water supplied to such fountain. Water Supply Co. of Albuquerque v. City of Albuquerque (N. M.) 128 Pac. 77, 43 L. R. A. (N. S.) 439.

The construction of a subway is a "city purpose," within Const. art. 8, § 10, which prohibits the incurring of indebtedness by a city, except for a city purpose. Admiral Realty Co. v. City of New York, 99 N. E. 241, 245, 206 N. Y. 110.

CITY RAILWAY

"When the broad term 'city railway' is used, the term must be taken to mean only what is essential to the definition of the term, and no particular motive power is essential. Whenever a statute specifies the motive power to be used, the expression of that power may be construed to exclude any other. When no kind of motive power is mentioned, it should be taken to indicate that the Legislature means a city railway, however propelled, whether by powers then familiar or those they know not of; in fact any kind of power which the ingenuity of man may contrive that does not constitute an additional burden upon the highway, or an injury and annoyance to the public." Howley v. Central Valley R. Co., 62 Atl. 109, 112, 213 Pa. 36, 2 L. R. A. (N. S.) 138, 5 Ann. Cas. 51 (quoting and adopting definition in Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co., 46 Atl. 12, 8 Del. Ch. 468, and citing Halsey v. Rapid Transit St. Ry. Co., 20 Atl. 859, 47 N. J. Eq. 380).

"When the broad term 'city railway' is used, the term must be taken to mean only what is essential to the definition of the term, and obviously no particular motive power is essential. Whenever a statute specifies the motive power to be used, the expression of the power must be construed to exclude any other. * * * When no kind of motive power is mentioned, it should be taken to indicate that the Legislature means

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what it says—a 'city railway,' however propelled, whether by powers then familiar or those they know not of; in fact, any kind of power which the ingenuity of man may contrive that does not constitute an additional burden on the highway or injury or annoyance to the public." Bubenzer v. Philadelphia, B. & W. R. Co. (Del.) 61 Atl. 270, 273 (quoting Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co., 46 Atl. 12, 8 Del. Ch. 468).

CITY RECORDER'S COURT

As inferior court, see Inferior Court.

CITY TREASURY

There is in Brooklyn no such precise thing as a "city treasury," and this term, used in a section of the city charter, must be taken as used to describe money that is raised, received, and expended by the municipal corporation. Public school moneys are properly thus described. Farrell v. Board of Education of City of New York, 98 N. Y. Supp. 1046, 1047, 113 App. Div. 405.

CIVIL

CIVIL ACTION—CASE—SUIT—ETC.

See, also, Cause (In Practice); Cause of Action; Suit; Suit of Civil Nature.

A "civil action" is defined as a proceeding in a court by one party against another for the enforcement or protection of a private right or the redress of a private wrong. Thrift v. Thrift, 75 Atl. 484, 485, 30 R. I. 357 (quoting 2 Words and Phrases, p. 1183).

The term "civil actions" as used in the practice act includes actions for equitable or legal relief, or both. Luddington v. Merrill, 71 Atl. 504, 81 Conn. 400.

"Every action for the enforcement or protection of private rights or the redress or prevention of private wrongs is a 'civil action.'" Harrigan v. Gilbert, 99 N. W. 909, 951, 121 Wis. 127.

A "civil action" is one brought to recover some civil right or to redress some wrong not a crime or a misdemeanor; and at common law is an action to recover private or civil rights or compensation for their infraction. Gruetter v. Cumberland Telephone & Telegraph Co., 181 Fed. 248, 251.

Under Rev. St. 1899, § 818, providing that a change of venue may be awarded in any civil suit to any court of record, the term "civil suit" refers to legal proceedings by which the rights and remedies of private individuals are enforced or protected, and authorizes a change of venue in proceedings under an assignment for benefit of creditors. In re Heath's Assignment, 117 S. W. 125, 126, 136 Mo. App. 347.

A "civil case" is a suit at law to redress the violation of some contract, or to repair some injury to property or to the person or personal rights of individuals; the term "civil case" is frequently used in statutes synonymously with civil action or civil cause Under Const. art. 14, §§ 1–3, providing that county officers shall be paid salaries, and providing for fees to be collected by the sheriff, and that in addition to the salary of the sheriff he shall receive from the party for whom the services are rendered in civil cases such fees as may be prescribed by law, and under Rev. St. 1899, §§ 1112, 1113, 1232, fixing the salaries of sheriffs, and declaring that the sheriff in addition to his salary shall receive from the party for whom the service is rendered in civil cases stated fees, and under Laws 1901, c. 79, providing for an inspection of horses and making the sheriff of each county an inspector, and providing for a fee pro rata on all horses inspected, services of a sheriff as inspector are not rendered in "civil cases," and he is not entitled to the fees collected. Messenger v. Board of Com'rs, 117 Pac. 126, 130, 19 Wyo. 309.

Actions for fines, forfeitures, or penalties.

Where a statute or ordinance imposes a penalty, unless special modes are prescribed, the sums must be collected by an action at law. Such action is a "civil action." People ex rel. Kane v. Sloan, 90 N. Y. Supp. 762, 764, 98 App. Div. 450.

An action to recover a penalty for violation of a city ordinance is a "civil suit" and not a criminal proceeding. The constitutional right to trial by jury does not apply to such action. City of Chicago v. Knobel, 83 N. E. 459, 460, 232 Ill. 112.

An action of debt to recover a penalty given by statute is a "civil action." United States v. Southern Pac. Co., 162 Fed. 412, 413.

An action against a foreign corporation to recover a penalty for violation of a statute requiring the corporation to file a copy of its articles of incorporation as a condition precedent to the transaction of business within the state is a "civil suit" and not a "criminal prosecution," within the meaning of the Constitution and laws of the state. Western Union Telegraph Co. v. Andrews, 154 Fed. 95, 98 (citing St. Louis, A. & T. Ry. Co. v. State, 19 S. W. 572, 56 Ark. 166; Kansas City, S. & M. R. Co. v. State, 37 S. W. 1047, 63 Ark. 134; St. Louis, I. M. & S. Ry. Co. v. State, 60 S. W. 654, 68 Ark. 561; Choctaw, O. & G. Ry. Co. v. State, 87 S. W. 631, 75 Ark. 369).

An action by the United States against a railroad company for the penalty imposed for a violation of act June 29, 1906, c. 3594, § 1, relative to the carriage of live stock, and known as the "28-hour law," is a "civil cause," with all the incidents of a civil suit. United States v. Atlantic Coast Line R. Co., 173 Fed. 764, 766, 98 C. C. A. 110.

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An action by the United States to recover from a carrier the penalty prescribed for violations of safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531, Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943) is a "civil," and not a "criminal," action. Chicago, B. & Q. Ry. Co. v. United States, 31 Sup. Ct. 612, 617, 220 U. S. 559, 55 L. Ed. 582.

An action for the penalty imposed by Code 1906, § 5004, imposing a penalty for the violation of the anti-trust law, is a "civil" and not a "criminal" action, within Const. 1890, § 147, providing that no judgment in a civil cause shall be reversed for want of jurisdiction, from error as to whether the case was in equity or in law, and a decree of the chancery court for a penalty will not be reversed on the ground alone that the action therefor was one at law; the term "civil cause" comprehending every conceivable cause of action, legal or equitable, except such as are criminal, where the judgment against defendant may be a fine or imprisonment, or both, and, in case of fine alone, imprisonment until payment. Grenada Lumber Co. v. State, 54 South. 8, 10, 98 Miss. 536; Dukate v. Adams, 58 South. 475, 476, 101 Miss. 433.

The qualifying term "civil" comprehends every conceivable cause of action, whether legal or equitable, except such as are criminal in the sense that the judgment against the defendant may be a fine or imprisonment, or both, and in case of fine alone imprisonment until payment, and, although a suit is in fact one to punish an offense against public justice, it may be a "civil cause," and within its definition a suit in chancery to recover penalties provided by Laws 1910, c. 134, for the illegal sale of liquor, is a "civil cause." State v. Marshall, 56 South. 792, 796, 100 Miss. 626.

Within the act creating the Newark district court and giving it jurisdiction of suits of a civil nature at law, in which the debt or other matter in dispute does not exceed $200, only private suits for private wrongs are of a "civil nature," and private suits for public wrongs or public suits for public wrongs are not suits of a civil nature. An action by a landlord for a statutory penalty imposed on a tenant holding over is a private suit for a private wrong, and within the jurisdiction of the Newark district court. Tims v. Spragg, 33 Atl. 213, 214, 58 N. J. Law, 273 (citing Koch v. Vanderhoof, 9 Atl. 771, 49 N. J. Law, 619).

In determining whether a suit to enforce a penalty provided by a state statute is one "of a civil nature" which is removable under section 2, Act Aug. 13, 1888, c. 866, 25 Stat. 434, correcting the enrollment of Act March 3, 1887, c. 373, 24 Stat. 552, and amending Act March 3, 1875, c. 137, 18 Stat. 470, the question is not whether the state statute is to be considered as remedial or penal for the purpose of the application of the rule of strict construction, but whether the action brought to enforce the penalty provided by the statute is essentially civil in its nature, as distinct from one which is criminal, or quasi criminal. Gruetter v. Cumberland Telephone & Telegraph Co., 181 Fed. 248, 251.

A penal action is a "civil suit" brought for the recovery of a statutory forfeiture, when inflicted as a punishment for an offense against the public. State ex rel. McNamee v. Stobie, 92 S. W. 191, 212, 194 Mo. 14.

"A penal action is a 'civil action' and must be brought as directed in the statute creating the same, or in accordance with the manner prescribed in the Code of Civil Procedure." Johnson v. Seaboard Air Line Ry., 52 S. E. 644, 646, 73 S. C. 36.

Adjudications of insanity

An insanity inquiry under Rev. St. 1909, § 474, involves no questions of public policy, but constitutes a civil case within Const. art. 2, § 28, as amended November 6, 1900, providing that the right to trial by jury as heretofore enjoyed shall remain inviolate and that in a trial trial by jury in all civil cases in courts of record three-fourths of the members of the jury concurring may render a verdict. State ex rel. Peper v. Holtcamp, 138 S. W. 521, 522, 235 Mo. 232.

Application for liquor license

An application for a liquor license is a "judicial proceeding," a "civil action." Scanlon v. Deuel, 94 N. E. 561, 562, 176 Ind. 208; Binzen v. Same, 94 N. E. 563, 176 Ind. 702: Bryan v. De Moss, 73 N. E. 156, 157, 34 Ind. App. 473.

The phrase "civil suit," in Rev. St. 1899, § 818, providing that a change of venue may be awarded in any "civil suit" for causes enumerated, refers to the legal proceedings by which the rights and remedies of private individuals are enforced or protected, in distinction to the words "criminal case," which refer to public wrongs and their punishment, and includes certiorari to review proceedings of the county court resulting in the granting to one of a dramshop license, since the proceeding involves the right of the licensee to sell liquor as a dramshop keeper, which is a private right. State ex rel. Bixman v. Denton, 107 S. W. 446, 448, 128 Mo. App. 304.

Attachment proceeding

An action which has for its purpose the subjection of property to the payment of a debt, and is commenced by attachment for that purpose, is a "civil action," and must be brought "in the county where the defendant resides or may be found." First Nat. Bank of Hennessey v. Hesser, 77 Pac. 36, 40, 14 Okl. 115.

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Bankruptcy proceedings

"A bankruptcy proceeding cannot be said to be an ordinary 'civil suit.' It is sui generis, and it is far-reaching and drastic in its effects. Whether accompanied by actual seizure of the bankrupt's property or not, it places an embargo on his right to dispose of his property and of his business generally. An action for malicious prosecution will lie for the institution and prosecution of a proceeding in bankruptcy without probable cause and with a malicious intent, although not accompanied by any actual seizure of the alleged bankrupt's property. Wilkinson v. Goodfellow-Brooks Shoe Co., 141 Fed. 218, 219, 220.

Bastardy proceeding

A bastardy proceeding is neither a "civil" nor "criminal" action, strictly speaking, but is a mere statutory proceeding designed primarily to enable the injured female to recover, of the person who in the eye of the law, has committed a grievous injury to her, compensation therefor. Meyer v. Meyer, 102 N. W. 52, 55, 123 Wis. 538.

A bastardy proceeding is "civil" and not "criminal" in its nature, and is intended merely for the enforcement of a police regulation. State v. Addington, 57 S. E. 398, 399, 143 N. C. 683, 11 Ann. Cas. 314 (citing State v. Liles, 47 S. E. 750, 134 N. C. 735).

A bastardy proceeding is a "civil action" for the enforcement of a police regulation, so far as it is necessary for the purpose of securing an allowance to the woman and to relieve the county from the burden of supporting the child. State v. Currie (N. C.) 76 S. E. 694, 695.

A proceeding in bastardy to compel the father or mother of a bastard child to give bond to indemnify the county from the subsequent maintenance of such child is a "civil proceeding," and not a "criminal prosecution." State v. Liles, 47 S. E. 750, 751, 134 N. C. 735.

A statute which provides that no person shall be excluded from being a witness in any "civil suit" by reason of his interest embraces a bastardy process, so as to allow defendant to testify. Murray v. Joyce, 44 Me. 342, 348 (citing Wilbur v. Crane, 30 Mass. [13 Pick.] 284).

Claim against receivers

"It has long been familiar that the 'civil action' of the Code includes all such proceedings as, prior to its enactment, were regarded as either actions at law or suits in equity, and rights of action since authorized by statute, unless the authorizing statute itself defined a mode of enforcing the right at variance from the procedure prescribed by the Code." An action brought by leave of court against a receiver for allowance of a claim to be paid in due course of administration is a "civil action." Webb v. Stasel, 88 N. E. 143, 144, 80 Ohio St. 122.

Claim for damages for flowage

A "claim for damages for flowage" of land by a milldam, under the mill acts, is not a "civil suit," within the meaning of Const. art. 1, § 20, declaring that in civil suits and in controversies concerning property the party shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. Ingram v. Maine Water Co., 57 Atl. 893, 894, 98 Me. 566.

Criminal proceedings distinguished

"Though the term 'civil causes' is often descriptively applied, in contradistinction to 'criminal causes'; yet it is not uncommon to apply it likewise in contradistinction to causes of maritime and admiralty jurisdiction." Per Wilson, J., dissenting. Wiscart v. Dauchy, 3 U. S. (3 Dall.) 325, 1 L. Ed. 619.

The word "civil" means relating to rights and remedies sought by action or suit. A "civil" remedy is the right of action given to a person injured, as opposed to a criminal prosecution. "Civil" suit, a suit for a private claim or injury. The word "civil" is used, in contradistinction to "criminal" to indicate the private rights and remedies of men as members of the community in contrast to those which are public and related to the government. Thus we speak of "civil" process and "criminal" process, "civil" jurisdiction and "criminal" jurisdiction; at common law, an action which has for its object the recovery of private or civil rights or compensation for their infraction. A proceeding under Rev. St. 1899, §§ 8195–8276, for the incorporation of a drainage district, is a "civil" suit within the meaning of Rev. St. 1899, § 818, providing that a change of venue may be awarded in "civil" suits. State ex rel. Kochtitzky v. Riley, 101 S. W. 567, 568, 203 Mo. 175, 12 L. R. A. (N. S.) 900 (quoting and adopting Webster's Dict.; 1 Bouv. Law Dict. [Rawle's Revision] p. 329).

Const. art. 14, § 1, provides that all county officers shall be paid salaries to be fixed by the Legislature. Section 2 provides for fees to be collected by the sheriff and an accounting therefor, and that, in addition to the salary of the sheriff, he shall be entitled to receive from the party for whom the services are rendered in "civil cases" such fees as may be prescribed by law. By section 3, the salaries of county officers are to be fixed by law within stated maximum limits. Rev. St. 1899, § 1112, fixed the salaries of sheriffs, and by section 1113 declared that the sheriff in addition to his salary might receive from the party for whom the service is rendered in civil cases certain stated fees. By section 1232, county officers receiving money for any county were required to pay the same into the county treasury. Laws 1901, c. 79, § 1, provided for an inspection of horses about to be transported or driven out of the state.

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Section 3 made the sheriff of each county an inspector, and required that he keep a record of inspections and file certain reports. Section 8 provided for a fee of 15 cents per head on all horses inspected, in full compensation for all inspection. Held, in an action by a sheriff to recover inspection fees paid into the county treasury pending a judicial determination, that the word "case" was to be construed as synonymous with "cause," "suit," "action," a "contested question" before a court of justice; that the term "civil cases," as used in the Constitution, was in contradistinction to criminal cases, and was to be broadly construed as inclusive of all cases not criminal, and that it was used as meaning a legal proceeding of some nature for the protection of a private right or the redress of a private wrong; and that the services of the sheriff as inspector were not rendered in civil cases, and hence that he was not entitled to the fees collected. Messenger v. Board of Com'rs of Converse County, 117 Pac. 126, 130, 19 Wyo. 309.

The distinction between a "civil proceeding" and a "criminal proceeding" is not whether the crown or the sovereign is a party, but whether the real end or object of the proceeding is punishment or reparation. Code 1904, p. 1045, § 2071, declares any one who fishes in the waters on another's land guilty of a trespass, and provides that on conviction he shall be fined. Section 2073, p. 1046, provides that the offender shall be carried before a justice, who shall try the case, and that, if judgment be rendered against the offender, it shall be for the forfeitures and costs, and if he does not satisfy the judgment the justice shall commit him to jail for one month, unless satisfaction be made. Section 2070b, cl. 8, p. 1044, provides that all penalties imposed or collected under the provisions of the chapter of which the above sections are a part shall be paid to the commonwealth. Section 3879, p. 2061, declares offenses which are not felonies to be misdemeanors. Held, that sections 2071 and 2073 create a criminal offense of the misdemeanor class and prescribe a criminal proceeding for their violation, and consequently an appeal from a judgment of conviction lies to the circuit court under Code 1904, pp. 2152, 2154, §§ 4106, 4107, providing for appeals to the circuit court from judgments of conviction in criminal cases before justices, although the fine imposed is less than $10, so that no appeal would lie to the circuit court under section 2947, p. 1562, providing for appeals in civil cases. Jernigan v. Commonwealth, 52 S. E. 361, 362, 104 Va. 850.

Contempt proceedings

A proceeding to punish for "contempt" has the characteristics of a criminal case, and is not a "civil action" within Code Civ. Proc. § 615, relative to the change of the place of trial of civil actions. State ex rel. Boston & M. Consol. Copper & Silver Min. Co. v. Clancy, 76 Pac. 10, 11, 30 Mont. 193.

A proceeding to protect the rights of the opposite party, brought under St. 1898, § 3477, subd. 3, authorizing proceedings to punish for contempt for violating a lawful order, is a "civil proceeding," while a proceeding under section 2565 et seq., authorizing courts to punish as for criminal contempt persons guilty of specified acts, brought in the name of the state, to punish an act as a criminal contempt, is a criminal proceeding, and the form of a proceeding to punish for contempt for violating an order of the court determines whether it is a civil or a criminal proceeding. Vilter Mfg. Co. v. Humphrey, 112 N. W. 1095, 1096, 132 Wis. 587, 13 L. R. A. (N. S.) 591.

Deportation proceeding

Alien Chinese persons not of the exempt classes having no right to be or remain in the United States, a deportation proceeding is a "civil proceeding," not involving punishment for a crime, the imposition of a fine, or the enforcement of a "penalty," so that defendant may not refuse to become a witness against himself. United States v. Tom Wah, 160 Fed. 207, 211, 212 (citing 6 Words and Phrases, p. 5272).

Divorce proceeding

An action for divorce is a "civil action," not embraced within actions ex contractu or actions ex delicto, though partaking of features characteristic of both, and the nature of the action is controlled by the nature of marriage, which creates a civil status. Cohen v. Cohen (Del.) 84 Atl. 122; New Jersey Soc. for Prevention of Cruelty to Animals v. Russ, 83 Atl. 961, 962, 83 N. J. Law, 450.

"Because marriage is declared to be a civil contract, it does not follow that a suit for divorce should be considered in the light of a 'civil action' merely. It is a civil action, in so far as the divorce act in itself fails to prescribe rules of procedure. If the divorce act is to be made effective, resort must be had to the Civil Code, but in so far only as recourse must be had to the rules of civil procedure is it a civil action. As the marriage relation is a public concern, so divorce is a public concern." On the trial of an action for divorce, where defendant does not appear, the trial judge has the right, and it is his duty as representing the state, to elicit facts as to matrimonial offenses committed by plaintiff, and grant or withhold the decree accordingly. Eikenbury v. Burns, 70 N. E. 837, 838, 33 Ind. App. 69.

Under Court and Practice Act, § 481, now Gen. Laws 1909, c. 298, § 8, permitting any party to a civil action heard by the superior court without a jury, aggrieved by the decision of the court upon any issue of fact or matter of law, to except thereto, exceptions lie to the decision of the superior court grant-

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ing a divorce, though not to the final decree entered six months thereafter; a divorce proceeding being a "civil action" within the statute to that extent. Thrift v. Thrift, 75 Atl. 484, 485, 30 R. I. 357.

Drainage proceedings

The words "civil case" and "civil suit" refer to the legal means by which the rights and remedies of private individuals are enforced or protected, in contradistinction to the words "criminal case," which refer to public wrongs and their punishment. A proceeding under Rev. St. 1899, §§ 8195–8276, for the incorporation of a drainage district, is a "civil suit," within section 818, providing that a change of venue may be awarded in civil suits. State ex rel. Kochtitzky v. Riley, 101 S. W. 567, 569, 203 Mo. 175, 12 L. R. A. (N. S.) 900.

Election contests

"Civil actions" do not include "election contests," which in the ordinary acceptation are special proceedings. Sumpter v. Duffie, 97 S. W. 435, 436, 80 Ark. 369.

An "election contest" is not a "civil case," within City Court Act, Laws 1901, p. 136, § 1, giving city courts concurrent jurisdiction with circuit courts in all civil cases. Brueggemann v. Young, 70 N. E. 292, 293, 208 Ill. 181.

A "contested election" is a "civil suit" brought to recover and enforce a civil right in controversy between contestant and contestee, and the rules of pleading and practice in civil suits are applicable to such contests, except when otherwise provided by the statute authorizing the proceedings. Nelson v. Sneed, 83 S. W. 786, 788, 112 Tenn. 36 (citing Boring v. Griffith, 1 Heisk. [48 Tenn.] 456; Blackburn v. Vick, 2 Heisk. [49 Tenn.] 379; State v. McConnell, 3 Lea [71 Tenn.] 335; State ex rel. Anderson v. Gossett, 9 Lea [77 Tenn.] 645; Moore v. Sharp, 38 S. W. 411, 98 Tenn. 68; Jones v. Glidewell, 13 S. W. 723, 53 Ark. 161, 7 L. R. A. 835).

Forcible entry and detainer proceedings

Proceedings in forcible entry and detainer are not "civil cases," within the purview of Const. art. 6, § 17, which provides that "appeals to the district courts from the judgments of county courts shall be allowed in all criminal cases, on application of the defendant, and in all civil cases, on application of either party, and in such other cases as may be provided by law." The statutory summary proceeding in forcible entry and detainer comes rather under the "other cases," referred to in the section quoted, than under the head of "civil cases," as the latter phrase is used therein. It is true the proceeding is a civil one, in the sense that it is not criminal, although to some extent criminal in form. Proceedings in forcible entry and detainer are intended to provide a speedy and more or less summary remedy, and belong in a class apart with other special and summary proceedings. Adkins v. Andrews, 96 N. W. 228, 1 Neb. (Unof.) 810.

Habeas corpus proceedings

A proceeding in habeas corpus is in its nature "civil." In re Jewett, 77 Pac. 567, 569, 69 Kan. 830.

Habeas corpus proceedings are "civil" and not "criminal." Winnovich v. Emery, 93 Pac. 988, 989, 33 Utah, 345.

A habeas corpus proceeding is a "civil proceeding," and an order for the discharge of the prisoner therein is appealable. Garfinkle v. Sullivan, 80 Pac. 188, 189, 37 Wash. 650.

The term "civil action" includes a proceeding in habeas corpus to determine the legality of an imprisonment or to determine the custody of an infant. Martin v. District Court of Second Judicial Dist., 86 Pac. 82, 83, 37 Colo. 110.

Mandamus proceedings

Mandamus proceedings are "civil actions," within Pub. Acts 1905, No. 309, providing for changes of venue in such actions. Woodworth v. Old Second Nat. Bank, 107 N. W. 905, 144 Mich. 338, 8 Ann. Cas. 310.

A proceeding in mandamus is a "civil proceeding," which may be in the name of the state at the relation of an individual as plaintiff. Rader v. Board of Education of Beaver Dist., 50 S. E. 240, 242, 57 W. Va. 220.

"Statutes everywhere seem to recognize the present proceeding by mandamus as a 'civil action,' with the relator as the plaintiff and the respondent as the defendant." State ex rel. Atchison, T. & S. F. R. Co. v. Board of Com'rs of Jefferson County, 11 Kan. 67, 68, 69.

Motions

The term "civil proceeding or process," as employed in Rev. St. c. 84, § 1, providing that any justice of the Supreme Judicial or either superior court may order notice concerning any civil proceeding in or out of term time, directing how it shall be given, and such order, when made in vacation, shall be indorsed on the process, is a generic term for writs of the class called judicial, and does not embrace mere motions in a pending cause. Mitchell v. Emmons, 71 Atl. 321, 324, 104 Me. 76.

Naturalization proceedings

A motion to vacate an order granting citizenship is not a suit in equity, either in form or substance, where no complaint or other pleading invoking the jurisdiction of the court to act against the defendant in the matter was ever filed, while under Code Civ. Proc. § 405, a "civil action" can only be instituted by the filing of a complaint.

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Tinn v. United States District Attorney, 84 Pac. 152, 153, 148 Cal. 773, 113 Am. St. Rep. 354.

As penal action

See Penal Action.

Probate proceedings

A proceeding in the probate court to establish a will does not come within the category of a "civil action," but is a special proceeding, though the latter is not defined in the statute. Lanning v. Gay, 78 Pac. 810, 70 Kan. 353.

An application to the clerk of the superior court to remove an administrator, as authorized by Code, § 1521, is neither a "civil action" nor a "special proceeding," within Code Civ. Proc., for the purpose of litigating rights and liabilities of adverse parties, but is a mere application for the exercise of a statutory power to protect the estate. In re Battle's Estate, 74 S. E. 23, 24, 158 N. C. 388.

Civ. Code Prac. 1869, § 2, divides remedies in civil cases into actions and special proceedings. Section 3 defines a "civil action" as an ordinary proceeding in a court of justice by one party against another to enforce a private right, or redress or prevent a private wrong, and declares that it may also be brought to recover a penalty or forfeiture. Section 4 declares that every other remedy in a civil case is a special proceeding. Kirby's Dig. § 6033, provides that a civil action is commenced by filing a complaint and causing a summons to issue. Held, that the matter of confirming accounts of guardians, or administrators or executors, is not a civil action, but a special proceeding. Nelson v. Cowling, 116 S. W. 890, 893, 89 Ark. 334.

The term "civil causes," as used in Comp. Laws 1909, § 3989, which provides that in the trial of such causes in the county court the pleadings and practice shall be the same as that of the district court, does not include matters arising in the exercise of the probate jurisdiction of the county court. There is a distinction between "civil causes" and cases arising under the probate jurisdiction of the county court under the classification of sections 15 and 16 of article 7 of the Constitution, providing for appeals from the county court to the Supreme Court and to the district court. Welch v. Barnett, 125 Pac. 472, 474, 34 Okl. 166; Stevens v. Myers, 126 Pac. 29, 62 Or. 372.

Proceedings before board

A proceeding before the railroad commissioners is not a suit or "civil cause," for those words include only actions in a court of justice, or which may come before such court by appeal, and such as are required to be commenced before other tribunals as a condition precedent to giving a court jurisdiction. They do not include proceedings before a board whose functions are administrative or ministerial merely, nor before one whose decision is final. City of Burlington v. Burlington Traction Co., 41 Atl. 514, 515, 70 Vt. 491.

Proceedings in error

Although a proceeding in error is not a "civil action," the identity of the action is not lost in the proceeding in error. Sterwerf v. Smith, 75 N. E. 944, 73 Ohio St. 62.

Proceeding on appeal

A proceeding on appeal from an order of a village board granting or refusing a license to sell intoxicating liquors is not a "civil case," within the meaning of Const. art. 1, § 24, and a final order in such a proceeding is not reviewable on appeal. Halverstadt v. Berger, 100 N. W. 934, 72 Neb. 462.

The phrase "process in civil actions" in Gen. St. 1902, § 566, providing that process in civil actions brought to the superior court must be made returnable to the next return day, or to the next but one, to which it can be made returnable, includes an appeal from the probate court to the superior court. Appeal of Campbell, 56 Atl. 554, 555, 76 Conn. 284.

A petition, under Rev. St. c. 65, § 30, for leave to enter and prosecute an appeal from a decree of the probate court, is a "civil proceeding" within chapter 84, § 1, providing that any justice of the Supreme Judicial Court, or of either of the superior courts may order notice concerning any civil proceedings in or out of term time, and notice thereon may be ordered by a justice in vacation. Sproul v. Randell, 78 Atl. 450, 451, 107 Me. 274.

Proceedings to assess damages for establishment of highway

The board of supervisors of a county, in making an order for allowance of damages for a public highway, is a tribunal, and the proceedings for its establishment a "civil case," within the meaning of the rule of practice of the circuit court providing that, "in appeals from justices' courts or other inferior tribunals, in civil cases, the appellant shall cause the case to be docketed," etc. Scott v. Lasell, 32 N. W. 322, 324, 71 Iowa, 180.

Proceedings to destroy liquor

Proceedings under an act providing for the condemnation and summary destruction of liquor illegally kept for sale are "civil" in their nature and not "criminal." Kirkland v. State, 78 S. W. 770, 72 Ark. 171, 65 L. R. A. 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 242.

Proceedings to expel or exclude aliens

A proceeding under our law to expel or exclude aliens is a "civil proceeding." United States v. Moy You, 126 Fed. 226, 227.

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A proceeding for the deportation of a Chinese laborer not having a certificate entitling him to residence required by the Chinese exclusion act is a "civil proceeding," and hence it is competent for the government to swear such person as a witness against himself. Low Foon Yin v. United States Immigration Com'r, 145 Fed. 791, 793, 76 C. C. A. 355.

Proceedings to remove officer

It is questionable whether a proceeding against a public officer for his removal from office on charges of misconduct is a "civil cause," within the meaning of Rev. Laws, c. 173, § 108, giving a right to take exceptions. Dow v. Casey, 79 N. E. 810, 811, 194 Mass. 48.

A proceeding to remove a public officer under Sess. Laws 1907–08, p. 611, c. 69, art. 3, § 23, providing that for the purpose of such removal a petition may be filed in the district court in the name of the state, or on relation of any citizen, upon the recommendation of the grand jury, or on relation of the county commissioners, or an attorney appointed by the Governor, and that a summons shall be issued and proceedings had as in other civil cases, is a "civil action." State ex rel. Smith v. Brown, 103 Pac. 762, 764, 24 Okl. 433.

Prosecution for violation of ordinance

A prosecution for the violation of a municipal ordinance designed for the preservation of the public peace, the security of the person or property, or the protection of public morals, is not "a civil action," but is a quasi criminal proceeding. Bray v. State, 37 South. 250, 253, 140 Ala. 172.

The great weight of authority in the United States is to the effect that all prosecutions for the violation of ordinances are "civil suits." A prosecution for being drunk and disorderly, in violation of an ordinance of an incorporated town, is a "civil proceeding." Fortune v. Incorporated Town of Wilburton, 82 S. W. 738, 5 Ind. T. 251, 5 Ann. Cas. 287.

Quo warranto proceedings

An information in the nature of a quo warranto is a "civil remedy," when used for the protection of private rights. People v. Healy, 82 N. E. 599, 602, 230 Ill. 280, 15 L. R. A. (N. S.) 603.

Under Code 1896, § 3428, "quo warranto" is a "civil action," and the complaint must allege the act or omission complained of concisely and clearly, and if faulty in that respect it is demurrable. State ex rel. Goodgame v. Matthews, 45 South. 307, 153 Ala. 646.

An information at the instance of the Attorney General in the nature of quo warranto, to forfeit the licenses of a foreign corporation and the charter of domestic corporations for misuser, is a "civil proceeding." State ex inf. Hadley v. Standard Oil Co., 116 S. W. 902, 1007, 218 Mo. 1.

Quo warranto is a "civil action" to redress a public wrong or enforce a public right. State ex rel. Attorney General v. Norcross, 112 N. W. 40, 43, 132 Wis. 534, 122 Am. St. Rep. 998.

An information in the nature of quo warranto was originally criminal in form and purpose; the object of the proceeding being not merely to oust, but to fine, the usurper. In the progress of time the fine fell to a nominal amount and its imposition was finally discontinued in England, though the practice still prevails in some of the American states. Therefore, through a gradual process of evolution, the procedure by information became essentially civil in character. State ex rel. Jackson v. Anheuser-Busch Brewing Ass'n, 90 Pac. 777, 778, 76 Kan. 184.

Quo warranto for the possession of an office against an intruder is a "civil action" within Burns' Ann. St. 1908, § 249, and hence within the jurisdiction of the Vigo superior court, created by the act of 1881 (Acts 1881, c. 19), giving the court concurrent jurisdiction with the circuit court in civil cases. State ex rel. Gleason v. Gerdink, 90 N. E. 70, 173 Ind. 245.

Scire facias

A scire facias on a forfeited recognizance given in a criminal prosecution is a "civil suit for recovery of money due upon contract," and hence an appeal in such proceeding, where the amount involved was only $200, should be taken to the Appellate Court. People v. Rubright, 89 N. E. 713, 241 Ill. 600.

Seizures for violation of law

A proceeding by the state, before a justice of the peace, for the seizure and destruction of liquor alleged to be kept in a prohibited district for sale, as authorized by Act Feb. 13, 1899, is a "civil proceeding," and the state is entitled to appeal from an adverse judgment, under Kirby's Dig. § 4665, authorizing any person aggrieved by a justice's judgment to appeal therefrom. White v. State, 98 S. W. 377, 80 Ark. 598.

A proceeding authorized by Liquor Tax Law (Laws 1896, c. 112) § 31c, added by Laws 1908, c. 350, for the forfeiture of liquors kept for an illegal use, is a proceeding in rem against specific property, and is a "civil" and not a "criminal" proceeding as defined by Code Civ. Proc. §§ 3335–3337, so that the court may direct a verdict in a proper case. Clement v. Two Barrels of Whisky & Divers Other Liquors, 120 N. Y. Supp. 1044, 1048, 136 App. Div. 291.

Suits in equity

Suits in chancery, wherein the statute provides the issues made may be tried by

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a jury, in which the verdicts rendered have the force and effect of the verdict of a jury in an action at law, are "civil proceedings" within the meaning of those words as employed in the statute in relation to the verdicts of juries in civil cases, being the act which provides for the submission of special questions of fact to be answered by juries. Bird v. Bird, 75 N. E. 760, 761, 218 Ill. 158.

Suit to recover for improvements

An action under Rev. St. 1899, § 3072, providing that, if a judgment of dispossession shall be given in an action for the recovery of real estate against a person in possession, such person may recover compensation for improvements made by him in good faith prior to notice of adverse title, is a "civil action," within section 1547, providing that in all civil actions the party prevailing shall recover costs, and hence the title of a purchaser at an execution sale of the property for costs of an action for improvements is superior to the title of one purchasing the property on foreclosure of a trust deed executed by the unsuccessful defendant while the action for improvements was pending. Tice v. Hamilton, 87 S. W. 497–499, 188 Mo. 298.

Tax proceedings

A petition for abatement of taxes is a "civil cause," within Pub. St. 1901, c. 225, § 1, in which petitioner may take the deposition of witnesses for use at the trial. Boston & M. R. R. v. State, 77 Atl. 996, 75 N. H. 513, 31 L. R. A. (N. S.) 539, Ann. Cas. 1912A, 382.

A request by state authorities to the probate court for an order for the payment of an inheritance tax in excess of the amount chargeable against an estate or an appeal by the Auditor General from an order of the probate court fixing the inheritance tax is a "civil proceeding," within Comp. Laws, § 11,277, providing that the people in civil proceedings instituted by a proper officer shall be liable for costs to the same extent as individuals instituting such proceedings, and the estate successfully resisting the claim of the state authorities is entitled to costs. In re Fox's Estate, 127 N. W. 668, 162 Mich. 531.

CIVIL AND CRIMINAL MATTERS

Under Const. art. 7, § 8, providing that the circuit courts shall have original jurisdiction in all matters, civil and criminal, not hereinafter prohibited by law, a bastardy proceeding, while neither strictly a criminal or civil action, is comprehended in the combination of the terms, "civil and criminal matters." Goyke v. State, 117 N. W. 1027, 1028, 136 Wis. 557.

CIVIL BODIES POLITIC

Incorporated religious societies are "civil bodies politic," and are amenable to the ordinary courts and governed by the statutes under which they are organized, so far as statutory regulations are prescribed. Klix v. Polish Roman Catholic St. Stanislaus Parish, 118 S. W. 1171, 1174, 137 Mo. App. 347.

CIVIL CASE

See Civil Action—Case—Suit, etc.

CIVIL CAUSE

See Civil Action—Case—Suit, etc.

CIVIL CONSPIRACY

"Any combination, no matter how lawful in its origin nor how praiseworthy in its objects, which turns aside for a moment from its legitimate portents and agrees to a course of conduct for the sole purpose of inflicting injury upon a third person, becomes at that moment a 'civil conspiracy,' and all damages sustained may be recovered." Hence, if a plumbers' union and a gas fitters' union assess a fine against a master plumber for breach of his agreement to employ members of a gas fitters' union to do certain work, or demand that sum to reimburse the union for investigating his contract to determine whether he was violating his agreement, the unions are guilty of a "civil conspiracy" and any payment made may be recovered. Burke v. Fay, 107 S. W. 408, 409, 128 Mo. App. 690 (quoting and adopting the definition in 1 Eddy, Combinations).

CIVIL CONTEMPT

A "civil contempt" consists in failing to do something ordered by the court for the benefit of the opposing party. Ex parte Wolters (Tex.) 144 S. W. 531, 587; Smythe v. Smythe, 114 Pac. 257, 259, 28 Okl. 266.

A "civil contempt" is the disobedience of some order or command of a court, entered in a civil cause. Fiedler v. Bambrick Bros. Const. Co., 142 S. W. 1111, 1113, 162 Mo. App. 528.

A "civil contempt" is one affecting only the rights of parties litigant. In re Rice, 181 Fed. 217, 220.

"Civil contempt" consists of matters arising in a proceeding and tending to impede or prejudice the rights and remedies of a party. Franzone v. Tumminelli, 123 N. Y. Supp. 455, 457, 67 Misc. Rep. 549.

Contempts are of two kinds, civil and criminal; a contempt being "civil" where it is instituted by a private individual for the purpose of enforcing some order made for his benefit, the punishment in such case not being, as in case of a criminal contempt, to protect the majesty of the law, but to coerce the performance of a civil act. Flathers v. State, 125 Pac. 902, 903, 7 Okl. Cr. 668.

A person who fails or refuses to do something which he has been ordered to do, or does something that he has been ordered not to do, for the benefit of the opposite party to a cause, is guilty of a "civil con-

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tempt," and the object of the punishment is to coerce the performance of an act remedial in its nature. Ex parte Clark, 106 S. W. 990, 996, 208 Mo. 121, 15 L. R. A. (N. S.) 389.

"Civil contempt" consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party; but failure to file an answer in a case at law, within the time allowed by law or order of court, is not a contempt of court, and an order prescribing a limit within which a defendant may file an answer is not an order requiring an answer to be filed, and is not for the benefit of the opposite party, but merely fixes the time within which the defendant may at his option prepare and file an answer if he desires, and his failure to act within the time given cannot hinder the other party or concern the court or be in contempt of its authority, but affects only the interests of the defendant. Rooker v. Bruce, 85 N. E. 351, 353, 171 Ind. 86.

"A 'civil contempt' is one in which the conduct constituting the contempt is directed against some civil right of the opposing party, as where an injunction is disregarded, or some act required by the court for the benefit of the other party should be neglected. In cases of contempt of this sort the proceeding for its punishment is at the instance of the party interested, and is civil in its character." Warner v. Martin, 52 S. E. 446, 447, 124 Ga. 387, 4 Ann. Cas. 180 (quoting and adopting definition in Welch v. Barber, 52 Conn. 147, 52 Am. Rep. 567).

" 'Civil contempts' are those quasi contempts which consist in failure to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court." French v. Commonwealth (Ky.) 97 S. W. 427, 429, 30 Ky. Law Rep. 98 (quoting Rap. Contempt, § 21, as quoted and approved in Wages v. Commonwealth, 13 Ky. Law Rep. 925).

Criminal contempt distinguished

Quasi criminal contempt distinguished, see Quasi Criminal Contempt.

Contempts are either civil or criminal; "civil contempt" embracing the failure of one to do something under order of court for the benefit of a party litigant. Gordon v. Commonwealth, 133 S. W. 206, 208, 141 Ky. 461.

Contempts are of two classes: Criminal contempts, prosecuted to preserve the power of courts and to punish the offender; and "civil contempts," prosecuted to preserve and enforce the rights of private parties and compel obedience to orders and decrees to enforce the rights and administer remedies which the court has found private parties entitled to. Merchants' Stock & Grain Co. v. Board of Trade of City of Chicago, 187 Fed. 398, 402, 109 C. C. A. 230.

Contempt proceedings are of two classes: Those prosecuted to preserve the power and vindicate the dignity of the courts by punishing the contemnor, and those prosecuted to compel observance and redress the violation of orders or decrees made in behalf of a party to an action pending before the court. The former are punitive and essentially criminal in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are the individuals whose private rights and remedies they are necessary to redress. Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 Fed. 774, 779, 68 C. C. A. 476.

Willful disobedience is a criminal contempt, while a mere disobedience by which the right of a party to an action is defeated or hindered may be a "civil contempt." In re Westminster Realty Corp., 108 N. Y. Supp. 551, 553, 123 App. Div. 797 (citing People v. Dwyer, 90 N. Y. 406, and Code Civ. Proc. §§ 8, 14).

Contempts of court are generally classified as either civil or criminal; the former consisting in a disobedience of some judicial order made in the interest of another party to a proceeding, and the latter of acts disrespectful to the court or obstructive of the administration of justice or calculated to bring the court into disrepute. Ex parte Gudenoge, 100 Pac. 39, 43, 2 Okl. Cr. 110.

Willful disobedience of an order of court in a civil action is not a criminal contempt; in such case the punishment is only ordered for the purpose of enforcing the order. Flathers v. State, 125 Pac. 902, 903, 7 Okl. Cr. 668.

A "criminal contempt" proceeding is one prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders; while "civil contempt" is one instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The President has no power to relieve from either fine or imprisonment imposed in proceedings for civil contempt. Heinze v. Butte & B. Consol. Min. Co., 129 Fed. 283, 284, 63 C. C. A. 388 (quoting and adopting definition in Re Nevitt, 117 Fed. 448, 54 C. C. A. 622).

There is a difference between a quasi criminal contempt and a "civil contempt." A judgment for criminal contempt is not only unnecessary, but positively unwarranted, unless there has been a willful disobedience of the court's order. A party may be guilty of both a criminal contempt and a civil contempt, or may be guilty of the one and not the other. A criminal contempt, actual or constructive, or, as Blackstone says, "direct

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or circumstantial," partakes of the quality of an offense against the state, whereas a civil contempt under the statute is such disobedience of an order of a court of competent jurisdiction, entered for the benefit or advantage of a party to a civil action, as works a loss or injury to the litigant. The one is quasi criminal and the other is a civil wrong; the one is absolved by a fine payable to the state or imprisonment, and the other by reparation to the other party litigant. Under Ballinger's Ann. Codes & St. § 5807, providing that, if any loss or injury to a party in an action prejudicial to his rights therein have been caused by the "contempt," the court may give judgment that the party aggrieved recover of the defendant a sum sufficient to indemnify him, it is not necessary that the contempt be a criminal contempt, for which a fine could be adjudged. State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 107 Pac. 196, 198, 55 Wash. 1.

Contempts are divided into criminal and civil contempts, yet the power of the court in each rests on its right to protect its dignity and to demand obedience to its decrees. A "civil contempt" consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein. Disobedience of an order to turn over property to a receiver appointed by the court is what is denominated a "civil contempt," and the consensus of authority is that the court, having made an order within its power, has the right to commit the violator until he complies with the order. Ex parte Dickens, 50 South. 219, 220, 222, 162 Ala. 272 (citing 9 Cyc. p. 6).

Violation of injunction

"'Civil contempts' are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. To this class of contempts belong such acts as the disobedience of an injunction issued at the suit of a private party." Ex parte Hedden, 90 Pac. 737, 744, 29 Nev. 352, 13 Ann. Cas. 1173 (quoting definition in Rap. Contempt, § 21).

CIVIL CONTRACT

Marriage as, see Marriage.

CIVIL CORPORATIONS

"Civil corporations" are of different grades or classes, but in essence and nature they must all be regarded as public. A board of education is a quasi public corporation existing only under statute having only the powers given under statute, and such implied powers as are absolutely necessary to execute such express powers. It cannot engage in business or make contracts outside its functions touching education. Herald v. Board of Education, 65 S. E. 103, 104, 65 W. Va. 765, 31 L. R. A. (N. S.) 588 (citing 1 Dillon, Mun. Corp. §§ 24, 25; Shinn v. Board of Education, 20 S. E. 604, 39 W. Va. 498; Honaker v. Board of Education of Pocatalico Dist., 24 S. E. 544, 42 W. Va. 170, 32 L. R. A. 413, 57 Am. St. Rep. 847).

CIVIL COURT

The word "civil," as used in the phrase "civil courts," when used in contradistinction to military courts, includes the criminal courts. Kirkman v. McClaughry, 152 Fed. 255, 258.

Owing to the distribution of jurisdiction into civil and criminal cases, the courts having jurisdiction of criminal cases were designated as "criminal courts" and those having jurisdiction of civil cases became known as "civil courts." State ex rel. Board of Education of St. Louis v. Nast, 108 S. W. 563, 566, 209 Mo. 708.

CIVIL DEATH

A person sentenced to the penitentiary for life is "civilly dead." Manley v. Mayer, 75 Pac. 550, 556, 68 Kan. 377, 1 Ann. Cas. 825 (citing Ashmore v. McDonnell [Kan.] 16 Pac. 687).

St. 1893, § 2578, providing that a person sentenced to imprisonment for life, is thereby deemed "civilly dead," has no application to the right of such person to testify, but applies to other civil rights. One who is "civilly dead" may testify; section 4209 providing that no person shall be disqualified as a witness by reason of conviction for crime, but such notice may be shown to affect his credibility. Martin v. Territory, 78 Pac. 88, 89, 14 Okl. 598.

CIVIL DISTRICTS

"Civil districts" in Const. art. 6, § 15, providing that the different counties shall be laid off, as the General Assembly may direct, into "civil districts" of convenient size, so that the whole number in each county shall not be more than 25, or 4 for every 100 square miles, and that there shall be two justices of the peace and one constable elected in each district by the qualified voters therein, etc., are but territorial subdivisions of counties. Their chief use is in regulating the number of justices of the peace allowed counties and in holding elections, and such districts cannot be clothed with corporate life, nor vested with legislative power, or other governmental function. Acts 1903, p. 1220, c. 424, abolishing certain districts of Knox county and redistricting the county, is not invalid, notwithstanding the districts as laid off are disproportionate in area, wealth, and population, and of shape inconvenient to their inhabitants, since the power to create the districts is vested in the legislative department, and its action in such respect is conclusive. Maxey v. Powers, 101 S. W. 181, 185, 117 Tenn. 381.

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CIVIL ENGINEER

As mechanic, see Mechanic.
As operative, see Operative.

CIVIL INSTITUTION

Marriage as, see Marriage.

CIVIL LIBERTY

There is no doubt that the words "life, liberty, and property," as used in both the fifth and fourteenth amendments of the United States Constitution, were used as representative terms. Of these words "liberty" is undoubtedly the most comprehensive. When the term "civil liberty" is used, there is now always meant a high degree of mutually guaranteed protection against interference with the interests and rights held dear and important by large classes of civilized men, or by all the members of a state, together with an effectual share in the making and administration of the laws as the best apparatus to secure that protection, and constituting the most dignified government of men who are conscious of their rights and of the destiny of humanity. We understand, by "civil liberty," not only the absence of individual restraint, but liberty within the social system and political organism—a combination of principles and laws which acknowledge, protect, and favor the dignity of man. We come thus to the conclusion that liberty, applied to political man, practically means in the main protection or checks against undue interference, whether this be from individuals, from masses, or from government. The highest amount of liberty comes to signify the safest guaranties of undisturbed legitimate action, and the most efficient checks against undue interference. McKinster v. Sager, 72 N. E. 854, 857, 163 Ind. 671, 68 L. R. A. 273, 106 Am. St. Rep. 268 (quoting and adopting definition in Leiber, Civil Liberty and Self-Government [Woolsey's 3d Ed.] 24, 40).

CIVIL MARITIME CASE

A "civil maritime case" is "one arising on the sea or from some act or contract concerning the commerce and navigation thereof." A civil case arising where the sea ebbs and flows, even though within the body of a county, is a case of admiralty or maritime jurisdiction within the federal Constitution. Case v. Woolley, 36 Ky. (6 Dana) 17, 20, 32 Am. Dec. 54 (citing and adopting De Lovio v. Boit, 2 Gall. 398, 7 Fed. Cas. 418; Plummer v. Webb, 4 Mason, 380, 19 Fed. Cas. 891; Drinkwater v. Spartan, 5 Amer. Jur. 26, 7 Fed. Cas. 1085; The Thomas Jefferson, 23 U. S. [10 Wheat.] 426, 6 L. Ed. 358; and Peyroux v. Howard, 32 U. S. [7 Pet.] 324, 8 L. Ed. 700).

CIVIL NATURE

See Suit of Civil Nature.

CIVIL OBLIGATION

A "civil obligation" is a legal tie which gives the party with whom it is contracted the right of enforcing its performance by law. In relation to their origin "civil obligations" are of two kinds, such as are created by operation of law, and such as arise from the consent of the parties who are bound by them and which are called contracts or conventional obligations. Morgan's Louisiana & T. R. & S. S. Co. v. Stewart, 44 South. 138, 143, 119 La. 392.

CIVIL OFFICE

"Salary" like an oath of office, is an incident to office merely, and not a necessary element in the determination of its character. The fact that there is no salary or emolument affixed to an office does not make it any the less a "civil office." In re Members of Legislature, 39 South. 63, 64, 49 Fla. 269 (citing 6 Words and Phrases, p. 4924).

The office of justice of the peace is a "civil office under the state" within Const. art. 6, subd. Elections, § 4, providing that every person holding any civil office under the state shall, unless removed according to law, exercise the duties of the office until his successor is duly qualified, the office being provided for by the Constitution and general laws, and being connected with the state judicial department, the justices being granted concurrent jurisdiction with the district court in civil actions involving $200 and jurisdiction in misdemeanor cases by Const. art. 5, § 22, and hence a justice is entitled to hold office until his successor qualifies. Ballantyne v. Bower, 99 Pac. 869, 871, 17 Wyo. 356, 17 Ann. Cas. 82.

CIVIL OFFICER

"'Civil officers' embrace only those officers in whom the portion of the sovereignty is vested and in whom the enforcement of the municipal regulations or the control of the general interests of society is confided. It is not such officers as canal commissioners." The term does not include commissioners to make a survey, to superintend the erection of a statehouse, to fund a city debt, or to liquidate a financial institution. Benedict v. City of New Orleans, 39 South. 792, 800, 115 La. 645 (citing United States ex rel. Noyes v. Hatch [Wis.] 1 Pin. 182; 2 Burns. § 21; Abbott's Law Dict.; Butler v. Regents of the University, 32 Wis. 124; Bunn v. People ex rel. Lafiin, 45 Ill. 397; People ex rel. Carlton v. Middleton, 28 Cal. 603; Andrews v. Saucier, 13 La. Ann. 301; Conrey v. Copland, 4 La. Ann. 307).

Aldermen and councilmen

Aldermen and common councilmen of a city are "civil officers," within Const. art. 2, § 2, conferring the right to vote for such officers on registry voters. In re The Newport Charter, 14 R. I. 655, 659.

Attorney at law

A practicing attorney is not a "civil officer," within Ky. St. § 2248, rendering such officers incompetent to serve as grand jurors.

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Shaw v. United States, 180 Fed. 348, 351, 103 C. C. A. 494.

Board of control

Members of a board of control created by law, who are charged with the duty of locating and continuously and permanently controlling and managing state institutions of learning, whose terms of office are definitely fixed, with provision for removal and appointment by the Governor to fill vacancies on such board, the office being continuous and permanent and remaining to be filled, though the incumbents may die or resign, are "civil officers," under the Constitution of Florida. The fact that there is no salary or emolument affixed to such office does not make it any the less a civil office, since salary or emolument, like an oath of office, is an incident to office merely, and not a necessary element in the determination of its character. In re Members of Legislature, 39 South. 63, 64, 49 Fla. 269 (citing 6 Words and Phrases Judicially Defined, p. 4924 et seq., and citations; People ex rel. Welker v. Bledsoe, 68 N. C. 457; McCornick v. Thatcher, 30 Pac. 1091, 8 Utah, 294, 17 L. R. A. 243).

Convict guard

While a state convict guard is a "civil officer," and may carry a pistol in the discharge of his duties, he cannot carry it when not in the discharge of his duties. Veal v. State, 125 S. W. 919, 920, 58 Tex. Cr. R. 340.

Justice of the peace

The phrase "civil office under the state," within Const. art. 6, subd. Elections, § 4, providing that every person holding a civil office under the state or any municipality therein shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified, import an office in which is reposed some portion of the sovereign power of the state, having some connection with the legislative, judicial, or executive department of the government. The office of justice of the peace comes within this class. Ballantyne v. Bower, 99 Pac. 869, 871, 17 Wyo. 356, 17 Ann. Cas. 82 (citing Attorney General ex rel. Moreland v. Common Council of City of Detroit, 70 N. W. 450, 112 Mich. 145, 37 L. R. A. 211; Montgomery v. State, 18 South. 157, 107 Ala. 372; Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169; People v. Leonard, 14 Pac. 853, 73 Cal. 230; Barnhill v. Thompson, 29 S. E. 720, 122 N. C. 493; State ex rel. Olson v. Scott, 117 N. W. 1044, 105 Minn. 513).

Mail carrier

A rural mail carrier, though an officer, is not a "civil officer," within Pen. Code 1911, art. 476, permitting a "revenue or other civil officer" engaged in the discharge of official duty to carry a weapon, because under the doctrine of ejusdem generis the quoted words apply only to a revenue officer, not civil, or other officer of the same character. Lattimore v. State (Tex.) 145 S. W. 588, 590.

A United States "mail carrier * * * is a private agent of the contractor for carrying the mail" (and in some cases the contractor himself), and is not embraced within the term "civil officers of the United States," as used in Code 1883, § 1005, excepting such officers from the prohibition against carrying concealed weapons. State v. Boone, 44 S. E. 595, 132 N. C. 1107 (quoting and adopting Mechem, Pub. Off. § 41).

School officers

Members of a city school committee are "civil officers." In re Election of School Committee of City of Woonsocket, 72 Atl. 417, 28 R. I. 629.

CIVIL PROCEEDINGS

See Civil Action—Case—Suit—Etc.

CIVIL PROCESS

The term "civil proceeding" or "process," as used in the statute relating to the ordering of notices in vacation, is a generic term for writs of the class called judicial. Mitchell v. Emmons, 71 Atl. 321, 324, 104 Me. 76.

Rev. Laws Mass. c. 25, § 88, requiring constables to give bond as a condition of serving "civil process," does not include the summoning of jurors, and the fact that a constable who served a summons on a juror in a prosecution for murder had not given the required bond is not a ground for challenge for cause. Commonwealth v. Tucker, 76 N. E. 127, 129, 189 Mass. 457, 7 L. R. A. (N. S.) 1056.

The warrant in bastardy proceedings commanding an arrest is a "civil process." Town of Hamden v. Collins, 82 Atl. 636, 638, 85 Conn. 327.

CIVIL REMEDY

See Civil Action—Case—Suit—Etc.

CIVIL RIGHTS

As privilege, see Privilege.

"A 'civil right' is a right accorded to every member of a district, community, or nation." Winnett v. Adams, 99 N. W. 681, 684, 71 Neb. 817 (quoting Anderson, Law Dict.).

"Civil rights" are such as belong to any citizen, or, in a wider sense, to every inhabitant of the country, and are not connected with the organization or administration of government, and include the rights of property, marriage, jury trial, etc. Friendly v. Olcott, 123 Pac. 53, 56, 61 Or. 580.

"The right to become the nominee of a political party, whether national or state, and as such nominee to receive the votes of the qualified electors voting to fill such office, is a purely 'political right,' as contradistinguished from 'civil or property right,'" and equity has no jurisdiction to enjoin officers of

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a state, acting under state statute, from issuing a certificate of nomination to a candidate for representative in Congress, as its jurisdiction extends only to relief of "civil rights." "Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of civil rights, which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of civil, rights." Anthony v. Burrow, 129 Fed. 783, 789 (quoting and adopting definitions in Re Sawyer, 8 Sup. Ct. 482, 124 U. S. 200, 31 L. Ed. 402; 2 Bouv. Law Dict. 597).

Under Const. art. 6, § 3, which provides that persons convicted of infamous crime, unless restored to their civil rights, shall be excluded from the elective franchise, an information charging that accused, in registering to vote, falsely swore that he had not lost his civil rights by being convicted of an infamous crime, whereas he had been convicted in another state of the infamous crime of breaking jail before conviction, does not state an offense; the right to vote being "political" and not "civil." State v. Collins, 124 Pac. 903, 904, 69 Wash. 268.

CIVIL SERVICE

See State Civil Service; Under the Civil Service Rules.

"'Civil service,' in its enlarged sense, means all service rendered to and paid for by the state or nation, or by political subdivisions thereof, other than pertaining to naval or military affairs." Though Const. art. 16, § 30, declares that the duration of all offices not fixed by this Constitution shall never exceed two years, it is presumed that this definition of the phrase "civil service" was in the mind of the Legislature when it enacted a city charter placing the police and fire departments under a civil service commission, and providing that the appointees thereof shall hold their positions during good behavior, rather than that a life tenure of office was contemplated, so in the reading of the constitutional provisions into the charter provision, the words "civil service" will remain unchanged, and be given the definition quoted. Callaghan v. McGown (Tex.) 90 S. W. 319, 322 (citing 2 Words and Phrases, p. 1200; Hope v. City of New Orleans, 30 South. 842, 106 La. 345).

CIVIL STATUS

Marriage as, see Marriage.

CIVIL SUIT

See Civil Action—Case—Suit—Etc.

CIVIL TERM

St. 1909, § 965 (Russell's St. § 2812), providing for criminal terms of the circuit court of a county, and for civil terms thereof, divides the circuit court of the county into criminal and civil terms, and while the one circuit judge of the judicial district embracing the county presides at both the criminal and civil terms, he is without jurisdiction to try a criminal case at a civil term or to try a civil action at a criminal term, the words "criminal term" applying to a term of court at which indictments are found and returned, and at which persons are tried for crimes and other penal offenses, and the words "civil term" applying to a term at which civil business is disposed of, and controversies cognizable at law or in equity are litigated. Smedley v. Commonwealth, 127 S. W. 485, 488.

CIVIL WAR

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A "civil war" is never solemnly declared, but becomes such by the number, power, and organization of the persons who originate and carry it on. When the parties in rebellion occupy and hold in a hostile manner a portion of territory, have declared their independence, cast off their allegiance, organized armies, and commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest as a war. The test of the existence of a civil war is when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open. The hostile opposition which continued in the Philippine Islands after the treaty of Paris was in the nature of a civil war, beginning by insurrection, and courts will take judicial notice of its existence. La Rue v. Kansas Mut. Life Ins. Co., 75 Pac. 494, 496, 68 Kan. 539 (quoting and adopting definition given in Prize Cases, 67 U. S. [2 Black] 635, 666–668, 17 L. Ed. 459).

CLAIM

See Adverse Claim; Contingent Claim; Disputed Claim; Doubtful Claim; False Claim; Fictitious Claim; Fraudulent Claim; Homestead Claim; Just Claim; Lawful Claim; Lienable Claim; Lode Claim; Mining Claim; Municipal Claim; Pre-emption Claim; Preferred Claim; Prior Claim; Private Claim; Proof of Claim; Provable Claim; Proved Claim; Secured Claim; Unliquidated Claim; Without Claim for Damage.

Allowance of claim as judgment, see Judgment.

Any claim, see Any.

Claims of any kind, see Any.

Contest of claims to public lands, see Contest.

Improvement on mining claim, see Improvement.

Liquidated claim, see Liquidated.

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Other claim, see Other.
Presentation of, see Present—Presented—Presentation.
Specially claimed, see Specially Set Up.

A "claim" is a demand made of a right or supposed right, calling on another for something due or supposed to be due. It implies that the right is a dispute, and is suggestive of debate, contention, and of something left for future determination. Gordon Bros. v. Wageman, 108 N. W. 1067, 1069, 77 Neb. 185.

Among other definitions of the word "claim," the Standard Dictionary gives the following: "To hold to be true against implied denial or doubt; affirm; assert." Pollock Min. & Mill. Co. v. Davenport, 78 Pac. 768, 31 Mont. 452.

"The words 'to claim' are sometimes incorrectly used as synonymous with 'to think,' or 'to insist.' Their proper meaning is 'to challenge as a right,' or 'to demand as due.'" Hill v. Henry, 57 Atl. 554, 555, 66 N. J. Eq. 150.

A "claim" is, not only legally speaking, but in ordinary parlance, clearly distinguishable from a "grant" or a "title." A "claim" is defined in the Century Dictionary as "the thing claimed or demanded; specifically, a piece of public land which a squatter or settler marks out for himself with the intention of purchasing it when the government offers it for sale; as, 'he staked out a claim.'" "A 'grant,' on the contrary, has a distinctly broader meaning. It implies an acquired right, and is described by Mr. Bouvier as applicable to the conveyance of incorporeal rights. But in the larger sense the term comprehends anything that is granted or passed from one to another, and is applied to every species of property. It therefore necessarily implies a 'title' or vested right in the grantee from the grantor, or has a much more pregnant signification than a claim." Corkran Oil & Development Co. v. Arnaudet, 35 South. 747, 754, 111 La. 563.

A "claim" in a juridical sense is a demand of some matter as of right, made by one person upon another to do or forbear to do some act or thing as a matter of duty. Vandalia R. Co. v. Stephens, 78 N. E. 1055, 39 Ind. App. 11.

A "claim" is a somewhat anomalous statutory procedure. To interpose a claim is permissive, not compulsory. A person may claim, or may let the property go to sale and take other legal action afterward. It has sometimes been analogized to a legal suit to recover the property levied on, and sometimes to an equitable proceeding to recover the property or to enjoin the sale. At any rate, it is a statutory proceeding by the claimant, who may intervene and seek to prevent the sale from taking place, on the ground that the property is his, and not subject. Walden v. Walden, 57 S. E. 323, 325, 128 Ga. 126.

As amount demanded or recoverable

A partial estimate by the city engineer of Omaha on a paving contract, and reported by him to the board of public works and the city council for allowance, is a "claim" against the city within the meaning of section 33 of the charter, allowing an appeal by taxpayer from an allowance of such claim. Lobeck v. State, 101 N. W. 247, 249, 72 Neb. 595.

Rev. Laws 1905, § 620, provides that no action shall be maintained against the county upon any claim, except county orders, when the only relief demanded is a judgment for money, until such claims have been duly presented to the board, and it shall have failed to act upon such claim within the time fixed by law, and unless the board shall give its consent to the institution of such action Held, that the section does not apply to the final payment due a contractor in drainage proceedings; the certificate of final completion of the contract issued by the engineer, and which the board may approve or disapprove, not being a "claim," within the statute. Merz v. Wright County, 131 N. W. 635, 637, 114 Minn. 448.

The word "claims," in Mills' Ann. St. § 801, providing that all "claims" against a county shall be presented to the county commissioners before any action shall be maintained thereon, refers to "claims" originating in contract, express or implied, between claimant and the county, and a claim by a county treasurer for the difference between his salary as fixed by Laws 1891, p. 307, and as reduced by Sess. Laws 1899, p. 331, based on the ground that the latter act is unconstitutional, is a contractual claim, and may not be put in suit without first presenting the same to the commissioners for audit and allowance. Gregg v. Board of Com'rs of Lake County, 76 Pac. 376, 378, 32 Colo. 357.

As assertion or pretension

The word "claim," used either colloquially or definitely, means the assertion of a right, and, where the court stated that it was about to give instructions based on this claim of the defendant that he acted in self-defense, it refers to the assertion by the defendant that the killing was excusable, because committed by him in the exercise of the right of self-defense. People v. Glover, 74 Pac. 745, 747, 141 Cal. 233.

"The word 'claim,' as used in the statute governing appeals from actions of county boards, is used in the sense of an assertion or a pretension." Sheldon v. Gage County Society of Agriculture, 98 N. W. 1045, 71 Neb. 411.

In view of the fact that Burns' Ann. St. 1908, §§ 6002, 6008, providing for the filing and allowance of claims against counties, contemplate that the claim and the "verifica-

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tion" thereof are separate instruments, and in view of the meaning of "claim," which is the assertion of a liability, to the one making it, to do a service or pay a sum, and of the term "verified," which, as applied to pleadings and statements of claims filed with municipal officers, etc., means an affidavit "attached to" such statement of claim as to the truth of the matter stated therein, the verification of a claim filed against a county for work done is not a part of the statement of claim, but a distinct instrument, and hence need not be alleged in the affidavit, together with the claim, in a prosecution for presenting a fraudulent claim to a county for work done, in order to admit the claim itself in evidence, as matters not forming a part of an instrument need not be set out in the affidavit as a part thereof, in order to prevent a variance. Bader v. State, 94 N. E. 1009, 1012, 176 Ind. 268.

"One meaning of the verb 'claim' is to assert; to maintain; to hold or maintain as a fact or as true." Hence an allegation that petitioner "claims" that he notified another that he would not indemnify him against loss, etc., sufficiently alleges that petitioner gave such notice to such other person. Collins v. Farley, 66 Atl. 713, 714, 80 Vt. 144.

As cause of action or defense

The word "claim," as used in Laws 1895, c. 95, § 1, which authorizes one having a claim against the state to sue thereon, is synonymous with "cause of action." Riddoch v. State, 123 Pac. 450, 451, 68 Wash. 329, 42 L. R. A. (N. S.) 251.

Code Civ. Proc. §§ 146–150, authorizing amendments which do not change the "claim" or defense, the limit of the power of amendment is only exceeded by a departure from the subject of the action. Wolfinger v. Thomas, 115 N. W. 100, 103, 22 S. D. 57, 133 Am. St. Rep. 900 (citing Post v. Campbell, 85 N. W. 1032, 110 Wis. 378).

A mechanic's lien under a contract made by a testator in his lifetime which was performed wholly or in part after his death cannot be enforced unless presentation of the claim to the executor is both pleaded and proved, in view of Rem. & Bal. Code, § 1479, providing that no holder of a claim against an estate shall maintain an action thereon unless the claim shall be first presented to the executor or administrator, the word "claim" being synonymous with "cause of action." F. T. Crowe & Co. v. Adkinson Const. Co., 121 Pac. 841, 842, 67 Wash. 420.

"Demand" or "claim" is properly used in reference to a cause of action. Injury to land, in that a county unlawfully entered thereon and constructed a road, is a "claim" or "demand," within a statute requiring all claims and demands against a county to be presented to the county commissioners before the action shall be maintainable thereon. Henry v. Board of County Com'rs of San Miguel County, 92 Pac. 697, 41 Colo. 267.

The fact that a state is not subject to an action on behalf of a citizen does not establish that he has no "claim" against the state for injuries to his property from a public improvement, or that no liability exists from the state to him; it only shows that he cannot enforce his claim and make the state answer in a court of law, and not that there is no liability and no claim, but only that there is no remedy. Coster & Pruyn v. Mayor, etc., of City of Albany, 43 N. Y. 399, 407.

Rem. & Bal. Code Wash. § 1470, providing that every executor and administrator shall immediately after his appointment cause to be published in some paper printed in his county a notice requiring creditors to present claims within a year after the date of notice, and section 1472, declaring that if a claim is not presented within such year it shall be barred, apply to mere personal claims against the estate of a deceased guardian; the word "claim" being synonymous with "cause of action." Newbery v. Wilkinson, 190 Fed. 62, 66, 67.

Whether plaintiff, in an action against a county, asserts a right of action for money had and received for money borrowed illegally by county officers, but used for specified legitimate current expenses, or whether he alleges an implied contract to repay him money so received and used, in either case it is a "claim" against the county, within Civ. Code 1910, § 411, requiring presentation of claims against counties within 12 months after they accrue. Butts County v. Wright, 71 S. E. 1046, 1047, 136 Ga. 697.

The word "claim," as used in Code Civ. Proc. § 531, which provides that the court may upon notice direct a bill of particulars of the claim of either party to be delivered to the adverse party, includes not only matters which are effective only as a defense, but matters set forth in an answer by way of counterclaim. Otto Huber Brewery v. Sieke, 131 N. Y. Supp. 271, 272, 146 App. Div. 467.

An answer setting out counterclaims, without demanding affirmative relief, alleges items which defendant must prove affirmatively in reduction of plaintiff's recovery; and the items constitute a "claim," within Code Civ. Proc. § 531, authorizing the court to order a bill of particulars of a claim of either party. McCool v. Merrill-Ruckgaber Co., 129 N. Y. Supp. 377, 378.

The word "claim," as used in Code Civ. Proc. 1893, § 139, providing that the court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, etc., when such amendment does not change substantially the claim or defense, means the plaintiff's right of action appearing by the pleading. Smock v. Carter, 50 Pac. 262, 263, 6 Okl. 300.

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The word "claim," in a motion by plaintiff for a bill of particulars of the claim of defendant, includes the defense and counterclaim set forth by defendant. Posner v. Rosenberg, 133 N. Y. Supp. 702, 703, 149 App. Div. 270.

A mechanic's lien under a contract made by a testator in his lifetime which was performed wholly or in part after his death cannot be enforced unless presentation of the claim to the executor is both pleaded and proved, in view of Rem. & Bal. Code, § 1479, providing that no holder of a claim against an estate shall maintain an action thereon unless the claim shall be first presented to the executor or administrator, the word "claim" being synonymous with "cause of action." F. T. Crowe & Co. v. Adkinson Const. Co., 121 Pac. 841, 842, 67 Wash. 420.

Claims ex delicto

The word "claims," in Comp. St. 1909, c. 14, art. 1, § 80, requiring claims to be presented to the city council for allowance before suit, applies only to claims arising on contracts, not for personal injury caused by the negligence of a city. Bayard v. City of Franklin, 127 N. W. 113, 87 Neb. 57.

The word "claims," within the statute requiring all claims against the county to be filed with the county clerk, referred only to those claims originating in contract, express or implied, between the claimant and the county, and not to claims for damages for torts committed. Gregg v. Board of Com'rs of Lake County, 76 Pac. 376, 378, 32 Colo. 357.

A claim against a city by a property owner for damages to his premises resulting from the overflowing of a sewer is now within the charter of second-class cities (Laws 1895, c. 182), known as the "White Charter," requiring all "claims" against the city for damages to property alleged to have been caused by negligence of the city or its officers to be presented to the common council. Ahrens v. City of Rochester, 90 N. Y. Supp. 744, 745, 97 App. Div. 480.

The words "claim or demand," in a city charter providing "that no action shall be maintained by any person against the city * * * upon any claim or demand until such person shall have first presented his claim or demand to the common council for allowance," etc., apply to claims or demands arising out of a tort. Bradley v. City of Eau Claire, 14 N. W. 10, 11, 56 Wis. 168.

Amsterdam City Charter (Laws 1885, c. 131) § 31, requires that all "claims" against the city be presented to the council for audit, and also requires presentation of claims for injuries arising out of defective highways within a stated time, and declares that no action shall be commenced thereon until three months after the presentation of the claim. Held, that the three months required to elapse after presentation of the claim before suit can be brought thereon refers only to claims for injuries arising out of defective highways, and does not relate to a claim of a county against the city for relief furnished to a pauper having a residence in the city. Onondaga County v. City of Amsterdam, 124 N. Y. Supp. 558, 561, 139 App. Div. 877.

Rev. Codes, § 2263, requiring an itemized statement of a "claim" against a village, duly verified by the claimant's oath, to be presented to the village authorities before suit commenced, does not apply to a claim for an injury because of a defective sidewalk or street. Miller v. Village of Mullan, 104 Pac. 660, 665, 17 Idaho, 28, 19 Ann. Cas. 1107.

Under a statute providing that all claims against a city for damages or injury arising from the defective condition of any street or bridge, or from the negligence of the city authorities in respect thereto, shall within 90 days after the happening of the injury or damage, be presented to the city in writing, signed by the claimant, describing the time, place, cause, and extent of the damage or injury, and that no action shall be maintained against city unless it appears that the "claim" on which it was based was presented to the council, and that the council did not within 90 days thereafter audit and allow the same, the mere fact that a claimant for damages for injuries resulting from the defective condition of a bridge demands a less sum than he is entitled to recover does not, on rejection of his claim, preclude him from recovering by action his actual damages, though they exceed the amount of his claim on file. Mackay v. Salt Lake City, 81 Pac. 81, 82, 83, 29 Utah, 247, 4 Ann. Cas. 824 (citing definition in Noble v. City of Portsmouth, 30 Atl. 419, 67 N. H. 183).

Debt synonymous

See Debt.

Demand distinguished

The words "demand" and "claim" are often interchangeable, and are taken as synonymous. But "demand" is not used in its broadest sense, as equivalent with "claim," in Greater New York Charter (Laws 1901, c. 466) § 101, providing that interest shall cease to run on sums awarded as damages six months after the date of the confirmation of the report, unless within that time demand therefor be made on the comptroller. It refers to a request made by the payee for money which has theretofore been legally determined as then payable to him, and which is specifically held for payment to him by the city. In re City of New York, 86 N. Y. Supp. 1035, 1038, 91 App. Div. 532.

A "demand" is a peremptory claim to a thing of right. It differs from a claim, in

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that it presupposes that there is no defense or doubt about the question of right. "Demand" will not admit of delay, while "claim" implies that the right is or may be doubtful, and that negotiations shall be had to determine the same. A statement by an owner of land to the adjacent owner, after the parties had agreed on a boundary line, that he was not satisfied and would like to have the thing settled peaceably, is not a "demand" for any part of the land in dispute, essential to the maintenance of ejectment therefor. Welborn v. Kimmerling, 89 N. E. 517, 520, 46 Ind. App. 98.

The terms "claims" and "demands" in P. S. 2814, providing for the appointment of commissioners to receive and adjust claims and demands of persons against a decedent, mean the same. Batchelder v. White Adm'rs, 71 Atl. 1111, 1112, 82 Vt. 132.

The word "demand" in Code, §§ 1308, 1309, making all credits taxable, and defining "credit" as including every claim or demand due, or to become due, for money, labor, or other valuable thing, and all money or property of any kind secured by deed or otherwise, is more comprehensive than the word "debt," which imports a sum of money owing on a contract express or implied, and embraces rightful claims whether founded on a contract, tort, or a superior right of property, and is a word of wider signification than any other except "claim," which means a demand of some matter as of right by one person on another to do or to forbear to do some act or thing as a matter of duty (citing 2 Words and Phrases, 1202, 1973). Under Code, §§ 1308, 1309, a claim on a fire policy for a loss occurring December 23d, which depends for its validity on whether there has been any breach of the conditions of the policy on the part of insured and on his making proofs of loss, is taxable, though the amount of damages had not been ascertained on January 1st following, but ascertained at the time of assessing, and though the insurer had the option to rebuild, since the value of the claim must be estimated by the assessor who is not limited to conditions known on January 1st, but who may use such information as may be available at the time of assessing, and since the claim of insured on insurer, even though there be an election to rebuild, is for property due on contract or a claim due or to become due for money, labor, or other valuable thing. Tally v. Brown, 125 N. W. 248, 249, 250, 146 Iowa, 360, 140 Am. St. Rep. 282.

The word "claim" is comprehensive. It is in a just, juridical sense a demand of some matter of right made by one person upon another, to do, or to forbear to do, some act or thing as a matter of duty. The term "demand," according to Lord Coke, is the largest word in law, except "claim," and a release of all demands discharges all sorts of actions, rights, titles, conditions before and after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, etc. Code Civ. Proc. § 3162, as amended by Laws 1897, p. 245, provides that the parties or assignees of parties to an action or proceeding against an executor or administrator on a claim or demand against the estate of a deceased person shall not be competent witnesses as to any matter of fact occurring before the death of such person. Held, that the complainant in a suit to enforce a trust in a mining claim against the executors of complainant's alleged co-owner was incompetent to testify to matters occurring before the death of the latter and to conversations as to such claim, and to declarations of decedent that plaintiff was one of the grantees in the patent. Delmoe v. Long, 88 Pac. 778, 781, 35 Mont. 139 (quoting and adopting definition in Prigg v. Pennsylvania, 41 U. S. [16 Pet.] 615, 10 L. Ed. 1060, and Anderson's Law Dict., and citing Bacon's Abridgment, title "Release," 283, and Vedder v. Vedder, [N. Y.] 1 Denio, 258).

The word "claim," as used in Rev. St. §§ 894, 1077, giving county commissioners power to pass on claims of the auditor for services and claims other than those of the auditor, naturally imports a matter of charge which is based on some statute, or grows out of the performance of some authorized contract, wherein the inquiry of the commissioners as to the auditor is confined to whether or not the services were rendered, and to other claims to determine the amount due, as contrasted with a mere demand unsupported by law. Jones v. Commissioners of Lucas County, 48 N. E. 882, 886, 57 Ohio St. 189, 63 Am. St. Rep. 710.

As equitable claim

Prior to the filing of an involuntary bankruptcy petition the bankrupt made an assignment of his claim on insurance policies constituting his sole assets, and the assignee rendered valuable services in attempting to collect the claims. On a trustee in bankruptcy being appointed, the assignee turned over to him the policies, with all proofs and claims, subject to a lien for allowances for the expenses incurred, and the trustee in bankruptcy subsequently settled the claims with the insurance companies. The claim of the assignee for expenses and services was an equitable claim, allowable by way of deduction from the fund realized for the benefit of creditors, to the extent of beneficial expenditure and service, and was not a "claim against the bankrupt," under Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560, 561. In re Levitt, 126 Fed. 889, 891.

Incumbrances on land

Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560, provides that claims which have been allowed may at any time before the estate is closed be reconsidered for cause; and, whenever a claim on which a dividend has been paid shall have been reconsidered

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and rejected in whole or in part, the trustee may recover from the creditor the amount of the dividends received on the claim if rejected in whole, or the proportionate part thereof if rejected in part. Held, that the word "claim" as so used did not include fixed liens on the real estate of the bankrupt, nor did the word "dividends" apply to payments thereon, and hence payment of such lien claim by the bankrupt's trustee pending a writ of error to review the judgment enforcing a lien was not merely tentative so as to entitle the trustee to continue to prosecute the proceeding in error after such payment. Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 116 Pac. 122, 124, 50 Colo. 342.

Judgment distinguished

See Judgment.

As liability

Testator bequeathed all his property to executors, in trust to accumulate rents and profits until the remarriage or death of the widow, and not to dispose of the same until the happening of either of such events, "except as hereinafter provided." By the second clause he directed payment of all claims and demands on or against his estate, and then a division of rents and profits among his wife and children. By the sixth clause he conferred power on the executors to pay all incumbrances, "claims and demands" against his estate, to raise money thereon and execute conveyances necessary in their judgment for the best interests of the estate, and to sell at either public or private sale. Held, that the term "claims and demands," as so used, included a liability to repair tenement buildings belonging to the estate in accordance with directions of the tenement house department, and that the executors, therefore, having no available funds to make such repairs, had power to sell the property before the repairs were made by the department, at its expense, for the benefit of the estate. Hess v. Hess, 117 N. Y. Supp. 555, 558, 132 App. Div. 749.

As lien

See Lien.

Money in bank

"Accounts," "claims," and "debts" belonging to a mercantile business are not ordinarily used to embrace money in bank, but to designate the accounts, claims, and debts against customers. Wyatt v. Norris, 66 S. E. 1016, 66 W. Va. 667.

Mortgage

Under a mortgage in the form of an absolute deed, reciting that the deed is subject to the claim of the Anglo-Californian Bank, Limited, the term "claim" is broad enough to include a mortgage. Anglo-Californian Bank v. Field, 80 Pac. 1080–1083, 146 Cal. 644.

As offer to vote

In Const. 1776, art. 4, providing that all inhabitants of full age who, among other qualifications, have resided within the county in which they claim a vote for twelve months shall be entitled to vote, etc., the phrase "claim a vote" means a lawful claim to vote at the time of the adoption of the Constitution. Carpenter v. Cornish, 83 Atl. 31, 32, 83 N. J. Law, 254.

As owns or claims to own

An award of referees that plaintiff should pay to an administrator for the "claim" of the estate in one yoke of oxen, was a finding that the oxen belonged to plaintiff and that he owed the estate on account thereof. Scott v. Perley, 98 Mass. 511, 514.

The word "claim" is a broad and comprehensive term, and includes title and ownership to real property when used in relation thereto. Sherman v. Sherman, 122 N. W. 439, 443, 23 S. D. 486.

Under Rev. St. 1895, arts. 2967, 2968, declaring that all property of the husband "owned or claimed" by him before marriage, and that "acquired" afterwards by gift, devise, or descent, shall be his separate property, and all property "acquired" by the husband or wife during the marriage, except that "acquired" by gift, devise, or descent, shall be the common property of the husband and wife, ownership resting in adverse possession for 10 years, existing in part before marriage and in part after marriage, is community property; the word "acquired" denoting all property coming to husband or wife during coverture by title, other than by gift, devise, or descent; and the word "claim," when applied to land, importing a legal or equitable right to the land; and the words "owned or claimed" signifying a legal or equitable ownership or legal or equitable right to demand the land. Sauvage v. Wauhop (Tex.) 143 S. W. 259, 263.

In common speech a person "claims" the land to which he has title, meaning by his claim of title to declare ownership, and such an expression, used in a pleading, means an assertion of title, and is equivalent to an allegation that the plaintiff has title to the land. Dugas v. Hammond, 60 S. E. 268, 269, 130 Ga. 87 (citing Stand. Dic.; Marshall v. Shafter, 32 Cal. 176).

The words "claim to * * * property" as used in section 8 of the judiciary act (Act March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 513]), authorizing suits to enforce such claims to be brought in the district where the property is situated, relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest or other direct right or claim to the property itself, and do not include a suit which merely seeks to enforce a restriction which the law imposes upon the

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owner of the property in reference to its proper use to avoid injury to other property, as one to abate or enjoin a nuisance. Ladew v. Tennessee Copper Co., 179 Fed. 245, 250.

As personal property

See Personal Property.

To public land

The word "claim," as used in the act of 1887 (24 Stat. 505) giving a federal circuit court jurisdiction to hear and determine certain claims against the United States, includes a claim by a purchaser or his assignee of timber land under the act of 1878 (20 Stat. 89) to have a patent issue for the same. Jones v. United States, 35 Fed. 561, 565.

Unsurveyed land within the primary limits of the grant to the Northern Pacific Railroad Company by Act July 2, 1864 (13 Stat. 365, c. 217), as fixed by the definite location of the road, but which at the time of the filing of the map of such location was actually occupied by a settler, who had made improvements thereon with the bona fide intention of acquiring title thereto under the homestead law when it should be surveyed, was subject to a "claim or right" within the meaning of the act, and did not pass under the grant. Trodick v. Northern Pac. Ry. Co., 164 Fed. 913, 915, 90 C. C. A. 653.

Continuous occupation of public land, with a bona fide intention to acquire the homestead laws as soon as it should be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railroad Company of its route, a "claim" upon the land, within the meaning of Act Cong. July 2, 1864, c. 217 (13 Stat. 365) § 3, restricting the grant in aid of such railroad to such odd-numbered sections within specified general limits as were free from pre-emption or "other claims or rights" at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers." Nelson v. Northern Pac. R. Co., 23 Sup. Ct. 302, 308, 188 U. S. 108, 47 L. Ed. 406.

In various uses

The words "claim" and "location" in mining law are used interchangeably. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 18 Sup. Ct. 895, 902, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.

The word "claim," in Code 1907, § 7342, is used in its popular sense, signifying a right to claim; a just title to something in the possession or at the disposal of another. Steele v. State, 48 South. 673, 674, 159 Ala. 9.

The word "claim" in a building contract between the state and a contractor, which provides that if at any time there should be evidence of any lien or claim for which, if established, the owner might become liable and which is chargeable to the contractor, the owner may retain out of any payment due or thereafter to become due an amount sufficient to indemnify against such lien or claim, is not synonymous with "lien," and a laborer or materialman may have a claim and yet be entitled to no lien to secure the payment thereof, but the state may not withhold payments from the contractor and pay the same to laborers and materialmen unless it has become directly responsible to the laborers and materialmen by contract, express or implied. Rathbun v. State, 97 Pac. 335, 337, 15 Idaho, 273.

The word "claim" as used in Gen. St. 1889, par. 1676, providing that no claim shall be allowed against the county unless presented within two years, includes a claim for compensation for land appropriated for public highways. Herdman v. Board of Com'rs of Woodson County, 50 Pac. 946, 6 Kan. App. 513.

In determining priorities of appropriation under the act of 1895, the transcript of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitute the "claims" for adjudication. Enterprise Irrigation Dist. v. Tri-State Land Co., 138 N. W. 171, 180, 92 Neb. 121.

A. transferred bonds, notes, mortgages, stocks, and other securities, including a number of shares of preferred stocks, with the following words: "I warrant the amount to be due in each case as set forth, on the 1st day of October inst., and each claim and demand good and collectible." Held, that the words "claim and demand" did not bring dividends not yet declared into the guaranty. Dana v. Conant, 30 Vt. 246, 253.

Decedent executed a demand note to defendant, agreeing that the proceeds of certain policies of life insurance, which he had deposited with defendant as collateral to secure the note, should be applied to the payment thereof, and that, if he should come under any other liability or enter into any other agreement with defendant while it was the holder of such obligation, then any excess of collaterals should be applied to such other note or claim, and, in case of any exchange of the collaterals, the provisions of the note should extend to the new collaterals. Decedent thereafter executed a new note to defendant's cashier for a debt owing to defendant, which note was, in fact, for defendant's benefit. When decedent died, he was also a member of a firm which was indebted to defendant for insurance premiums collected and unpaid. At this time all but $181.50 of the original debt had been paid, for which amount a renewal note had been given which was due and unpaid. Held, that the words "liability," "agreement" and "claim," used in the collateral agreement were sufficient to cover every conceivable obligation, and that the surplus due on the policies was therefore liable, not only for the balance of the original debt, but also for the note made payable to defendant's cashier, and for the firm's liability for the unpaid premiums. Norfleet v.

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Pamlico Insurance & Banking Co., 75 S. E. 937, 939, 160 N. C. 327.

A suit in a state court by the receiver of an insolvent corporation against another corporation to set aside a conveyance of property then held by the defendant on the ground of fraud is essentially one in rem, and creates an equitable lien on the property, and on the bankruptcy of the defendant does not come within Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549, which authorizes a court of bankruptcy to stay a pending suit against a bankrupt upon a "claim from which a discharge would be a release," and the court, having no power to compel the complainant in such suit to submit his claim to its jurisdiction, has no power, under Rev. St. § 720, to stay the suit. In re United Wireless Telegraph Co., 192 Fed. 238, 239.

A suit to enjoin the enforcement of a municipal ordinance regulating telephone rates is not one in which the Constitution or law of a state is "claimed" to violate the federal Constitution, within the meaning of Act March 3, 1891, c. 517, § 5, 26 Stat. 827, governing direct review in the federal Supreme Court of decrees of Circuit or District Courts, where the first and only reference to the federal Constitution is in the opinion of the circuit judge, on final hearing, holding that the rates are confiscatory and destructive of the telephone company's rights under that Constitution; the case as made by the bill being that the ordinance was passed without legislative authority, and its further allegations as to the confiscatory character of the ordinance being referable only, if consistency with its other provisions is to be observed, to the state Constitution, which would be violated if such allegations were true. City of Memphis v. Cumberland Telephone & Telegraph Co., 31 Sup. Ct. 115, 117, 218 U. S. 624, 54 L. Ed. 1185.

A suit by a nonresident owner of lands within the territorial jurisdiction of the federal Circuit Court for the Eastern District of Tennessee for protection against injury from a discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the district does not present a "claim to real property within the district," within the meaning of Act March 3, 1875, c. 137, § 8, 18 Stat. 472 providing for bringing in absent defendants in local actions, so as to confer jurisdiction upon that court over the New Jersey corporation which refuses to appear voluntarily in the suit as a defendant. Wetmore v. Tennessee Copper Co., 31 Sup. Ct. 84, 85, 218 U. S. 369, 54 L. Ed. 1073; Ladew v. Tennessee Copper Co., 31 Sup. Ct. 81, 84, 218 U. S. 357, 54 L. Ed. 1069.

CLAIM AGAINST DECEASED

A third party's claim against an administrator and the heirs of an estate for money paid the administrator under a mutual mistake is not a "claim against the deceased," within the meaning of Pub. St. 1901, c. 191, § 4, specifying the time within which a suit must be begun against an administrator for any cause of action against the deceased. Redington Hub Co. v. Putnam, 82 Atl. 715, 716, 76 N. H. 336.

St. 1898, § 2932, provides that, in an action prosecuted by an administrator, costs shall be chargeable only against the estate, unless the court shall direct the same to be paid by the plaintiff personally for mismanagement or bad faith; and section 3752 declares that, if the assets received by an executor or administrator which can be appropriated to the payment of debts shall not be sufficient, he shall, "after paying necessary expenses of administration, pay the debts against the estate in the order therein prescribed." Held, that where an administrator was authorized by the county court to bring suit for the collection of assets alleged to belong to the estate, as provided by sections 3811, 3813, and he was beaten therein, without mismanagement, the costs were not a "claim against decedent" within section 3838, providing for the adjustment of such claims, but were payable from the assets of her estate. Ferguson v. Woods, 102 N. W. 1094, 1095, 124 Wis. 544.

CLAIM AGAINST ESTATE

See, also, Demand against Estate.

The word "claim," in Code, § 3279, providing the amount allowed on any claim which it becomes necessary to satisfy in disregard of or in opposition to a will must be taken ratably from the interests of heirs, devisees, and legatees, is used in its broadest sense as an assertion of any right against the estate, and the widow's right to a distributive share constitutes a claim such as is contemplated by the statute. Dillavou v. Dillavou, 104 N. W. 432, 433; Id., 106 N. W. 949, 950, 130 Iowa, 405.

Code Civ. Proc. § 2718, authorizing reference of certain "claims against a decedent's estate," is limited to claims which existed against the intestate, and does not authorize a reference of claims for funeral expenses. Genet v. Willock, 87 N. Y. Supp. 938, 939, 93 App. Div. 588.

The word "claim," in Bankr. Act July 1, 1898, c. 541, § 57n, refers to the substance of the obligation rather than to any mere attribute of it. Claims proved against the estate of a bankrupt, which from their nature are entitled to priority under a state statute, may be allowed such priority, though not claimed until more than one year after the date of the adjudication, when the question of distribution of estates first arises. In re Ashland Steel Co., 168 Fed. 679, 681, 94 C. C. A. 165.

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A demand for the whole or a part of the estate is not a "claim" against it, within Rev. Laws 1905, §§ 3730, 3734. A "claim against the estate" of a decedent, within Rev. Laws 1905, §§ 3730, 3734, 3872, is a demand of a pecuniary nature which could have been enforced against decedent in his lifetime. In re Brust's Estate, 127 N. W. 11, 13, 111 Minn. 352, 20 Ann. Cas. 852.

A demand for rescission of the sale of a stallion and return of the purchase notes is not a "claim" within Prob. Code, §§ 178, 180, requiring a claim against a decedent's estate to be presented to the personal representatives before suit thereon, but such sections have reference only to demands enforceable against decedent by a personal action for the recovery of money only. Kline v. Gingery, 124 N. W. 958, 959, 25 S. D. 16.

A demand made through an attorney or agent upon an administrator for possession of the property of the estate which he represents, or a request made by an attorney of the judge of the probate court that he be notified if any further proceedings are to be taken in the estate, is not an appearance or "claim" within the purview and meaning of section 5715 of the Revised Codes, sufficient to stop the running of the statute limiting the time within which such claim of the right of succession shall be made by a nonresident alien. Connolly v. Reed, 125 Pac. 213, 217, 22 Idaho, 29.

Where a person claims ownership and right of possession, and an administrator denies the allegations of the complaint, claiming the property as that of the estate, the action or trial of property is not for a "claim or demand" against the estate, within the meaning of Code, § 5957, subdiv. 3, relating to the competency of witnesses in actions for claim or demand against the estate of a decedent. Cunningham v. Stoner, 79 Pac. 228, 231, 10 Idaho, 549.

Where an administrator sued for a portion of a mining claim, because a deed by the intestate under which defendants claimed was so indefinite as to be inoperative, defendant's claim under the deed was not a "claim or demand against intestate's estate," so as to render them incompetent to testify as to matters occurring prior to his death. Collins v. McKay, 92 Pac. 295, 297, 36 Mont. 123, 122 Am. St. Rep. 334.

"Claim," as used in Code Civ. Proc. § 1880, subd. 3, which makes persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a "claim or demand against the estate of a deceased person" incompetent as witnesses as to any fact occurring before death of such person has the same meaning as when used in the Code provisions for the settlement of decedent's estates, where it is used synonymously with "demand," and "has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money and upon which only a money judgment would have been rendered. It does not include a family allowance. In re McCausland's Estate, 52 Cal. 568, 576 (quoting and adopting definition in Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140).

An order of a court of bankruptcy allowing expenses incurred by a bankrupt's trustee for counsel fees is not one allowing a "debt or claim" against the estate, within the meaning of Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553, and appealable thereunder, but is an administrative order over which the Circuit Court of Appeals is given jurisdiction to superintend and revise by section 24b, and such mode of review is exclusive. W. J. Davidson & Co. v. Friedman, 140 Fed. 853, 72 C. C. A. 553.

Rem. & Bal. Code Wash. § 1470, provides for the publication of notice to creditors by every executor or administrator, and requires presentation of claims within a year of the date of the notice, and section 1472 declares that, if a claim is not presented within such time, it shall be barred. Held, that the word "claim," as so used, included the right of a ward, after he became of age, to recover against the estate of his deceased guardian for a devastavit, and that, in the absence of fraud or equitable considerations, his failure to present the claim to the administrator of the guardian's estate constituted a bar to his right to sue either the estate of the deceased guardian or his surety. Newberry v. Wilkinson, 199 Fed. 673, 682, 118 C. C. A. 111.

A "debt against an estate" ordinarily contemplates a debt owed by the deceased, but a "claim against an estate" is not so restricted, and within a refunding bond given by an heir may include funeral expenses, current taxes, etc., and the lawful expenses of administration, including a commission for the administrator. Callaway v. Title, Guaranty & Trust Co., 111 S. W. 905, 906, 132 Mo. App. 466.

Debts payable in the future are "claims against an estate" on assignment for the benefit of creditors, as are also damages for breach of contract prior to the assignment. In re Chestnut St. Trust & Saving Fund Co.'s Assigned Estate, 66 Atl. 332, 333, 217 Pa. 151, 118 Am. St. Rep. 909.

Expenses accruing after the death of decedent and in connection with the administration of his estate are "claims against the estate," within Mills' Ann. St. § 4870, dividing demands against the estates of decedents into four classes, and providing that one class shall include the expenses of administration and settlement of the estate. United States Fidelity & Guaranty Co. v. People, 98 Pac. 828, 834, 44 Colo. 557.

CLAIM AGAINST LAND

"Charge" is defined in Bouvier's Law Dictionary as "a lien, incumbrance, or claim

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which is to be satisfied out of the specific thing or proceeds thereof to which it applies." Under Code 1904, c. 16, § 83, providing that proceedings to enforce any charge or lien on lands shall be instituted in the county where such lands lie etc., the word "charge" means a lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies, and a bill to set aside a conveyance as in fraud of creditors is a "claim" to be satisfied out of the land or the proceeds thereof. Abramson v. Horner, 80 Atl. 907, 912, 115 Md. 232.

CLAIM AND DELIVERY

"In 'claim and delivery,' the purpose is to obtain possession of the property with damages for its detention. The value to be found by the jury which the plaintiff may recover, in case a redelivery cannot be had, is the market value at the time the taking occurred or the wrongful detention began. Osmers v. Furey, 81 Pac. 345, 348, 32 Mont. 581.

An action of "claim and delivery" is primarily an action for possession, and general allegations of ownership or right of possession are sufficient. Summerville v. Stockton Milling Co., 76 Pac. 243, 250, 142 Cal. 529.

The statutory action of "claim and delivery" (B. & C. Comp. § 284) for the recovery of possession of specific personal property is substantially the ancient remedy of "replevin." Freeman v. Trummer, 91 Pac. 1077, 1079, 50 Or. 287.

The Code action of "claim and delivery" requires that the particular description of the property claimed and also the separate value of each article be stated, for the purpose of enabling the court to render judgment in case the defendant fails to deliver the property. The action takes the place, and has in it all the elements, of detinue, replevin, and trover. If a party in possession has converted the property, and no longer has it in his possession, he is liable for the value thereof. American-German Nat. Bank v. Gray & Dudley Hardware Co., 110 S. W. 393, 398, 129 Ky. 105.

An action of "claim and delivery" by a chattel mortgagee, under a mortgage providing that on the happening of a contingency the mortgagee might take possession of the property, using all necessary force to do so, looked merely to the recovery of possession of the property, and in no sense could be termed an action for the recovery of the secured debt, and hence could not be held nonmaintainable on the ground that the debt was due and foreclosure afforded a more speedy remedy for collection of the debt. Caseday v. Lindstrom, 75 Pac. 225, 227, 44 Or. 309.

"In action of 'claim and delivery' the primary relief sought is the recovery of the possession of personal property; but, if that cannot be secured, the alternative relief to which the plaintiff is entitled is the value of the goods or chattels taken or withheld, or of his special property therein. Casto v. Murray, 81 Pac. 883, 886, 47 Or. 57.

CLAIM ARISING ON CONTRACT

A petition for the reformation of a contract with the federal government and for damages for breach thereof as reformed is within the jurisdiction of the Court of Claims under Act Cong. March 3, 1887, defining the jurisdiction of the court as extending to all "claims founded on any contract" with the federal government or for damages in cases not sounding in tort, etc. A claim for money upon a contract which would be like a right of action at common law, but for the need of help from equity to establish the contract seems to fall within the words of the statute in their obvious, literal sense. United States v. Milliken Imprinting Co., 26 Sup. Ct. 572, 573, 202 U. S. 168, 50 L. Ed. 980 (citing District of Columbia v. Barnes, 25 Sup. Ct. 401, 197 U. S. 146, 150, 152, 49 L. Ed. 699, 701; South Boston Iron Works v. United States, 34 Ct. Cl. 174, 200).

Plaintiff purchased from defendant's testator property by warranty deed. After paying the taxes on the property due before the testator's death, he sued defendants for the amount of the taxes so paid. Held, the claim arose from a breach of a covenant in a deed, and was a claim arising on contract within Rev. St. 1898, § 3851, providing that "all claims arising upon contracts * * * must be presented within the time limited in the notice" given by the executor or administrator to creditors of the estate. Clayton v. Dinwoodey, 93 Pac. 723, 725, 33 Utah, 251, 14 Ann. Cas. 926.

A claim by a county against the state for the support of orphans is a "claim on contract," as used in Act Feb. 28, 1893, p. 57, c. 65, providing that all persons having claims on contract against the state, not allowed by the state board of examiners, may sue thereon within two years after the accrual of the cause of action. San Luis Obispo County v. Gage, 73 Pac. 174, 177, 139 Cal. 398.

CLAIM CHECK

The "claim check" system, employed by a railway terminal company and a cab company, was operated by passengers calling for the cab company to transfer their trunks from their homes to the station; the cab company calling for the trunk, placing one of its checks thereon, and giving to the proposed passenger duplicate check. The trunk was then conveyed to the baggage room of the terminal company, and upon presentation of the claim check by the passenger, accompanied by a railroad ticket, a railroad check was issued. Such system was not of itself unlawful, but it was unlawful for the terminal company to give the exclusive privilege of

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using such system to a particular cab company, or to give such cab company the exclusive right to use parts of its baggage room while refusing to permit passengers or other transfer companies to place trunks in the baggage room until a railroad ticket was obtained by the passenger. Hart v. Atlanta Terminal Co., 58 S. E. 452, 457, 128 Ga. 754.

CLAIM FOR DAMAGES

There is a clear distinction between a notice of negligence and a "claim for damages." A mere notice to a telegraph company that its employés have been negligent in the transmission of a message, together with the circumstances of the negligence, is not a presentment of a claim for damages based on such negligence, within the contract for the transmission of the message, providing that the company shall not be liable for damages where the claim is not presented within a specified time, etc. Western Union Telegraph Co. v. Moxley, 98 S. W. 112, 113, 80 Ark. 554.

CLAIM FOR LABOR OR MATERIAL

Claims for patterns made for the contractor from which to make castings required for the vessel, for towing in the delivery of materials, for wharfage paid in connection with such delivery, and by a local transfer company for hauling materials, are all "claims for labor or material," within the meaning of the statute, and recoverable on the bond; but advances of freight made to common carriers by such transfer company are not so recoverable. Title Guaranty & Trust Co. v. Puget Sound Engine Works, 163 Fed. 168, 179, 89 C. C. A. 618.

CLAIM FOR LOSSES

Under a statute providing that "net assets" means the funds of an insurance company available for the payment of its obligations in the commonwealth after deducting therefrom losses and "claims for losses," an insurance company whose assets exceed by about $30,000 its liabilities, not including claims against it aggregating $300,000, based on policy holders disputing the validity of settlements for losses, is insolvent, and the insurance commissioner may apply for a receiver and enjoin the company from carrying on further business as authorized by the statute; the phrase "claims for losses" including all pending claims, whether finally adjudged valid or invalid. Cutting v. American Ins. Co., 83 N. E. 396, 397, 197 Mass. 131.

CLAIM LIQUIDATED BY JUDGMENT

A creditor whose debt was paid within four months prior to bankruptcy, but from whom the amount was recovered by the trustee by suit as a preference, is one holding a "claim liquidated by judgment" within Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561, and he may prove it within 60 days thereafter, though over a year after the adjudication. In re Coventry Evans Furniture Co., 171 Fed. 673, 674.

CLAIM OF OWNERSHIP

A conveyance of land by the adverse occupant is evidence of "claim of ownership" for the foundation of an adverse title. Suit v. Republic Iron & Steel Co., 55 South. 639, 172 Ala. 101.

Civ. Code 1897, § 3899, provides that any person desiring to subdivide his lands into lots shall cause the same to be surveyed; and section 3900 declares that a plat certified by the surveyor shall be filed in the office of the judge of probate in the county where the lands are situated, and shall be recorded in a suitable book, and certified copies may be used in evidence with like effect as in the case of deeds. Held that, where a prior occupant of certain land in controversy filed a plat thereof under such sections, the plat was evidence of a "claim of ownership" on his part in support of a claim of title by adverse possession. Suit v. Republic Iron & Steel Co., 55 South. 639, 172 Ala. 101.

An instruction that unless the jury believed that plaintiff, or his vendors, under whom he claims, owned or held the land in controversy in actual adverse possession, continuously, to a well-defined, marked boundary line, for 15 years prior to the alleged trespass, they should find for the defendants, is not fatally defective, because it does not state that plaintiff must have claimed, as well as held, such possession, although it is usual to use the word "claimed" in an instruction of such character. Vincent v. Willis (Ky.) 82 S. W. 583, 584.

The word "claim," as used in Revenue Act (Stat. 1861, p. 421) § 5, which declares that the term "real estate," whenever used in the act, shall include the ownership of, or "claim" to, or possession of, or right of possession to, any land, means something more than a mere assertion by the party assessed that he owns, or is entitled to possess, the lands described in the list; while the word carries with it the idea of such assertion it involves also the idea of an actual possession of the land claimed, and hence a "claim and possession" is assessable. People v. Frisbie, 31 Cal. 146, 148.

CLAIM OF RIGHT

The statute, declaring that land must be held under a "claim of right" inconsistent with and hostile to the claim of another, refers to a claim of the possessor when he is holding only for himself, and a claim to satisfy the statute may be only such as is involved in a mere maintenance of possession of and the exercise of dominion over the land, provided there is present the attitude of hostility and exclusiveness towards the true owner; but the facts must give rise to the inference of a claim or an attitude of that character where there is no color or

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claim of title. Smith v. Jones, 132 S. W. 469, 471, 103 Tex. 632, 31 L. R. A. (N. S.) 153.

The "claim of a right under an authority exercised under the United States," within the meaning of Rev. St. U. S. § 709, defining the appellate jurisdiction of the Supreme Court of the United States over state courts, is presented by a contention that a Montana statute was authorized by Enabling Act Feb. 22, 1889 (25 Stat. 676, c. 180), and was therefore valid, even if repugnant to the Constitution of that state. State of Montana v. Rice, 27 Sup. Ct. 281, 283, 204 U. S. 291, 51 L. Ed. 490.

Under Rev. St. 1895, art. 3349, defining adverse possession as the actual and visible appropriation of the land, commenced and continued under a "claim of right" inconsistent with and hostile to the claim of another, a person who enters upon land with knowledge that he has no title and that another has, but with the intention to occupy it in hostility to all the world, and who does so occupy it openly and visibly, is in adverse possession. Link v. Bland, 95 S. W. 1110, 1111, 43 Tex. Civ. App. 519.

It is not necessary that a claimant of land and those through whom he claims ever made oral declaration of such "claim of right." It may be inferred from the manner of the occupancy. The same, as well as all other essential elements of adverse possession, may be shown by positive acts of ownership inconsistent with the title and possession of the true owner of the land in controversy, such as erecting, repairing, and occupying buildings on the land, leasing the same, and collecting the rents, selling and conveying, or offering to sell and convey. The rule has been stated that unexplained occupancy continued for 20 years raises the presumption that such occupancy is under "claim of right" and adverse. Rennert v. Shirk, 72 N. E. 546, 547, 549, 163 Ind. 542.

The term "claim of right," as applied to adverse possession, is not synonymous with the word "notice." Swope v. Ward, 84 S. W. 895, 897, 185 Mo. 316 (citing Whitaker v. Whitaker, 58 S. W. 5, 157 Mo. 342).

CLAIM OF TITLE

The actual possession and improvement of premises as owner are accustomed to possess and improve their estate, without any payment of rent, recognition of title in another, or disavowal of a title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his title and holding as absolute owner, and unless rebutted by other evidence will establish the fact of "claim of title." Rennert v. Shirk, 72 N. E. 546, 548, 163 Ind. 542 (quoting and adopting definition in Dyre v. Eldridge, 36 N. E. 522, 136 Ind. 659; La Frombois v. Jackson ex dem. Smith, 8 Cow. [N. Y.] 588, 603, 18 Am. Dec. 463).

As color of title

The term "color of title" is not synonymous with "claim of title"; but, to constitute color of title, there must be a paper title to give color to the adverse possession, whereas a claim of title may be constituted wholly by parol. Barrett v. Brewer, 69 S. E. 614, 615, 153 N. C. 547, 42 L. R. A. (N. S.) 403.

While "color of title" is appearance of title, which in reality is not title, "claim of title" is entering and occupying by one with intent to hold land as his own against the world, irrespective of color of right or title as a foundation for his claim; the two terms being distinct but supplementary to each other, in that while "color of title," without claim, is of little effect, "claim of title," without color, may ripen into title to land actually occupied, while with color it may ripen into title not only to land actually occupied, but by a legal fiction may extend to all land described in the color of title, if that actually occupied be part of it. Crowder v. Doe ex dem. Tennessee Coal, Iron & Ry. Co., 50 South. 230, 232, 162 Ala. 151, 136 Am. St. Rep. 17.

CLAIM ON FORFEITED RECOGNIZANCE

As penalty, see Penalty.

CLAIM PROVABLE IN INSOLVENCY

Under Pub. St. 1882, c. 157, § 26, defining "claims provable in insolvency" as debts due and payable from the debtor at the time of the first publication of the notice of issuing the warrant, and debts at that time absolutely due, though not payable, a claim against a surety on an administrator's bond under Pub. St. 1882, c. 143, § 10, on account of a judgment recovered against the administrator for a debt due from the estate, was not a provable debt, when at the time of the first publication of the warrant the demand required by the section had not been made on the administrator. McIntire v. Cottrell, 69 N. E. 1091, 185 Mass. 178.

CLAIM TO REAL ESTATE

The words "setting up claim thereto," in Ky. St. 1903, § 11, providing that any person having both the legal title and possession of land may prosecute a suit in equity against any person setting up claim thereto, means title or right that is hostile to the plaintiff's claim. Brown v. Ward (Ky.) 105 S. W. 964, 965 (quoting Campbell v. Disney, 18 S. W. 1027, 93 Ky. 41).

CLAIM UPON LAND

Tax liens held by the state are not interests in and claims upon the land on which they are a lien, within the meaning of Laws 1903, c. 234, § 6, relating to the registration of land titles. National Bond & Security Co. v. Daskam, 97 N. W. 458, 91 Minn. 81.

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CLAIM UPON TREASURY

"Claims upon the treasury" mean claims which the state is or may be under legal obligations to pay, such as the salaries of its officers and employés, the cost of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions. Lancaster County v. State, 104 N. W. 187, 188, 74 Neb. 211, 13 Ann. Cas. 88 (quoting and adopting definition in State ex rel. Sayre v. Moore, 59 N. W. 755, 40 Neb. 854, 25 L. R. A. 774).

CLAIMANT

See Bona Fide Claimant; Lien Claimant; Successful Claimant.

The term "claimant under color of title," in Const. art. 13 (Code 1906, p. lxxxiv), relating to the transfer of title of land forfeited to the state, is the status of one who relies on the doctrine of adverse possession, however defective his color of title may be, so long as his claim is not predicated on fraud or breach of trust. State v. West Branch Lumber Co., 63 S. E. 372, 381, 64 W. Va. 673.

In condemnation proceedings

Under a statute relative to condemnation proceedings, providing that all persons claiming an interest in the property may appear and defend their interest, the term "claimants" embraces any person who has an interest in the land, and whose rights would be affected by its condemnation. Brigham City v. Chase, 85 Pac. 436, 438, 30 Utah, 410.

Under Ballinger's Ann. Codes & St. § 5644 providing that persons and corporations claiming money paid into court in condemnation proceedings may apply to the court therefor, and the court may order payment to the claimant, or require an action to be brought to determine conflicting claims, a mortgagee, a lien claimant, and a municipality, having a claim on an assessment for street paving, were "claimants" against the money paid into court by the railway company in the condemnation suit. North Coast Ry. Co. v. Hess, 105 Pac. 853, 855, 56 Wash. 335.

CLAMP

A "clamp" is an instrument of wood, metal, or other rigid material, used to hold anything, or to hold or fasten two or more things together by pressure, so as to keep them in the same relative position. American Can Co. v. Hickmott Asparagus Canning Co., 142 Fed. 141, 145, 73 C. C. A. 359 (citing Cent. Dict.).

CLANDESTINE

An indictment for smuggling, charging that defendant did "bring into the country clandestinely" certain dutiable goods, was synonymous with the provision of Rev. St. § 2865, making it an offense to "clandestinely introduce" dutiable goods into the country with intent to avoid payment of duty. Rogers v. United States, 180 Fed. 54, 58, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264.

A fraudulent entry of merchandise at the custom house cannot be classified as "smuggling," nor brought within the words "clandestinely introduce," in Rev. St. § 2865, making it criminal to smuggle or clandestinely introduce merchandise into the United States. United States v. 646 Half-Boxes of Figs, 164 Fed. 778, 780.

CLASS

See Gift to a Class; Second Class.

"A 'class' is a number of persons or things ranked together for some common purpose (Bouv. Law Dict.), and when a legacy is to a class, all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment." Davis v. Sanders, 51 S. E. 298, 299, 123 Ga. 177 (quoting and adopting definition in Mitchell v. Mitchell, 47 Atl. 325, 73 Conn. 303).

The use of the word "class" in Const. 1890, § 193, partially abrogating the fellow servant rule as to employés of "any railroad corporation," and providing that the Legislature may extend the remedies herein provided for to any other class of employés, clearly indicates that it was not the purpose of such section to extend its provisions to all employés of all persons or corporations. Bradford Const. Co. v. Heflin, 42 South. 174, 178, 88 Miss. 314, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077.

A life insurance company, issuing contracts providing for a special income in consideration of insured rendering on request services for the company, and providing for the creation by the company of a dividend fund for the class holding such policies, etc., does not violate Code 1907, § 4579, prohibiting an insurance company from giving any particular policy holder of the same class any advantage in the dividends or other benefits to accrue thereon, etc.; the word "class" qualifying "policy holder," and meaning the holders of like contracts. Julian v. Guarantee Life Ins. Co., 49 South. 234, 236, 159 Ala. 533.

A gift to a "class" is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number. Herzog v. Title Guarantee & Trust Co., 69 N. E. 283, 286, 177 N. Y. 86, 67 L. R. A. 146.

Where a testator, having sisters and children of deceased sisters, gave the balance of his estate to his lawful heirs, to be di-

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vided equally among them, the term "lawful heirs" constituted a single "class," so that the distribution must be per capita, and not per stirpes. In re Griswold, 86 N. Y. Supp. 250, 252, 42 Misc. Rep. 230.

A devise to two persons, naming them, "with whom I live, and whom I regard and treat as my adopted daughters," is not a devise to a "class," entitling one to the entire devise on the death of the other before the death of the testator. In re Hittell's Estate, 75 Pac. 53, 54, 141 Cal. 432.

The word "class," as used by the courts in declaring that, on appeal in any suit of any "class" over which justices are given jurisdiction, an amendment may be made in the circuit court to cure an omission of a jurisdictional fact, means those cases which the statute has marked out and given justices of the peace jurisdiction over. When a suit is commenced before a justice, which does not for any reason come within the standards set up by statute, it is not in the class of cases over which justices have jurisdiction. United States Fidelity & Guaranty Co. v. Foskett-Kessner Feed Co., 73 S. W. 364, 365, 100 Mo. App. 316.

CLASS LEGISLATION

See, also, General Law; Special Law.

"Class legislation" is that which discriminates against some and favors others of the same station; hence a statute requiring the vaccination of school children is not class legislation, within Const. U. S. Amend. 14. French v. Davidson, 77 Pac. 663, 664, 143 Cal. 658 [citing Barbier v. Connolly, 5 Sup. Ct. 357, 113 U. S. 27, 28 L. Ed. 923].

Act Ala. March 9, 1901 (Acts 1900–01, p. 2685), regulating the business of money brokers, and providing that all persons engaged in loaning money on security of bills of sale, etc., shall express in the instrument securing such loan the rate of interest, the date of the loan, the fact that the instrument is taken for a loan of money, a minute description of the property, and within five days shall file the instrument for record in the office of the probate judge, and that contracts for the loan of money made in violation of the act shall be void, was a valid exercise of the state's police power, and was not unconstitutional for inequality, although its provisions do not apply to the business of banking and loans when the amount exceeds $75. The court said: "Perfection is no more to be exacted in legislation than in other human work. The motives and interests animating men, and the economic, industrial, social, and moral conditions which affect the welfare of society, are almost infinite in number and character, so that it is impossible in practice, without creating evil and injustice, to apply the same unbending rule to all of these varying situations in dealing with concrete human affairs. Legislative power, therefore, must frequently indulge in marked differences between persons and things in its attempts to remedy particular evils. Neither the state nor the federal Constitution exacts perfect equality in the apportionment of the burdens which the state finds it necessary to impose upon men to advance the public weal. Mere want of equality in the burdens imposed, or varying rules for the conduct of different persons, even in relation to the same general subject-matter, will not avail to overthrow a statute, if the differences it makes are not merely arbitrary. If its distinctions are based upon some just reason, and it does not attempt, under the guise of regulating an evil, to deprive of liberty or property without due process, or unjustly to confer special or exclusive privileges upon one class at the expense of others, or to put burdens and penalties upon such persons beyond the extent to which their conduct and relations to an evil fairly subject them, in view of the principle upon which the regulations are rested, the statute is not objectionable on constitutional grounds." In re Home Discount Co., 147 Fed. 538, 545 (citing Commonwealth v. Danziger, 57 N. E. 461, 176 Mass. 290; Dorman v. State, 34 Ala. 216; Missouri, K. & T. Ry. Co. v. May, 24 Sup. Ct. 638, 194 U. S. 267, 48 L. Ed. 971; Fidelity Mut. Life Ass'n v. Mettler, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; Holden v. Hardy, 18 Sup. Ct. 383, 169 U. S. 391, 42 L. Ed. 780).

An ordinance making it unlawful for the proprietor of a place where intoxicating liquors are sold to permit any person or persons other than himself and family to enter such room and place where the liquors are sold during the hours when the sale is prohibited is equally applicable to all dealers in intoxicating liquors, whether at wholesale or retail, and is not "class legislation" within the well-defined meaning of that term. In enacting police regulation, if the classification therein made is usual, practical, and reasonable, that is sufficient. State v. Calloway, 84 Pac. 27, 31, 11 Idaho, 719, 4 L. R. A. (N. S.) 109, 114 Am. St. Rep. 285.

The fourteenth amendment to the federal Constitution does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like conditions and circumstances, both in the privileges conferred and in the liabilities imposed. Class legislation, discriminating against some and favoring others is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation, and which affects alike all persons similarly situated, is not within the amendment. The Ohio statute, in so far as it enacts that every person,

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firm, or corporation desiring to engage in fishing in the waters of Lake Erie and the estuaries and bays thereof within the state, shall make application to the commissioners of fish and game and obtain a license so to do, and for such license shall pay a certain fee, is neither a violation of the fourteenth amendment to the federal Constitution nor repugnant to the state Constitution. State v. Hanlon, 82 N. E. 662, 665, 77 Ohio St. 19, 13 L. R. A. (N. S.) 539, 122 Am. St. Rep. 472.

In the exercise of the police power in establishing a day of rest, a large discretion must be allowed to the Legislature in determining what kind of labor or business should be prohibited, and what are and what are not works of necessity or charity; and unless the classification is manifestly purely arbitrary, and not founded on any substantial distinction or natural reason, the courts have no right to interfere with the exercise of legislative discretion, and the courts cannot hold such legislation unconstitutional, as being class legislation. Laws 1903, c. 362, prohibiting the keeping open of butcher shops for the sale of meats on Sunday, etc., is not "class legislation," within Const. art. 4, §§ 33, 34, prohibiting class legislation. State ex rel. Hoffman v. Justus, 98 N. W. 325, 326, 91 Minn. 447, 64 L. R. A. 510, 103 Am. St. Rep. 521, 1 Ann. Cas. 91 (citing State v. Petit, 74 Minn. 376, 77 N. W. 225).

Legislation which affects one class and not another, but which affects all members of the same class alike, is not unconstitutional as "class legislation." Laws 1903, p. 162, relating to the operation and speed of automobiles on the highways of the state, fixing the amount of license, and prescribing a penalty for violating the same, is not "class legislation," as discriminating against certain users of the highway. State v. Swagerty, 102 S. W. 483, 485, 203 Mo. 517, 10 L. R. A. (N. S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725 (quoting and adopting the definition to Barbier v. Connolly, 5 Sup. Ct. 357, 113 U. S. 32, 28 L. Ed. 923).

CLASS SUIT

A "class suit" is one in which one or more members of a numerous class, having a common interest, sue in behalf of themselves and all other members of that class. Such suits are sometimes called "creditors' suits" and sometimes "stockholders' suits." Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 96.

CLASSES OF STATE LANDS

The "classes of state lands" referred to in the revenue law, providing that the comptroller shall annually certify lands sold or patented by the United States, together with the various classes of state lands sold during the year, to the assessors of the counties in which such lands may be situated, includes lands the title to which had matured in the state by tax sale and which had been sold during the year. State ex rel. Sunday v. Richards, 39 South. 152, 153, 50 Fla. 284.

CLASSIFICATION

See Governed by Illinois Classification; Unclassified Service; Value or Classification.

There can be no proper "classification" of cities and counties for the purpose of legislation except by population. That is not classification which merely designates one county of the commonwealth, and contains no provision by which any other county may, by reason of its increase of population, come within the class. A statute providing for the consolidation of any two contiguous cities situated in the same county in the commonwealth is local legislation, and obnoxious to the Constitution, where the commonwealth contains only two such cities. Sample v. City of Pittsburgh, 62 Atl. 201, 203, 212 Pa. 533.

The "classification of property" for purposes of taxation, when upheld as not violative of the constitutional provision, is always coupled with the proviso, "if all of the same class are taxed alike." A provision of a city charter directing that all debts due a person, including all notes, mortgages, trust deeds, and all solvent credits, secured or unsecured, shall be assessed and listed for taxation at the fair and full worth, and then exempting notes representing purchase price of property, was not a "classification of property" within the true meaning of the word. Adams v. Kuykendall, 35 South. 830, 833, 83 Miss. 571.

CLASSIFIED LIST

Municipal Code 1902, § 151 (96 Ohio Laws, p. 71), provides that police departments in cities shall be maintained under the merit system; and section 149 (page 70) relates to the composition of the police department, and provides that the chief of police shall be appointed from the classified list of such department. Section 153 provides that the directors of public safety shall classify the service in the police department, and sections 153, 156, 158, and 164 (pages 71, 72, 74) provide the procedure in preparing such classification and for the preparation of a register for each class of position in the classified service of the city. Held, that the words "classified list," in section 149, relate to the register prescribed by section 164. State v. Wyman, 72 N. E. 457, 459, 71 Ohio St. 1.

CLAUSE

See Commercial Clause; Enacting Clause; Iron Safe Clause; Open Mortgage Clause; Saving Clause; Spendthrift Clause.

Residuary clause, see Residuary.

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CLAY

As mineral, see Mineral.

Plastilina, or modeling clay, an article not containing clay, is not dutiable as "clay," either directly or by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 93, 30 Stat. 156, but as an "unenumerated manufacture," under section 6, 30 Stat. 205. Bancel v. United States, 176 Fed. 132.

CLEAN

The term "clean" may be applied to a great variety of merchandise, and its scope and meaning are within the comprehension of any one. "Clean busheling scrap," in a contract of sale of iron scrap, does not relate to the particular grade but to the quality of the bunch sold, considered in its entirety. Lichtenstein v. Rabolinsky, 90 N. Y. Supp. 247, 250, 98 App. Div. 516.

Under charter authority to pass ordinances for the government of the city relative to cleaning sidewalks, a city can require owners, etc., of property abutting on streets, etc., within four hours of daylight after snow has ceased falling, to cause the snow to be removed from sidewalks adjoining such property. State v. McCrillis, 66 Atl. 301, 302, 28 R. I. 165, 9 L. R. A. (N. S.) 635, 13 Ann. Cas. 701.

CLEAN HANDS

See Unclean Hands.

The maxim, "He who comes into equity must come with clean hands," expresses rather a principal of inaction than of action, and means that equity refuses to lend its aid to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter in relation to which he seeks relief. Danciger v. Stone, 187 Fed. 853, 858.

The maxim, "He who comes into equity must come with clean hands," is synonymous with "Who does inequity shall not have equity," and "they must come with clean hands, with a conscionable regard for the rights of others, ready to do equity on their part, and seeking only equity at the hands of the court." Little v. Cunningham, 92 S. W. 734, 736, 116 Mo. App. 545.

The equitable maxim, that "he who comes into equity must come with clean hands," does not reach a case where the cause of action is meritorious, and where, subsequent to suit brought, the complainant has been guilty of reprehensible conduct, but which does not go to the cause of action. Chute v. Wisconsin Chemical Co., 185 Fed. 115, 118.

The maxim, "One who comes into equity must come with 'clean hands,'" is based upon conscience and good faith, and the bad faith or the unconscionable conduct that will justify the application of this maxim must be based upon the actual knowledge or willful fraud. The fraud of an agent, that is by mere imputation chargeable upon a complainant, will not render the hands of the latter unclean within the meaning of this maxim. "Unclean hands," within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a court of equity as a court of conscience will not even listen, because the conduct of such suitors is itself unconscionable in the moral sense that imports actual knowledge. Vulcan Detinning Co. v. American Can Co., 67 Atl. 339, 341, 72 N. J. Eq. 387, 12 L. R. A. (N. S.) 102 (citing American Ass'n v. Innis, 60 S. W. 388, 109 Ky. 595).

It is a fundamental principle of equity that he who seeks equity must do equity, and he who comes into equity must come with "clean hands." As is stated in 1 Pom. Eq. Jur. (2d Ed.) §§ 397, 399: "Whenever a party, who as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." Ashe-Carson Co. v. Bonifay, 41 South. 816, 819, 147 Ala. 376.

The principle, applicable to all classes of actions, that every suitor who seeks redress at the hands of a court should come unfettered and unsullied by faults and wrongs of his own commission against the contending party, has become aphorized in the law as "clean hands." It is plainly and palpably violated and infringed whenever a litigant who prays a divorce has been guilty of any act which under the statute would furnish the defendant a cause of action as against him. Cupples v. Cupples, 80 Pac. 1039, 1040, 33 Colo. 449.

CLEAR

See In the Clear; Past and Clear; Three Feet Wide in the Clear.

Know the way to be clear, see Know.

The word "clear" is synonymous with "evident," as used in the constitutional guaranty providing for bail except for capital offenses when proof is evident. The words "clear," "convincing," "satisfactory," and "clear of all reasonable doubt," when used with reference to the measure of proof necessary to show a deed absolute on its face to be a mortgage, all substantially convey the same meaning and require the same degree of proof. Winston v. Burnell, 24 Pac. 477, 478, 44 Kan. 367, 21 Am. St. Rep. 289. The word "evident" means "clear to the vision, especially clear to the understanding, and satisfactory to the judgment. Its synonyms are: 'Manifest'; 'plain'; 'clear'; 'obvious';

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'visible'; 'apparent'; 'conclusive'; 'indubitable'; 'palpable'; 'notorious.'" State v. Kauffman, 108 N. W. 246, 20 S. D. 620 (quoting with approval from Webster's Dict.).

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 269, 30 Stat. 172, the provision for "clear" shelled almonds refers to nuts that are practically and substantially free from shells, dust, and dirt, and after being divested of their outer covering are fairly free from that covering. Heide v. United States, 175 Fed. 316, 317.

CLEAR DAYS

"When so many 'clear days' or so many days 'at least' are given to do an act, or 'not less than' so many days must intervene, both the terminal days are excluded." In re Gregg's Estate, 62 Atl. 856, 857, 213 Pa. 260 (quoting and adopting the language of Endlich, Interpretation of Statutes, § 391).

CLEAR EVIDENCE OR PROOF

See, also, Clearly Proven.

That a fact must be shown by "clear and satisfactory" evidence means that the nature of the case demands a closer scrutiny of the evidence than in an ordinary controversy. Peterson v. Bauer's Estate, 111 N. W. 361, 362, 76 Neb. 652.

The term "clear and satisfactory proof," or "clear and convincing proof," as used in instruction in civil actions, does not bear the interpretation of "proof beyond all reasonable doubt." In a case involving false swearing, "clear and satisfactory proof" may be defined to be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime. Virginia Fire & Marine Ins. Co. v. Hogue, 54 S. E. 8, 11, 105 Va. 355.

The phrase "clear and satisfactory evidence," as used in a statute providing that if any railway company, common carrier, or person affected thereby, shall be dissatisfied with the decisions of the railway commission with reference to any order, such dissatisfied company or person may file a petition in the district court of the county where the cause of action arose, against such commission as defendant, and in all trials under the article, the burden of proof shall rest on the plaintiff, who must show by "clear and satisfactory evidence" that the orders complained of are unreasonable, etc., describes a degree of proof greater than a preponderance of evidence, and such as was necessary in order to establish fraud by that party to an action upon whom the burden of proof rested. The Legislature intended that the words should describe that degree of proof necessary to establish fraud or prove mistake in a written instrument. Chicago, R. I. & P. R. Co. v. Nebraska State Ry. Commission, 124 N. W. 477, 481, 85 Neb. 818, 26 L. R. A. (N. S.) 444 (citing Atchison, T. & S. F. R. Co. v. State, 100 Pac. 16, 23 Okl. 231, 18 Ann. Cas. 102; Id., 101 Pac. 262, 23 Okl. 510; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission of Louisiana, 33 South. 214, 109 La. 247).

Under Laws 1905, p. 549, c. 362, relating to a review of the orders, etc., of the railroad commission, and providing that in all trials the burden of proof shall be upon the plaintiff to show by clear and satisfactory evidence that the order complained of is unlawful or unreasonable, the "clear and satisfactory" proof required by the statute is such proof as is necessary to establish fraud or prove mistake in the execution of a written instrument; but it is not necessary that the orders be confiscatory in character and effect to enable the court to review them, such a construction being negatived by Const. art. 7, § 8, giving circuit courts appellate jurisdiction of, and supervisory control over, all inferior courts and tribunals. Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission of Wisconsin, 116 N. W. 905, 912, 136 Wis. 146.

CLEAR OF ALL CHARGES

A grantee under a deed, executed when ground rents were not a distinct object of taxation, who covenanted to pay ground rents "clear of all charges and assessments whatsoever," was bound to pay taxes on the ground rent. Peart v. Phillips (Pa.) 4 Yeates, 386, 387.

CLEAR OPPORTUNITY

In the last clear chance doctrine, that on discovery by defendant of the plaintiff's peril it is his duty to use ordinary care to avoid injuring the plaintiff if defendant has a "clear opportunity to avoid such injury," the words quoted mean such an opportunity as would necessarily be clear and plain to a man of ordinary intelligence and prudence in a given emergency, and if he fails to take advantage thereof he is liable for the injury, providing the other is not negligent after he discovers the danger. Harrington v. Los Angeles Ry. Co., 74 Pac. 15, 19, 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85.

CLEAR PREPONDERANCE

The rule requiring a "clear preponderance" of the evidence to warrant a determination contrary to findings by a trial court, requires the preponderance to be so apparent as to manifestly outweigh any probable legitimate influence on the triors of those advantages for discovering the truth which the reviewing tribunal cannot have. Ott v. Boring, 121 N. W. 126, 128, 139 Wis. 403.

CLEAR PROCEEDS

Under Const. art. 9, § 5, appropriating the clear proceeds of all penalties and forfeitures of all fines to the school fund, the "clear proceeds" of a fine includes the total sum, less only the sheriff's fees for collection

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in case the fine and costs are not collected in full. State v. Maultsby, 51 S. E. 956, 139 N. C. 583.

The "clear proceeds" of fines and penalties, within Const. art. 11, § 8, providing that the clear proceeds of the penalties for funds and of all fines in the several counties for any breach of the penal law or military laws of the state shall belong and be securely invested and sacredly preserved in the several counties as a county public school fund, means the part of the fine or penalty which is given by statute of the state. State ex rel. Rodes v. Warner, 94 S. W. 962, 964, 197 Mo. 650.

CLEAR STOCK

Under a contract for the sale of lumber calling for "clear stock," the term "clear stock" means lumber without knots and nothing more. Herrmann Lumber Co. v. Heidelberg, Wolf & Co., 92 N. Y. Supp. 256, 257, 46 Misc. Rep. 465.

CLEAR VALUE

The terms "actual value," as used in section 29, and "clear value," in section 30, War Revenue Act June 13, 1898, c. 448, 30 Stat. 464, 465, considered, and held to convey the idea of definite or certain value, something in no sense speculative. Lynch v. Union Trust Co. of San Francisco. 164 Fed. 161, 167, 90 C. C. A. 147.

CLEARANCE

"Clearance" means to satisfy the customs, harbor dues, and the like, and obtain from the governmental authority of the port leave to depart. International Mercantile Marine Co. v. Stranahan, 155 Fed. 428, 432.

CLEARING HOUSE CERTIFICATE

As personal property, see Personal Property."

CLEARLY

The word "clearly," in an instruction that, to show fraud, the facts must lead naturally and clearly to the facts sought to be established, and must be inconsistent with any other reasonable or probable theory, will not be interpreted as requiring proof beyond a doubt, where the charge also stated that only a fair preponderance of the evidence was required. Ley v. Metropolitan Life Ins. Co., 94 N. W. 568, 569, 120 Iowa, 203.

CLEARLY APPEAR

The provisions of the amendment to Ohio Rev. St. § 3256, and of section 3300, now sections 8806, 8807, and 8809, Gen. Code, relating to stock purchases and holdings, are clearly cumulative and meet the requirements of section 3269, now section 8733, Gen. Code, reciting that a "special provision shall govern unless it 'clearly appear' that the provisions are cumulative"—the word "clearly" meaning in a clear manner, without obscurity, without entanglement or confusion, without uncertainty; and "cumulative" meaning "additional," that which is superadded to another thing of the same character and not substituted for it. Mannington v. Hocking Valley Ry. Co., 183 Fed. 133, 154.

The words "clearly and manifestly," in Gen. St. 1901, § 7991, providing that any estate or interest in lands or personal estate or other property, acquired by the testator after the making of his will, shall pass thereby in like manner as if held or possessed at the time of the making of the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator, are themselves indefinite, and the statute does no more than require that the will shall disclose an intention that such property shall pass under it. Durboraw v. Durboraw, 72 Pac. 566, 67 Kan. 139.

CLEARLY PROVEN

An instruction that fraud is never presumed and must be "clearly and distinctly proven" is erroneous, as requiring too high a degree of proof under Code Civ. Proc. § 3390, subd. 5, providing that in civil cases the jury shall be instructed that, when the evidence is contradictory, the decision must be made according to a preponderance of the evidence, since such an instruction advises the jury that something more than a bare preponderance of testimony is necessary to be produced by the defendants on the question of fraud. Gehlert v. Quinn, 90 Pac. 168, 170, 35 Mont. 451, 119 Am. St. Rep. 864.

CLEAT

The piece of wood nailed to short crosspieces or lugs extending through the links of a chain, the apparatus being used to remove refuse falling into a trough at a sawmill, is called a "cleat"; its function being to strengthen the lugs and at the same time to make them fast in the chain. Ramsey v. Tremont Lumber Co., 46 South. 608, 121 La. 506.

CLERICAL

CLERICAL ERROR

The omission of the word "vexation" in an affidavit of appeal otherwise complying with Rev. St. 1909, § 2040, requiring appellant to file an affidavit stating that the appeal is not made for vexation or delay, is a clerical error, which is a mistake in copying or writing, and the affidavit on an amendment is sufficient to give jurisdiction on appeal in the absence of timely objection. Cassidy v. City of St. Joseph, 152 S. W. 306, 309, 247 Mo. 197.

"A 'clerical error' is an error of a clerk or subordinate officer in transcribing or entering an official proceeding ordered by another." Wetmore, to Use of McKay, v. Kar-

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rick, 27 Sup. Ct. 434, 438, 205 U. S. 141, 153, 51 L. Ed. 745 (quoting Marsh v. Nichols, S. & Co., 9 Sup. Ct. 168, 171, 128 U. S. 605, 615, 32 L. Ed. 538, 542).

"A 'clerical error' is one made by a clerk in transcribing or otherwise, and, of course, must be apparent on the face of the record, and capable of being corrected by reference to the record only." Trott v. Birmingham Ry., Light & Power Co., 39 South. 716, 717, 144 Ala. 383.

The expression "clerical error" implies negligence or carelessness of a clerk, writer, or copyist, and assumes that the mistake, or negligence, or carelessness, is that of one engaged in the subordinate service of transcription, copying, or comparison; labor not requiring original thought. Held that, where a standard article was incorrectly invoiced at an excessive price, this was a clerical error of a kind of which correction is not harmful to the administration of customs laws, and relief from which should be granted. Morimura Bros. v. United States, 160 Fed. 280, 281.

CLERICAL MISPRISION

A "clerical misprision" is either a mistake or a fraud perpetrated by the clerk of court, which is susceptible of demonstration by the face of the record, and relief for actions upon either of these grounds is by statute fixed at five years from time of discovery of the fraud or mistake. Commonwealth v. Caudell, 89 S. W. 535, 536, 121 Ky. 537.

CLERICAL MISTAKE

An importer, in giving the invoice value of his merchandise, stated it in dollars instead of rupees, having mistaken the rupee abbreviation for the dollar mark. Held, that this constituted a "clerical mistake." United States v. Muller, Maclean & Co., 158 Fed. 405, 406, 85 C. C. A. 515.

CLERK

See Auditor's Clerk; Clerk of Court; County Clerks; Ordinary Clerk; Proper Clerk; Regular Clerk; Town Clerk.

"The word 'clerk' (known to our forefathers as 'clark') at root denoted a member of the clergy, and the time was when the law and the gospel flowed from the same fountain; judges of court were taken from the ranks of the clergy (1 Bl. p. 17), and the maxim, 'Nullis clericus, nisi causidicus,' was in full vigor of bloom and fruitage. However, in progress of time, clerks and judges became sharply differentiated. A small or great 'court hand' became in vogue as need called. The manifest impossibility of a judge's having charge of and writing the records and issuing the writs became apparent, and the offices of clerks of court were created. In our state a 'clerk' is not a constitutional officer in the sense a sheriff is, but his office is recognized in the Constitution and is provided for by express statute, and may not be dispensed with." State ex rel. Hensen v. Sheppard, 91 S. W. 477, 482, 192 Mo. 497.

In Comp. Laws 1897, § 3031, authorizing admission of books of account in evidence where the party offering them kept no clerk, the word "clerk" implies more than a mere amanuensis. It means one having knowledge of the business, so as to be able of his own knowledge to testify as to it. Radcliffe v. Chaves, 110 Pac. 699, 701, 15 N. M. 258.

The terms "agent," "servant," or "clerk," as used in a statute denouncing embezzlement, contemplate one who has undertaken to transact some business or manage some affair for another, by the authority and on the account of the latter, and to render an account of it, or who is subject to the immediate direction and control of his master, so that a boy employed by the agent of an express company, whose salary was paid by the agent, is not a "servant," "clerk," or "agent" of the company, within the contemplation of the statute. Tipton v. State, 43 South. 684, 686, 53 Fla. 69 (quoting and adopting the definitions in 2 Bishop's New Crim. Law, § 233; 1 Clark's Crim. Law, p. 274).

In considering whether or not a person accused of embezzlement was a "servant," an "agent," or the like, it should be born in mind that in the law of embezzlement there cannot be a "clerk" without an employer, a "servant" without a master, or an "agent" without a principal. The words "clerk" and "servant" imply in some one the power of control. Tipton v. State, 43 South. 684, 686, 53 Fla. 69.

Assistant, deputy, or stenographer

Under Rev. St. 1887, § 4889, providing for service of notice on a clerk, in the absence of an attorney, it may be presumed that a stenographer, who was in charge of an attorney's office, was the "clerk" of the attorney. Peter v. Kalez, 83 Pac. 526, 528, 11 Idaho, 553.

Bank cashier

An assistant cashier of a national bank is a "clerk or agent," within the meaning of Rev. St. § 5209, providing that every president, director, cashier, teller, clerk, or agent of any association, who makes any false entry in any report, shall be guilty of a misdemeanor. Cochran v. United States, 15 Sup. Ct. 628, 629, 157 U. S. 286, 39 L. Ed. 704.

Bookkeeper

The word "clerk," as used in Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563, giving priority to debts for wages due to "workmen, clerks, or servants," earned within three months prior to the bankruptcy includes a bookkeeper; and the right of a clerk to priority is not affected by the fact that his employment by the bankrupt was not ex-

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clusive, but that he also did work for others. In re Baumblatt, 156 Fed. 422, 423.

As clerk of court

The court takes judicial notice of the names and signatures of its own officers, and where the officer's signature is followed by the word "Clerk" it will be presumed on appeal that he was clerk of the court in which the case was tried. Cardenas v. State, 124 S. W. 953, 954, 58 Tex. Cr. R. 109.

The word "clerk," when used in the statutes, means clerk of the court in which an action is brought, or is pending, or in which a proceeding is had. McLennan County v. Boggess, 137 S. W. 346, 347, 104 Tex. 311 (quoting 2 Words and Phrases, p. 1226).

The word "clerk," as used in a certificate of acknowledgment, declaring the officer taking the acknowledgment to be "the clerk of Harris county," means that he is the county clerk of that county. Riviere v. Wilkens, 72 S. W. 608, 610, 31 Tex. Civ. App. 454.

Factor distinguished

A "clerk" is defined as "a person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this: That the latter supplies the place of his principal in respect to the property consigned to him. A general name for salesmen, bookkeepers, amanuenses, and other employés of that class; a person employed in an office, public or private, for keeping records or accounts." Cyc. Law Dict. There is therefore a difference between the term "agent," as used in a statute requiring a foreign corporation transacting business in the state to maintain an office where process may be served upon it, and providing for such service by delivering a copy to any officer or agent in charge of such office, or, if there be no office, then to any officer, agent, or employé in any county, etc., and the term "clerk." But when a railroad company leaves only a clerk in charge of its place of business service on such clerk is sufficient. State ex rel. Texas Portland Cement Co. v. Sale, 132 S. W. 1119, 1121, 232 Mo. 166.

As laborer

See Laborer.

As officer

See Officer.

As position

See Position.

CLERK HIRE

As salary, see Salary.

CLERK OF CORPORATION

The word "clerk," as used in the statute providing for the service of process on a clerk of a foreign corporation, means some general officer, and not any person who happens to hold a clerk's position with it. Erie R. Co. v. Van Allen, 69 Atl. 484, 485, 76 N. J. Law, 119.

CLERK OF COURT

See, also, Clerk.

The "clerk of the court" is an officer who records the proceedings of the court and has custody of its records. Citizens' State Bank v. Read, 90 N. E. 492, 493, 45 Ind. App. 158.

The clerk of the district court is an "officer of the court," and in order to properly perform the duties devolving upon him by law it is the duty of the judge of the court to recognize him as such officer. Matney v. King, 93 Pac. 737, 745, 20 Okl. 22.

Code Cr. Proc. 1895, art. 1143, entitling the "clerks of courts" in which fines, etc., are recovered to a commission thereon, does not authorize compensation to justices of the peace for clerical services performed by them in cases in which fines were collected. McLennan County v. Boggess, 137 S. W. 346, 347, 104 Tex. 311.

The offices of county clerk and clerk of the county court are separate and distinct, although by the statute they are filled by the same person. In the different offices he has charge of two different and separate sets of records pertaining to different jurisdictions. Records in the office of the county clerk are not records of the county court, and filing a paper in that office does not make it part of the records of that court. Therefore the filing of the published list of delinquent lands, with the certificate of the publisher, in the "office of the county clerk and ex officio clerk of the county court of said county," is not a compliance with the statute requiring it to be filed as part of the records of the county court. Drennen v. People, 78 N. E. 937, 222 Ill. 592 (citing McChesney v. People ex rel. Kochersperger, 174 Ill. 46, 50 N. E. 1110).

The clerk of the district court of the residence of the seller, such clerk knowing the sureties offered on the bond, is a "clerk of court," within the provision of a contract for the sale of goods that the seller would "send a bond that 'clerk of court' knowing sureties would accept" to a bank in Georgia, to be delivered to the buyer. Equitable Mfg. Co. v. J. B. Davis Co., 60 S. E. 262, 263, 130 Ga. 67.

The "clerk of court" of a county, in the discharge of his duty to draft such orders and writings as may be required of him by the presiding judge, and necessary for the transaction of the business of the court, is a mere ministerial officer, and acts under the direction and supervision of the judge, and when such orders have been approved and signed by the judge it will be presumed that they were done and performed under his direction and sanction. Kinnison v. Carpenter, 72 Ky. (9 Bush) 599, 602.

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Under Revenue Law (Hurd's Rev. St. 1905, c. 120) § 186, requiring a certificate of publication of a delinquent tax list to be filed as part of the record of the county court, a filing thereof by the county clerk is not a sufficient compliance with the law, though the offices of the county clerk and clerk of the county court are filled by the same person, and notwithstanding Hurd's Rev. St. 1905, c. 131, § 1, providing that the words "county clerk" shall be held to include "clerk of the county court" and the words "clerk of the county court" to include "county clerk," unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute. McCraney v. Glos, 78 N. E. 921, 922, 222 Ill. 628.

St. 1898, c. 548, § 277, expressly provides for the filling of a vacancy in the office of a clerk of the courts by an election "at the next annual election for which precepts can be seasonably issued," and by section 274 (page 630) authority is given to the justices, in case of a vacancy in the office of clerk of the superior court of Suffolk county, "to appoint a clerk," without an express statement of the term for which such appointment may be made. This section also provides for an election to fill the vacancy. St. 1893, p. 1235, c. 417, § 218, provides that if there is a failure at an election to choose a clerk of the courts the Governor shall declare such failure and cause a special election to be held, and that in case of a vacancy in an office of a clerk of the courts some person may be appointed as provided by law to fill such office until a person is duly elected and qualified. Held, that the term "clerk of the courts" in section 218 was intended to include the clerks of the superior court in Suffolk county, so that on the death of one of such clerks for the care of civil business a clerk appointed by a justice for no stated term, which referred to the statute, constituted an appointment only until the next annual election for which precepts could be seasonably issued. Attorney General v. Campbell, 78 N. E. 133, 134, 191 Mass. 497.

Section 15a of chapter 69, Sess. Laws 1910, provides that the clerk of the county court shall receive as full compensation in counties having over 50,000 population not to exceed $125 per month. Section 30 of the same act provides that "the clerk of the district court, the clerk of the superior court, the county clerk, the county treasurer, and the register of deeds shall receive as their full compensation the following salaries: In counties having a population of not to exceed 7,000: The clerk of the district court and register of deeds, per annum, $1,000.00. The county clerk and clerk of the county court, per annum, 1,000.00. The treasurer, per annum, 900.00." Held, that the words "clerk of the county court" were erroneously used, and that the words "clerk of the superior court" should be deemed substituted therefor. Schaffer v. Board of Com'rs of Muskogee County, 124 Pac. 1069, 1070, 33 Okl. 288.

As court

See Court (Of Justice); Superior Court.

As magistrate

See Magistrate.

As ministerial officer

See Ministerial Office—Officer.

CLERK'S COSTS

Under Acts 1895, c. 145, § 114, providing that clerks of courts, on behalf of the county in which said courts are held, shall tax and charge upon proper books the fees and amounts provided by law, which amounts so taxed shall be designated as "clerk's costs," but shall in no sense belong to the clerk, but to the county, and enumerating items of specific services for which the fees as prescribed are to be taxed and charged, and further providing that for attending court, in person or by deputy, the clerk shall receive, for each daily report of actual attendance, $2, the term "clerk's costs" does not include the per diem allowance for such clerk or deputy. State ex rel. Board of Com'rs of Tippecanoe County v. Flynn, 69 N. E. 159, 167, 161 Ind. 554.

CLEW

"A 'clew,' which if followed up diligently would lead to a discovery, in law is equivalent to a discovery—equivalent to knowledge." German Sav. Bank v. Des Moines Nat. Bank, 98 N. W. 606, 609, 122 Iowa, 737.

CLIENT

"Client," as used in Civ. Code 1895, § 4416, providing that, where an attorney retains money of his client, he is liable to rule as a sheriff is, does not embrace an attorney who employed another to assist him in litigation to which the former was not a party and only interested by reason of his fee being contingent upon winning, and the latter cannot be ruled by the former for refusal to pay over money. Haden v. Lovett, 65 S. E. 853, 854, 133 Ga. 388, 18 Ann. Cas. 114.

A juror is not disqualified on the ground that he is a "client" of an attorney engaged in the cause, within the meaning of Code, § 3688, par. 5, when the litigation in which the relationship of attorney and client had existed is terminated, and the only relationship now existing between the attorney and the juror is that of debtor and creditor. Jones v. Ford, 134 N. W. 569, 672, 154 Iowa, 549, 38 L. R. A. (N. S). 777.

CLINCHER TIRE

The fundamental feature of a "clincher tire" is the use of pneumatic pressure to

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attach the outer cover or "shoe" to the rim. The shoe serves both to protect and to retain the inflated tube on the rim. The inner tube, by its inflation to a high pressure, serves to attach the outer shoe firmly to the rim. The problem of attaching the inflated tube to a wheel rim is solved by making the expansion of the tube which is to be confined the efficient means of securing to the rim the shoe which is to confine the inflated tube. Such a tire does not infringe the Schrader patent, No. 466,577, for improvements in wheel tires, having for its essential feature an internal clamping device for securing a U-shaped tire to the rim of the wheel, whether used as a cushion tire or as including an inflated tube, making it pneumatic. Boston Woven Hose & Rubber Co. v. Pennsylvania Rubber Co., 156 Fed. 787, 788.

CLINICAL

The establishment and maintenance of a hospital to afford "clinical" instruction is not ultra vires of a university authorized to teach medicine. Succession of Hutchinson, 36 South. 639, 656, 112 La. 656.

CLIP HOOKS

"Clip hooks" are "two regular iron hooks having one side flat, suspended (reversed to one another) from a small iron thimble. By overlapping, these two shapes form one complete inclosing hook. These are also known as 'sister hooks.'" Louden Machinery Co. v. Janesville Hay Tool Co., 148 Fed. 686, 693, 78 C. C. A. 548 (quoting and adopting the definition in Patterson's Nautical Encyc. "Clip Hooks").

CLOSE

The New York city charter, vesting the legislative power in the common council, composed of a board of aldermen consisting of one alderman elected from each ward for two years and of a board of assistant aldermen consisting of an assistant alderman from each ward elected for one year, each body exercising its powers in separate sessions, and providing that, if any ordinance or resolution passed shall not be returned by the mayor within 10 days, the same shall become a law as if he had signed it, unless "the close of the session of the common council shall prevent its return," etc., recognizes the continuity of the common council and authorizes the conclusion of business which had its inception in previous sessions or years, and a resolution granting a pier right adopted by the board of aldermen in one year and by the board of assistant aldermen in the following year and approved by the mayor is effective; the word "close" not referring to the adjournment of one of the bodies on a particular day to another specified time, but referring to the end of the year when newly elected members come in. In re City of New York, 87 N. E. 759, 763, 193 N. Y. 503.

As inclosure

See Inclosure.

As interest in soil

A plea in an action of trespass quare clausum fregit that "the 'close' aforesaid, in which the trespass aforesaid is supposed to be committed as set forth in the declaration aforesaid, is, and at the time when the trespass was committed was, the soil and freehold of the city," does not put in issue title to the entire tract described in the declaration, but only the place of the trespass. City of Providence v. Adams, 10 R. I. 184, 187.

The gist of the action of trespass quare clausum fregit is breaking and entering by force and arms the defendant's "close," and the term "close" so used, being technical, signifies an interest in the soil, and not merely a "close" or inclosure, in the common acceptance of the term. Prussner v. Brady, 136 Ill. App. 395, 397 (quoting and adopting definition in 1 Chitty, Pleading, 134–136).

CLOSE (verb)

Keep closed, see Keep.

Permit to close a street, see Permission—Permit.

An intention to "settle by the payment of differences," "betting on future prices," or "closing up without delivery by the payment of differences," is equivalent to and means an intention by one who has sold for future delivery to buy on the same board for the same delivery, and to offset the purchase against the sale, and receive or pay the difference. Carson v. Milwaukee Produce Co., 113 N. W. 393, 395, 133 Wis. 85.

Complainant in an application for a patent set out a claim as follows: "A pin or stud, consisting of a single piece of wire pin-pointed at one end and fashioned to form the single shank, *b*, and loop, *a*, in combination with a metal cap, *A*, 'closed' upon the loop in manner substantially as herein described, for the purposes specified." The amended claim was: "A pin or stud consisting of a pin-pointed shank, *b*, having an angular neck, *á*, and a closed loop, *a*, of the form of the metallic cap, made of one continuous piece of wire, in combination with such cap, which is upset or closed over the looped head, substantially as set forth." It was claimed that the word "closed" was used in two different senses in the amended claim, and that, as applied to the loop in the first instance, it meant a closed or shut or fully formed loop, something equivalent to a circle, though not necessarily in that form. The court says: "It seems to me that the contention is correct, and that the word 'closed,' as used, has two different meanings; that as used in the first instance it did not

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relate to the cap at all, but to the pin-pointed shank having a closed loop for its head, while in its second use it plainly refers to the cap which is to be crimped or closed over such 'looped head.' I regard any other construction as impossible." McGill v. Whitehead & Hoag Co., 137 Fed. 97, 98.

A bargain

According to the settled construction, the employment of a professional broker "to sell" or "close a bargain" concerning real estate, merely authorizes him to find a purchaser at the specified price, and does not authorize him to execute a contract of sale in the name of his principal, or to sign his principal's name to any contract of sale. Lichty v. Daggett, 121 N. W. 862, 867, 23 S. D. 380.

In reference to streets

Under Laws 1895, c. 1006, a street is legally "closed" when the board of estimate and apportionment adopts proper resolutions to that end and the map is filed and commissioners of appraisal appointed; but the actual physical closing is postponed till other access is provided by opening of other streets, or, if no access is provided, till resulting damages have been ascertained and paid abutting owners. In re West 151st St. in City of New York, 117 N. Y. Supp. 841, 843, 132 App. Div. 867.

Neither the failure of county authorities formally to open up streets in a platted addition outside of corporate limits, nor the fact that they have not been used by the public, will make them in law "closed" or unopened streets, within Gen. St. 1901, § 6058, where everything was done at the time the plat was filed necessary to open them for public use. Kiehl v. Jamison, 101 Pac. 632, 633, 79 Kan. 788.

The lawful change of grade of a street is not a "closing up, or use, or obstruction," within the meaning of a statute (Laws 1899, c. 255), imposing liability for consequential damages on municipalities or others who "close up, use, or obstruct" a highway. Smith v. City of Eau Claire, 47 N. W. 830, 831, 78 Wis. 457.

CLOSE CONFINEMENT

"Close confinement" in the penitentiary before execution, substituted for confinement in the county jail by Act N. D. March 9, 1903, claimed to be an ex post facto law, does not mean "solitary confinement," thus increasing the punishment, though solitary confinement may involve "close confinement." Such confinement means only such custody as will safely secure the production of the body of the prisoner on the day ordered. Rooney v. North Dakota, 25 Sup. Ct. 264, 266, 196 U. S. 319, 49 L. Ed. 494, 3 Ann. Cas. 76.

CLOSED CIRCUIT

See Locally Closed Circuit.

CLOSED PRIMARY

The Nebraska primary law provides for what is called the "closed primary." It is supposed that the members of each political party will participate in nominating the candidates of that party, and the voters of one party are not allowed to nominate candidates for another party. State ex rel. Dickinson v. Sheldon, 113 N. W. 802, 803, 80 Neb. 4.

CLOSED SHIPMENT

Where defendant shipped a car of corn to a third person on plaintiff's order, and plaintiff failed to obtain payment before insolvency of the third person, and sued defendant to recover the value of the corn on the ground that defendant should have made the shipment a "closed" one, so that the third person could not have obtained possession of the shipment without first making payment, such manner of making shipments being according to custom, there was no prejudice to plaintiff in permitting defendant to testify that he had frequently made shipments to plaintiff's father-in-law, who was wealthy, and that all the shipments were "open." Smith v. Landa, 101 S. W. 470, 471, 45 Tex. Civ. App. 446.

CLOSED SHOP

A "closed shop" is one that employs union labor only. Irving v. Joint Dist. Council of New York and Vicinity of United Brotherhood of Carpenters, etc., 180 Fed. 896, 899.

The term "open shop" has a distinctive trade meaning, and, in reference to trade matters, means that, in selecting employés, there shall be no discrimination between union and nonunion men. The "open shop" means nonrecognition of unions as such, and excludes the idea of discrimination against men because of their membership in a union. The moment they are discriminated against with reference to their employment, the shop pursuing such policy becomes a "closed shop." Sackett & Wilhelms L. & P. Co. v. National Ass'n of Employing Lithographers, 113 N. Y. Supp. 110, 114, 61 Misc. Rep. 150.

CLOSELY BUILT UP

Under Gen. Laws 1909, c. 86, § 1, defining "closely built up" as territory of a city contiguous to a public highway built up with structures devoted to business, or territory of a city contiguous to a public highway where for not less than a quarter of a mile the dwelling houses average less than 100 feet apart, or territory outside of a city contiguous to a public highway within a distance of one-half a mile of any post office, provided that for a distance of at least one-fourth of a mile within such limits the dwelling houses average less than 100 feet apart, and provided that the officers have placed signs on the highway to slow down, and section 11, fixing the maximum rate of speed

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of motor vehicles on highways where the territory contiguous is closely built up, etc., territory is considered with reference to its location as within or without the limits of a city, and a territory within a city as devoted or not devoted to business; and where an offense is committed within a city, it is unnecessary to allege and prove the existence of signs within such limits, because the definition of "closely built up" territory outside of a city is inapplicable, and where a highway comes within the statutory definition of "closely built up," whether in the business or residential part of a municipality, an operator of a motor vehicle must reduce the speed to a rate not exceeding 15 miles per hour. State v. Buchanan, 79 Atl. 1114, 1116, 32 R. I. 490.

CLOSING OF POLLS

Election Law (Laws 1896, c. 909) § 8, as amended by Laws 1901, c. 654, provides that the polls shall be opened at 6 o'clock in the forenoon and shall close at 5 o'clock in the afternoon, that the "closing of the polls" shall mean the close of delivery of official ballots to electors, and that electors who have lawfully begun the act of voting before the time fixed for the close of the polls shall be allowed to complete the act. Section 104, subd. 1 (Laws 1896, c. 909), provides that while the polls are open electors may enter within the guard rail at the polling place for the purpose of voting and shall proceed to the inspectors and give their names. Section 106 (page 956) provides that an elector who has received a ballot as provided by section 104 is entitled then and there to vote and shall be deemed to have commenced the act of voting. Held, that the delivery of the ballot to electors is limited to those who enter within the guard rail while the polls are open, and at 5 o'clock the delivery of official ballots to electors must cease, and no elector to whom a ballot has not been delivered before that time can be allowed to vote. Newcomb v. Leary, 112 N. Y. Supp. 657, 658, 128 App. Div. 329.

CLOTH

See Bolting Cloth; Cotton Cloth; Cravenette Cloth; Hop Cloth; Printing Cloths; Waterproof Cloth; Wool or worsted Cloths.

CLOTHING

As household furniture, see Household Furniture.

As household goods, see Household Goods.

CLOTHE WITH INDICIA OF OWNERSHIP

An allegation by defendant, in an action to recover possession of a horse, that he is the owner and that plaintiff intrusted the horse to a third person for sale "clothed with the indicia of ownership," is a metaphorical expression of such uncertain meaning that it is the duty of plaintiff's attorney to inform himself by a bill of particulars as to the acts of the plaintiff, or the facts constituting such indicia, if they are not in writing. Adams v. Coe, 119 N. Y. Supp. 1086, 65 Misc. Rep. 517.

CLOUD ON TITLE

A "cloud on a title" is a semblance of title legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded. Dodsworth v. Dodsworth, 98 N. E. 279, 280, 254 Ill. 49.

"A mere verbal claim of an oral assertion of ownership is not a 'cloud' which can be removed by decree. The remedy in such cases is by an action for damages for slander of title (Civ. Code 1895, § 3833), or by injunction; but in view of the law as codified in Civ. Code 1895, §§ 4892, 4893, the instrument may be canceled, not only when it meets the definition of a technical 'cloud,' but also when it may be vexatiously or injuriously used against the owner, or when it casts suspicion on his title, or when it subjects him to future liability or present annoyance, and the cancellation is necessary to his present protection. Names should be disregarded and relief should be afforded against the harmful effect of the instrument whether it as a matter of strict law would have that effect or not." Weyman v. City of Atlanta, 50 S. E. 492, 493, 122 Ga. 539 (citing Waters v. Lewis, 32 S. E. 854, 106 Ga. 758).

Lis pendens by itself does not constitute a "cloud or incumbrance upon a title," and does not of itself furnish any ground in reason why a purchaser should not be compelled to complete his purchase. Baecht v. Hevesy, 101 N. Y. Supp. 413, 415, 115 App. Div. 509.

A "cloud upon title" is in itself a title or incumbrance, apparently valid, but in fact invalid; something which, nothing else being shown, constitutes an incumbrance upon it, or a defect in it; something that shows prima facie the right of a third person, either to the whole or to some interest in it, or to a lien upon it. McArthur v. Griffith, 61 S. E. 519, 521, 147 N. C. 543.

Where a conveyance of land has been made by deed from the husband to the wife upon a valuable and bona fide consideration, not named in the deed, and the land has been sold under execution against the husband issued in an action brought after the record of the deed of conveyance, such sale is a "cloud upon the title" of the wife, which equity may remove. Pettit v. Coachman, 41 South. 401, 404, 51 Fla. 521.

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Where by an order of the superior court it was provided that, if a named person should become the purchaser of designated property at a sale by a receiver, he should be allowed, instead of paying the purchase price into the hands of the receiver, to give bond "for the forthcoming of the money to meet the order of the court," and he became at such sale the actual purchaser, giving bond as provided, with sureties therein named, and subsequently the court rendered judgment against him for a part of the purchase money, the judgment could not be amended at a subsequent term of the court so as to include the sureties; no suit or other proceeding having been brought for the breach of the bond. Where an execution based upon a certain amended judgment was levied upon certain lands as the property of one of the sureties, and he placed in the hands of the levying officer (the deputy sheriff of the county) an affidavit of illegality setting forth the above-stated facts, but the sheriff proceeded, nevertheless, to advertise and sell at sheriff's sale the property so levied on, and made a sheriff's deed conveying it to the purchaser of said sale, the same was illegal. Such a deed, upon equitable petition duly brought, will be canceled as a "cloud upon the title" of the owner of the land. Giddens v. Alexander, 56 S. E. 1014, 127 Ga. 734 (citing Graham v. Hall, 68 Ga 354; Wynne v. Lumpkin, 35 Ga. 208).

Where a vendor tendered title under the foreclosure of a first mortgage, leaving outstanding a sheriff's deed to a third person, executed on foreclosure of the second mortgage, such deed, being a claim under judicial sale and not showing its invalidity on its face, or in connection with its first foreclosure, constituted a "cloud," and rendered the vendor's title unmarketable. Stack v. Hickey, 138 N. W. 1011, 1012, 151 Wis. 347.

As requiring evidence to avoid

"'Cloud on title' is something which constitutes an incumbrance upon it, or an apparent defect in it, something which shows prima facie some right of a third party, either to the whole or some interest in it." The true test to determine whether a deed would cast a "cloud on title" is to determine whether "the true owner of the property, in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence to defeat a recovery. If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed." Haggart & McMasters v. Chapman & Dewey Land Co., 92 S. W. 792, 77 Ark. 527, 7 Ann. Cas. 333 (quoting and adopting 2 Cooley, Tax'n, 1448; Pixley v. Huggins, 15 Cal. 133).

A "cloud upon title" is a title or incumbrance apparently valid, but in fact and truth invalid. The true test is: If the person claiming under the alleged cloud should bring an action against the true owner, would the owner be required to offer evidence to defeat the action? If so, the cloud exists; if not, there is no cloud. Dailey v. Koepple, 51 South. 348, 350, 164 Ala. 317.

A "cloud on title" is a semblance of a title, legal or equitable, or a claim of an interest, in lands appearing in some legal form, but which is in fact unfounded. It is a title or incumbrance apparently valid, but actually invalid, and exists where the claim of an adverse party to land is valid on the face of the instrument or the proceeding sought to be set aside, and extrinsic facts are required to be established to show its invalidity. Allott v. American Strawboard Co., 86 N. E. 685, 688, 237 Ill. 55.

Instrument defective on face

A "cloud" is the semblance of title, either legal or equitable, or a claim of interest in lands appearing in some legal form, but which in fact is unsound; hence an ordinance and statute, void and unconstitutional on their face, purporting to authorize a condemnation of land, do not constitute a cloud on the title of the land claimed to be subject to condemnation thereunder. Roby v. South Park Com'rs, 74 N. E. 125, 126, 215 Ill. 200.

CLUB

See Social Club.

Business corporation distinguished

See Business Corporation.

As person

See Person.

As voluntary association

The term "club" is defined by Webster as "an association of persons for the promotion of some common object, as literature, science, politics, good fellowship," etc. An agreement which restricts the use of a tract of land bordering on a lake to residence purposes, and which provides that the same shall not be used for "hotel, club, or camping purposes," is violated by the erection thereon of a clubhouse for use in connection with a landing place for boats, and in connection with golf grounds established thereon. Boyden v. Roberts, 111 N. W. 701, 706, 131 Wis. 659.

A "club" is defined to be an association of individuals for pleasure or profit. In Commonwealth v. Pomphret, 137 Mass. 567, 50 Am. Rep. 340, Judge Field said: "The word quoted has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. A club is a definite association organized for indefinite existence; not an ephemeral meeting for a particular occasion, to be lost in a crowd at its dissolution." Wright v. City of Macon, 64 S.

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E. 808, 810, 5 Ga. App. 750 (citing Martin v. State, 59 Ala. 34; Eichbaum v. Irons [Pa.] 6 Watts & S. 67, 69, 40 Am. Dec. 540).

As a weapon

See Deadly Weapon.

The word "stick" is a synonym for the word "club." State v. Richard, 53 South. 669, 671, 127 La. 413.

CLUB PURPOSE

An agreement which restricts the use of a tract of land bordering on a lake to residence purposes, and which provides that the same shall not be used for "hotel, club, or camping purposes," is violated by the erection thereon of a clubhouse for use in connection with a landing place for boats, and in connection with golf grounds established thereon. Boyden v. Roberts, 111 N. W. 701, 706, 131 Wis. 659.

CO.

"Com." and "Co." are both well understood abbreviations for the word "company," when used as a part of the name of a commercial firm. Where a declaration alleged the making and delivery of a note to, and indorsement by, "S. & Com.," and the evidence showed that it was indorsed by "S. & Co.," there was no variance. Keith v. Sturges, 51 Ill. 142, 143.

COACH

See Hackney Coach; Stagecoach.

Under Act Feb. 20, 1911, § 1, requiring common carriers to provide two brakemen on passenger trains consisting of four or more passenger coaches or cars, two brakemen are not required on passenger trains of four or more cars where less than four are passenger coaches or passenger cars, the word "passenger" in the statute qualifying "cars" as well as "coaches"; the words "coaches," and "cars" including all cars used for transportation of passengers. Ex parte Galivan, 122 Pac. 961, 162 Cal. 331.

COAL

See Available Coal; Domestic Egg Coal; Egg Coal; Pea Coal; Pure Anthracite Coal; Smokeless Coal; Steam Egg Coal.

As materials, see Materials.

As real property, see Real Property.

As tool, see Tool—Tools of Trade.

COAL BANKS

A deed excepting all "coal banks" operated to reserve to grantor the veins of coal in the ground, and not merely open "coal banks," where at the time of its execution the country in which the land lay was sparsely settled, and there were no railroads, and there had been no mercantile development of coal mines. Jones v. American Ass'n, 86 S. W. 1111, 1112, 120 Ky. 413.

COAL BED

See Bed.

The term "coal bed" may be used in the sense of "quarry." Hoysradt v. Delaware, L. & W. R. Co., 151 Fed. 321, 327, 330, 331.

Where a deed conveyed all that certain "coal bed" on Lackawanna creek on lot No. 1, occupied by W., the word "coal bed" was synonymous with "coal vein," and passed to the grantee the entire bed or vein of coal, and not a parcel or piece thereof. Delaware, L. & W. R. Co. v. Gleason, 159 Fed. 383, 86 C. C. A. 383, 385.

COAL CAR

A "coal car" is a flat car with a coal bin on top of it. Losey v. Atchison, T. & S. F. Ry. Co., 114 Pac. 198, 199, 84 Kan. 224, 33 L. R. A. (N. S.) 414.

COAL LANDS

As mineral land, see Mineral Land.

To constitute a tract of public land "coal lands of the United States" within the meaning of Rev. St. § 2347 et seq., which can only be acquired by purchase as therein provided, it is not essential that the presence of coal thereon in paying quantity should have been actually demonstrated, but consideration should be given to the proof of which the subject by its nature is susceptible, such as the known presence of coal in surrounding land, the visible exposure of out-crop and the surrounding geological formation, and it is sufficient if the land is generally regarded by the local public as having a special value for its coal contents beyond its value for agricultural or like purposes. United States v. Diamond Coal & Coke Co., 191 Fed. 786, 791, 112 C. C. A. 272.

COAL MINE

As improvement of land, see Improvement.

As mine, see Mine.

See, also, Premises.

In an action under the mining act for the death of an employé by defendant's violation of section 4 in failing to have flanges on the drum of a hoisting engine used in sinking an air shaft, special findings that death was caused during the construction work preparatory to opening a coal mine, and that the shaft was not in use in connection with the mining of coal or for ventilating in coal mine or for an escapement shaft, do not bring defendant's property within section 34, defining "mine" and "coal mine" as all parts of the property of a mining plant which contribute directly or indirectly to the mining of coal, and defining "shaft" as any opening which is or may be used for ventilation or escapement, or for hoisting men in connection

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with mining, and are therefore so inconsistent with a general verdict for plaintiff that judgment for defendant is proper. Moore v. Dering Coal Co., 89 N. E. 674, 675, 242 Ill. 84.

Defendant mining company maintained a hoisting engine at the top of an incline, which was used for the dumping of rock, dirt, etc., which had been separated from the coal, and later constructed a second incline, over which coal intended for retail trade was hoisted by the other side of the same engine; rock and coal cars being often operated in different directions at the same time. Thereafter another engine was substituted to haul the rock cars, and the old engine was continued to haul the coal cars, which were permitted to descend by gravity. Held, that such hoist, though outside the mine, was a part of defendant's mine, as defined by Hurd's Rev. St. 1905, c. 93, § 34, to include all parts of a mining plant on the surface or underground which contribute under one management to the mining and handling of coal, and was therefore within section 16, subd. "d," making it the duty of the mine manager to see that all dangerous places above and below were properly marked and danger signals displayed wherever required. Spring Valley Coal Co. v. Greig, 80 N. E. 1042, 1044, 226 Ill. 511.

COAL SHOOTER

See Shooter; Shooting Coal.

COAL STORES

There is a distinction between "sea stores" and "coal stores" as those terms are used with reference to the navigation laws relating to the transfer of goods from one vessel to another in port, and the transfer of coal, after the arrival of a vessel in a harbor, from one vessel to another of the same line, would be an unlading of the coal. (Dissenting opinion.) United States v. Hawley & Letzenrich, 160 Fed. 734, 736.

COAL-TAR COLOR OR DYE

Bromofluorescic acid is dutiable as a "coal-tar color or dye," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 152. Kuttroff, Pickhardt & Co. v. United States, 154 Fed. 1004, 83 C. C. A. 679; United States v. Kutroff, Pickhardt & Co., 147 Fed. 758, 759.

COAL-TAR PREPARATIONS

The term "coal-tar preparations" is more specific than the term "chemical compounds." Lysol, a coal-tar preparation, is dutiable under paragraph 15, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152, providing for preparations of "coal tar * * * not medicinal," rather than under paragraph 3, Schedule A, § 1, c. 11, of said act, 30 Stat. 151, covering "chemical compounds." United States v. Lehn, 124 Fed. 87, 89.

COAL VEIN

See Coal Bed.

COARSE MEAL

In the manufacture of corn meal for culinary purposes, the corn is first kiln-dried, then cracked or ground between rollers, and afterwards bolted. A product made by the same rollers, but set farther apart so as not to crush the grain so finely, and with the corn not kiln-dried and the product not bolted, but merely passed between the rollers and then loaded in the cars, and variously known as "cracked corn," "chop," and "coarse meal," was not in the ordinary acceptation of the term "meal," and was properly distinguished from meal in apportioning cars among shippers. State ex rel. Crandall v. Chicago, B. & Q. R. Co. (Neb.) 101 N. W. 23, 24, 72, 542.

COAST

COASTWISE STEAM VESSEL

A duly registered American steamer engaged in making voyages between United States ports on Puget Sound and San Francisco, although in making such voyages she touched at the foreign way port of Victoria, taking on freight and passengers for San Francisco, was a "coastwise steam vessel," within the meaning of Rev. St. § 4444, which exempts such vessels from the operation of state pilotage laws, and a state pilot whose services were refused on her entry into the port of San Francisco, her master and mate being licensed pilots under the laws of the United States, cannot subject her to pilotage fees under Pol. Code Cal. §§ 2466, 2468. The Queen, 184 Fed. 537, 539.

COATED

The provision for "coated wire" in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161, is not limited to a process of covering by galvanizing, dipping, or other similar method; and wire, made by inserting an iron wire in a hollow tube of nickel and then drawing the whole wire down until the nickel covering becomes welded to and a part of the iron core, is "coated," within the meaning of the law. Hermann Boker & Co. v. United States, 168 Fed. 464.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161, the provision for wire "coated with * * * metal" includes an article produced by pushing a steel or iron rod through a nickel tube and then wire-drawing the whole, thus bringing it down to the required diameter, and welding the nickel to the core. It makes no difference whether the coating referred to is affixed by welding, dipping, electroylsis, or otherwise. United States v. Hermann Boker & Co., 176 Fed. 730, 731, 100 C. C. A. 276.

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Sheets consisting of a plate of iron or steel with a sheet of nickel welded thereto, the material being rolled to the desired thickness after welding, are not sheets "coated with * * * metals," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 132, 30 Stat. 160. Boker v. United States, 180 Fed. 959, 960.

COCA-COLA

"Coca-Cola" is a compound, which among many ingredients contains some of the extract of coca, omitting cocaine, its most characteristic ingredient, and some of the ingredients of the extract of cola, including chiefly caffeine, which, while an important ingredient of the extract of cola, is not characteristic of it in any distinctive sense, but is also found in extracts from coffee beans and tea leaves. Coca-Cola Co. v. Nashville Syrup Co., 200 Fed. 153, 157.

COCCYX

"The 'coccyx' is a little undeveloped tail that does not come through the skin, composed of two or three vertebræ." Lowenthal v. Vicksburg, S. & P. Ry. Co., 42 South. 483, 486, 117 La. 1007.

The "coccyx" is the small bone at the extremity of the backbone, which in early childhood is soft tissue or cartilage, that later ossifies. Louisville & N. R. Co. v. Reaume, 107 S. W. 290, 292, 128 Ky. 90.

COCCYX NEURALGIA

"Coccyx neuralgia" is an ailment of the coccyx, accompanying an injury or break. Louisville & N. R. Co. v. Reaume, 107 S. W. 290, 292, 128 Ky. 90.

COCK

A "stack" of hay is a large pile, gathered after the hay has been seasoned, as distinguished from a "cock" or "shock," which is a small pile, into which the hay is gathered after being mowed, and thus permitted to remain until seasoned. People v. Doyle, 110 Pac. 458, 459, 13 Cal. App. 611.

COCKTAIL

A Manhattan "cocktail" is generally known as an intoxicating liquor, and no proof of its intoxicating character is necessary. State v. Pigg, 97 Pac. 859, 860, 78 Kan. 618, 19 L. R. A. (N. S.) 848, 130 Am. St. Rep. 387.

COCOA

COCOA BUTTER

"Cocoa butter" is produced from the beans of the cacao or chocolate tree; the word "cocoa" being a corruption of the word "cacao," while all products made in imitation of cocoa butter and adapted to its use are "cocoa butterine," within Tariff Act July 24, 1897, c. 11, § 11; Schedule G, par. 282, 30 Stat. 172. United States v. Oriental American Co., 129 Fed. 249.

COCOA BUTTERINE

"Cocoa butterine," as provided for in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 282, 30 Stat. 172, consists of products made in imitation of cocoa butter, and adapted for use as a substitute therefor. United States v. Oriental American Co., 129 Fed. 249.

Refined cocoanut oil is not "cocoa butterine," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 282, 30 Stat. 172. Fuerst Bros. & Co. v. United States, 176 Fed. 95, 96, 100 C. C. A. 25.

COCOANUT OIL

"Cocoanut oil" is made from the fleshy part of the cocoanut, a product of the cocoa palm. United States v. Oriental American Co., 129 Fed. 249.

In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199, the provision for "cocoanut oil" includes refined as well as unrefined oil and is a more specific term than "cocoa butterine," in section 1, Schedule G, par. 282, 30 Stat. 172. Fuerst Bros. & Co. v. United States, 176 Fed. 95, 100 C. C. A. 25.

CO-CONSPIRATOR

In an action to recover money and property claimed to have been paid for patent rights, sold plaintiff by several defendants conspiring together to defraud him and induce him to purchase by fraudulent representations, allegations that defendant R. was a "partner" in the unlawful scheme did not allege such a partnership as the statute requires to be denied under oath; the word "partner" as used being synonymous with "co-conspirator." Rushing v. Spreen (Tex.) 142 S. W. 49, 57.

One who learns of a conspiracy after it is formed, and then joins it, or knowingly aids in the execution of its scheme, or shares in its profits, becomes from that time as much a "co-conspirator" as if he were one of those who originally designed it and put it in operation. United States v. Standard Oil Co., 152 Fed. 290, 294 (citing Lincoln v. Claflin, 7 Wall. 132, 138, 19 L. Ed. 106; United States v. Babcock, 24 Fed. Cas. 913; United States v. Cassidy, 67 Fed. 698, 702; Spies v. People, 12 N. E. 865, 976, 17 N. E. 898, 122 Ill. 1, 3 Am. St. Rep. 320; United States v. Johnson, 26 Fed. 682, 684).

COCOONS

See Silk Cocoons.

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CODE

See Criminal Code.

"When a code is adopted, the understanding is that such code is a declaration of established law, rather than an enactment of new and different rules. This is the idea of a 'code,' except as to matters of procedure and jurisdiction, which often ignore the past, and require affirmative description." Bassett v. United States, 11 Sup. Ct. 165, 167, 137 U. S. 506, 34 L. Ed. 762.

The fact that Acts 1907, p. 847, § 120, relating to a special road and bridge tax, is embodied as a section in the printed Code of 1907, imparts to it no validity, because it was approved after the approval of the "Code," which is properly the manuscript prepared by the code commissioner, revised by the code committee, and adopted by the Legislature, and not the printed volumes labeled "Code of Alabama." City of Anniston v. Court of County Com'rs of Calhoun County, 48 South. 605, 158 Ala. 68.

CODEBTOR

A surety on an appeal bond, against whom judgment has been jointly rendered under Code 1906, § 86, providing that judgment on appeal from a justice court should be rendered jointly against the principal and his surety, is a "codebtor," within Bankr. Act July 1, 1898, c. 541, § 16, 30 Stat. 550, which provides that the liability of a codebtor with a bankrupt shall not be altered by the discharge of such bankrupt. Bailey v. Reeves (Miss.) 59 South. 802.

CODEFENDANT

Two persons indicted separately, one for theft, the other for receiving the stolen property, are "codefendants," within the rule preventing the wife of one defendant, who has not been tried, testifying against his codefendant. Bowmer v. State, 116 S. W. 798, 800, 55 Tex. Cr. R. 416.

CODICIL

A "codicil" is some addition to or qualification of a will, and is dependent for its life and force on the life and force of the will, and cannot be admitted to probate where the will to which it refers has been revoked. In re Nokes' Estate, 130 N. Y. Supp. 187, 71 Misc. Rep. 383.

A "codicil" is a clause added to a will after its execution, and does not revoke the will, but is to be construed with it as one entire instrument. Lee v. Lee, 91 N. E. 507, 45 Ind. App. 645.

"A 'codicil' is some addition to or qualification of a last will and testament. A codicil is part of a will to which it is attached or referred, and both must be taken and construed together as one instrument." "By its very definition, the word 'codicil' imports a reference to some paper as a will; and the fact that the 'codicil' is written upon a sheet of paper containing a writing which purports to be testamentary in character is sufficient to justify the inference that such writing is the will referred to by the 'codicil.'" In re Plumel's Estate, 90 Pac. 192, 193, 151 Cal. 77, 121 Am. St. Rep. 100 (quoting and adopting definition in Proctor v. Clarke [N. Y.] 3 Redf. Sur. 445, 448).

"A 'codicil' is a supplement or an addition to a will, made by the testator, to be taken as part of the testament, and having for its object the explanation, modification, addition to, subtraction from, or alteration of some or all of the provisions contained in the will. A 'codicil' may confirm, re-execute, revive, republish, or revoke any will with which it may be incorporated." Logan v. Cassidy, 50 S. E. 794, 802, 71 S. C. 175.

In reply to counsel's argument that the term "codicil," used by the notary, designated the last bequest as a separate act, and not as a part of the one will, the district court said that the notary did not use the term "codicil" alone, but styled the additional bequest a "codicil and addition to the will"; but, if he had used the term "codicil" alone, he would have been using a term synonymous with the word "bequest" or "disposition"; that the Civil Code uses the word "codicil" as synonymous with the word "disposition" or "legacy," in the provision that no "disposition" mortis causa shall henceforth be made otherwise than by a last will or testament; but the name given to the act of last will is of no importance, and dispositions may be made by testament or under that institution of heir, legacy, codicil, donation mortis causa, or under any other name indicating the last will, provided that the act be clothed with the forms required for the validity of the testament, and the clauses it contains clearly establish that it is a disposition of last will. The conclusions of the district court were affirmed. Oglesby v. Turner, 50 South. 859, 864, 124 La. 1084.

CODIFYING ACT

Laws 1896, c. 908, §§ 130 and 151 (Gen. Tax Law), providing that the county treasurer shall publish notice of tax sales and of redemptions in newspapers designated for the publication of the session laws, is a "codifying act," designed to reduce all statutes relating to taxation into a complete and harmonious system. A "codifying act" is presumed to exhaust the subject to which it relates, unless a different intention appears on the face of the statute or is an irresistible inference from special circumstances. The new enactment is substituted in place of all statutes previously existing, and becomes the sole rule of action. In re Troy Press Co., 79

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N. E. 1006, 1007, 1008, 187 N. Y. 279 (citing Suth. St. Const. [Lewis' Ed.] §§ 269, 270; King v. Cornell, 1 Sup. Ct. 312, 106 U. S. 395, 27 L. Ed. 60; Tracy v. Tuffly, 10 Sup. Ct. 527, 130 U. S. 206, 223, 33 L. Ed. 879; State v. Wilson, 43 N. H. 415, 419, 82 Am. Dec. 163; Bartlett v. King, 12 Mass. 537, 545, 7 Am. Dec. 99).

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COEMPLOYÉ

"Coemployé" is used with the same meaning as fellow servant. Jarnek v. Manitowoc Coal & Dock Co., 73 N. W. 62, 97 Wis. 537.

An interruption having occurred in the circuit of an electric light company, a lineman before making the necessary repair, in the presence of his foreman, the electrician and engineer, turned off the current, and told them not to turn it on until they heard from him. Within half an hour the electrician and engineer tested the circuit, and, no break being disclosed, the engineer turned on the current with the result that the lineman, then repairing the break, received the charge. Neither the electrician nor engineer exercised any supervisory power over the lineman or the work. Held, that the electrician and engineer were "coemployés" of the lineman, for whose negligence the company was not liable. Shank v. Edison Electric Illuminating Co., 74 Atl. 210, 212, 225 Pa. 393, 30 L. R. A. (N. S.) 46, 17 Ann. Cas. 465.

COERCE—COERCION

See, also, Duress; Intimidation.

Persuasion is not "coercion." Van Valkenburgh v. Oldham, 108 Pac. 42, 44, 12 Cal. App. 572.

Putting one in actual fear of loss of his property or of injury to his business unless he submits to demands made upon him is often not less potent in "coercing" than fear of violence to his person. Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners, 63 Atl. 585, 587, 214 Pa. 348, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275.

"Coercion," which results, however directly and intentionally, from the exercise of the absolute right to refrain from contracting, cannot amount to a tort, because it is not a violation of any legal right. Alfred W. Booth & Bro. v. Burgess, 65 Atl. 226, 232, 72 N. J. Eq. 181.

"The word 'coerce' means to restrain by force, especially by law or authority; to repress. In the sense in which it now prevails, it differs but little from the word 'compel,' yet there is a distinction between them; 'coercion' being usually accomplished by indirect means as by threats or intimidation, physical force being more rarely used in coercing. It imports some actual or threatened exercise of power possessed, or supposed to exist or be possessed, by the party who, it is claimed, so acted." The federal anti-trust act prohibits any combination which obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader engaged in business. This includes restraint of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade or commerce except on conditions that the combination imposes. United States v. American Naval Stores Co., 172 Fed. 455, 462.

"To constitute the 'coercion' or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or recovering the payment over the person or property of another, for which the latter has no means of immediate relief than by making the payment." Where a mortgage provided that on default of interest the mortgagee could treat principal and interest as due, and on such default he brought suit for foreclosure, which constituted an election to treat the mortgage as due, and where the mortgagor tendered the amount of the mortgage and interest, and the mortgagee then stated that the foreclosure suit had been discontinued and insisted on payment of $1,000, which the mortgage provided for in case the mortgagor elected to pay the amount of the mortgage before it was due, and the mortgagor, to procure the discharge of the mortgage, paid such bonus, the payment was under "duress" and involuntary, and could be recovered back in an action for that purpose. Kilpatrick v. Germania Life Ins. Co., 75 N. E. 1124, 1126, 183 N. Y. 163, 2 L. R. A. (N. S.) 574, 111 Am. St. Rep. 722 (quoting and adopting definition in Radich v. Hutchins, 95 U. S. 210, 213, 24 L. Ed. 409).

Rev. Laws 1905, § 5097, so far as it makes it an offense for an employer to require or influence any person to agree not to join or remain in labor union as a condition of obtaining or retaining employment, violates Const. U. S. Amend. 14, prohibiting any state from depriving any person of life, liberty, or property without due process of law; the liberty and right of property thereby protected including the employer's right to contract for the purchase of labor. State

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ex rel. Smith v. Daniels, 136 N. W. 584, 586, 118 Minn. 155.

Pen. Code, § 171a, provides that any person who shall "coerce or compel" any employé not to join any labor organization as a condition of such person securing employment or continuing the same shall be deemed guilty of a misdemeanor. Held, that the words "coerce or compel" do not imply the use of unlawful means, but mean the coercion or compulsion resulting from the desire to obtain work and the inability to obtain it without entering into such agreement. People v. Marcus, 97 N. Y. S. 322, 324, 110 App. Div. 255.

Of jury

The court's action, in recalling the jury after it had been out several hours and urging an agreement, and later recalling it a second time and again urging them to strenuous effort to reach an agreement, in order that the work of the court might progress and cases not accumulate, and calling their attention to the rule that, if the evidence did not sustain the contention of the party who had the affirmative of the issue, the verdict should be for the other party, did not amount to "coercion" or otherwise to reversible error. Karner v. Kansas City Elevated R. Co., 109 Pac. 676, 677, 82 Kan. 842.

COFFEE

See Substitute for Coffee.

Articles used as, see Articles Within Tariff Act.

As provisions, see Provisions.

Coffee essence is not "coffee," within Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 529, but is dutiable as "articles used as coffee or as substitutes for coffee under section 1, Schedule G, par. 283. E. C. Hazard & Co. v. United States, 175 Fed. 967, 968, 99 C. C. A. 357.

COFFIN

There is no law which requires a "coffin" to be made of any certain material, so that, where a father properly clothed his deceased baby before burying it, he is not liable criminally for his failure to provide other than a worthless paper box as a coffin, and a homemade wooden box in which to contain it, though his selection offended the sense of propriety of his neighbors and the people of the community. Seaton v. Commonwealth, 149 S. W. 871, 873, 149 Ky. 498.

COGNIZANCE

In ordinary parlance, to have cognizance of means to have knowledge of. But the legal meaning of the word "cognizance" is broader than its ordinary meaning. It not only implies knowledge of the subject-matter, but power to deal with it. The term "the court having cognizance thereof," as used in section 4819, Civ. Code 1895, authorizing the party distrained for rent to replevy the property distrained by making a counter affidavit and giving security, and providing that in such case the levying officer shall return the same to "the court having cognizance thereof," means the justice which issued the distress warrant, and, unless the amount claimed exceeds $100, such justice has jurisdiction to try the issue made by the counter affidavit, whether defendant resides in his district or the property is to be found in his district or not, provided the county be that of defendant's residence. Dean v. Donalson, 58 S. E. 679, 680, 2 Ga. App. 462.

Rev. Code 1852, amended to 1893, p. 852, c. 114, § 7, provides that if one sue in any court upon a cause of action cognizable before a justice of the peace under chapter 99, and shall not recover more than $50, besides costs, he shall not recover costs, unless he shall have previously filed with the prothonotary a written affidavit that plaintiff had a just cause of action against defendant exceeding in amount $50. Rev. Code, p. 813, c. 110, § 22, provides that the real estate of a decedent shall not be bound by a judgment against his executors or administrators, unless such judgment be rendered upon a verdict or referee's report or a rule of reference. Held, that the purpose of section 7 was to compel creditors to resort to justices' courts to collect small debts, so that where the maker of a note was dead, and it was impossible to satisfy the note out of his personal estate, and the executor had not sold the realty for the payment of debts, so that the only remedy was to obtain a judgment, which would be a lien upon the realty, a suit on the note to obtain such judgment was not one "cognizable before a justice of the peace," within that section, though the amount recovered was less than $50 and no affidavit was filed as provided, and hence plaintiff was entitled to costs. Tappan v. Bacon (Del.) 78 Atl. 294, 295.

The term "offenses cognizable by justices of the peace," in Const. art. 1, § 7, providing that no person shall be held to answer for a capital or other infamous crime unless on presentment or indictment by a grand jury, except in cases of impeachment or of such offenses as are cognizable by a justice of the peace, etc., embraces such causes as may be made so cognizable in the future. State v. Nichols, 60 Atl. 763, 765, 27 R. I. 69.

COHABIT—COHABITATION

See Illicit Cohabitation; Living in State of Cohabitation and Adultery.

The word "cohabit," in criminal statutes relating to lewdness, means dwelling together as husband and wife. State v. Dashman, 101 S. W. 597, 598, 124 Mo. App. 238.

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The crime of incest was not cognizable at common law in 1805, the date of the passage of the act adopting the common law of England as to the definition of crimes; and hence, to determine the elements of incest, we must look to the statutes of this state alone. Act 78 of 1884, p. 101, provides: "Whoever shall hereafter knowingly intermarry, or cohabit without marriage, being within the degrees of consanguinity within which marriage is prohibited by articles 94 and 95 of the Civil Code of the state of Louisiana, shall be deemed guilty of the crime of incest." It cannot be said that the word "cohabit," as used in the statutes, is to be understood as requiring the consent of both parties. According to the dictionaries and the decisions of the courts, the word "cohabit" means "to dwell together as husband and wife," thus implying a relation based on the consent of both parties. But in the construction of the statute above referred to the word "cohabit" must be taken as meaning sexual intercourse, and to constitute the crime of incest the concurrence of both parties is not essential. State v. Freddy, 41 South. 436, 437, 117 La. 121, 116 Am. St. Rep. 195 (citing People v. Jenness, 5 Mich. 305, 321; De Groat v. People, 39 Mich. 124; People v. Burwell, 63 N. W. 986, 106 Mich. 27; People v. Skutt, 56 N. W. 11, 96 Mich. 449; State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321; State v. Eding, 42 S. W. 935, 141 Mo. 283; State v. Jarvis, 26 Pac. 302, 20 Or. 437, 23 Am. St. Rep. 141; Noble v. State, 22 Ohio St. 545; State v. Thomas, 4 N. W. 908, 53 Iowa, 214; Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691; State v. Markins, 95 Ind. 464, 48 Am. Rep. 733; and State v. Fritts, 2 S. W. 256, 48 Ark. 66; distinguishing Cannon v. United States, 6 Sup. Ct. 278, 116 U. S. 55, 29 L. Ed. 561).

"Cohabitation" between a husband and wife, essential to common-law marriage, contemplates a dwelling or living together as husband and wife. Bishop v. Brittain Inv. Co., 129 S. W. 668, 677, 229 Mo. 699, Ann. Cas. 1912A, 868.

The "cohabitation" meant by the act of February, 1879 (Laws 1879, p. 136, c. 73), adding to the canons of descent by legitimatizing children of colored parents born at any time before January 1, 1868, of persons living together as husband and wife, and conferring on such children all the rights of heirs at law or next of kin with respect to the estate of such parents or either of them, is not casual sexual intercourse, but an exclusive cohabitation such as is usually signified by the words "living together as man and wife." Spaugh v. Hartman, 64 S. E. 198, 199, 150 N. C. 454.

As continuous and public

Burns' Ann. St. 1908, § 2353, providing that whoever cohabits with another in a state of adultery or fornication shall be fined, etc., does not contemplate private acts of incontinence and unchastity, but designs to prohibit and punish the illicit relations of persons who without lawful marriage cohabit or live together as man and wife; to "cohabit," within the statute, meaning a dwelling together for some period of time as distinguished from occasional transient interviews for illicit intercourse. Richey v. State, 87 N. E. 1032, 1033, 172 Ind. 134, 139 Am. St. Rep. 362, 19 Ann. Cas. 654.

In a prosecution for fornication under Gen. St. 1894, § 6557, a single act does not constitute "cohabiting" within the statute. State v. Williams, 102 N. W. 722, 94 Minn. 319.

Merely visiting

"Cohabitation," necessary to establish a common-law marriage, must consist of a living or dwelling together in the same habitation as husband and wife, and not merely a sojourning or a habit of visiting or remaining together for a time, with sexual intercourse. Klipfel's Estate v. Klipfel, 92 Pac. 26, 28, 41 Colo. 40, 124 Am. St. Rep. 96.

Code 1906, § 1029, provides that if any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall on conviction be punished, etc., and that the offense may be proved by circumstances showing habitual sexual intercourse. Held, that "cohabitation," within such statute, means habitual indulgence in sexual intercourse to such an extent that, if publicly known, it would lead men to characterize the woman as the man's mistress; and mere proof of one or more occasional separated acts of sexual intercourse is not sufficient. Spikes v. State, 54 South. 1, 2, 98 Miss. 483.

Sexual intercourse implied

The word "cohabit," used in the statutes defining "incest," means sexual intercourse, whether within a common dwelling or elsewhere. State v. Spurling, 40 South. 167, 115 La. 789.

COHABIT AS HUSBAND AND WIFE

"'Cohabitation as husband and wife' is a manifestation of the parties having consented to contract that relation inter se. It is a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation, and the parties are holden and reputed to be husband and wife. The cohabitation must be matrimonial. The repute, to have its fullest effect, should be uniform. It then casts upon the party denying the marriage the burden of proving it did not take place." In re Peterson's Estate,

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134 N. W. 751, 758, 22 N. D. 480 (quoting definitions in Bishop v. Brittain Inv. Co., 129 S. W. 668, 677, 229 Mo. 699, 728, Ann. Cas. 1912A, 868, and Bish. Mar., Div. & Sep.).

In an indictment of an unmarried man for fornication, charging that he and an unmarried woman did "live and cohabit together as man and wife," etc., the words "as man and wife" give to the word "cohabit" a meaning equivalent to that conveyed by the words "in a state of fornication." State v. Smith, 47 N. E. 685, 18 Ind. App. 179.

The term "cohabiting as husband and wife" is ambiguous, and may mean either cohabitation under the assumption of the relation of husband and wife, or, without regard to any such actual relation, in the manner of cohabitation as between husband and wife. In re Boyington's Estate, 137 N. W. 949, 951.

COIN

An information charging the larceny of "one gold coin current as money in this state, of the value of $5.00," etc., sufficiently describes the property stolen in view of Rev. Code Cr. Proc. § 219, providing that all the forms of pleading in criminal actions and rules by which the sufficiency of pleadings is to be determined are those prescribed by the Code and section 237, providing that, in an indictment or information for the larceny of money, it is sufficient to allege the larceny without specifying the coin, number, denomination, or kind thereof, for the term "coin" has a definite signification, and the designation used was in effect an allegation that it was a gold coin stamped by government authority. State v. Faulk, 116 N. W. 72, 74, 22 S. D. 183.

So-called "coin swords," which consist of copper coins corded together and securely fastened around an iron bar or rod covered by metal foil, and are used for ornamental purposes, are not within the provision for "coins," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 530, 30 Stat. 197, but are dutiable under section 1, Schedule C, par. 193, of the act. Soy Kee & Co. v. United States, 177 Fed. 601.

COINCIDENT

The statement of one in a position to know at the time of the act or near thereto, spontaneously made without design, that characterizes and explains the act, is admissible in evidence. "The coincident rule"—that is that the declarations or admissions must be strictly contemporaneous with the act—does not prevail in Texas. However, the tendency of the later cases in the United States is to regard the point of time as less material and to treat the declarations and admissions as admissible, if they spring from the transaction in controversy, and tend to qualify, characterize, or explain it, and are voluntary and spontaneous, and are made at a time so near as to preclude the idea of deliberate design. According to the doctrine of these cases, each transaction is to be judged by its own peculiar facts, without conclusive regard to a fixed interval of time, and with more regard to the question whether the declaration or admission seems to have been voluntarily and spontaneously made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. City of Austin v. Nuchols, 94 S. W. 336, 342, 42 Tex. Civ. App. 5.

A statement in a patent for a process for bleaching nuts that acid is added to the solution "coincidently" with the dipping of the nuts therein should be reasonably construed, and does not require that the acid should be added at the instant of the dipping, but a successive dipping of different crates of nuts after the acid has been added and while it remains effective is fairly within the process. Fullerton Walnut Growers' Ass'n v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 452, 92 C. C. A. 295.

COINSURANCE

See Double Insurance.

There is a wide distinction between "coinsurance" and "concurrent insurance"; the latter term being used to designate insurance placed in other companies covering the same risk, while there is no "coinsurance" where the insured does not bear a proportion of the risk. Oppenheim v. Fireman's Fund Ins. Co., 138 N. W. 777, 779, 119 Minn. 417.

"Double insurance," or "coinsurance," occurs when several policies are effected for the benefit of the same person on the same subject-matter, while "reinsurance" is effected by the insurer for his own protection. Where a marine carrier issued insured bills of lading, which bound it as an insurer of the cargo covered, and against the risks so assumed it took out a marine policy, providing that it was understood and agreed to be in effect a reinsurance of the risks assumed by insured, the latter contract was one of "reinsurance," and not of "coinsurance," such as would entitle the insurance company to prorate the loss with the carrier. Ocean S. S. Co. v. Ætna Ins. Co., 121 Fed. 882, 887.

COKE

See Metallurgical Coke.

COLD CHISEL

A "cold chisel" is a tool designed for cutting iron by holding it against the iron to be cut and striking it with a hammer. Baltimore & O. S. W. R. Co. v. Walker, 84 N. E. 730, 736, 41 Ind. App. 588.

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COLD-DRAWN

Within Tariff Act July 24, 1897, Schedule C, par. 141, imposing an additional duty on iron rods, cold-drawn, in addition to the ordinary process of hot-rolling, screw rods, which are first hot-rolled and then cold-drawn, are "cold-drawn" rods, and subject to the additional duty, although the cold drawing of a screw rod is not an additional process, but a process incidental to their preparation. United States v. George Nash & Co., 158 Fed. 401, 402, 85 C. C. A. 511.

COLD-ROLLED

In construing the paragraph of the Tariff Act of July 24, 1897, relating to steel strips, "cold-rolled, smoothed only," the point to be determined is whether they have acquired a trade meaning or a trade understanding. United States v. Crucible Steel Co. of America, 137 Fed. 384, 385, 69 C. C. A. 576.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 141, 30 Stat. 162, relating to steel strips "cold-rolled, * * * brightened * * *, or polished by any process to such perfected surface finish, or polish better than the grade of cold-rolled, smoothed only," these words were employed by Congress with the meaning theretofore given them by customs authorities under earlier acts, and therefore they do not include strips whose only polish or brightening is incidentally acquired during the cold-rolling, and which were not included in similar former provisions. United States v. Crucible Steel Co., 147 Fed. 537.

COLLAR

A "collar," in mechanics, is a ring or a round flange upon or against an object. Beardsley v. Howard & Bullough American Mach. Co., 176 Fed. 619, 621.

The straight piece of timber, stretching across the top of the upright square pieces used to support the roof of a mine, is called a "collar." Birmingham Min. & Const. Co. v. Skelton, 43 South. 110, 111, 149 Ala. 465.

COLLARED

Rev. Laws, c. 102, § 143, authorizes any one to kill a dog not "collared" according to the statute, and section 128 requires the owner or keeper to cause it to wear a collar marked with the owner's name and its registered number. Held, that the killing of a dog was justifiable where it had on a collar with its owner's name, but without a registered number upon it, though the owner of the dog acted in good faith, and had understood that the dog was to have the same registered number as another one of his that had died. Moore v. Mills, 77 N. E. 638, 191 Mass. 56.

COLLATERAL

A word used to designate property which is pledged as security. Ikelheimer v. Consolidated Tobacco Co. (N. J.) 59 Atl. 363, 364.

An instrument in the ordinary form of a negotiable note, except that it contained at the end thereof, and before the signatures the added words, "Collateral for S. B. note," constituted a contract of suretyship as defined by Civ. Code, § 2831. National Bank of Commerce of San Diego v. Schirm, 86 Pac. 981, 983, 3 Cal. App. 696.

As descendants

See Descendant.

COLLATERAL ATTACK

A "collateral attack" on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. Continental Gin Co. v. De Bord, 123 Pac. 159, 161, 34 Okl. 66; Lieber v. Lieber, 143 S. W. 458, 475, 239 Mo. 1.

By "collateral attack" is meant any proceeding in which the integrity of a judgment is challenged, except in the action wherein the judgment is rendered, or by appeal, and except a suit to declare the judgment void ab initio. McKinney v. Adams, 50 South. 474, 476, 95 Miss. 832 (citing 2 Words and Phrases, pp. 1249, 1250).

"Collateral attack" is a proceeding aside from or outside of the regular proceeding in the case. A motion to set aside a default judgment on the ground of want of jurisdiction is a "collateral attack." People v. Norris, 77 Pac. 998, 999, 144 Cal. 422.

An attempt to impeach a judgment by matters dehors the record is a "collateral attack." Parsons v. Weis, 77 Pac. 1007, 1009, 144 Cal. 410.

A "collateral attack" on a judgment is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on the judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try the title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effect. Scudder v. Cox, 80 S. W. 872, 873, 35 Tex. Civ. App. 416 (citing Crawford v. McDonald, 33 S. W. 327, 87 Tex. 626).

A "collateral attack" on a judgment is, in its general sense, any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree. The fact that the parties are the same, and that the defendants seek to attack the decree by allegations in their answer, cannot change the rule, or make the attack any the

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less a collateral one. It is well settled that judgments of a court of competent jurisdiction are not subject to collateral attack, unless they are void, and by "void" is meant that they are an absolute nullity. People v. McKelvey, 74 Pac. 533, 534, 19 Colo. App. 131 (citing Cochrane v. Parker, 54 Pac. 1027, 12 Colo. App. 169).

"A plea to a writ of scire facias to revive a judgment denying service of process is a 'collateral attack' on the judgment." Bank of Eau Claire v. Reed, 83 N. E. 820, 821, 232 Ill. 238, 122 Am. St. Rep. 66.

An attempt by an independent proceeding to impeach a foreclosure decree rendered in another court is a "collateral attack" on such decree. Cohen v. Portland Lodge No. 142, B. P. O. E., 152 Fed. 357, 359, 81 C. C. A. 483.

There is a distinction between the attack on a judgment in a collateral proceeding, and the attack on a judgment by appeal. Where the return to a summons failed to show it served by one qualified to serve it, the recital of the judgment to the effect that defendant was "personally served" did not conclusively show legal service, on an appeal from an order denying a motion to vacate the judgment and permit a defense; the attack not being "collateral," and the court not having certified due and legal service. French v. Ajax Oil & Development Co., 87 Pac. 359, 360, 44 Wash. 305 (distinguishing Rogers v. Miller, 42 Pac. 525, 13 Wash. 82, 52 Am. St. Rep. 20).

"A proceeding which attempts to avoid or defeat the force and effect of a judgment in a manner not authorized by law is a 'collateral attack' on such judgment." A proceeding to compel contribution by heirs whose allowances had been all charged to the executrix's annual allowances and approved by the probate court upon settlement of the administrator de bonis non, after due notice, is a "collateral attack." Mueller v. Grunker, 123 S. W. 469, 471, 145 Mo. App. 611 (quoting and adopting Smith v. Young, 117 S. W. 628, 136 Mo. App. 65).

A "collateral attack" on a judgment is an attempt to avoid its binding force in a proceeding not instituted to amend, correct, reform, vacate, or enjoin its execution, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try the title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effect. In an action of debt on a judgment by default, a plea that the citation in the case wherein the judgment was obtained did not have the seal of the district court affixed thereto was a "collateral attack" on the judgment. Newman v. Mackey, 83 S. W. 31, 33, 37 Tex. Civ. App. 85.

The attack upon a judgment is a "collateral attack," if the action or proceeding has an independent purpose and contemplates some other relief or result than the mere setting aside of the judgment, although the setting aside of the judgment may be necessary to secure such independent purpose. Where an action was instituted to quiet title to land, and in order to so quiet the title a judgment must be held to be void, the action is clearly a "collateral attack" on that judgment. O'Neill v. Potvin, 93 Pac. 20, 21, 13 Idaho, 721 (citing 1 Black, Judg. § 252).

A plea of former jeopardy in prosecution for assault to murder, setting up that at a former trial for the same offense the jury reported and were discharged, in the absence of defendant and his counsel, may be entered at a subsequent trial on the same indictment, after change of venue to a different county and at a subsequent term of court, without making a copy of the judgment discharging the jury an exhibit; such a plea not being a "collateral attack" on an existing judgment not appealed from. Vela v. State, 95 S. W. 529, 530, 49 Tex. Cr. R. 588.

A proceeding to vacate a divorce decree, under Code, § 4091, providing that the district court may vacate a judgment after the term for certain causes, is not a "collateral attack" on the decree. Wood v. Wood, 113 N. W. 492, 495, 136 Iowa, 128, 12 L. R. A. (N. S.) 891, 125 Am. St. Rep. 223.

Direct attack distinguished

Where a judgment set up in bar is directly assailed as procured by fraud, it is a "direct" and not a "collateral" attack. Houser v. W. R. Bonsal & Co., 62 S. E. 776, 778, 149 N. C. 51.

In a proceeding to revive a judgment, an attack on the jurisdiction of the court by answer is a "direct attack," and not a "collateral attack." Waterman v. Bash, 89 Pac. 556, 558, 46 Wash. 212.

Where certain claims were allowed against a decedent's estate, and the administrator was ordered to sell certain real estate for the payment thereof, a contest filed by plaintiff, objecting to the confirmation of a sale had under such order because the debts were barred by limitations, and charging fraud on the part of the husband of one of the heirs in procuring the administration to be opened for the purpose of allowing such claims, constituted a "direct," and not a "collateral," attack on the proceeding allowing the claims. Smart v. Panther, 95 N. W. 679, 681, 42 Tex. Civ. App. 262.

A suit by a judgment debtor to vacate the judgment and to enjoin the execution of the same on the ground of its invalidity is a "direct," and not a "collateral," attack. Lane v. Moon, 103 S. W. 211, 214, 46 Tex. Civ. App. 625.

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A suit to redeem from a mortgage which has been foreclosed by a decree of court, on the ground that complainant, who was made a defendant in the foreclosure suit, was not legally served with process therein and his right of redemption was therefore not cut off, is a "collateral," as distinguished from a "direct," attack on the foreclosure decree. Cohen v. Portland Lodge No. 142, B. P. O. E., 144 Fed. 266, 268.

Where a petition, in a suit to quiet title to certain land, alleges that an order of court directing a guardian to sell land was procured by fraud, and prays to have the order of sale and subsequent orders approving the sale canceled, the suit is a "direct attack" on the orders, and not a "collateral attack." Brown v. Trent (Okl.) 128 Pac. 895, 897.

COLLATERAL BEQUEST OR DEVISE

"Collateral" means on the side of, or at one side of, the subject. Hence the word used in the title of the collateral inheritance tax law, an act establishing a tax on collateral inheritances, bequests, and devises cannot be construed as merely qualifying the words "bequests and devises," and thus rendering the act which imposes a tax on devises to persons not akin to the testator unconstitutional, because such classes are not within the purview of the title. In re Campbell's Estate, 77 Pac. 674, 676, 143 Cal. 623.

COLLATERAL CONSANGUINITY

Illegitimate children acknowledged by their father in accordance with Civ. Code, § 1387, are not "collateral heirs," and any inheritance passing to such a child from its father is not a collateral inheritance subject to a collateral inheritance tax. Wirringer v. Morgan, 106 Pac. 425, 426, 12 Cal. App. 26.

Code Pub. Gen. Laws 1904, art. 46, providing by sections 6, 14, and 21 for the descent of real estate, declares by section 27 that if, in the descending or collateral line, any parent shall be dead, a child or children shall, by representation, be considered in the same degree as the parent would have been if living, and shall have the same share of the estate as the parent would have been entitled to if living, "provided that there be no representation admitted among 'collaterals' after brother's and sister's children"; and article 93, § 129, provides: "After children, descendants, father, mother, brothers and sisters of the deceased, and their descendants, all collateral relations in equal degree shall take, and no representation among such collaterals shall be allowed." Testatrix directed her estate to be converted into cash and distributed among her "heirs at law and next of kin, who should be entitled thereto under the laws of Maryland." Held, in a contest between the first cousins of the deceased and the children of a deceased first cousin, that the children of the deceased first cousin were not within the class described by the will and took nothing thereunder. Suman v. Harvey, 79 Atl. 197, 204, 114 Md. 241; Hettinger v. Safe Deposit & Trust Co. of Baltimore (Md.) 79 Atl. 205.

COLLATERAL CONSIDERATION

See Consideration.

COLLATERAL COVENANT

A "collateral covenant" is such as appears to be foreign from the instrument, not touching the land or its value, or the value of its reservation, or of the term, but a distinct matter put in by the parties, which does not appear necessarily to influence the demise or grant. Withers v. Wabash R. Co., 99 S. W. 34, 37, 122 Mo. App. 282 (quoting and adopting the definition in Poage v. Railway Co., 24 Mo. App. 199, and citing Coughlin v. Barker, 46 Mo. App. 53).

By the term "collateral covenants," which do not pass to the assignee, "are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate." Where the lessee of premises deposited money with the lessor, to be returned at the end of the lease if all rent should be paid and the premises left in good order, the lessee's assignee could not recover the deposit against the lessor's grantees; there being no claim that they ever came in possession of the deposit, and the covenant to return the money not running with the land. Joseph Fallert Brewing Co. v. Blass, 103 N. Y. Supp. 865, 866, 119 App. Div. 53.

COLLATERAL FACTS

The test whether a matter is "collateral" is whether the cross-examining party is entitled to go into such matter in chief; if not, it is "collateral." Dotterrer v. State, 88 N. E. 689, 693, 172 Ind. 357, 30 L. R. A. (N. S.) 846.

The phrases "immaterial matters" and "collateral attendant facts" are primarily not absolutely synonymous, for collateral attendant facts may be material; but, when used in an instruction, where the phrase "collateral attendant facts" is placed in antithesis to the phrase "material facts," they by every fair rule of construction become, for the nonce, equivalent in meaning. Blanchard v. State, 69 S. E. 313, 8 Ga. App. 419.

In an action for services rendered on defendant's farm at her request and for her benefit, defendant admitted on cross-examination that, after plaintiff's claim had been made known to her, she mortgaged the farm for $900 for the purpose of taking up a mortgage given by her husband on property belonging to him, but on redirect examination the inquiry whether in giving this mortgage she had any purpose to defeat the collection of the plaintiff's claim was excluded by the court. Held: (1) That, if the testimony be called purely collateral, it was not for the plaintiff to call out collateral facts which

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might prejudice, and then object to an explanation of them. (2) That the testimony that the defendant had given the mortgage under such circumstances might operate as an implied admission of liability on her part, and was therefore material and not purely "collateral evidence." Pelkey v. Hodgdon, 67 Atl. 218, 219, 102 Me. 426 (citing Wig. Ev. § 282; 1 Ency. Evidence, p. 366; Heneky v. Smith, 10 Or. 349, 45 Am. Rep. 143).

A witness cannot be cross-examined as to a "collateral fact," which the cross-examining party may not prove as a part of his own case, merely to contradict the witness and discredit his testimony. Citizens' Ry. & Light Co. v. Johns, 116 S. W. 62, 64, 52 Tex. Civ. App. 489.

COLLATERAL FRAUD

See Extrinsic or Collateral Fraud.

COLLATERAL HEIRS

See Collateral Consanguinity.
Heirs as including, see Heirs.

COLLATERAL IMPEACHMENT

"A 'collateral impeachment' of a judgment or decree is an attempt made to destroy or evade its effect as an estoppel by reopening the merits of the case, or by showing reasons why the judgment should not have been rendered, or should not have a conclusive effect in a collateral proceeding (i. e., in any action other than that in which the judgment was rendered); for, if this be done upon appeal, error, or certiorari, the impeachment is direct." An action to set aside a divorce decree on the ground that it was obtained without legal service or appearance by defendant, that the affidavit for service by publication was defective, and that it was obtained through fraud, was a collateral and not a direct attack on the decree. Racey v. Racey, 73 Pac. 305, 306, 12 Okl. 650 (quoting and adopting definition in Black's Law Dict.).

COLLATERAL INHERITANCE TAX

See, also, Privilege Tax.

"The 'collateral inheritance tax' is on the right to succession to property, and not on the property itself, and it is collectible out of each specific share or interest, not out of the general property of the estate." In re Kennedy's Estate, 108 Pac. 280, 283, 157 Cal. 517, 29 L. R. A. (N. S.) 428.

A tax on the interests of lineal descendants is a lineal inheritance tax, and that on collateral descendants a "collateral inheritance tax." In re Macky's Estate, 102 Pac. 1075, 1078, 46 Colo. 79, 23 L. R. A. (N. S.) 1207.

"A 'collateral inheritance or succession tax' is a duty or bonus exacted in certain instances by the state upon the right and privilege of taking legacies, inheritances, gifts, and successions passing by will, by intestate laws, or by any deed or instrument, made inter vivos, intended to take effect at or after the death of the grantor. The burden or the tax is not imposed upon the property itself, but upon the privilege of acquiring property by inheritance. In nearly all inheritance tax laws the statutes provide for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheritance can be valued." In re Tuohy's Estate, 90 Pac. 170, 171, 35 Mont. 431 (quoting Gelsthorpe v. Furnell, 51 Pac. 267, 20 Mont. 299, 39 L. R. A. 170).

COLLATERAL LINE

See Collateral Consanguinity.

COLLATERAL MATTER

A "collateral matter," within the meaning of the rule that a witness cannot be contradicted as to "collateral matter" brought out on cross-examination, is a matter concerning facts not bearing upon the issue. Finn v. New England Telephone & Telegraph Co., 64 Atl. 491, 101 Me. 279.

"Collateral matter" solicited on cross-examination is defined to be a matter which the cross-examining party would not have been permitted to introduce in evidence as a part of his original case. State v. Matheson, 103 N. W. 137, 140, 130 Iowa, 440, 114 Am. St. Rep. 427, 8 Ann. Cas. 430.

COLLATERAL POWER

A "collateral power" is a bare power given to a mere stranger, who has no interest in the estate or property to which it relates. Columbia Trust Co. v. Christopher (Ky.) 117 S. W. 943, 946.

COLLATERAL PROCEEDING

A "collateral proceeding," as opposed to direct attack on a judgment, is an action having an independent purpose and contemplates some relief or result other than the overturning of the judgment, though it may be essential to its success that the judgment be overthrown. Hence, on motion for writ of possession under a sheriff's deed, a plea by the judgment debtor and his wife attacking the validity of the judgment was improper, being a collateral attack. Alford v. Gully (Ky.) 115 S. W. 216, 217.

COLLATERAL PROMISE

Where, on death of one under contract with defendant to labor for a share of the crop, his wife contracted with defendant to do the work for a share of the crop, less the amount due by deceased to defendant, her agreement is not a "collateral promise to pay the debt of another," within the statute of frauds, but an original agreement, supported by a new consideration. Wilkie v. Murphy, 70 S. E. 1028, 1030, 88 S. C. 415.

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COLLATERAL SECURITY

The legal definition of "collateral security" is "security for the payment of money besides the original security." A note signed by the Journal Publishing Company to the bank is not security besides the original security, and hence not collateral security to a note signed by said company and three indorsers to said bank. Schnitzler v. Fourth Nat. Bank, 42 Pac. 496, 500, 1 Kan. App. 674.

A contract for the sale of buggies provided that all goods on hand and the proceeds of all sales of goods shipped under the contract, and on all subsequent orders, whether the proceeds are in notes, cash, or book accounts, should be held as "collateral security" by the buyer, in trust and for the benefit of and subject to the order of the seller, until all obligations of the buyer arising under the contract had been paid in cash. All goods on hand were to be kept insured by the buyer for the seller's benefit, so far as its interest might appear, and a failure to do so, in case of fire, obligated the buyer to assume all liability or loss, and that the title to all goods so shipped should remain in the seller until the price was paid, and until all notes given were paid in cash. The seller however contemplated that the buyer might make sales of the goods on its own terms, with power to give an absolute title in due course of business, and without any liability to account to the seller for the proceeds of such sales, except to hold such proceeds and the goods remaining as its own property in trust or as "collateral security" for the unpaid portion of the price due to the seller. Held, that such contract was not a valid conditional sale, but an attempt to reserve a lien to secure payment of the price of the goods, the title to which vested at once in the buyer on delivery. Pontiac Buggy Co. v. Skinner, 158 Fed. 858, 864.

Rev. St. 1899, § 3710, provides that in an action to enforce a lien on personal property pledged or mortgaged, or involving the validity of such lien, proof that the party holding the lien has exacted usurious interest for the debt shall render any mortgage or pledge of personal property, or any lien thereon, invalid. Held, that the delivery of a promissory note as collateral security for a principal note given for the same amount as the balance due on the first note, and executed to plaintiff the day that a payment was made on the first note, was a "pledge" within the meaning of the statute, though it was signed by an additional maker. The authorities have defined "collateral security" as a pledge of incorporeal property as distinguished from chattels. The words necessarily indicate something additional to the principal obligation, and running along with it as security therefor. Winfrey v. Strother, 128 S. W. 849, 850, 145 Mo. App. 115.

COLLATION

"Collation" is the supposed or real return to the mass of the succession, which an heir makes of property which he received in advance of a share or otherwise, in order that such property may be divided, together with the other effects of the succession, under the express provisions of Civ. Code, art. 1227, and does not apply to purchasers not coheirs of the undivided interest of certain of the heirs. Sibley v. Pierson, 51 South. 502, 513, 125 La. 478.

The obligation as to "collating," defined (Rev. Civ. Code, art. 1227) to be the return to the mass of the succession which an heir makes of property received in advance of his share in order that such property may be divided with the other effects of the succession, is confined to children or grandchildren succeeding to their mothers and fathers and other descendants. Succession of Watt, 48 South. 335, 340, 122 La. 952; Lindsley v. McIver, 48 South. 628, 57 Fla. 466.

In the absence of anything in an ordinance itself to indicate that the word "collation" has not been used in its ordinary meaning, the court will understand that it has been so used. In its ordinary meaning, it describes a "luncheon," "a devout work," etc.; and, so understanding the word, it describes nothing that could fall within the cognizance of the police powers of police juries, which possess only such powers as are expressly conferred on them by law. Therefore a police jury ordinance making it an indictable offense to "give or hold or participate at what is commonly called a 'collation'" is void. State v. Denoist, 40 South. 365, 115 La. 949.

An heir who comes to a succession under the terms of the Civil Code, and as authorized thereby, must return to his coheirs of that which he has received from the common ancestor; he cannot retain anything donated unless he has a defense. This is the interpretation given to Civ. Code, art. 1227, defining "collation" as the supposed or real return to the mass of the succession which the heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided, together with the funds of the succession. Blank v. Blank, 50 South. 745, 747, 124 La. 832.

COLLECT—COLLECTION

See For Collection and Credit; Indorsement for Collection; In Process of Collection; With Collection.
Expenses of collection, see Expenses.

The word "collect" in some revenue laws is synonymous with the word "levy," while in others the word "levy" is not used in the sense of collecting a tax by execution. The

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word "levy" in a proclamation of the Governor calling a special session of the Legislature to provide necessary revenue and to enact a revenue law for the assessment of property for taxation and the levy and collection of taxes, does not show intention of the Governor that a measure for taxation of property should only be passed, rather than a revenue law, since the word "levy" is sometimes used in the sense of raising or imposing, and not in the sense of collecting, a tax by execution. Parsons v. People, 76 Pac. 666, 669, 32 Colo. 221.

The word "collections," as used in Rev. St. c. 41, § 61, requiring fines, penalties, and "collections" under the act to be paid in to the county treasury, taken in connection with the other language of the act, if it means anything, seems to refer to moneys collected, and not to fines and penalties imposed and paid. State v. Hanna, 58 Atl. 1061, 1062, 99 Me. 224.

Means of collection included

The word "collect," in Gen. St. 1909, § 3497, requiring an administrator to "collect" the assets of an estate within one year, does not mean merely assemble or reduce to possession, but, in the case of assets in the form of enforceable obligations, the word has its ordinary signification, which includes the use of the usual means for accomplishing collection. Ekblad v. Hanson, 117 Pac. 1028, 1030, 85 Kan. 541 (citing Ryan v. Tudor, 2 Pac. 797, 31 Kan. 366).

"The meaning of the word 'collect,' as given by the lexicographers, is 'to gather; to assemble.' When used with reference to the collection of money, it often implies much more than the mere act of receiving the money." Hubbell v. Board of Com'rs of Bernalillo County, 86 Pac. 430, 13 N. M. 546 (quoting Purdy v. City of Independence, 39 N. W. 641, 75 Iowa, 356).

Note or mortgage

"Collection" may perhaps involve a full discharge of a debtor's liability; but where defendant agreed to pay plaintiff for assisting in the collection of certain notes and mortgages, without specifying any particular method of collection, and plaintiff procured money from a bank by becoming personally bound therefor, which money was received by defendant on his transfer of a note and mortgage to the bank without recourse, the defendant received the full benefit of even a technical "collection." Koch v. Lunschen, 123 N. W. 692, 693, 24 S. D. 227.

As obtain payment

"The words 'collect taxes,' as used in a statute relating to the collection of taxes, mean to obtain payment of the same from the taxpayers. In most cases such payments will be voluntary; but the power to collect carries with it the authority to use force in the manner pointed out by the laws to obtain payment. * * * The securing of these taxes from the taxpayers, therefore, is the collection referred to in the statute." Hubbell v. Board of Com'rs of Bernalillo County, 86 Pac. 430, 13 N. M. 546 (quoting Taylor v. Kearney County, 53 N. W. 211, 35 Neb. 381-387).

COLLECT ON DELIVERY

See C. O. D.

COLLECTED

See Amount Collected; Earned and Collected; Sum Collected.

The word "collected," as used in Laws 1896, p. 859, § 187, as amended by Laws 1901, c. 118, § 1, imposing an annual state tax on domestic insurance companies, and providing that the term "gross premiums" shall include such premiums as are "collected" from policies subsequently canceled and from reinsurance, applies to the latter subject with the same force as to the former. The act does not refer to what is paid out, for it permits no deduction, even for expenses, for what is paid in. The premium paid for reinsurance is an expense of the business, but a premium collected from reinsurance is part of the gross receipts from the corporate business, which is what the statute aims at. People ex rel. Continental Ins. Co. v. Miller, 70 N. E. 10, 11, 177 N. Y. 515.

Where fines and costs against defendants in criminal cases are not paid, and they are placed at hard labor for the benefit of the county, such fines are not "collected," within the meaning of Gen. St. 1888, p. 182, providing that the county attorney can demand his per centum only after fines are collected; the word "collected" being used in the statute in its ordinary sense. Power v. Fleming County, 35 S. W. 541, 99 Ky. 200.

Where a complaint demanded judgment that a cotenant in possession account for rents and profits thereof received by him, and an interlocutory judgment directed the referee to take and state an account of the rents and profits collected and received, the rents and profits "collected and received" could only mean what he actually collected, less what he during the same time paid out, and, the interlocutory judgment being affirmed on appeal by the Appellate Division and Court of Appeals, the question cannot be again raised on appeal from the final judgment; Code Civ. Proc. § 1316, providing that an appeal from a final judgment brings up for review an interlocutory judgment which has not already been reviewed upon a separate appeal, and section 1350 providing that an appeal to the Appellate Division from a final judgment after its affirmance upon appeal of an interlocutory judgment brings up for review only the proceedings to take the final judgment, or upon which it was taken.

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Adams v. Bristol, 111 N. Y. Supp. 231, 234, 126 App. Div. 660.

The phrases "issued in the regular way" and "collected in the regular way," in a contract providing for the redemption of trading stamps so issued and collected, have the same meaning and describe the same transaction. Sperry & Hutchinson Co. v. Hertzberg, 60 Atl. 368, 370, 69 N. J. Eq. 264.

COLLECTING OFFICER

A justice of the peace is a "collecting officer" as to debts sued in his court, and may, on an execution from his court against joint defendants, enter payment by one of them, as required by Civ. Code 1910, § 5971, to authorize enforcement of contribution against the other defendants. Higdon v. Williamson, 73 S. E. 528, 529, 10 Ga. App. 376.

COLLECTION OF ANTIQUITIES

A painting and its frame, both produced before the year 1700, are dutiable under Act Oct. 1, 1890, par. 465, imposing a duty on paintings, and is not exempt from duty as a part of a "collection of antiquities," under paragraph 524 of the free list. United States v. Gunther, 71 Fed. 499, 500, 18 C. C. A. 219.

COLLECTION OF MONEY

An injunction restraining a substituted trustee under a deed of trust from selling the land, but saying nothing about the collection of the notes for which the deed of trust was security, was not one restraining the "collection of money," within Sayles' Ann. Civ. St. 1897, art. 3008, requiring a refunding bond in such cases. Hicks v. Murphy (Tex.) 151 S. W. 845, 847.

COLLECTOR

See Tax Collector.

One who procures regularly from various places in a city fragments and scraps of food left over and transports them in wagons to a farm for use as food for swine is a "collector" of garbage and kitchen refuse within a municipal ordinance prohibiting such collection by any persons not having a contract with the municipality therefor. City of Rochester v. Gutberlett 133 N. Y. Supp. 541, 545, 73 Misc. Rep. 607.

COLLEGE

Regular college, see Regular School or College.

A "college," as an institution, means, or ought to mean, growth; the elimination of the false; the fostering of the true. As it is expected to be perpetual in its service, it must conform to the changed condition of each new generation, possessing an elasticity of scope and work commensurate with the changing requirements of the times which it serves. Central University of Kentucky v. Walter's Ex'rs, 90 S. W. 1066, 1070, 122 Ky. 65.

Under Act Cong. July 2, 1862, c. 130, 12 Stat. 503, and Act Cong. Aug. 30, 1890, c. 841, 26 Stat. 417 (U. S. Comp. St. 1901, p. 3214), granting certain public lands or land scrip to the several states, providing that the proceeds thereof shall be invested to constitute a perpetual fund for the endowment of one "college," where the leading object shall be instruction in mechanic arts and agriculture, and appropriating money arising from the sales of the public lands to the states for the benefit of such schools, "the law does not require that the 'leading object' of the aided institution in its entirety, or as a complete institution, be the teaching of the branches of learning related to agriculture and mechanic arts." A university may, and usually does, embrace several colleges. Our statutes expressly declare that the State University "shall embrace colleges or departments of letters of science, and the arts"; that the "college or department of the arts shall embrace courses of instruction in the practical and fine arts, especially in the application of science to the arts of * * * mechanics, engineering, architecture, agriculture, and commerce, together with instruction in military tactics." It is sufficient if the aided institution maintains a college or department whose leading object is instruction in the prescribed branches, and applies the funds to the support of such college or department; and the institution will not be rendered incapable of appropriating the donations from the fact that a majority of its students are enrolled in other departments. State ex rel. Wyoming Agricultural College v. Irvine, 84 Pac. 90, 99, 14 Wyo. 318.

"Whether any particular school is a 'college,' or not, depends upon the facts of the particular case. It may ambitiously so style itself, and not be such. Here, however, is an institution stamped as a university or college by law. Its curriculum shows it to be one of high order, and its reputation so stamps it. Its 'school of pharmacy' is merely one of its departments; and when the term is thus applied in an advanced institution of learning, it and the term 'college' are convertible into each other." Within the Pharmacy Act (Gen. St. p. 993), a "school of pharmacy," which is one of the departments of an advanced institution of learning, is a "college of pharmacy." State Board of Pharmacy of Kentucky v. White, 2 S. W. 225, 227, 84 Ky. 626.

Property owned by a private individual and used by him directly and exclusively for educational purposes is exempt from taxation, under Code 1906, § 4251, par. "d," as property belonging to a "college or institution for the education of youth"; the statute making no distinction between natural and artificial persons. City of Jackson v. Pres-

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ton, 47 South. 547, 549, 93 Miss. 366, 21 L. R. A. (N. S.) 164.

A "hospital," with incidental educational features, such as the training of nurses and the instruction of medical students, is not an "institution incorporated or established solely for * * * educational * * * purposes," nor a "college, academy, school, or seminary of learning," within the meaning of paragraph 638 of the Tariff Act of 1897; and surgical instruments or appliances imported by such a hospital for its use are not entitled to admission free of duty under said paragraph. Massachusetts General Hospital v. United States, 112 Fed. 670, 672, 50 C. C. A. 417.

Common school distinguished

See Common School.

As private school

See Private School.

As public corporation

See Public Corporation.

As public institution

See Public Institution.

As school

See School.

COLLEGE LOCATION

Removal, see Remove—Removal.

COLLE'S FRACTURE

A "Colle's fracture," referring to a fracture in the lower joint of the arm, is a split in the lower end of the arm bone. Gulf, C. & S. F. R. Co. v. Sandifer, 69 S. W. 461, 463, 29 Tex. Civ. App. 356.

COLLISION

See Risk of Collision.

"Collision" means the act of colliding, and imports striking together; violent contact. Both bodies need not be in motion. Harris v. American Casualty Co. of Reading, Pa., 85 Atl. 194, 195, 83 N. J. Law, 641.

Where plaintiff's automobile, on meeting a team, was compelled to steer into the grass at a point on a level with the roadbed, and while endeavoring to return to the roadbed it was overturned, there was a sufficient "collision" with the shoulder of the roadbed, within the meaning of a policy insuring against collision, to justify a verdict for plaintiff, if the automobile did not strike the roadbed. Hardenburgh v. Employers' Liability Assur. Corp., 138 N. Y. Supp. 662, 663, 78 Misc. Rep. 105.

The word "collision," as used in a policy covering an automobile, was not to be confined to a case where both of the colliding objects were in motion. Lepman v. Employers' Liability Assur. Corporation, Ltd., of London, 170 Ill. App. 379, 380.

The word "collision," as used in marine insurance, is no longer strictly limited to that fortuitous injurious contact of navigating vessels which is its natural and obvious signification. Western Transit Co. v. Brown, 152 Fed. 476, 477 (citing London Assur. v. Companhia De Moagens Do Barreiro, 17 Sup. Ct. 785, 167 U. S. 149, 42 L. Ed. 113; Cline v. Western Assur. Co., 44 S. E. 700, 101 Va. 496; Burnham v. China Mut. Ins. Co., 75 N. E. 74, 189 Mass. 101, 109 Am. St. Rep. 627; Newtown Creek Towing Co. v. Ætna Ins. Co., 57 N. E. 302, 163 N. Y. 114; Wright v. Brown, 4 Ind. 95, 58 Am. Dec. 622).

A vessel which struck a wrecked vessel, sunk several hours before and never raised, though practicable to do so at a cost exceeding her value when raised, did not come into "collision" with another vessel, within the meaning of a policy insuring her against collision with another vessel. Burnham v. China Mut. Ins. Co., 75 N. E. 74, 189 Mass. 100, 109 Am. St. Rep. 627.

A running-down or collision clause in a marine policy of insurance on a vessel, providing that the insurer shall indemnify the insured if the vessel insured shall come in collision with another vessel, applies only where there is an actual contact between the insured vessel and another, and the insured is not liable in case of a collision between a tow of the insured vessel and another, although the insured vessel may have been subjected to liability for such collision. Coastwise S. S. Co. v. Ætna Ins. Co., 161 Fed. 871, 872.

COLLOQUIUM

A "colloquium" only serves to show that the words were spoken in reference to the matter of the averment. Penry v. Dozier, 49 South. 909, 913, 161 Ala. 292.

The office of a "colloquium," as formerly used, was to connect the libelous words with the plaintiff by setting forth facts with much nicety, showing that they applied to him, and were so intended by the defendant. A complaint for libel, showing the name, age, occupation, character, and reputation of the plaintiff are not the same as those of the person mentioned in the libelous article, not showing that the libel referred to plaintiff, except by the general allegation that it was published of and concerning plaintiff, is demurrable as not stating facts sufficient to constitute a cause of action; Code Civ. Proc. § 535, providing that the pleader need not allege extrinsic facts for the purpose of showing the application of the defamatory matter to plaintiff, not applying. Corr v. Sun Printing & Publishing Ass'n, 69 N. E. 288, 289, 177 N. Y. 131.

"The 'colloquium' in libel actions should connect the introductory matter with the speaking of the libelous words, leaving it for

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the innuendo to give such words the explanation of the particular meaning." Hamilton v. Lowery, 71 N. E. 54, 55, 33 Ind. App. 184 (quoting and adopting the definition in Harrison v. Manship, 22 N. E. 87, 120 Ind. 43).

"Colloquium," used with reference to a petition in an action for slander, has the sense of "inducement," meaning a statement of sufficient circumstances to import a defamatory meaning to words which form the basis of the complaint, where they are not in themselves actionable. Krup v. Corley, 69 S. W. 609, 612, 95 Mo. App. 640.

COLLUSION

"Collusion" implies a concerted or agreed purpose to commit a fraud or accomplish a wrong. Wallace v. Jones, 107 N. Y. Supp. 288, 290, 122 App. Div. 497.

"'Collusion' implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose." Dickerman v. Northern Trust Co., 20 Sup. Ct. 311, 314, 176 U. S. 181, 44 L. Ed. 423.

In French law, a "collusion" is "a fraudulent arrangement between two or more persons to give a false or deceptive appearance to a transaction in which they engage." This definition does not render a party to the collusion incompetent to testify. Sere v. Darby, 43 South. 255, 258, 118 La. 619 (quoting definition from Black, Law Dict.).

Accused notified a justice that he had had a fight and would have to suffer for it, and asked that a warrant against him should be made returnable at noon so that he and his friends might conveniently attend. An affidavit was made at the justice's instance by a person designated as a state's witness, several eyewitnesses were summoned and examined and the assaulted person, his brothers who were present at the fight, and his father, were notified to attend the trial, delayed for their coming, but they did not attend. Several witnesses who saw the fight were examined, two of them not of kin to accused, but cousins of the assaulted person, and accused was found guilty and fined. Held, that there was no "collusion" rendering the proceedings void and not a bar to another prosecution. State v. Cale, 63 S. E. 958, 960, 150 N. C. 805, 134 Am. St. Rep. 957.

In divorce proceedings

The term "collusion," as used in divorce suits means an agreement between husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant. Doeme v. Doeme, 89 N. Y. Supp. 215, 217, 96 App. Div. 284.

"Collusion" in cases of divorce is not only a corrupt agreement between the parties whereby one shall commit the matrimonial offense, or under the terms of which evidence of an offense not committed is fabricated, but also includes any agreement whereby evidence of a valid defense is suppressed. Griffiths v. Griffiths, 60 Atl. 1090, 1091, 69 N. J. Eq. 689.

"'Collusion,' in the law of divorce, is a corrupt agreement between a husband and wife, whereby one of them, for the purpose of enabling the other to obtain a divorce, commits a matrimonial offense, or whereby for some purpose evidence is fabricated of an offense not actually committed, or evidence of a valid defense is suppressed. 14 Cyc. 640. Again, 'collusion' has been defined as a corrupt combining of married parties to procure a sentence of judicial order by some false practice, as for one of them to appear to, or in fact, do what would otherwise be the ground of divorce, or in any way deceive the court in a cause that is seeking its interposition as for a real injury." Bowe v. Bowe, 106 N. Y. Supp. 608, 610, 55 Misc. Rep. 403 (quoting 2 Bish. Marr., Sept. & Div. 249).

The term "collusion," as used in the law of divorce, is not to be limited to a corrupt bargain to impose a case on the court, either by the suppression of evidence or by the manufacture thereof, but includes any agreement between the parties as the result of which no defense shall be made to the dissolution of the marriage tie which would not otherwise be dissolved, in violation of public policy. Sheehan v. Sheehan (N. J.) 77 Atl. 1063.

"Collusion" is defined to be "a conspiracy of the husband and wife to obtain a decree of divorce by false or manufactured testimony." A more comprehensive definition is: "'Collusion,' in the law of divorce, is a corrupt agreement between the husband and wife, whereby one of them, for the purpose of enabling the other to obtain the divorce, commits a matrimonial offense, or whereby, for the same purpose, evidence is fabricated of an offense not actually committed, or evidence of a valid defense is suppressed." State v. Richardson, 48 South. 458, 469, 122 La. 1064 (dissenting opinion of Provosty, J.).

An agreement between a husband and wife, made pending a suit by her for divorce, which provides for alimony, but which is unaccompanied by any understanding that she shall have a divorce, or be unresisted at the trial, is not collusive, barring a divorce; a "collusion" to bar a divorce being a conspiracy of husband and wife to obtain a divorce by false testimony, as distinguished from "connivance," which is a corrupt consenting. Rapp v. Rapp, 145 S. W. 114, 115, 162 Mo. App. 673.

Rev. Codes 1905, § 4058, defines "collusion," as a ground for denying a divorce, as an agreement between the husband and wife that one of them shall commit, or appear to have committed, or be represented in court

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as having committed, acts constituting a cause for divorce, to enable the other to obtain a divorce. Held, that "represented," within the statute, means misrepresented, and such collusion is not proved by evidence failing to show any agreement between the husband and wife that one of them should commit or appear to have committed acts constituting cause for divorce, where it does not appear that defendant was represented as having committed acts for such purpose, which he had not committed. Wiemer v. Wiemer, 130 N. W. 1015, 1017, 21 N. D. 371.

COLLUSIVELY

In an action under the taxpayer's act (Laws 1881, p. 709, c. 531, as amended by Laws 1887, p. 885, c. 673, and Laws 1892, p. 620, c. 301), the complaint sought to recover from the board of supervisors certain items which it alleged were illegally and "collusively" audited. The schedules were attached to the complaint, and set forth in detail the illegality and fraudulent character of the several claims allowed, and charged that each defendant presenting such claims knew that the sums claimed were in excess of the fees allowed him by law. Held, that the complaint was not demurrable because failing to allege that the defendants auditing such claims also knew that they were in excess of the fees allowed by law, as the word "collusively" sufficiently implies such fact. That word is one used in the statute, and is defined by the lexicographers to mean "fraudulently concerted." Wallace v. Jones, 74 N. E. 576, 577, 182 N. Y. 37.

COLONEL

Under the well-understood meaning of the military titles used in Const. art. 7, § 1, relating to militia officers, the title of an officer commanding a regiment was "colonel." Campbell v. Gilkyson, 75 Atl. 160, 161, 78 N. J. Law, 327.

COLOR

See Give Color.

"Color" is the impression given to the eye by lines of light of various rates of vibration. The reason for the natural color of bodies has perhaps some relation to molecular or atomic structure of such bodies, but there is no scientific distinction, so far as producing color is concerned, between imitating and producing color by the addition of an ingredient known as a dye and added for the purpose alone of producing a given color and the selection and addition of an ingredient which performs the same coloring function, but at the same time adds other qualities to the compound. Meyer v. State, 114 N. W. 501, 504, 134 Wis. 156, 14 L. R. A. (N. S.) 1061.

Chlorophyll, a coloring matter used in staining oils and foodstuffs, is not a "color," within the meaning of Tariff Act July 24, 1897, c. 1, § 1, Schedule A, par. 58, 30 Stat. 154, but is dutiable as an unenumerated manufactured article under section 6, 30 Stat. 205. United States v. Magnus & Lauer, 159 Fed. 751, 752.

Lakes containing lead are more specifically provided for as "colors * * * containing lead," under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 54, 30 Stat. 154, than as "lakes * * * not specially provided for," under paragraph 58, 30 Stat. 154. United States v. G. Siegle Co., 175 Fed. 885, 886.

An article which contains all the essential elements and determining characteristics of a color or dye, needing only to have its coloring properties rendered accessible by dropping it into water containing an alkali, is a "color or dye," with the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 15, 30 Stat. 152. Kuttroff, Pickhardt & Co. v. United States, 154 Fed. 1004, 83 C. C. A. 679.

As apparent or prima facie right

"'Color,' in law, means not the thing itself, or the right to the thing, but only an appearance thereof." Where a county judge has exclusive jurisdiction over estates and administration thereof, his office gives him "color" of right to obtain posesssion of money of a deceased, so as to sustain a prosecution against him for embezzling the money. Hendee v. State, 113 N. W. 1050, 1054, 80 Neb. 80.

In pleading

"'Color,' as a term of pleading, signifies an apparent or prima facie right; and the meaning of the rule that every pleading in confession and avoidance must give color is that it must admit an apparent right in the opposite party and rely therefor on some new matter by which that apparent right is defeated." Before a defendant, sued for slander, can plead that the words spoken were a privileged communication, he must admit the speaking of the words charged in the petition, or at least enough to give plaintiff an apparent cause of action. Shipp v. Patton, 93 S. W. 1033, 1034, 123 Ky. 65 (quoting and adopting definition in Steph. Pl. p. 206).

A plea of "son assault demesne," which is in the nature of a confession of the assault charged, and an avoidance thereof, by showing that the plaintiff first assaulted the defendant, and that the injuries grew out of his assault, must, even under the Code, give "color," which, as a term of pleading, signifies an apparent or prima facie right in the plaintiff; the Code, while having abolished forms, not having changed the substance of various pleas. Shirley v. Renick, 151 S. W. 357, 358, 151 Ky. 25.

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COLOR BLINDNESS

"Color blindness," as defined in Cent. Dict., is an incapacity for perceiving colors, or certain colors. It is not a mere incapacity for distinguishing colors, which might be due to want of training or the absence or great weakness of the sensations upon which the power of distinguishing colors must be founded. A railway night switchman, becoming color blind during his employment, is thereby disabled by sickness, within the meaning of his employer's contract that it will pay him sick benefits for a limited period while he is disabled by sickness or accidental injury, provided the fact be established by proof of acute or constitutional disease. Kane v. Chicago, B. & Q. R. Co., 132 N. W. 920, 921, 90 Neb. 112, 36 L. R. A. (N. S.) 1145, Ann. Cas. 1913A, 764.

COLOR OF APPARENT ORGANIZATION

Where persons act as a corporation under color of apparent organization pursuant to some charter or enabling act, their authority cannot be questioned collaterally, and "color of apparent organization" does not mean a full or substantial compliance of the statute, but merely an apparent attempt under the law to perfect an organization followed by user. Kwapil v. Bell Tower Co., 104 Pac. 824, 825, 55 Wash. 583.

COLOR OF AUTHORITY

"Color of authority," as applied to a de facto officer, means authority derived from an election or appointment, however irregular or informal. In re Krickbaum's Contested Election, 70 Atl. 852, 854, 221 Pa. 521.

"Color of authority," as applied to de facto officers, is authority derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer. One acting as judge in a new judicial district before the law establishing it has become operative, by appointment of the Governor under the erroneous belief that the district was already in existence, is a de facto judge having color of authority, and his acts are valid as to third persons and the public. State v. Ely, 113 N. W. 711, 713, 16 N. D. 569, 14 L. R. A. (N. S.) 638 (quoting and adopting definition in McCrary, Elect. § 253).

An execution under which land was taken, which did not include the land taken, was not "color of authority" so as to prevent the person ousted from recovering possession of such land by forcible entry and detainer. Granberry v. Storey (Tex.) 127 S. W. 1122, 1124.

COLOR OF LAW

"Color of law" means mere semblance of legal right; "color," as a modifier, in legal parlance, meaning appearance, as distinguished from reality. City of Topeka v. Dwyer, 78 Pac. 417, 420, 70 Kan. 244.

COLOR OF OFFICE

See Color of Title (To Office).

Extortion by color of office, see Extort—Extortion.

"Color of office" is an appointment or election of some kind. Buck v. Hawley & Hoops, 105 N. W. 688, 689, 129 Iowa, 406.

Where the act of an officer is in the line of his duty, it is what is termed in the books "colore officii." Board of Com'rs of Ramsey County v. Sullivan, 93 N. W. 1056, 89 Minn. 68.

An act done "colore officii" is an act done, not only by an officer, professing to act as such, but also under color of authority to act in or about the particular matter in connection with which it is done. State v. Mankin, 70 S. E. 764, 766, 68 W. Va. 772.

Acts of particular officers

The acts for which a sheriff or his sureties may be held liable are termed acts done "virtute officii," and those for which they cannot be held liable are termed "colore officii." The distinction is that acts are done "virtute officii" when they are within the authority of the officer, but done in an improper exercise of his authority or in abuse of the law, while acts are done "colore officii" where they are of such nature the office gives him no authority to do them. Gold v. Campbell, 117 S. W. 463, 468, 469, 54 Tex. Civ. App. 269 (citing Leger v. Warren, 57 N. E. 506, 62 Ohio St. 500, 51 L. R. A. 193, 78 Am. St. Rep. 738).

" 'Color of office' is a claim or assumption of right to do an act by virtue of an office, made by a person who is legally destitute of any such right." Code Cr. Proc. 1895, art. 247, provides that a peace officer may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is a felony or against the public peace, and Pen. Code 1895, tit. 9, c. 3, declares that the act of a person rudely displaying any pistol near any private house in a manner calculated to disturb the inhabitants will constitute a disturbance of the peace. Pen. Code 1895, tit. 9, c. 4, provides for the arrest of any person unlawfully carrying a pistol without a warrant by any peace officer; and Pen. Code 1895, art. 342, declares that a peace officer who shall fail or refuse to arrest such person "on his own knowledge or information from some credible person" shall be punished by a fine. Held, that where certain deputy sheriffs, having heard a shot fired by certain persons on horseback, attempted to stop and search them, and in doing so shot and injured plaintiff without either having seen a pistol in his possession or having been informed that he had one, their act was without authority and

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under "color of office" only, for which the sheriff was not liable. Brown v. King, 93 S. W. 1017, 1019, 41 Tex. Civ. App. 588 (quoting and adopting definition in Black, Law Dict.).

"Color of office," as used in 2 Rev. St. § 286, prohibiting a sheriff or other officer from taking any bond, obligation, or other security by color of his office in any other case or manner than such as is provided by law, and declaring every such bond or obligation void, implies an illegal claim of right or authority to take the security. A bond taken by an officer which would be valid at common law is not unlawful merely because not expressly authorized by statute. Griffiths v. Hardenbergh, 41 N. Y. 464–469.

Virtute officii distinguished

Acts done by an officer "virtute officii," for which the sureties on his bond are liable, are such as are done within the authority of the officer, but in the doing of which the authority is improperly exercised or the confidence reposed in him by the law is abused; while acts done "colore officii," for which the sureties are not liable, are such as the office gives him no authority to do. Gold v. Campbell, 117 S. W. 463, 469, 54 Tex. Civ. App. 269.

A distinction is taken between acts of an executive officer, done by virtue of his office, or "virtute officii," and acts done under color of his office, or "colore officii"; illegal acts done only "colore officii" make bondsmen liable, if the illegality consists in an abuse of authority, instead of an outright usurpation. State ex rel. Brennan v. Dierker, 74 S. W. 153, 155, 101 Mo. App. 636.

Acts done "virtute officii" are within the authority of an officer, but which are accomplished by the improper exercise of that authority and in violation of the confidence which the law reposes in him, and his sureties are liable for such acts; whereas acts "colore officii" are unauthorized by the office and do not amount to a breach of the bond. Stephens v. Hendee, 115 N. W. 283, 284, 80 Neb. 754 (quoting and adopting definition in Mechem, Pub. Off. § 284, and State, to use of Goodin, v. McDonough, 9 Mo. App. 63; citing State v. Porter, 95 N. W. 769, 69 Neb. 203; Ottenstein v. Alpaugh, 2 N. W. 219, 9 Neb. 237; State ex rel. Leidigh v. Holcomb, 65 N. W. 873, 46 Neb. 612; State v. Moore, 76 N. W. 474, 56 Neb. 82; Comstock-Castle Stove Co. v. Caulfield, 95 N. W. 783, 1 Neb. [Unof.] 542; Snyder v. Gross, 95 N. W. 636, 69 Neb. 340, 5 Ann. Cas. 152; Wilson v. State, 72 Pac. 517, 67 Kan. 44).

In considering this question—liability on official bonds—some courts have adopted a distinction between acts "virtute officii" and acts "colore officii," holding sureties on official bonds liable in the former case, and not in the latter. A definition of such acts is thus stated in People v. Schuyler, 4 N. Y. 173, founded on the common law: "Acts done 'virtute officii' are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him, whilst acts done 'colore officii' are where they are of such nature that his office gives him no authority to do them." This distinction is said to be disregarded in most jurisdictions. 25 Ency. Law (2d Ed.) 724. And in a very full and able note in Feller v. Gates (Or.) 91 Am. St. Rep. 511, Mr. Freeman, the author, says, as our investigation convinces us is true: "The distinction suggested has been productive of anything but harmony among the authorities, and, in its attempted application to particular cases, it has served to confuse rather than clarify. It is a distinction hard to make in theory, and even more difficult to apply in practice. Not only do courts differ as to liability of sureties for acts colore officii, but, among those authorities which agree that such acts are covered by the obligation of the bond, the most widely divergent views are entertained as to what constitute acts colore officii, within the meaning of the definition." If a state constable, in an attempt to discharge a duty of his office, in the seizure of contraband liquor or the arrest of one openly violating the dispensary law, should, without just excuse, commit an assault and battery, or if, in overcoming resistance, he should so exceed his duty as to become the aggressor in an assault and battery, to the injury of another, then there is liability upon his bond. But an assault and battery committed by a constable under a bald assumption and usurpation of authority, without process or authority of any kind, would not be covered by the terms of his bond. Wieters v. May, 50 S. E. 548, 549, 71 S. C. 9.

COLOR OF RIGHT

The "color of right" which constitutes one an officer de facto may consist in an election or appointment, or in the holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such length of time as to raise the presumption of colorable right by election or appointment. Heard v. Elliott, 92 S. W. 764, 766, 116 Tenn. 150 (citing Hamlin v. Kassafer, 15 Pac. 778, 15 Or. 456, 3 Am. St. Rep. 176).

"Color of right," which constitutes one an officer de facto, may consist in an election or appointment, or in holding over after the expiration of one's term. In re Krickbaum's Contested Election, 70 Atl. 852, 855, 221 Pa. 521 (citing Hamlin v. Kassafer, 15 Pac. 778, 15 Or. 456, 3 Am. St. Rep. 176).

There is a vast difference between "color of title" and "color of right." The first is a technical term, and the second, when used in a finding in a suit by an equitable owner to

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charge a purchaser as trustee of the legal title, that a party has no right or "color of right" in the property, refers in no manner to the legal title, but to the equitable rights in the premises. Tye v. Manley, 104 S. W. 636, 638, 7 Ind. T. 332.

COLOR OF TITLE

"Color of title" is a technical term, and means that which in appearance is title, but in fact is not a good title. United States v. Casterlin, 164 Fed. 437, 439; W. O. Whitney Lumber & Grain Co. v. Crabtree, 166 Fed. 738, 740, 92 C. C. A. 400; Knight v. Grim, 66 S. E. 42, 43, 110 Va. 400, 19 Ann. Cas. 400; Montoya v. Unknown Heirs of Vigil, 120 Pac. 676, 688, 16 N. M. 349 (quoting and adopting the definition in Wright v. Mattison, 18 How. 50, 15 L. Ed. 280); Nunn v. Lynch, 115 S. W. 926, 927, 89 Ark. 41, 16 Ann. Cas. 852; Point Mountain Coal & Lumber Co. v. Holly Lumber Co. (W. Va.) 75 S. E. 197, 199.

"Color of title" is such a defective muniment of title as is not wanting in intrinsic fairness and honesty. Veeder v. Gilmer, 105 S. W. 331, 333, 47 Tex. Civ. App. 464.

"Color of title" is that which in appearance is title, but which in reality is not title. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances in which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title. Johnson v. Hurst, 77 Pac. 784, 791, 10 Idaho, 308 (citing Cameron v. United States, 148 U. S. 301, 308, 13 Sup. Ct. 595, 37 L. Ed. 459, 462).

Act of Legislature

Acts of the Legislature attempting to convey to railroads rights of way across land, all rights of the state in which were afterwards conveyed to a city, whether or not within the provisions of the Constitution as to appropriation of public property for private purposes, were not utterly void or nugatory, but were at least effective to prevent the railroad being naked trespassers and their tracks nuisances; so that being continued in open possession thereof for more than 50 years, claiming title under such acts, the railroads acquired title. Pryor v. City of Buffalo, 90 N. E. 423, 428, 429, 197 N. Y. 123.

Administrator's or guardian's deeds

An administrator's deed was such an appearance of title as to constitute "color of title" in the grantee, though the administrator's sale was void for want of jurisdiction in the court to order the same, and there had been no confirmation thereof. Fletcher v. Josephs (Ark.) 152 S. W. 293, 294 (citing 2 Words & Phrases, p. 1264).

A valid security deed, converted into an absolute conveyance by the grantor's administrator, constitutes "color of title" sufficient to support limitations in favor of the grantee, if followed by seven years' possession, although the administrator had not been authorized to make the conveyance. English v. Marshall, 58 S. E. 351, 352, 128 Ga. 730.

An administrator's deed, conveying decedent's homestead pursuant to an order of court directing the sale, after hearing of the petition to sell real estate to pay debts, is "color of title," within St. 1898, §§ 4211, 4212, 4215, barring actions to recover real estate held adversely under an instrument purporting to convey title. Steinberg v. Salzman, 120 N. W. 1005, 1007, 139 Wis. 118.

Bona fides

Possession by a grantee in a deed under the belief that he is the actual possessor, and he intends to so hold, is a holding under "color of title." In re City of Seattle, 100 Pac. 1013, 1015, 52 Wash. 588.

Good faith in the acquirement of title within Limitation Law § 6, authorizing the acquisition of title by possession under "color of title," does not require ignorance of adverse claims or defects in the title, and there is good faith where there is no fraud, and the color of title is not acquired in bad faith. Where a party to a suit in partition obtained a decree vesting title in him, and he was not guilty of fraud or bad faith in procuring it, and believed it gave him title, and he knew that a third person had an interest in the premises, and his sole heir and widow were parties to the suit, he acquired "color of title" in good faith, though the third person's administrator and a part of the tenants in common, not made parties, were not bound by the decree. Peters v. Dicus, 98 N. E. 560, 562, 254 Ill. 379.

Where a duly qualified trustee's successor, without authority from the court, conveyed a portion of the trust estate, such deed, though ineffective to convey a valid title to the property, when taken in good faith under the belief that he had authority to sell, induced by his representation that an order had been passed conferring it, constituted "color of title." Maynard v. Greer, 59 S. E. 798, 129 Ga. 709.

Bond or contract for title

The words "color of title," having received a judicial interpretation prior to the enactment of Acts 1883, p. 106, § 1, relative to the right of occupants of land to compensation for improvements made by them, are presumed to have been used in the act according to that interpretation. A bond for title is not "color of title," within the meaning of Acts 1883, p. 106, § 1, providing for compensation for improvements made by an occupant, under color of title, of land belonging to another. Beasley v. Equitable Securities Co. (Ark.) 84 S. W. 224, 228 (citing

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Suth. Stat. Const. § 255; Black, Interp. Laws, pp. 130, 131; End. Interp. St. § 367).

Certificate of sale

A sheriff's certificate of sale issued to the purchaser at a mortgage foreclosure constitutes "color of title" within Ballinger's Ann. Codes & St. § 5504 (Pierce's Code, § 1162). Goetter v. Moore, 101 Pac. 365, 367, 53 Wash. 5.

A certificate of sale acquired by the purchaser at a mortgage foreclosure, constitutes "color of title" sufficient to support limitations if followed by seven years' possession. Olson v. Howard, 80 Pac. 170, 171, 38 Wash. 15.

A certificate of purchase at tax sale is not "color of title," within Kirby's Dig. § 5057, providing that unimproved and unin-closed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto; the deed executed pursuant to the statute being the only evidence of title under a tax sale. Townsend v. Penrose, 105 S. W. 588, 589, 84 Ark. 316.

As chain of transfers

To render a possession of three years a bar to an action by the true owner, the person in possession must have held under title or "color of title," and, to constitute title or color of title, there must be a chain of transfer from or under the sovereignty of the soil, necessarily presupposing a grant from the government as the basis of transfer, and the grant must be effectual to convey to the grantee whatever right the government had in the land at the time of the grant. Hulett v. Platt, 109 S. W. 207, 211, 49 Tex. Civ. App. 377.

Claim of title distinguished

While "color of title" is appearance of title, which in reality is not title, "claim of title" is entering and occupying by one with intent to hold land as his own against the world, irrespective of color of right or title as a foundation for his claim; the two terms being distinct but supplementary to each other, in that, while "color of title," without claim, is of little effect, "claim of title," without color, may ripen into title to land actually occupied, while with color it may ripen into title not only to land actually occupied, but by a legal fiction may extend to all land described in the color of title, if that actually occupied be part of it. Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co., 50 South. 230, 232, 162 Ala. 151, 136 Am. St. Rep. 17.

As to what constitutes "color of title" and "claim of title" the courts differ in the different states, because it largely depends upon the language of the different statutes. The term "color of title" is not synonymous with "claim of title," as used in the statutes of some states. To constitute "color of title" there must be a paper title to give color to the adverse possession, whereas a "claim of title" may be constituted wholly by parol. Revisal, § 382, provides that when one in possession of realty, or those under whom he claims, shall have been possessed thereof, under known boundaries, and under color of title for seven years, no entry shall be made or action maintained against the possessor for a recovery of the land. Held, that the colorable title required must be a writing upon its face professing to bear title, but which does not do so because of want of title in the person making it, or the defective mode of conveyance that is used. A "descent cast," where an ancestor is in possession, gives color of title. The term "privity," within the rule that color of title must purport to convey title to the claimant thereunder or to those with whom he is in privity, means privity of possession, and not privity of blood, for a "privy in blood" is one who derives his title by descent, and privity of title applies to a real title, which can descend, and not to a mere colorable title. To show privity of possession, so as to avail of the color of title of a prior occupant, the later occupant must enter under the prior one and obtain his possession either by purchase or descent from him. Barrett v. Brewer, 69 S. E. 614, 615, 153 N. C. 547, 42 L. R. A. (N. S.) 403 (citing 6 Words and Phrases, pp. 5606, 5609; Hamilton v. Wright, 30 Iowa, 480; Tate's Heirs v. Southard, 10 N. C. 120, 14 Am. Dec. 578).

Decree of court

A decree in partition is "color of title," within the statute of limitation, giving ownership to an actual possessor for seven years under claim and color of title in good faith, with payment of taxes. Carpenter v. Fletcher, 88 N. E. 162, 164, 239 Ill. 440.

A decree by the circuit court having jurisdiction of partition of real estate, the enforcement of trusts, and of matters of account, which shows that a petition was filed by the executors of a deceased trustee against the surviving trustee, the surviving parties to the trust agreement who had not assigned their interests, the assigns of such as had assigned their interests, and the heirs of deceased parties, that all the defendants were in court, that some defendants were defaulted, that a hearing was had on the pleadings and report of the master, and that a decree was entered decreeing that the title to the real estate vested in fee simple in the surviving trustee in trust for the persons and in the proportions mentioned in the decree, settling the account between the parties, indicates a proceeding of the subject-matter of which the court has jurisdiction and shows jurisdiction of the parties, and, in the absence of a showing to the contrary, the decree is "color of title," within Limitation Law (Hurd's Rev. St. 1909, c. 83) § 6, authorizing the acquisi-

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tion of title by possession under color of title. Peters v. Dicus, 98 N. E. 560, 562, 254 Ill. 379.

Under the statute authorizing the court in partition to determine questions of conflicting titles and by its decree invest titles in the parties to whom the premises are allotted, a decree in partition which vests title in a party thereto is "color of title," within Limitation Law (Hurd's Rev. St. 1909, c. 83) § 6, authorizing the acquisition of title by possession under color of title, though there was a defect of parties in the partition suit. Peters v. Dicus, 98 N. E. 560, 562, 254 Ill. 379.

Deed from life tenant

Where a remainderman in expectancy took a deed in January, 1902, from the life tenant and at a time when it could not be known or foreseen whether the life estate would mature into a fee-simple title or the remaindermen would ever acquire any title or interest in the estate, and the deed thus executed purported to convey an absolute and fee-simple title to the estate, and the purchaser took such conveyance, believing she was acquiring an absolute estate, and entered into the possession of the property thereunder and continued in the open, exclusive, and notorious possession thereof, occupying and cultivating the same continuously until the commencement of an action by the other remaindermen in expectancy in November, 1908, paying all taxes and assessments thereon, and making improvements, held, that such facts constitute "color of title" and adverse possession within the meaning of sections 4038, 4039, and 4040, Rev. Codes, and bar any right of recovery on the part of the other remaindermen in expectancy. Wilson v. Linder, 123 Pac. 487, 491, 21 Idaho, 576, 42 L. R. A. (N. S.) 242.

As extending possession beyond actual possession

"Color of title" is not necessary to give title by adverse possession, but it is necessary to extend the title acquired beyond the limits of the actual possession. Actual possession of part of a tract, with color of title for the whole tract, carries the possession to the limits of the land described in the deed giving color. Bradbury v. Dumond, 96 S. W. 390, 391, 80 Ark. 82, 11 L. R. A. (N. S.) 772.

"Color of title" is that which in appearance is title, but which in reality is no title, and, if an instrument itself passes or constitutes title, it is not color, and hence if grantor had legal title to one 40 only of a tract described, or had color only, possession of grantee of that 40 under the deed could not be extended to the other 40's described. Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co., 50 South. 230, 231, 162 Ala. 151, 136 Am. St. Rep. 17.

Where, in a boundary dispute, plaintiff claimed under a patent to the northwest quarter of a specified section, while defendants claimed that the land in controversy was no part of such section, a requested charge that if plaintiff for more than 20 years held possession of the land in controversy under claim and "color of title," etc., he was entitled to recover, was erroneous, since the patent could not operate as color of title, unless the land was within the boundaries of the tract described therein. Coulter v. Gudehus (S. D.) 139 N. W. 330, 333.

Formal requisites and description

"'Color of title' is anything in writing connected with the title which serves to define the extent of the claim. It is wholly immaterial how imperfect or defective the writing may be considered as a deed. If it is in writing and defines the extent of the claim, it is a sign, semblance, or claim of title." Randolph v. Casey, 27 S. E. 231, 233, 43 W. Va. 289.

"'Color of title' is anything in writing connected with the title which serves to define the extent of the claim. It matters not how imperfect or defective the writing may be, considered as a conveyance, if there is a writing which defines the extent of the claim." Moore v. Mobley, 51 S. E. 351, 352, 123 Ga. 424 (quoting and adopting definition in Street v. Collier, 45 S. E. 294, 118 Ga. 470).

A deed, though actually conveying nothing, may be sufficient on which to found a tangible successful claim of adverse possession, if such possession continues sufficiently long to ripen into an absolute title. Criswell v. Noble, 113 N. Y. Supp. 954, 957, 61 Misc. Rep. 483.

A writing purporting to contain an agreement to convey land, but which is so indefinite as to the description of the land that the same cannot be thereby identified without extrinsic evidence showing the description applicable to the particular parcel of land, does not constitute "color of title." Priester v. Melton, 51 S. E. 330, 123 Ga. 375.

The office of "color of title" is to determine the character of the occupants' possession, and define its limits and extent, and hence presence in the record of a document purporting to vest one with title may amount to color of title in him, though it be so defective as to be utterly insufficient to convey, and in such cases it is immaterial that the instrument is void as a source of title by grant. Hassam v. J. E. Safford Lumber Co., 74 Atl. 197, 199, 82 Vt. 444.

"'Color of title' is anything in writing purporting to convey the title to the land which defines the extent of the claim; it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title." "Its effect is to fix

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the character of the occupant's possession and to define its extent and limits." A contract of partition in writing under seal, partitioning between the parties thereto, describing and defining the boundaries of the land to be held by each in severalty, and mutually binding the parties to each other in a specified sum that, if any of them should lose any of the land so held and improved by him, the others should make it good, under which contract each of the parties enters into possession of the portion so set apart to him, and continues in open, notorious, and adverse possession thereof, such contract, with such possession, is "color of title." Stover v. Stover, 54 S. E. 350, 353, 354, 60 W. Va. 285 (citing Core v. Faupel, 24 W. Va. 238, 247; Kincheloe v. Tracewells, 11 Grat. [52 Va.] 587; Creekmur v. Creekmur, 75 Va. 430, 438; Oney v. Clendenin, 28 W. Va. 34–54; Adams v. Alkire, 20 W. Va. 480, 485; Randolph v. Casey, 27 S. E. 231, 43 W. Va. 289; Swann v. Thayer, 14 S. E. 423, 36 W. Va. 46; Shanks v. Lancaster, 5 Grat. [46 Va.] 110, 50 Am. Dec. 108).

A deed conveying land described by metes and bounds and a decree of court distributing to the grantee the land described as in the deed are "color of title." Owsley v. Matson, 104 Pac. 983, 156 Cal. 401.

Where an instrument in the form of a deed was signed by mark and bore an acknowledgment by one purporting to be an officer, which, though invalid as an acknowledgment, was good as an attestation, the deed was "color of title." Davis v. Arnold, 39 South. 141, 143 Ala. 228.

A deed, though dated as of a time prior to its execution, is "color of title" from the time of its execution, as is also an instrument describing the land and containing a warranty of title, though containing no words of transfer. Doe ex dem. Anniston City Land Co. v. Edmondson, 40 South. 505, 507, 145 Ala. 557.

"Color of title" is that which has the semblance of title, but which in fact is no title, and is anything in writing, however defective or imperfect, purporting to convey title to the land, and which defines the extent of the claim. An essential requisite of it is that it purports to pass title. As a court of law takes cognizance of nothing but a legal title, it is difficult to see how a colorable equitable title, such as a title bond or other executory contract, could be treated or regarded in that court as color of title. There is authority for the position that a title bond is color of title if the purchase money has been wholly paid, so that nothing remains to be done except the delivery of a deed. It is difficult, however, to see how the payment or nonpayment of purchase money can make any difference, inasmuch as the holding must proceed upon the theory that the sole object of color of title is to define boundaries, and that it need not purport to pass any legal title. Lewis v. Yates, 59 S. E. 1073, 1075, 62 W. Va. 575.

"What constitutes 'color of title' has been a subject of discussion in the courts of all states and frequently by our own court." As defined in other cases, "'It is the apparent right in the tenant which he has derived by his paper title, which distinguishes him from a trespasser or intruder.' 'A claim or "color of title" may be shown by any paper purporting to convey the land or the right to its possession into the party asserting adverse possession, however and for whatever reason such paper might be lacking in the essentials of a valid title, provided the party claims under it in good faith.' 'Color of title is that which in appearance is title, but which in reality is not title.'" If it appears from an instrument that it was the intention of the grantors to transfer lands described to the grantees in division of an estate, it is sufficient to constitute color of title in the grantees to support an adverse possession, although it may lack words of conveyance, technically speaking; nor is it necessary that the grantor shall have had title. Henry v. Brown, 39 South. 325, 327, 143 Ala. 446 (quoting definitions in Saltmarsh v. Crommelin, 24 Ala. 352; Goodson v. Brothers, 20 South. 443, 111 Ala. 596; Black v. Tennessee Coal, Iron & R. Co., 9 South. 538, 93 Ala. 113).

The limitation act (Act April 4, 1872 [Laws 1871–72, p. 557], § 6) provides that every one in the actual possession of land under claim and color of title made in good faith, who for seven successive years continues in such possession and pays all taxes, shall be adjudged the legal owner to the extent of his paper title, and extends the benefit of the section to purchasers during the seven years who shall continue such possession and the payment of taxes, so as to complete such payment of taxes and possession for seven years; and section 7 provides the same as to vacant and unoccupied land. Held, that any instrument having a grantor and grantee, apt words of conveyance, and describing the lands to be conveyed, gives "color of title" within the statute, and a conveyance from children to mother, which contains such requisites, was sufficient color of title, though the only consideration was love and affection. Wells v. Wells, 92 N. E. 932, 934, 246 Ill. 469.

According to Beverly v. Burke, 9 Ga. 944, 54 Am. Dec. 351, defining "color of title" as "a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used, a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law," and to Veal v. Robinson, 70 Ga. 816, defining the term as "anything in writing purporting to convey title to land which defines the extent of the

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claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title" and to other decisions of our court giving substantially the same definition, it would seem that the character of the instrument relied on as "color of title" is immaterial. Luttrell v. Whitehead, 49 S. E. 691, 692, 121 Ga. 699 (citing Field v. Boynton, 33 Ga. 239; Griffin v. Stamper, 17 Ga. 108; Millen v. Stines, 8 S. E. 315, 81 Ga. 655).

A deed to tenants in common gives good "color of title" to one of such tenants, and actual and exclusive possession under known boundaries, pursuant to a division of the premises by the parties in interest, for seven years at law, gives an indefeasible title as against one not claiming to be tenant in common. Sutton v. Jenkins, 60 S. E. 643, 645, 147 N. C. 11.

Must be valid on its face

A deed void for defects apparent on its face constitutes "color of title," open, notorious, exclusive, and hostile possession under which for 10 years gives title. Russell v. Tennant, 60 S. E. 609, 610, 63 W. Va. 623, 129 Am. St. Rep. 1024.

A wholly unauthorized grant of public land in the Philippine Islands by subordinate Spanish officials, showing its invalidity on its face, cannot serve as the basis of a prescriptive title under the Spanish royal decree of June 25, 1880, under which a prescriptive right can be founded on possession for 10 years under just title and in good faith. Tiglao v. Insular Government of Philippine Islands, 30 Sup. Ct. 129, 130, 215 U. S. 410, 54 L. Ed. 257.

Must purport to convey title

"Any instrument of writing which purports to convey a certain tract of land, describing the same, is 'color of title.'" Though no jurisdiction was obtained over the person of defendant in divorce, a sheriff's deed in a sale under execution based on a personal money judgment for alimony constituted color of title. Joplin Brewing Co. v. Payne, 94 S. W. 896, 897, 197 Mo. 422, 114 Am. St. Rep. 770 (citing Hamilton v. Boggess, 63 Mo. 233; Hickman v. Link, 10 S. W. 600, 97 Mo. 482; Allen v. Mansfield, 18 S. W. 901, 108 Mo. 343; Suddarth v. Robertson, 24 S. W. 151, 118 Mo. 286; Quick v. Rufe, 64 S. W. 102, 164 Mo. 408).

"Color of title" may be defined to be a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or the defective mode of conveyance which is used, and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it. Bond v. Beverly, 67 S. E. 55, 57, 152 N. C. 56.

A deed which one, who has given a warranty deed of the property, thereafter takes from a third person, is "color of title," and, when accompanied by adverse possession for the legal period, ripens into actual title against any one, including his prior grantee. Chatham v. Lansford, 63 S. E. 81, 82, 149 N. C. 363, 25 L. R. A. (N. S.) 129.

Defendants went into possession of land in 1900 under a conveyance from a mortgagee in possession under a mortgage executed in 1894, and they were in possession in 1905. They took possession from a lessee of the mortgagee who had taken possession from a person who had contracted to buy the place from the mortgagee by verbal bargain and sale, but had not paid for it. Held, that the mortgage, as it conveyed legal title, constituted "color of title" in the mortgagee in possession. Stewart v. Lowdermilk, 61 S. E. 523, 147 N. C. 583.

Must show title in grantor

"Color of title" does not depend on the validity or the effect of the grant, but wholly on its intent and meaning. There may be color of title, even if the grantor had nothing to convey. A grant by a city to a railroad of the right to erect, maintain, and operate an elevated road in a street gives to the railroad the apparent authority to appropriate the easements of light, air, and access appurtenant to the lots abutting on the street, and is color of title on which the railroad may acquire a prescriptive right to the easements, though the city had no power to transfer the easements. Hindley v. Manhattan R. Co., 78 N. E. 276, 282, 185 N. Y. 335.

Where a patentee of certain land conveyed to a third person before conveying to defendant's prior grantors, and it was not shown that there had been any reconveyance of such outstanding title, defendants had not "color of title" from the sovereignty of the soil and could not therefore claim under the three-year statute of limitations. Saxton v. Corbett (Tex.) 122 S. W. 75, 78.

Paper title required

A purchaser at a void partition sale does not have "color of title" until the deed is delivered to him, within Kirby's Dig. § 2754, providing that if any person, believing himself to be the owner, either in law or equity, under "color of title," has peacably improved any land which on judicial investigation shall be decided to belong to another, the value of the improvements shall be paid by the successful party before the court shall cause possession to be delivered. Cowling v. Nelson, 88 S. W. 913, 915, 76 Ark. 146.

Condemnation proceedings do not constitute "color of title" to sustain adverse possession until a final order has been entered confirming the report of commissioners, and reciting that the damages have been paid, and hence limitations do not start to run until such order. Knight v. Grim, 66 S. E. 42, 43, 110 Va. 400, 19 Ann. Cas. 400.

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A successful contestant for homestead entry on government lands, who has made proper filing of his homestead entry after the final determination of his contest, is entitled to the undisturbed possession of the lands filed upon; and may proceed before a justice of the peace, in an action of forcible entry and detainer, against the unsuccessful contestant, and those in possession, under a claim of license from such unsuccessful contestant, and such unsuccessful contestant, and those persons in possession under him, after a final determination of the contest adverse to him, are mere trespassers, in possession without "color of title," within the meaning of section 6430, Snyder's Comp. L. Oklahoma, Session Laws 1907-08, § 3, p. 459. Hibbard v. Craycraft, 121 Pac. 198, 199, 32 Okl. 160.

Possession required

Possession is essential to title under "color of title." Mere "color of title" does not draw possession to one who is not in, or does not take, actual possession of some part of the land. Bush v. Thomas, 50 South. 133, 134, 162 Ala. 168.

Quitclaim deed

A deed, not being a mere quitclaim, is "color of title." McBride v. Caldwell, 119 N. W. 741, 743, 142 Iowa, 228.

"Color of title" is that which in appearance is title, but which in reality is not. Where a person claims under a quitclaim deed, he is claiming under "color of title." Little v. Crawford, 88 Pac. 974, 975, 13 Idaho, 146 (citing Johnson v. Hurst, 77 Pac. 784, 10 Idaho, 308; Wright v. Mattison, 59 U. S. [18 How.] 50, 15 L. Ed. 280).

Where a quitclaim deed was claimed to have conveyed the property in controversy to defendant, and possession of at least a portion of the land in controversy was taken under the deed, it was sufficient to give "color of title," though there was nothing contained therein showing that the grantor claimed any interest in the property at the date of its execution. Archer v. Beihl, 136 Fed. 113, 118, 69 C. C. A. 101.

Recording required

Failure to record a receipt from the sheriff to a tax-sale purchaser, as expressly required by statute, goes to invalidate the deed, but does not affect the "color of title" afforded by the deed. Greenleaf v. Bartlett, 60 S. E. 419, 422, 146 N. C. 495, 14 L. R. A. (N. S.) 660.

Sheriff's deed

A certificate of sale acquired by the purchaser at a foreclosure and a sheriff's deed delivered to the purchaser under an order confirming the sale are "color of title," within Ballinger's Ann. Codes & St. § 5503 (Pierce's Code, § 1160), providing that every person in actual, open, and notorious possession of lands under color of title in good faith for seven years shall be the legal owner. Johnson v. Bartlett, 96 Pac. 833, 834, 50 Wash. 114.

Tax deed

A tax deed to land is "color of title." Morgan v. Pott, 101 S. W. 717, 719, 124 Mo. App. 371.

A void tax deed constitutes "color of title." State v. Harman, 50 S. E. 828, 838, 57 W. Va. 447; Lara v. Sandell, 100 Pac. 166, 167, 52 Wash. 53.

A tax deed, void for insufficiency of the description as "part of" a certain section, does not constitute "color of title." Gannon v. Moore, 104 S. W. 139, 140, 83 Ark. 196.

A tax deed, void on its face because not acknowledged before the proper officer, does not constitute "color of title" and is ineffective to start the six-year statute of limitations. Matthews v. Blake, 92 Pac. 242, 243, 16 Wyo. 116, 27 L. R. A. (N. S.) 339.

"Color of title" is a paper writing, usually a deed, which professes and appears to pass the title, but fails to do so. A tax deed of land sold for default in payment of taxes by a life tenant, in whose name it was listed, and conveying the title, but not that of the remaindermen, is not "color of title" as against them. Smith v. Proctor, 51 S. E. 889, 892, 139 N. C. 314, 2 L. R. A. (N. S.) 172 (citing 2 Words and Phrases, p. 1264).

A tax deed constitutes "color of title" under Hurd's Rev. St. 1908, c. 83, § 6, providing that every person in actual possession under color of title, who shall for seven successive years continue in possession and pay all legal taxes, shall be held to be the legal owner of said lands. Illinois Cent. R. Co. v. Cavins, 87 N. E. 371, 372, 238 Ill. 380.

A tax deed, executed to a purchaser at a tax sale under a judgment in a suit against the original owner brought after the recording of a tax deed to another purchaser at a prior tax sale under a prior judgment for taxes in a suit against the original owner, is "color of title" within Rev. St. 1899, § 4268 (Ann. St. 1906, p. 2342), and one claiming under such deed and entering into possession and improving and claiming the property has lawful possession; "color of title" being any writing purporting to convey title to land by appropriate words of transfer and describing the land. Dunnington v. Hudson, 116 S. W. 1083, 1085, 217 Mo. 93.

A tax deed reciting that the land was sold for taxes and bid in by the grantee, and that the owner had failed to redeem, was "color of title," within Revisal 1905, § 382, barring actions for land where defendants had been in possession thereof for 7 years under colorable title, etc., though the deed was invalid and conveyed no title because of the sheriff's failure to comply with Laws

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1881, p. 218, c. 117, § 36, requiring him to bid in land sold for taxes for the county, if no one will pay the tax for a less number of acres than the whole. Greenleaf v. Bartlett, 60 S. E. 419, 420, 146 N. C. 495, 14 L. R. A. (N. S.) 660.

Under Laws 1899, c. 158, providing that title to real property may be acquired by adverse, open, exclusive, and undisputed possession for 10 years under claim of title and by paying all taxes for such period, a deed executed and delivered by a county auditor of land sold to the state for taxes and to which the title of the state had been perfected by the lapse of time allowed for redemption pursuant to Laws 1890, c. 132, §§ 86, 87, though void on its face, constituted "color of title" sufficient on which to base an adverse claim. Woolfolk v. Albrecht, 133 N. W. 310, 312, 22 N. D. 36.

Void deed

An unauthorized conveyance by the surviving husband of community property after the death of the wife does not convey title or "color of title," and as to such interest the conveyance will not support a defense of limitations of three years. Hardy Oil Co. v. Burnham (Tex.) 124 S. W. 221, 223.

Where a grantee in a deed conveying a community homestead of 240 acres entered into the immediate possession of the premises and continuously occupied the same for over 10 years, the deed, though void because executed by the grantor in direct hostility to his wife's homestead rights, and therefore not "color of title," within Sayles' Ann. Civ. St. 1897, art. 3340, providing that an action for real estate against a person in the possession thereof under color of title shall be instituted within a specified time after the accrual of the cause of action, was admissible in trespass to try title brought by an heir of the grantor's wife on the issue of the extent of the grantee's disseisin of the grantor's wife, notwithstanding article 3344, providing that adverse possession shall not be construed to embrace more than 160 acres, or the number of acres actually inclosed, where the same exceeds 160 acres, etc. Sanders v. Word, 110 S. W. 205, 206, 50 Tex. Civ. App. 294.

Though a deed under which a defendant in possession claims is absolutely void and conveys nothing, it is nevertheless "color of title," and, with seven years' adverse continuous possession under it, a legal title is perfected. McFarland v. Cornwell, 66 S. E. 454, 457, 151 N. C. 428.

A deed not void on its face, but referring as a part of its description to another deed which is void on its face, is "color of title," within Civ. Code 1901, par. 2937, barring after five years actions for the recovery of real estate in the adverse possession of another claiming under a recorded deed. Work v. United Globe Mines, 100 Pac. 813, 815, 12 Ariz. 339.

A deed by an Indian, conveying land patented to him by an instrument in the usual form of homestead patents, constitutes "color of title," within Rev. Code Civ. Proc. § 54, making 10 years' actual possession and payment of taxes under color of title ground for an adjudication of ownership, whether or not such deed is actually void under the United States laws prohibiting Indians from conveying land within five years from the date of patents to them. Murphy v. Nelson, 102 N. W. 691, 693, 19 S. D. 197.

A deed from the proper officer on foreclosure sale, even though the proceedings are void, is sufficient to give "color of title," and if the grantee entered under such color, and remained in active possession for the proper time, he acquired an indefeasible title as against all persons not under disability. Sutton v. Jenkins, 60 S. E. 643, 645, 147 N. C. 11.

Will

A will may be color of title, but it must furnish a sufficient description to identify the land; and a mere "devise of all lands belonging to the testator in this state" will not constitute "color of title," within section 6 of the limitation law (Hurd's Rev. St. 1911, c. 83), providing that title may be acquired by one in possession of land by payment of taxes thereon for seven years under claim and color of title. Peabody v. Burri, 99 N. E. 690, 693, 255 Ill. 592.

COLOR OF TITLE (To Office)

"Color of title" to an office is the authority derived by an election or an appointment, however irregular or informal, so that the incumbent be not a mere volunteer. Howard v. Burke, 93 N. E. 775, 777, 248 Ill. 224.

"Color of title" to an office is that which in appearance is title, but which in reality is no title. It is this color of title, or, as it has been said, color of authority, which distinguishes the de facto officer from a mere intruder or usurper. Nall v. Coulter, 78 S. W. 1110, 1111, 117 Ky. 747, 4 Ann. Cas. 671.

" 'Color of title' to office is analogous to color of title to land. The latter does not mean a good title, or even a defective conveyance from one having a title, but only the appearance of title; that is, a deed to the premises in due form of law." A person acting as judge in a new judicial district, before the law establishing it has become operative, by appointment of the Governor, under an erroneous belief that the district was already in existence, is a de facto judge acting under color of title. State v. Ely, 113 N. W. 711, 713, 16 N. D. 569, 14 L. R. A. (N. S.) 638 (quoting and adopting definition in Re Ah Lec, 5 Fed. 899).

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"'Color of title' to an office is defined to be that which in appearance is title but which in reality is no title." It is this color of title which distinguishes the de facto officer from a mere intruder or usurper, whose acts are absolutely void. Where a de jure chief of police is, pending suit on charges against him in the district court, wrongfully suspended by order of the judge thereof at chambers, which order is later set aside and the suit dismissed, and where the city pays a chief of police de facto, during his incumbency, the salary provided by law, the officer de jure after obtaining possession of the office cannot recover from the city the salary for the same period. Stearns v. Sims, 104 Pac. 44, 46, 24 Okl. 623, 24 L. R. A. (N. S.) 475.

The essential to the creation of an "officer de facto" is that his incumbency should not be legal, but that it should be exercised by some election or appointment, attempted as of legal right, but invalid for want of power in the appointing body, or because of a defect in the election, and an officer so elected or appointed actually in possession of the office exercising its functions and acting under "color of title," which means an apparent right to the office, is an "officer de facto." Coquillard Wagon Works v. Melton, 125 S. W. 291, 292, 137 Ky. 189.

COLORABLE ASSIGNMENT

"Colorable assignment of a lease" means, not an assignment to avoid liability for rent under the lease, but that, the assignor retaining possession, the assignment was made to conceal that possession. Adams v. H. Koehler & Co., 121 N. Y. Supp. 390, 392, 136 App. Div. 623.

COLORABLE CAUSE

A "colorable cause" or a "colorable invocation of jurisdiction," as applied to the jurisdiction of an inferior court, means that some person apparently qualified to do so has appeared before the judge and made complaint under oath, stating some fact which may, with other facts unstated, constitute a criminal offense, or stating some fact which bears some general similitude to a fact designated by law as an offense, calling on the judge to pass on the sufficiency of the affidavit to elicit the process issued. Broom v. Douglass (Ala.) 57 South. 860, 864.

COLORABLE IMITATION

A trade-mark constitutes a "colorable imitation" to another if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other. Cusimano & Co. v. Olive Oil Importing Co., 38 South. 200, 201, 114 La. 312.

COLORABLE INVOCATION OF JURISDICTION

See Colorable Cause.

COLORATION

See Artificial Coloration.

COLORE OFFICII

See Color of Office.

COLORED

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule 1, pars. 305, 309, providing for colored cotton cloth, the character of the fabrics as "colored" is determined by the condition of the warp and the filling threads alone; and cottons having colored figures but an uncolored foundation are not "colored" within the act, though the figures cover most of the foundation fabric and give the effect of a colored fabric. United States v. Rusch & Co., 160 Fed. 279, 280.

The word "colored" by a consensus of opinion means of some other color than white, having a dark or black color of the skin, specifically in the United States belonging wholly or partly to the African race, having or partaking of the color of the negro. Throughout the United States, except on the Pacific Slope, the word "colored," when applied to race, has the definite and well-known meaning of a person having negro blood in his veins. State v. Treadaway, 52 South. 500, 502, 126 La. 300, 139 Am. St. Rep. 514, 20 Ann. Cas. 1297.

COLORED CHILD

"Colored children," within Const. § 187, providing for separate schools for white and colored children, include all children wholly or in part of negro blood, or having any appreciable admixture thereof; and a child having one-sixteenth negro blood may not attend a school for white children. Mullins v. Belcher, 134 S. W. 1151, 142 Ky. 673, Ann. Cas. 1912D, 456.

COLORED PERSON

A person of "color," within statutes relating to their qualification as witnesses, is one in whom there is a distinct and visible admixture of negro blood. State v. Davis (S. C.) 2 Bailey, 558, 559.

In ancient times in the territory of Orleans, the term "persons of color" was used to designate persons who were neither white nor black. "'Persons of color' may have descended from Indians on both sides, from a white parent, or mulatto parents in possession of freedom" (quoting Adelle v. Beauregard, 1 Mart. [La.] 184, where it was held that a "person of color" was presumed to be free, while in the case of blacks the presumption was that they were slaves, since during the regime of slavery all free persons of African descent were styled either "persons of color" or "free colored persons").

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The word "colored," however, as used in Acts La. 1890, No. 111, p. 152, requiring railroads to provide separate accommodations for white and colored persons, means negroes or persons having an admixture of colored blood. Webster's International Dictionary. The same word is also often applied to black people, Africans or their descendants, mixed or unmixed, and to persons who have any appreciable mixture of African blood. Lee v. New Orleans Great Northern R. Co., 51 South. 182, 183, 125 La. 236 (citing 7 Cyc. pp. 400, 401).

Acts 1901–02, c. 137, § 29, provides that when any minor child under 14, by reason of neglect, crime, or other vice of the parents, is growing up without education or salutary control, and in circumstances exposing it to a vicious life, the child may be committed to the care of the Children's Home Society. Held, that where minor daughters of a mother of gentle birth were not neglected, but were comfortably cared and provided for by their mother, and their stepfather, and it did not appear that from neglect or any vice of the mother or her husband the children were growing up without education or salutary control, and in circumstances exposing them to a vicious life, the mere fact that their mother married for her second husband one who had less than one-fourth negro blood in his veins, and was therefore not a "colored person," within Code 1904, §§ 2252, 2253, 3783, 3788, defining a colored person as one having one-fourth or more colored blood in his veins, and prohibiting such a person from intermarrying with a white woman, was insufficient to justify the commitment of the children to the custody of the society. Moon v. Children's Home Society of Virginia, 72 S. E. 707, 708, 112 Va. 737, 38 L. R. A. (N. S.) 418.

A covenant in a deed that the title to the land should never vest in a person of African descent or "colored person" was not breached by a conveyance of the land to a corporation composed of negroes, since the corporation was a community distinct from its members, and was not a "colored person" within the covenant. People's Pleasure Park Co. v. Rohleder, 61 S. E. 794, 796, 109 Va. 439.

As citizen

See Citizen.

COLORED RACE

Any person having an appreciable mixture of negro blood belongs to the colored race, within Acts 1890, p. 152, No. 111, requiring railroad companies to provide separate accommodations for white and colored races. Lee v. New Orleans Great Northern R. Co., 51 South. 182, 183, 125 La. 236.

COLPORTAGE

"Colportage" is the sending forth of persons to labor for the spread of the gospel by distributing religious books and tracts, and so a bequest for that purpose is exempt from a transfer tax under Tax Law, § 221, as amended by Laws 1905, c. 368. In re McCormick's Estate, 99 N. E. 177, 206 N. Y. 100.

COLT

An information for the larceny of one gray horse "colt" is not insufficient because the word "colt" is not included within the term grand larceny as defined by section 7048, Rev. St. 1887, providing that the taking a "horse, mare, gelding," etc., is larceny, as the word "colt" merely described the age of the animal. State v. Williams, 86 Pac. 53, 56, 12 Idaho, 492.

As horse

See Horse.

As mare

See Mare.

COM.

"Com." and "Co." are both well understood abbreviations for the word "company," when used as a part of the name of a commercial firm. Where a declaration alleged the making and delivery of a note to, and indorsement by, S. & Com., and the evidence showed that it was indorsed by S. & Co., there was no variance. Keith v. Sturges, 51 Ill. 142, 143.

COMAKER

Defendant was properly held to be a "comaker" of a note, where it indorsed its name on the back of the note before delivery to the payee, and there was no evidence of any agreement or understanding that it should be considered merely an indorser. First Nat. Bank of Kansas City v. Guardian Trust Co., 86 S. W. 109, 115, 187 Mo. 494, 70 L. R. A. 79.

COMBAT

See Mutual Combat.

COMBED SILK

In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 660, for "silk, raw, or as reeled from the cocoon, but not * * * advanced in manufacture in any way," held: (1) That the provision does not cover any form of raw silk advanced beyond the condition of skeins; (2) that silk known as "singles" or "silk on tubes," which has been wound from the skeins onto tubes, the effect of this process being to advance the silk a stage in preparation for its ultimate use, has been "advanced in manufacture"; and (3) that silk in this form is not free of duty under this provision, but dutiable under paragraph 384, § 1, Schedule L, of said act, as "silk

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* * * not further advanced or manufactured than carded or combed silk." Klots v. United States, 139 Fed. 606, 607, 71 C. C. A. 590.

"Combed silk" that has fallen from or been caught in the machines in which it was undergoing further operations is dutiable under the provision in paragraph 384, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185, for silk not further manufactured than combed, and is not subject to the provision for silk waste in paragraph 661, § 2, Free List, 30 Stat. 201. Fawcett v. United States, 154 Fed. 1003, 83 C. C. A. 197.

COMBINATION—COMBINE

A tacit understanding between conspirators to work to a common purpose is a "combination." In re Friedman, 164 Fed. 131, 140.

A "combination" is "the union or association of two or more persons or parties for the attainment of some common end." Where a holding corporation was organized to control the patents and business of all the wire glass manufacturing companies, including defendant, and the latter received its proportion of the stock of the holding company as its share of the consideration for a transfer of patents, etc., and was entitled to be represented on the holding company's board of directors, the organization of such company, etc., constituted a "combination" within a contract by which plaintiff gave defendant a license to use certain patents in the manufacture of such glass, providing that if defendant should enter any trust, pool, combination, or trade arrangement with other manufacturers to control the output or regulate the prices of wire glass, plaintiff should be deemed beneficiary under such contract, combination or trade arrangement. Brownsville Glass Co. v. Appert Glass Co., 136 Fed. 240, 245 (quoting and adopting definition in Cent. Dict.).

In the case of an indictment for conspiracy charging that defendants did unlawfully and willfully "combine, confederate, and conspire," etc., it was said that it seems impossible to ascribe to the words "combine, confederate, and conspire" any meaning other than that the defendants mutually engaged to accomplish the purposes charged. When it is said that A. and B. confederated or conspired to do an act, the words seem to have a well-defined significance. The etymological, technical, and popular significance of these words, when predicated of two or more persons, is that they reciprocally will to assist in a common enterprise; and the enterprise being common, and the will of all the defendants being common, the agreement was common and between each and all of the defendants. State v. Nugent, 71 Atl. 485, 486, 77 N. J. Law, 84.

COMBINATION (In Patent Law)

"To sustain a patent on a 'combination' of a device, * * * a new result must be obtained which is due to the joint and co-operating action of all the old elements." Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co., 160 Fed. 476, 491 (quoting and adopting definition from Brinkerhoff v. Aloe, 13 Sup. Ct. 221, 224, 146 U. S. 515, 516, 36 L. Ed. 1068).

A combination of old elements to be patentable must operate in a new way to produce a new or an improved result, and the change from the old art must be such a one as would not occur to the ordinary mechanic skilled in the art. Fellows v. Borden's Condensed Milk Co., 180 Fed. 421, 428.

To constitute a patentable combination of old elements, they must co-operatively perform a different function from what they did before, unless it is shown that, in the combination as applied to a machine or device in its entirety, a new and useful result is produced. Elliott-Fisher Co. v. Donning, 171 Fed. 96, 103.

A "combination," as used in the patent law, is a union of elements which may be partly old and partly new, or wholly old or wholly new. But, whether new or old, the combination is a means—an invention—distinct from them. If new, they may be inventions, and the proper subjects of patents, or they may be covered by claims in the same patent with the combination. They are not identical with the combination. One element is not the combination, and cannot be regarded as a substantive part of the invention represented by the combination, and it can make no difference whether the element was always free or becomes free by the expiration of a prior patent, foreign or domestic. In making a combination, an inventor may draw from the whole field of mechanics. Crown Cork & Seal Co. v. Standard Brewery, 174 Fed. 252, 262 (adopting definitions in Leeds & Catlin Co. v. Victor Talking Machine Co., 29 Sup. Ct. 495, 500, 213 U. S. 301, 325, 53 L. Ed. 805, 813).

To constitute a "combination" in patent law it is essential that there should be some joint operation performed by the elements, producing a result due to their joint and co-operating action, while in an "aggregation" there is a mere adding together of separate contributions each operating independently of the other. Portland Gold Min. Co. v. Hermann, 160 Fed. 91, 99, 100, 87 C. C. A. 247 (quoting and adopting definition in American Chocolate Machinery Co. v. Helmstetter, 142 Fed. 978, 74 C. C. A. 240).

A "combination" in patent law is a union of elements which may be partly old and partly new, or wholly old or wholly new; but, whether the elements be old or new, the combination is distinct from them. The elements thereof, if new, may be inventions

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so as to be the subject of patent or may be covered by claims in the same patent with the combination. A "combination" and not a function of a machine is embodied in a claim of a patent for a "sound-producing apparatus consisting of a traveling tablet having a sound record formed thereon and a reproducing stylus shaped for engagement with said record and free to be vibrated and propelled by the same, substantially as described." Leeds & Catlin Co. v. Victor Talking Machine Co., 29 Sup. Ct. 495, 500, 503, 213 U. S. 301, 53 L. Ed. 805.

A "combination" in a patent for a combination described in the specifications and stated in the claim is an entirety, and, where one of its elements is omitted, it ceases to exist. Where a patent is for an improvement on a known machine by a mere change of form or a new combination of parts, the patentee cannot invoke the doctrine of equivalents to establish infringement by another, who has also improved the original machine by the use of a different form or combination performing the same functions. Central Foundry Co. v. Coughlin, 141 Fed. 91, 94, 72 C. C. A. 93.

To constitute a "combination" it is essential that there should be some joint operation performed by its elements producing a result due to their joint and co-operating action, as distinguished from an "aggregation," in which there is a mere adding together of separate contributions, each operating independently of the other. Hence a patent for a combination of elements in a machine is not infringed by a machine in which the elements of the combination are merely aggregated operating successively and independently of each other. American Chocolate Machinery Co. v. Helmstetter, 142 Fed. 978, 979, 74 C. C. A. 240.

The bringing together of old elements, so as to do no more than their original work and which do not co-operate with other elements in doing something new and useful, is not invention; but, if they co-act with each other in a new and unitary organization so as to produce a more beneficial result than by their separate operation, it may constitute a patentable combination. National Tube Co. v. Aiken, 163 Fed. 254, 261, 91 C. C. A. 114.

COMBINATION IN RESTRAINT OF TRADE

See Illegal Combination in Restraint of Trade; Unlawful Combination.
See, also, Restraint of Trade.

A "combination" to destroy competition between dealers in a commodity is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederate and giving effect to the purpose of the latter, whether of extortion or mischief. Total suppression of trade in the commodity is not necessary in order to render the combination one "in restraint of trade." Where an association of retail druggists in a certain city and wholesale druggists formed a combination to maintain a maximum schedule of prices, and in pursuance of the plan refused to sell to plaintiff, a retailer who had refused to join the combination, and coerced and intimidated vendors of like commodities by means of threats to blacklist and boycott such vendors if they sold to plaintiff, whereby such vendors were deterred from selling to plaintiff, the parties to the combination were liable to plaintiff for resulting damages to his business. Klingel's Pharmacy v Sharp & Dohme, 64 Atl. 1029, 1030, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184.

A grocery company and a photographic company agreed that the latter should furnish the former with trading tickets, each entitling its holder to a photo art calendar at the photographic company's studio when countersigned by the grocery company, and the grocery company agreeing to pay a certain amount for each ticket three months from date, or as soon as the tickets should be disposed of it before that time, and to dispose of the tickets as soon as possible, and it was further agreed that from the date of the contract the photographic company should not, without the consent of the grocery company, or until the disposal of the tickets furnished, sell any other local grocery company any of such tickets. Held, that such a contract was not a combination of persons, within the meaning of the act of 1903 (Gen. Laws 1903, p. 119, c. 94), prohibiting trusts, monopolies, and conspiracies in restraint of trade. Forrest Photographic Co. v. Hutchinson Grocery Co. (Tex.) 108 S. W. 768, 769.

The Duluth Board of Trade, as constituted under its charter and rules, is not a conspiracy or combination in restraint of trade or which restrains, limits, or interferes with free competition in the production of grain, or in the purchase and sale thereof, in violation of the anti-trust law (Gen. Laws 1899, p. 487, c. 359; Rev. Laws 1905, § 5168). State v. Duluth Board of Trade, 121 N. W. 395, 406, 107 Minn. 506, 23 L. R. A. (N. S.) 1260.

An information for quo warranto alleged that defendant and another company were competitors in buying cotton seed, and agreed that defendant would not buy any seed in the territory adjacent to the plant of the other concern if it would ship defendant a certain amount of seed at certain prices, and that the agreement was an unlawful combination to restrain trade, for the purpose of limiting the price of a commodity, etc. Held, that the information alleged a single cause of action, and was sufficient under Laws 1900, p. 125, c. 88, defining a "combine" to be a combination to hinder competition. State

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v. Jackson Cotton Oil Co., 48 South. 300, 301, 95 Miss. 6.

The freedom of contract is not unreasonably abridged, in violation of Const. U. S. Amend. 14, by Code Miss. § 5002, which, as construed by the state court, condemns as a combination in restraint of trade an agreement between retail lumber dealers not to deal with any manufacturer or wholesale dealer who sells direct to consumers in localities in which such retail dealers conduct their business and keep a sufficient stock to meet demands, and to inform each other of any such sales. Grenada Lumber Co. v. Mississippi, 30 Sup. Ct. 535, 537, 217 U. S. 433, 54 L. Ed. 826.

Within Const. art. 15, § 12, providing that no incorporation, stock company, person, or association should combine or form what is known as a "trust" for the purpose of fixing the price or regulating the production of any article of commerce or product of the soil for consumption by the people, the terms "combine" and "form a trust" are of equal dignity, and both are to be regarded as modified and explained by the clause "for the purpose," etc. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., 75 Pac. 89, 95, 29 Mont. 428.

A "combine," to fall within the purview of Code 1892, § 4437, must have as a constituent element, either a violation of public policy, in that it tends to create a monopoly, or is in restraint of trade, or that it involves a delegation and abandonment of corporate powers, and is inimical to the public welfare. Yazoo & M. V. R. Co. v. Searles, 37 South. 939, 943, 85 Miss. 520, 68 L. R. A. 715.

Only acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of their evident purpose, injuriously restrain trade, fall within the condemnation of Act July 2, 1890, c. 647, 26 Stat. 209, of combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part of such trade or commerce. United States v. American Tobacco Co., 31 Sup. Ct. 632, 634, 221 U. S. 106, 55 L. Ed. 663.

"The word 'combination,' as used in the anti-trust law, is a word not yet possessed of an accurate legal meaning. Its place in the terminology of criminal law is, I believe, no older than this statute. Of itself it means no more than 'co-operation'—a union of effort—and, if I am right in believing the act to be aimed at the result of such united effort or co-operation, it can make no difference whether those personally assisting in or contributing to such wrongful result were original laborers in the vineyard or came at the eleventh hour; their statutory recompense is the same." United States v. MacAndrews & Forbes Co., 149 Fed. 823, 831.

To constitute a trust, within the anti-trust law (Rev. St. 1899, c. 143), there must be a combination of capital, skill, or acts; "combination," as so used, meaning "union" or "association." State ex inf. Hadley v. Standard Oil Co., 116 S. W. 902, 1044, 218 Mo. 1.

To show a "combination" in violation of the anti-trust statute, it is necessary that the combination was entered into to increase the price of an article above its real value or depreciating the price below its real value.—Stahr v. Hickman Grain Co., 116 S. W. 784, 785, 132 Ky. 496.

The test of legality of a combination under Anti-Trust Act July 2, 1890, c. 657, is its necessary effect on competition in commerce among the states or with foreign nations, and where its necessary effect is but incidentally or indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of the act; but, where its necessary effect is to stifle or directly and substantially to restrict free competition in commerce among the states or with foreign nations, the combination is in restraint of trade and falls under the ban of the act. United States v. Standard Oil Co. of New Jersey, 173 Fed. 177, 188.

The combination of the stocks of the various corporations trading in petroleum and its products in the hands of a holding company, with the intent to exclude others from the trade, and thus centralize in the combination the perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, constitutes a violation of the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209, against combinations in restraint of interstate or foreign commerce, or the monopolization or attempt to monopolize any part of such trade or commerce. Standard Oil Co. of New Jersey v. United States, 31 Sup. Ct. 502, 505, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

Sherman Anti-Trust Law (Act July 2, 1890, c. 647, § 3) declares that every contract, combination, and form of trust or otherwise, and conspiracy in restraint of trade or commerce, in any territory of the United States, or in restraint of trade or commerce between any such territory and another, etc., are declared illegal, and that every person who shall make any such contract or engage in any such "combination, or conspiracy," shall be deemed guilty of a misdemeanor. Held, that the words "combination or conspiracy" as so used were synonymous, and hence an indictment alleging that defendants entered into a "combination or conspiracy" in restraint of trade was not duplicitous as alleging two distinct offenses. Tribolet v.

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United States, 95 Pac. 85, 87, 11 Ariz. 436, 16 L. R. A. (N. S.) 223.

A combination of shipowners to prevent competition between members by maintaining uniform freight rates in South African trade, and to eliminate the possibility of competition with other lines by requiring shippers to pay forfeit money in case they patronized other lines, constituted a combination in restraint of competition and foreign commerce, in contravention of the federal anti-trust statute. Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 252, 92 C. C. A. 315.

A combination by stockholders in two competing railway companies to form a stockholding corporation, which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, is a combination in restraint of interstate and international commerce, and violates Anti-Trust Act July 2, 1890, c. 647, 20 Stat. 209, declaring illegal every combination in restraint of interstate or foreign commerce. Northern Securities Co. v. United States, 24 Sup. Ct. 436, 452, 193 U. S. 197, 48 L. Ed. 679.

The International Harvester Company, a foreign corporation, which absorbs the property and business of six separate, independent, competing corporations, manufacturing from 80 to 90 per cent. of the agricultural implements of the country, and which thereafter conducts the business of manufacturing agricultural implements under the respective names of such corporations, and which thereby obtains power to suppress competition, is an unlawful combination to suppress competition within the anti-trust laws, though it has used its power only in a moderate degree, since, where persons deliberately acquire power that will enable them to control the market if they choose to exercise such power, they cannot show to escape liability under the anti-trust laws that they did not intend to control trade or limit competition; the laws forbidding the acquisition of power to influence the market by combinations of interests that otherwise would compete in the market. State ex inf. Major v. International Harvester Co. of America, 141 S. W. 672, 676–678, 237 Mo. 369.

The provisions of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209, making unlawful any combination "in restraint of trade or commerce among the several states" or to monopolize any part of such trade or commerce, do not make every combination in restraint of competition in interstate trade unlawful, but there may be a restraint of competition that does not amount to a restraint of trade within the meaning of the act. On the other hand, a combination cannot escape the condemnation of the act merely because of the form it assumes, and a single corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with such corporation, puts a restraint on interstate commerce, and monopolizes or attempts to monopolize a part of such commerce, in a sense that violates the act. United States v. E. I. Du Pont De Nemours & Co., 188 Fed. 127, 149.

The combination and unification of the terminal facilities at St. Louis under the exclusive ownership and control of less than all the railway companies under compulsion to use them—the inherent conditions being such as to prohibit any other reasonable means of railway access to that city—violates the provisions of the Sherman anti-trust act of July 2, 1890, §§ 1 and 2, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize such commerce which must pass through the gateway at St. Louis. United States v. Terminal R. R. Ass'n of St. Louis, 32 Sup. Ct. 507, 509, 224 U. S. 383, 56 L. Ed. 810.

Any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts in that regard the liberty of a trader to engage in business, is within the inhibition of Anti-Trust Act July 2, 1890, against "combinations in restraint of trade or commerce among the several states." A combination by members of labor organizations to destroy an existing interstate traffic in hats by preventing the manufacturers, though the instrumentality of a boycott, from manufacturing hats intended for transportation beyond the state, and to prevent their vendees in other states from reselling the hats so transported, and from further negotiating with the manufacturers for the purchase and transportation of such hats from the place of manufacture to the various places of destination, is a "combination in restraint of trade or commerce among the several states," within the meaning of Anti-Trust Act July 2, 1890, the members of which are liable for the threefold damages which, under section 7 of that act, may be recovered by those injured in business or property by violations of the act, although a negligible amount of intrastate business may be affected in carrying out the combination, and although the members of the combination are not themselves engaged in interstate commerce. Loewe v. Lawlor, 28 Sup. Ct. 301, 303, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815.

The acquisition by the Union Pacific Railroad Company, then operating a line from Missouri river points to Portland, and thence to San Francisco by steamship connection, of 46 per cent of the outstanding capital stock of the Southern Pacific Company, with the intent and result, not only of securing the California connection at Ogden over the

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Central Pacific line, and thus effecting such a continuity of the Union Pacific and Central Pacific lines from the Missouri river to San Francisco, as was contemplated by Act July 1, 1862, c. 120, 12 Stat. 489, Act July 2, 1864, c. 216, 13 Stat. 356, and Act June 20, 1874, c. 331, 18 Stat. 111, but of obtaining the dominating control of the entire Southern Pacific system, consisting of lines by water and rail, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific coast points, with various branches and connections, besides a steamship line from San Francisco to Panama, and from San Francisco to the Orient, and a half interest in another line between the two latter points, which system was actively competing with the purchasing road for interstate business, large in volume, though small in comparison with the total traffic carried, creates, contrary to the act of July 2, 1890, a combination in restraint of interstate trade. United States v. Union Pac. R. Co., 33 Sup. Ct. 53, 61, 226 U. S. 61, 57 L. Ed. 124.

The test of an unlawful combination in restraint of trade, under Act July 2, 1890, c. 647, § 1, 26 Stat. 209, is its necessary effect upon free competition in commerce, and a combination, the effect of which is to stifle and substantially restrict such competition, is unlawful; but if the effect is only indirectly to restrict competition, while its chief result is to foster the trade to those who make it, it is not within the law. Union Pac. Coal Co. v. United States, 173 Fed. 737, 739, 97 C. C. A. 578.

As trust

See Trust (Combination).

COMBINATION CAR

A car about 60 feet long with a door in each side and each end, and with a platform at the end next the locomotive, but none at the other, is called a "combination car." Lewis v. Vicksburg, S. & P. R. Co., 38 South. 92, 114 La. 161, 108 Am. St. Rep. 335.

COMBINATION PATENT

See Combination (In Patent Law).

COMBINED DRAINAGE

The term "combined drainage" is defined thus: "Where there are lands so related that the same system will benefit all of them more or less, and it is proposed to construct at the expense of all the owners, in proportion to the benefits to their respective lands received, they may proceed to accomplish it without resort to condemnation, in the mode prescribed. That is the system of combined drainage. The combination referred to is not of ditches, though that may generally be required, but of contribution to the expense of constructing, extending, improving, and maintaining them." People ex rel. Harrison v. Commissioners of Mineral Marsh Drainage Dist., 62 N. E. 225, 228, 193 Ill. 428 (quoting and adopting the definition in Klinger v. People ex rel. Conkle, 22 N. E. 600, 602, 130 Ill. 509, 513).

COMBUSTIBLE

See Incombustible.

The Charter of the City of Hoboken empowered the council to regulate the manufacture and keeping of gunpowder, fireworks, and other dangerous and combustible articles, and the city's Building Code prohibited the erection of any building for the manufacture or repair of mattresses or any other article wherein excelsior or other combustible material was used, or the storage of such materials within certain distances of designated buildings. Held, that the word "combustible" was broad enough to include articles likely to cause a conflagration, and that ordinary materials for mattresses were within the class of articles prohibited by the Code. Neumann v. City of Hoboken, 82 Atl. 511, 512, 82 N. J. Law, 275.

COMBUSTION

See Slow Combustion.

Spontaneous combustion, see Spontaneous.

COMBUSTION TOOK PLACE

To say that "combustion took place" means took fire. Per Porter, J., dissenting. Sun Ins. Office of London v. Western Woolen-Mill Co., 82 Pac. 513, 519, 72 Kan. 41.

COME

See May Come; To Come.

To reside

A girl who comes to a town to work as a maid is a person who has "come to reside" within the meaning of section 3 of the statute relating to paupers. Middlebury v. Waltham, 6 Vt. 200, 202.

A woman who took up her abode in a town under a contract to make cheese, and who had no regular home, is a person who has "come to reside" within the meaning of section 4 of the statute relating to paupers. Town of Berlin v. Town of Worcester, 50 Vt. 23, 25.

A stranger, who with his family takes up his abode in a town with the intention of building a home in some other town at some indefinite future time, held to have "come to reside" within the meaning of the statute relating to paupers. Town of Jamaica v. Town of Townshend, 19 Vt. 267, 271.

A pauper, who came to the town of P. to hire out for the summer, but who intended to leave in the fall, was a person who "came to reside" within the meaning of the

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statute relating to paupers. Town of Pittsford v. Town of Chittenden, 44 Vt. 382, 384.

A pauper went to S., where his wife from whom he had separated resided, without any intention of remaining. He decided to live with his wife while there and went to work and boarded his wife. Held, that he had "come to reside" within the meaning of the pauper statute. Town of Sharon v. Town of Cabot, 29 Vt. 394, 395.

One who had a wife but did not live with her, but who was hired for a term in another town, was a person who had "come to reside" within the meaning of the statute regarding paupers. Town of Stamford v. Town of Readsboro, 46 Vt. 606, 611.

COME BY THE FATHER

Where a child, whose father was a member of the Creek Tribe of Indians, but whose mother was not, was born May 6, 1901, and died in November of the same year, thus becoming entitled to enrollment in the tribe, but without receiving his allotment at the time of his death, the land to which he was entitled came to him by the blood of his tribal parent, or "from his father," within the meaning of Mansf. Dig. Ark. c. 49, providing that on the death of a person intestate, unmarried, and leaving no children, the estate if it "came from the father," shall go to the father, and hence on his death, and the subsequent allotment, his father took the full title. Shulthis v. McDougal, 170 Fed. 529, 533–535, 95 C. C. A. 615.

COMING

A coal miner who approaches the bottom of the shaft from above with a view of leaving the cage or who approaches the bottom of the shaft from his working place below with a view of entering the cage is within the protection given by Hurd's Rev. St. 1908, c. 93, § 28, par. "b," providing that, so long as there are miners underground, the operator shall maintain sufficient light at the bottom of the shaft thereof so that persons "coming to the bottom" may discern the cage and objects in the vicinity. Robertson v. Donk Bros. Coal & Coke Co., 87 N. E. 373, 375, 238 Ill. 344.

A petition in an action for the conversion in October, 1907, of animals, describing them as "coming twos" and as part of property mortgaged to plaintiff in November, 1906, is supported by the mortgage which describes them as "yearlings," since, if they were yearlings when mortgaged, they would be "coming twos" the following October at the time of the alleged conversion. Barron v. San Angelo Nat. Bank (Tex.) 138 S. W. 142, 144.

COMET

A "comet," as defined by Stand. Dict., is a heavenly body consisting of a coma, surrounding a bright star-like nucleus, with a nebulous tail or train, often of great length. A "comet" consisting of a five-pointed solid star with a nebulous tail, together with the word "Coma," does not infringe a trade-mark using a six-pointed star with the word "Star."—Hutchinson, Pierce & Co. v. Loewy, 163 Fed. 42, 43, 90 C. C. A. 1.

COMFITS

The term "comfits" in paragraph 263, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171, is practically synonymous with "confections," and includes boiled marrons (chestnuts) preserved in syrup. Schall & Co. v. United States, 154 Fed. 1005, 83 C. C. A. 329.

COMFORT

Some of the synonyms of "comfort" are "consolation," "contentment," "ease," "enjoyment," "happiness," "pleasure," and "satisfaction." It is a common English word. A person publishing a magazine under the name "Comfort" has a trade-name in such title, which is infringed by the use of the name "Home Comfort" for a magazine, entitling him to an injunction, without proof of damages. Gannert v. Rupert, 127 Fed. 962, 963, 62 C. C. A. 594.

Under the statute (Rem. & Bal. Code, § 8309) defining a nuisance as an act or omission which either annoys, injures, or endangers the comfort, health, or safety of others, the maintenance in a residential district of a city of a sanitarium for the treatment of tuberculosis patients is a nuisance, where the fear induced by the proximity of the sanitarium disturbs the "comfortable enjoyment" of adjacent property, whether the fear is founded on scientific facts or not, for "comfortable enjoyment" means mental quiet as well as physical comfort, and the word "comfort" implies whatever is requisite to give security from want and furnish reasonable physical, mental, and spiritual enjoyment. Everett v. Paschall, 111 Pac. 879, 880, 61 Wash. 47, 31 L. R. A. (N. S.) 827, Ann. Cas. 1912B, 1128.

COMITY

The doctrine of "comity" is "in general terms that there are, between nations at peace with one another, rights both national and individual resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts, respectively." Disconto Gesellschaft v. Terlinden, 106 N. W. 821, 823, 127 Wis. 651, 15 L. R. A. (N. S.) 1045, 115 Am. St. Rep. 1063 (quoting and adopting definition in 6 Webster's Works, p. 117).

"Comity" is not a rule of law, but of practice, convenience, and expediency, and,

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while it is something more than mere courtesy, its obligation is not imperative. Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945, 960.

"'Comity' is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has substantial value in securing uniformity of decision and discouraging repeated litigation of the same question, but its obligation is not imperative. * * * It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the court is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views, that comity comes into play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law."—Norwich Union Fire Ins. Soc. v. Stanton, 191 F. 813, 815, 112 C. C. A. 327 (quoting and adopting definition in Mast, Foos & Co. v. Stover Mfg. Co., 20 Sup. Ct. 708, 177 U. S. 485, 44 L. Ed. 856).

Under the rule of "comity," a foreign corporation is not required to domesticate to maintain an action in the state courts, but a foreign corporation, to enjoy the privileges of a domestic corporation, must comply with the laws of the state. A foreign corporation not complying with Const. art. 10, § 5, and Rev. St. 1899, § 3058, relating to the right of foreign corporations to transact business in the state, may not maintain an action to enforce a contract with a telephone company based on the latter's failure to transmit a message correctly, where the defense of noncompliance is raised. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 101 Pac. 939, 941, 17 Wyo. 507.

"Comity," with reference to the treatment of the citizen of another state on an order of arrest, means that this state will do by courtesy what the other state would do under like circumstances in connection with a citizen of this state, so that, where the New York courts hold that a citizen of another state surrendered by extradition is not entitled to an exemption in New York from arrest for other crimes or upon civil process, a New York citizen extradited into this state will not be exempt from arrest while herein. Rutledge v. Krauss, 63 Atl. 988, 990, 73 N. J. Law, 397.

Comity depends, not alone on a disposition to favor the citizens of another state, but rests on settled principles of practice, expediency, and convenience, and is a rule recognized by courts, when applied within bounds of discretion, and based on the statute law or decisions of courts of general jurisdiction of other states, which will be given force if they do not conflict with the local law, inflict an injustice, or violate public policy. State ex rel. Baker River & S. R. Co. v. Nichols, 99 Pac. 876, 877, 51 Wash. 619.

"'Comity' is not a rule of law, but one of practice and convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decisions and discouraging repeated litigation of the same question, but its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided and which arose under the same facts. * * * Comity, however, has no application to questions not considered by the prior court or, in patent cases, to alleged anticipating devices which were not laid before that court." Torrey v. Hancock, 184 Fed. 61, 69, 107 C. C. A. 79 (quoting Mast, Foos & Co. v. Stover Mfg. Co., 20 Sup. Ct. 708, 177 U. S. 485, 44 L. Ed. 856).

COMITY OF NATIONS

"'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 16 Sup. Ct. 139, 143, 159 U. S. 113, 40 L. Ed. 95; The Disconto Gesellschaft v. Umbreit, 28 Sup. Ct. 337, 340, 208 U. S. 570, 52 L. Ed. 625 (quoting and adopting the definition in Hilton v. Guyot, 16 Sup. Ct. 139, 143, 159 U. S. 113, 40 L. Ed. 95, 108); Prentis v. Atlantic Coast Line Co., 29 Sup. Ct. 67, 74, 211 U. S. 210, 53 L. Ed. 150 (quoting and adopting definition in Hilton v. Guyot, 16 Sup. Ct. 143, 159 U. S. 163, 40 L. Ed. 108).

"'Comity' is defined as a courtesy; a disposition to accommodate. By the rules of comity between nations, the courts of one state will voluntarily enforce the laws of a friendly state or nation when, by such enforcement, they will not violate their own public policy or laws or injuriously affect the interests of their own state or of their own citizens." Disconto Gesellschaft v. Terlinden, 106 N. W.

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821, 824, 127 Wis. 651, 15 L. R. A. (N. S.) 1045, 115 Am. St. Rep. 1063.

"Comity of nations" is defined as the courtesy by which nations recognize within their own territory, or in their own courts, the peculiar institutions of another nation, or the rights and privileges acquired by its citizens in their own land. Comity can only arise when a citizen, whether natural or artificial, of one state, having certain powers, rights, or privileges in the state of its domicile, passes into another state and there exercises or attempts to exercise the same privileges or powers. Myatt v. Ponca City Land & Imp. Co., 78 Pac. 185, 188, 14 Okl. 189, 68 L. R. A. 810.

Courts recognize the laws of other states and countries pertaining to contracts, and give them force and effect, upon the principle of "comity," which is the voluntary act of the state or nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. The "comity of nations," rightly understood, cannot violate, because it is a part of, the law of this and every other civilized country. It being upon the principle of the voluntary act of comity that contracts valid where made, but invalid in the state of the forum, will be in force in the latter state, if not contrary to the established policy or a positive statute of that state, it is within the discretion of the lawmaking power of the state of the forum to limit the extent to which the principle of comity shall be applicable; and the Legislature of the state has the power to say that this principle of comity shall not be extended to a contract, the result of which is to give one of the parties thereto the means of violating the laws of the state and its established policy in relation to the sale therein of commodities believed to be prejudicial to the interests of its citizens. In furtherance of the established policy of the state to prohibit the sale of intoxicating liquors within its limits Rev. St. Me. c. 29, § 64, was enacted forbidding a remedy to certain suitors, under conditions named, even if they were innocent in making the contract of sale which placed in the possession of the purchaser the means of violating the prohibitory laws. The legal effect of this enactment was simply to limit the application of the principle of comity, and to extend the well-established principle that courts will not enforce a contract made by both parties with the view and for the purpose of violating the laws of the state of the forum to the case of a contract where one of the parties only to it, the purchaser, had that purpose in view. This enactment was within the discretion of the lawmaking powers of the state and is not violative of the interstate commerce clause of the federal Constitution. Corbin v. Houlehan, 61 Atl. 131, 135, 100 Me. 246, 70 L. R. A. 568.

COMMENCE

See Duly Commenced.

Webster defines the word "commence" to mean to start, to begin, to originate, to perform the first act of. The word "commence," as used in Code Civ. Proc. § 26, relating to a proceeding commenced before a judge of the court, means to start, begin, originate, or to perform the first act of. Bridges v. Koppelman, 117 N. Y. Supp. 306, 312, 63 Misc. Rep. 27.

L. O. L. §§ 363–377, abolished the writ of quo warranto, and provided that the remedies obtainable under that proceeding might be obtained by an action at law in the name of the state by the prosecuting attorney. Subsequently, by L. O. L. § 2666, the office of Attorney General was created, and section 2670 makes it his duty to appear, prosecute, and defend for the state all suits or proceedings in the Supreme Court in which the state is a party or interested, to appear, prosecute, or defend any action in any court in which the state is a party or interested, and, when requested, to consult and advise with the district attorneys. Held, that it being the duty of the courts to reconcile, if possible, two apparently conflicting statutes, so that both may stand, the enactment of these later statutes did not deprive prosecuting attorneys of the exclusive right to commence those actions given in place of quo warranto; the word "commence" having rather a different significance from "prosecute," which may mean to prosecute an action to completion after it has been commenced by another. State v. Millis, 119 Pac. 763, 765, 61 Or. 245.

To "commence" is to "institute," and, where a statute authorized a householder to "institute" an action for breach of any condition of the bond of a school district treasurer, he was also authorized to maintain it to adjudication. School Dist. No. 9, Kingman County, v. Brand, 81 Pac. 473, 474, 71 Kan. 728.

To initiate means to "commence." "Commence" is defined in Cent. Dict. as "to cause to begin to be, perform the first act of, enter upon, begin." Webster defines it: "To begin, to originate, to do the first act in anything, to take the first step." In England it is settled that the filing of a bill or declaration is to be regarded for every essential purpose as commencement of the suit. Whether we give the word "commenced" its common meaning, or whether it be construed in the light of the General Statutes, the filing of the bill of complaint "commences" foreclosure proceedings. J. I. Kelly Co. v. St. Paul Fire & Marine Ins. Co., 47 South. 742, 750, 56 Fla. 456 (quoting and adopting Schroeder v. Imperial Ins. Co., 63 Pac. 1074, 132 Cal. 18, 84 Am. St. Rep. 17).

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COMMENCEMENT

As applied to the employment of teachers, the word "commencement," when used in connection with colleges, according to American usage, does not mean the commencement of the college year, but the last day of the college year, when degrees are conferred upon the graduates. Brookfield v. Drury College, 123 S. W. 86, 94, 139 Mo. App. 339.

COMMENCEMENT OF ACTION

See Attempt to Commence Action; Commencement of New Action.
Date of commencement of action, see Date.

To "commence a suit" is to demand something by the institution of process in a court of justice. Eckerle v. Wood, 69 S. W. 45, 46, 95 Mo. App. 378 (quoting and adopting Cohens v. Virginia, 6 Wheat. [19 U. S.] 403, 5 L. Ed. 257).

Under Burns' Ann. St. 1908, § 966, authorizing the issuance of a garnishee summons where at the time the "action is commenced" plaintiff files with the clerk an affidavit averring that any person has the control of any property of defendant, etc., a garnishee summons may issue on the filing of the complaint, the issuance of summons, returned "Not found," and the filing of an affidavit averring that the party sought to be summoned as garnishee has property of a nonresident defendant; for the quoted words must be taken in their ordinary sense, and not within the definition of the commencement of an action under section 317. Northern Indiana R. Co. v. Lincoln Nat. Bank, 92 N. E. 384, 386, 47 Ind. App. 98.

Appointment of commissioners in condemnation proceedings

Under Code Civ. Proc. § 66 (Judiciary Law [Laws 1909, c. 29; Consol. Laws, c. 30] § 475), giving an attorney a lien from the "commencement" of a proceeding, no right of lien attached under a retainer to obtain for an owner of land a proper award in condemnation proceedings by New York City, where the land was conveyed to a corporation before application was made for the appointment of the commissioners of estimate and assessment in the condemnation proceeding, which was the "commencement" of such proceeding; any remedy of the attorneys being action against their client for breach of contract. In re Albers Realty Co., 125 N. Y. Supp. 179, 182, 140 App. Div. 277.

Filing complaint or petition

A suit is "commenced" when it is brought by the filing of a petition within Code Ga. 1895, §§ 4960, 4973, providing that the clerk shall indorse the date of the filing of a petition only when the suit is perfected by service, or waived by the defendant. Bentley v. Reid, 133 Fed. 698–700, 66 C. C. A. 528.

An action against a nonresident, who is outside of the state, to defeat a tax title is to be deemed begun, within Gen. St. 1901, § 7680, requiring a suit to be begun within five years from the recording of the deed, where the plaintiff, without causing a summons to be issued, has filed his petition and affidavit for publication, and caused notice to be delivered to the only newspaper printed in the county, with directions for its insertion, provided a proper publication results. Canaday v. Davis, 101 Pac. 626, 627, 79 Kan. 816.

Rev. Codes, § 6428, provides that "civil actions can only be commenced within the periods prescribed in this title [relating to commencing actions], after the cause of action shall have accrued, except where a different limitation is prescribed." Section 6457 declares that an action is commenced within the meaning of the title before referred to, when the complaint is filed. Section 6464 provides that if, in an action commenced in time, judgment is reversed without a new trial, or the action is terminated otherwise than by voluntary discontinuance, dismissal for want of prosecution, or final judgment on the merits, the plaintiff may sue anew after the time limited, and within a year after such reversal or termination. Section 6532 requires the complaint to state the facts of a cause of action in ordinary and concise language. Defendant may demur for want of a sufficient statement of facts, and under section 6539 this objection is never waived. By section 6588 plaintiff may amend once as of course. By section 6589 the court may allow a party to amend by adding or striking out the name of the party, or correcting a mistake therein, or a mistake in any other respect, and may likewise allow an amendment in other particulars. By section 6591 on decision of a demurrer the court may allow the party in fault to plead anew or amend. Held, that an action was commenced by the filing of the complaint, though it was insufficient in its allegations of defendant's capacity and plaintiff's ownership of property alleged to have been injured, and that the court, after demurrer sustained, properly allowed an amendment perfecting the only cause of action claimed, and thus relating back to the date of filing the original complaint. Clark v. Oregon Short Line R. Co., 99 Pac. 298, 301, 38 Mont. 177.

Under Rev. St. 1899, § 566, authorizing institution of a suit by filing a petition in the clerk's office and suing out a summons thereon against defendant, a suit is "commenced," so as to arrest the bar of the statute, from the time the petition is filed, though the summons is not issued till later and after the expiration of the period of limitation, unless plaintiff directed the clerk not to issue till further orders; in which latter case the suit is to be treated as not commenced till a pur-

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pose to proceed with it is manifested by causing the summons to actually issue. McCormick v. Clopton (Mo.) 130 S. W. 122, 124.

The "commencement of an action" within Pol. Code, § 3417, providing that, unless the party contestant in proceedings to determine a conflict commences his action within 60 days after the order of reference is made, his rights in the premises and under his application cease, means the filing of a complaint, and the "filing of a complaint" means the setting forth of the facts on which the contestant relies. Polk v. Sleeper, 76 Pac. 819, 821, 143 Cal. 70.

Bankr. Act July 1, 1898, c. 541, § 1, subd. 4, 30 Stat. 544, defines a "bankrupt" as a person against whom an involuntary petition has been filed, and subdivision 10, 30 Stat. 544, defines the terms "date of bankruptcy," "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, to mean the date when the petition is filed. Section 8, 30 Stat. 549, declares that the death of a bankrupt shall not abate the proceedings. Held, that the death of a bankrupt after the filing of an involuntary petition against him, though prior to service, does not abate the proceedings. Shute v. Patterson, 147 Fed. 509, 510, 78 C. C. A. 75 (citing In re Hicks, 107 Fed. 910; Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312).

Filing indictment or information

A petition for the removal of a criminal prosecution commenced in a state court against a revenue officer of the United States, under Rev. St. § 643, need not be filed until after the indictment of the defendant, where an indictment is required by the state law, until which time the prosecution has not been "commenced" within the meaning of the statute. Virginia v. Felts, 133 Fed. 85, 87 (citing Virginia v. Paul, 13 Sup. Ct. 536, 148 U. S. 107, 37 L. Ed. 386; Georgia v. O'Grady, 10 Fed. Cas. 245, 3 Woods, 496; Pennsylvania v. Artman, 19 Fed. Cas. 187, 3 Grant, Cas. 436).

The affidavit of the prosecuting attorney is not the "commencement of a criminal proceeding," but the information filed by him is the legal basis thereof, so as to enable the person informed against to maintain an action for malicious prosecution. Carp v. Queen Ins. Co., 101 S. W. 78, 98, 203 Mo. 295.

Filing præcipe

Under section 7342, Gen. St. 1901, providing that the repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding "commenced," a proceeding to reverse a judgment of the trial court is not "commenced" within the provisions of the statute until the petition in error with the case-made or transcript attached are filed with the clerk together with a præcipe for summons. Kansas City v. Dore, 88 Pac. 539, 540, 75 Kan. 23.

The commencement of an action in a justice court, that will arrest the running of limitations, is not the order for summons or attachment, the two kinds of process provided for in such court, but the issuance thereof, so that filing a præcipe before the justice, commanding the issuance of summons or attachment, is not a "commencement of action" with such effect. McMullin v. Beck (Del.) 80 Atl. 524.

Foreclosure proceedings

Where insured had no knowledge, at the time of loss, of the filing of the petition to foreclose a mortgage on the premises, by which the suit was begun according to statute, there was no forfeiture of the policy under a clause providing that it should be void "if with the knowledge of the insured foreclosure proceedings be commenced," etc., though insured had been previously served with citation. London & L. Fire Ins. Co. of Liverpool v. Davis, 84 S. W. 260, 262, 37 Tex. Civ. App. 348.

"Commencement of foreclosure proceedings," as used in a standard policy, providing that it shall be void if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of sale, means the institution of judicial proceedings for the enforcement of the mortgage, and waivers of legal delays and other waivers of a nature to greatly facilitate and expedite the judicial proceedings, if ever begun, do not constitute of themselves the "commencement of foreclosure proceedings." Strictly speaking, there is in this state no such thing as a foreclosure proceeding, but, as elsewhere, mortgages have to be enforced, and the clause evidently applies to whatever proceedings may be appropriate for the enforcement of mortgages, and this in Louisiana means judicial proceedings. "Commencement of foreclosure proceedings" must be held to be synonymous with "filing of suit." Stenzel v. Pennsylvania Fire Ins. Co., 35 South. 271, 273, 110 La. 1019, 98 Am. St. Rep. 481.

Holding to bail in criminal cases

Code 1906, § 1402, provides that, when an embezzlement is committed, it may be prosecuted either in the county in which the money or property, or some part thereof, was received or converted, or in the county in which the party charged was under obligation to pay over the funds or the property embezzled; and section 1406 declares that when an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in either county in which the offense was committed, prosecuted, or consummated, where prosecution shall be first begun. Held that, where accused was charg-

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ed with embezzlement in the county where the embezzlement was alleged to have occurred, and he was arrested and held to bail, but the charge was dismissed by the grand jury, such proceedings constituted the "commencement of a prosecution," under section 1415, declaring that a prosecution may be commenced by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer, which conferred exclusive jurisdiction on the courts of such county, and precluded subsequent prosecution in another county under section 1402. State v. Hughes, 51 South. 464, 96 Miss. 581.

Issuance of summons

A suit is "commenced" by filing a petition and causing a summons to be issued thereon. Code, § 57; Gen. St. 1901, § 4487. Barnett v. Schad, 85 Pac. 411, 91 Pac. 539, 73 Kan. 414.

A suit is "brought" when in law it is "commenced," the two words meaning the same thing and being interchangeable; and while an action is said to be commenced or brought, so far as plaintiff is concerned, when the complaint is filed, the general rule in the United States, in the absence of statute, is that the action is deemed in law to be brought, so far as the defendant is concerned, from the time the summons or other appropriate process is issued and delivered to the officer with a bona fide intent to have it served. A suit in equity to cancel and set aside certain patents issued by the government to lands described in the bill is not "commenced" by the issuance of a subpœna to be served outside the territorial jurisdiction of a federal court, the service of which is a mere nullity for all purposes, so as to stop the running of limitations. United States v. American Lumber Co., 80 Fed. 309, 315 (citing and adopting Goldenberg v. Murphy, 2 Sup. Ct. 388, 108 U. S. 162, 27 L. Ed. 686).

Laws Nev. 1861, c. 12, § 20, providing that an action shall be deemed "commenced" when the complaint has been filed and summons issued and placed in the hands of one authorized to serve the same, is not controlling on the question of the time of commencement of an action founded on an adverse claim, authorized by Rev. St. U. S. § 2326, providing that an adverse action must be commenced within 30 days after the filing of the adverse claim, because the limitation within which such an action must be commenced is fixed by the federal statute; but the question as to what constitutes the commencement of an action is determined by Code Civ. Proc. § 22, providing that a civil action shall be commenced by the filing of the complaint and the issuance of a summons, etc. Harris v. Helena Gold Min. Co., 92 Pac. 1, 2, 29 Nev. 506.

Ky. St. 1903, § 2524, provides that an action shall be deemed "commenced" when the first summons or process is issued in good faith, and by Code Civ. Prac. § 39, an action is commenced by filing the petition in the clerk's office, and causing a summons to be issued thereon. Held, that an action was commenced when the petition was filed and the summons issued, although the petition was not verified until subsequently. City of Dayton v. Hirth, 87 S. W. 1136, 1137, 121 Ky. 42.

Burns' Ann. St. 1908, § 317, providing that a civil action shall be commenced by filing in the office of the clerk a complaint, causing a summons to issue thereon, and the action shall be deemed to be commenced from the time of issuing the summons, except as to those against whom publication is made, in which case the action is deemed commenced from the time of the first publication, taken from Rev. St. 1881, § 314 (Code Civ. Proc. § 55), following Code Civ. Proc. §§ 37–54 (Rev. St. 1881, §§ 292–306), relating to limitations of time within which actions may be commenced after their accrual, is enacted primarily to fix a definite time within which the plea of limitations may be made; but it is not limited to that purpose, and the provisions thereof must be applied to other statutes, where the time of the commencement of an action is material, unless such statutes show a contrary intent, or the construction by such application will frustrate the legislative purpose. Northern Indiana R. Co. v. Lincoln Nat. Bank, 92 N. E. 384, 386, 47 Ind. App. 98.

Under Code 1906, § 728, providing that certain actions shall be commenced by filing a declaration on which a summons shall immediately issue, and that an action is deemed to have been commenced at the filing of the declaration, if a summons issue thereon, etc., an action cannot relate back to the filing of a claim before a justice, but must relate to the issuance of summons, where issuance was delayed at plaintiff's direction. Stewart v. Pettit, 48 South. 5, 6, 94 Miss. 769.

Issuance of warrant in criminal case

The mere filing of a complaint before a magistrate charging the commission of a felony, upon which no warrant is issued nor arrest made, is not such a "commencement" of the prosecution as will take the case out of the operation of the statute of limitations. In re Griffith, 11 Pac. 174, 175, 35 Kan. 377.

"A criminal prosecution is 'commenced' when the warrant is duly issued and placed in the hands of a proper officer to be executed in good faith, and with due diligence, and if so issued within the time limited by law for the commencement of such criminal prosecution, and executed thereafter without unnecessary delay, even though the arrest be made after the statutory limitation has run, the prosecution will still be deemed to

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have been commenced in time." State v. Waterman, 88 Pac. 1074, 75 Kan. 253 (quoting and adopting definition in Re Clyne, 35 Pac. 23, 52 Kan. 441).

Issuance of writ of replevin

Where replevin for certain mules was brought in the county where the mules were at the time of filing the petition, the issuance of the writ, and the placing of the same in the hands of the officer for service, the fact that thereafter some of them were taken to another county did not defeat the action, but the officer could follow the property to the other county as authorized by Code, § 4169, providing that, when any property is removed to another county after the commencement of the action, the officer may follow the same and execute the writ in any county of the state where the property is found; the phrase "commencement of the action" referring to the issuance of the writ. Rummelhart v. Boone, 126 N. W. 338, 339, 147 Iowa, 390.

Maintain action synonymous

See Maintain.

Motion

A receiver operating a railroad during the pendency of a foreclosure suit under an order expressly providing that the operating expenses should be paid out of the proceeds of the sale, if the income was insufficient for that purpose, audited and vouched claims incurred by him, and they were approved for payment by the master in chancery. The income not having produced a sufficient fund, they were not paid for several years, and until a motion was made for their payment from the distribution of the proceeds of the sale. Held, that the claimants were not barred by the statute of limitations, the allowance and approval preventing its running, and the motion of the creditors not constituting the "commencement of an action" within the meaning of the statute. St. Louis Union Trust Co. v. St. Louis & S. F. R. Co. (Tex.) 146 S. W. 348, 350.

After sale of certain real estate in partition for an alleged inadequate price, plaintiffs were employed to have the sale set aside and procure a new sale; the owners agreeing each to pay 20 per cent. of their proportion of any increase obtained on resale. A new sale was ordered and an appeal to the Supreme Court dismissed, and on a new sale the property was sold at an increase of $5,200; but in the meantime the original purchaser, who became the purchaser at the resale, had obtained by assignment the interest of two of the co-owners of the property, with notice of the contract for plaintiffs' fees, and refused to pay plaintiffs the proportionate share of the increase to which the purchaser's assignors were entitled. Held, that the filing of the motion to set aside the original sale was the "commencement of an action," within Rev. St. 1909, § 964, providing that from the commencement of an action, or the service of an answer containing a counterclaim, the attorney appearing for a party has a lien on his client's cause of action and on the proceeds of a report, decision, or judgment in the client's favor, in whosesoever hand they may come, and that plaintiffs were entitled to enforce such lien to the extent of their fees against the purchaser. Smoot v. Shy, 139 S. W. 239, 241, 159 Mo. App. 126.

Notice

Under the Employers' Liability Act (Laws 1902, p. 1749, c. 600, § 2), providing that no action for injuries thereunder shall be "maintained" unless notice of the time, place and cause of injury is given to the employer, the word "maintained" is synonymous or equipollent with the word "begun" or "commenced," to the effect that the requirement is a condition precedent, and hence the provisions of the statute make the giving of such notice a condition precedent to the bringing of an action under the act. Grasso v. Holbrook, Cabot & Daly Contracting Co., 92 N. Y. Supp. 101, 103, 102 App. Div. 49 (citing Burbank v. Inhabitants of Auburn, 31 Me. 590; Boutiller v. The Milwaukee, 8 Minn. 97, 105 [Gil. 72]; Smith v. Lyon, 44 Conn. 175; Byers v. Bourret, 64 Cal. 73, 28 Pac. 61; Merz v. City of Brooklyn, 11 N. Y. Supp. 778).

Service of summons or writ

A civil action is "commenced" by filing in the office of the clerk of the proper court a complaint and causing summons to be issued thereon, and where the service is constructive as authorized by Kirby's Dig. §§ 6055, 6056, the action commences when the proceedings therein provided for are complied with. Boynton v. Chicago Mill & Lumber Co., 105 S. W. 77, 80, 84 Ark. 203 (quoting and adopting definition in Kirby's Dig. § 6033).

An action is "commenced," within the meaning of Rev. St. Wyo. 1899, § 3465, providing that if, in an action commenced in due time, plaintiff fail otherwise than upon the merits, he may commence a new action within one year thereafter, in which case the bar of limitations shall not apply, where the service of summons was quashed because made by the coroner authorized to serve process only where the sheriff is a party, based on the fact that the sheriff was improperly joined as a party. Clause v. Columbia Savings & Loan Ass'n, 95 Pac. 54, 60, 16 Wyo. 450.

An action is "commenced" as to each defendant when the summons is served on him, and it is deemed to be pending from the time of such service until there is a final determination of the action. In case of service on a nonresident by publication, the action is commenced by the first publication. H. L. Spencer Co. v. Koell, 97 N. W. 974, 975, 91 Minn. 226.

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An action is "commenced," within the meaning of the statute of limitations, when the summons is directed to the sheriff or other officer with the intent that it shall be actually served; but it applies only to defendants who are parties to the action at the time of such delivery, or who have been made parties before the statute of limitations had run against the claim upon which the action is brought. Such delivery of summons does not prevent the running of the statute in favor of parties or persons who, although liable upon the obligation, are not parties named as defendants in the action; and it is immaterial whether the omission was by design or through ignorance, mistake, or inadvertence. So, also, when by order amending a summons a new party defendant is brought in, if between the time of the commencement of the action as to the original parties and the time when the new defendant is brought in the period of limitation has expired, the plea of the statute of limitation interposed by the party made defendant by the amendment is a bar to his liability and is good. The date of the commencement of a suit in chancery as to a defendant who is made a party by the amendment to the original bill is the time of filing the amended bill, and he will be protected by the statute of limitation if the period prescribed by the statute had elapsed before the amended bill was filed. Nunn v. Louisville (Ky.) 105 S. W. 119, 121 (quoting and adopting definition in Shaw v. Cock, 78 N. Y. 194; Brown v. Goolsby, 34 Miss. 437).

An action is not "commenced" until the court has in some manner acquired jurisdiction of something in relation to the controversy; but ordinarily the commencement of an action does not depend on service of process on defendant or jurisdiction over him, and, when plaintiff submits himself and the subject-matter to the jurisdiction of the court, he has commenced his suit. Northern Indiana R. Co. v. Lincoln Nat. Bank, 92 N. E. 384, 388, 47 Ind. App. 98.

Under Comp. Laws 1909, § 5552, providing that an action shall be deemed commenced as to each defendant when summons is served on him, or on a codefendant united in interest with him, where a proceeding in error is brought to reverse a judgment for defendants in error, who are joint contractors or otherwise united in interest, and service is made on one of them, the action, for purposes of limitation, is to be deemed commenced as to all. First State Bank of Davidson v. Clingan, 109 Pac. 69, 70, 26 Okl. 150.

The "commencement" of an action is not postponed to the time when service of the writ is effected. An action begins with the issue of the summons or capias, and not with the date of the præcipe. Bovaird & Seyfang Mfg. Co. v. Ferguson, 64 Atl. 513, 514, 215 Pa. 235.

Where a judgment sought to be reviewed was rendered November 23, 1909, and petition in error and case-made, with præcipe for summons in error were filed July 10, 1910, but no summons in error issued until May 10, 1911, held, that the proceeding was not commenced within one year of judgment appealed from, within Wilson's Rev. & Ann. St. 1903, §§ 4218, 4748, providing that an action shall be deemed commenced at the date of service of summons. W. N. & D. B. Taliaferro v. James, 120 Pac. 651, 31 Okl. 168.

By the terms of section 3892, St. Okl. 1893, an action is deemed to be "commenced" as to each defendant at the date of the summons which is served on him; and where a plaintiff in error causes summons to issue on the last day within the year following the date of the final judgment appealed from, but fails to serve it on one of the necessary defendants in error, and also fails to secure service on him within 60 days after the issuance of the first summons (as provided in the same section), the appeal should be dismissed on the ground of defect of parties. Wedd v. Gates, 82 Pac. 808, 809, 15 Okl. 602.

The general rule that a suit is "commenced" when the summons is taken out is changed by section 416, Code Civ. Proc. N. Y., providing that a civil action is "commenced" by the service of a summons. A circuit court has authority, under Rev. St. U. S. § 716, to issue a writ for the seizure of infringing copies of a copyright publication alleged to be in the possession of the infringer, preliminary to an action under Rev. St. U. S. § 4965, to recover the penalty prescribed therein for each copy found in the possession of the defendant; such writ being one necessary for the exercise of the court's jurisdiction, notwithstanding that the New York statute provides that a civil action is "commenced" by the service of a summons. Stern v. Jerome H. Remick & Co., 164 Fed. 781, 782.

An action against a nonresident is not "commenced," within the statute of limitations, by the filing of the petition or of the affidavit for publication for service of process, nor until the completion of the service of process by publication, and, where the publication was not completed until after the running of the statute, a personal judgment could not be rendered, though the nonresident personally appeared after the claim was barred. Slater v. Roche, 126 N. W. 925, 928, 148 Iowa, 413, 28 L. R. A. (N. S.) 702.

Same—Bona fide attempt to serve

To constitute the "commencement of a suit" in equity in a federal court, which will stop the running of the statute of limitations, there must be the filing of a bill and the due issuance of a writ of subpœna, which

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must come to the hands of the serving officer with intent that it be served, and there must be a bona fide attempt to serve it, followed, if unsuccessful, by reasonable diligence to procure service through further or additional process. United States v. Miller, 164 Fed. 444, 445.

Service of writ of attachment

An action to subject property of a nonresident to the payment of a foreign judgment is commenced, within the statute of limitations, when the property is levied on under a writ of attachment, if not before, and the statute then ceases to run. Slater v. Roche, 126 N. W. 925, 926, 927, 148 Iowa, 413, 28 L. R. A. (N. S.) 702.

COMMENCEMENT OF BUILDING

Under Act Pa. June 4, 1901 (P. L. 437) § 13, which provides that a mechanic's lien, in case of an original construction, shall take effect "as of the date of the visible commencement upon the ground of the work of building the structure or other improvement," the mere doing of half a day's work by a subcontractor in tearing down a part of a brick wall of a building left standing after a fire was not the visible "commencement of a new building," which would fix the date of the contractor's lien therefor, as against a mortgage taken several days after, and before any further work was done. George M. Newhall Engineering Co. v. Egolf, 185 Fed. 481, 483, 107 C. C. A. 581.

COMMENCEMENT OF NEW ACTION

A mere change in a party to an action does not of itself change the cause of action or ground of recovery, and, unless the cause of action is a new one, the amended declaration is not subject to the statute of limitations, and the substituting of the party having the legal right to sue on the claim for which the action has been brought, instead of another improperly named as plaintiff, is not the "commencement of a new action" within the statute of limitations. Beresh v. Supreme Lodge Knights of Honor, 99 N. E. 349, 351, 255 Ill. 122.

COMMENCEMENT OF TRIAL

"Commencement of the trial," as used in Code Cr. Proc. § 292, permitting accused before commencement of the trial to file an affidavit of prejudce of the presiding judge, means the calling of the case for trial and the drawing of a jury. As said in Lipscomb v. State, 25 South. 158, 76 Miss. 223, "a trial is commenced, within the meaning of the statute construing its terms according to the ordinary and common acceptation and meaning, when all dilatory proceedings have been disposed of and when all ordinary affairs, the object of which is to prevent a trial, have been ineffectually exhausted and the cause is called for trial and nothing remains to be done except to proceed therein." State v. Johnson, 124 N. W. 847, 851, 24 S. D. 590.

Code, § 4502, authorizes either party to a suit before a justice of the peace to obtain a change of venue "before the trial is commenced"; section 3649 defines a trial as the judicial examination of the issues in an action, "whether of law or fact"; section 3647 provides that an issue arises in the pleadings where a conclusion of law is maintained by one party and controverted by the other; and section 3557 includes motions and demurrers within the definition of pleadings. Held, that the submission of a motion to strike matter from an answer filed by defendant on the return day, in a suit before a justice, and to make the same more specific, which was sustained, constituted the commencement of the trial within section 4502, after defendant was not entitled to a change of venue. Columbus Junction Tel. Co. v. Overholt, 102 N. W. 498, 126 Iowa, 579.

COMMENCEMENT OF WORK

See Visible Commencement of Work.

COMMENT

Under St. 1893, § 5206 (Wilson's Rev. & Ann. St. 1903, § 5494), providing that in criminal trials accused shall be a competent witness, but his failure to testify shall not create any presumption against him, and shall not be mentioned at the trial, and, if "commented" on by counsel it shall be ground for new trial, it is immaterial what words are used; and if they are clearly calculated to attract the attention of the jury to the fact that accused has not testified in his own behalf, that he might have done so, and that by such failure some inference might be indulged against him, the statute is violated. Perkins v. Territory, 87 Pac. 297, 17 Okl. 82.

COMMERCE

See Connection with Interstate Commerce; Domestic Commerce; Foreign Commerce; Interstate Commerce; Railroad Engaged in Interstate Commerce; Regulate Commerce; Restraint of Commerce.

Article of commerce, see Article.

Combination in restraint of commerce, see Combination in Restraint of Trade.

See, also, Trade.

"Commerce," as used in Const. U. S. art. 1, § 8, providing that Congress shall have power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, involves trade and commercial relations and intercourse among citizens of different states or countries and comprehends navigation between the United States and foreign countries, and the transportation by land or water of persons or property between the different states and in foreign

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countries constitutes interstate and foreign commerce. People ex rel. Freel v. Downs, 136 N. Y. Supp. 440, 447.

"Commerce" is defined as follows: " 'Commerce,' undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." " 'Commerce,' in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation." " 'Commerce' is a term of the largest import. It comprehends intercourse for the purpose of trade in all its forms, including the transportation, purchase, sale, and exchange of commodities." Snead v. Central of Georgia R. Co., 151 Fed. 608, 613 (citing Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 229, 6 L. Ed. 23; Welton v. Missouri, 91 U. S. 280, 23 L. Ed. 347).

"Commerce" within the federal Constitution comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities. Loverin & Browne Co. v. Travis, 115 N. W. 829, 832, 135 Wis. 322; F. A. Patrick & Co. v. Deschamp, 129 N. W. 1096, 1097, 145 Wis. 224; Snead v. Central of Georgia R. Co., 151 Fed. 608, 613; Imperial Curtain Co. v. Jacob, 127 N. W. 772, 773, 163 Mich. 72; United States v. Scott, 148 Fed. 431, 434 (quoting and adopting definition in Gibbons v. Ogden, 9 Wheat. [22 U. S.] 189, 6 L. Ed. 23).

"Commerce," in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation. Riverside Mills v. Atlantic Coast Line R. Co., 168 Fed. 987, 989, 990 (citing Gibbons v. Ogden, 9 Wheat. [22 U. S.] 230, 6 L. Ed. 78); Northern Securities Co. v. United States, 24 Sup. Ct. 436, 478, 193 U. S. 197, 48 L. Ed. 679.

"Commerce among the states" comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of different states. State v. Peet, 68 Atl. 661, 664, 80 Vt. 449, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998; Charleston & W. C. Ry. Co. v. Anchors, 73 S. E. 551, 553, 10 Ga. App. 322 (quoting and adopting the definition in Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. Ed. 238, 241, which is quoted and adopted in Kidd v. Pearson, 9 Sup. Ct. 6, 128 U. S. 1, 32 L. Ed. 346); Hickory Marble & Granite Co. v. Southern R. Co., 60 S. E. 719, 147 N. C. 53 (citing Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158); United States v. Hopkins, 82 Fed. 529, 537, 538 (quoting and adopting definition in Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Gloucester Ferry Co. v. Pennsylvania, 5 Sup. Ct. 826, 114 U. S. 196, 29 L. Ed. 158; United States v. E. C. Knight Co., 15 Sup. Ct. 254, 156 U. S. 13, 39 L. Ed. 325); United States v. Westman, 182 Fed. 1017, 1018; La Moine Lumber & Trading Co. v. Kesterson, 171 Fed. 980, 983 (quoting and adopting definition in Gloucester Ferry Co. v. Pennsylvania, 5 Sup. Ct. 826, 828, 114 U. S. 196, 203, 29 L. Ed. 158).

Webster defines "commerce" to be "the exchange or buying and selling of commodities, especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic." In Gibbons v. Ogden it was said that "commerce" is more than traffic; it is intercourse, and that it is regulated by prescribing rules for carrying on that intercourse. It has even been held that "commerce" includes navigation and transportation of both persons and property, as well as traffic generally, and all the cases agree in treating the word "commerce" as one of large and extensive meaning. In Hopkins v. United States, 171 U. S. 597, 19 Sup. Ct. 47 (43 L. Ed. 290), it is said that the term "interstate commerce" is one of very large significance; that it comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. Brooks v. Southern Pac. Co., 148 Fed. 986, 991 (citing Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Gloucester Ferry Co. v. Pennsylvania, 5 Sup. Ct. 826, 114 U. S. 196, 29 L. Ed. 158; Hooper v. California, 15 Sup. Ct. 207, 155 U. S. 648, 653, 39 L. Ed. 297; United States v. E. C. Knight Co., 15 Sup. Ct. 249, 156 U. S. 1, 39 L. Ed. 325).

In determining the meaning and scope of the clause of the federal Constitution giving Congress power to regulate commerce, the Supreme Court has deemed it undesirable to give to the words employed therein any hard and fixed definition, or to mark with absolute certainty the extent of the power thereby conferred. It has been declared that "interstate commerce" is a term of very large significance, and that the power conferred by the Constitution as to interstate and foreign commerce, one without limitation. It authorizes legislation with respect to all subjects of foreign and interstate commerce, the persons engaged in it, and the instruments

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by which it is carried on. "Commerce" undoubtedly is traffic, but it is something more; it is intercourse. In view of the large significance given to the terms of the commerce clause and the scope of the power thereby conferred, Act Cong. June 11, 1906, 34 Stat. 232, c. 3073, commonly called the "Federal Employers' Liability Act," is a "regulation of commerce between the states, or with foreign nations," within the meaning of the commerce clause of the Constitution, and hence within the power of Congress. Kelley v. Great Northern R. Co., 152 Fed. 211, 217 (citing Hopkins v. United States, 19 Sup. Ct. 40, 171 U. S. 578, 597, 43 L. Ed. 290; Sherlock v. Alling, 93 U. S. 101, 23 L. Ed. 819; Western Union Tel. Co. v. Texas, 105 U. S. 460, 464, 26 L. Ed. 1067; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 189, 194, 6 L. Ed. 23).

The "power to regulate commerce" conferred by the federal Constitution on Congress is the power to regulate; that is, to prescribe the rule by which "commerce" is to be governed, like all other powers vested in Congress, it is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed by the Constitution. Webster defines "commerce" as the "exchange, or the buying and selling of commodities; intercourse." In Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. Ed. 23, etc., it is said that "commerce undoubtedly is traffic; but it is something more. It is intercourse." In Wabash, St. L. & P. R. Co. v. Illinois, 7 Sup. Ct. 4, 118 U. S. 557, 30 L. Ed. 244, etc., it is held that "transportation of freight and passengers is commerce." "Interstate commerce" is the trading and trafficking in commodities between and amongst citizens of different states. It is transporting by common carriers passengers and property from one state into another state. It is the selling and buying of a commodity, or commodities, by a citizen of one state to a citizen of another state, which commodity is to be transported from the state of the seller to the state of the buyer, or to another state, and there resold, or used, as may serve the purpose of the buyer. Under these definitions Act June 11, 1906, c. 3073, 34 Stat. 232, "relating to the liability of common carriers * * * engaged in commerce between the states * * * to their employés," and which makes every such carrier liable to any employé or his personal representative for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works, is not a regulation of "interstate commerce," but establishes new rules of liability, growing out of the relation of master and servant, which, if valid, are binding on all courts, both state and federal, but which have no such relation to "interstate commerce" as to bring them within the constitutional power of Congress to regulate such commerce, and the act is, for that reason, void. Howard v. Illinois Cent. R. Co., 148 Fed. 997, 999, 1000 (citing Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Gloucester Ferry Co. v. Pennsylvania, 5 Sup. Ct. 826, 114 U. S. 196, 29 L. Ed. 158; Wabash, St. L. & P. R. Co. v. Illinois, 7 Sup. Ct. 4, 118 U. S. 557, 30 L. Ed. 244; Hopkins v. United States, 19 Sup. Ct. 40, 171 U. S. 578, 43 L. Ed. 290).

Use of buildings along a city thoroughfare chiefly for trade, the buying and selling of goods, and to some extent for manufacturing, is not "commerce" in such a sense that money can be raised by taxation to promote it, as it can be for the improvement of a harbor or the construction of a railroad. In re Opinion of Justices, 91 N. E. 405, 408, 204 Mass. 607, 27 L. R. A. (N. S.) 483.

"Commerce" is traffic, the buying, selling, and exchanging of commodities, and comprehends more than the mere contracts by which merchandise is bought, sold, and exchanged, and includes the actual transfer of merchandise and delivery of manual possession thereof and its transportation from one place to another, and hence Employers' Liability Act June 11, 1906, c. 3073, making interstate carriers liable for injuries to employés notwithstanding the latters' negligence, if the carrier's negligence was gross in comparison with that of the employé, is not unconstitutional as not within the power of Congress to regulate interstate commerce. Plummer v. Northern Pac. Ry. Co., 152 Fed. 206, 208.

" 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all of its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of a foreign country, and between the citizens of different states." It is said that "commerce" with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation of persons and property as well as the purchase, sale, and exchange of commodities. Commerce is undoubtedly traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribed rules. Within the comprehensive definition given the term "commerce," a newspaper is a subject of commercial intercourse and sale between state and state like any other article in which a right to traffic exists. Preston v. Finley, 72 Fed. 850, 859 (quoting Welton v. Missouri, 91 U. S. 280, 23 L. Ed. 347; Mobile County v. Kimball, 102 U. S. 703, 26 L. Ed.

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238; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 189, 6 L. Ed. 23).

"'Commerce' comprehends intercourse for the purpose of trade in any of its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states, and power to regulate it embraces all the instruments by which such commerce may be conducted." Acts Okl. 1907, p. 586, c. 67, which prohibits, except for private use, the construction of pipe lines for the transportation of natural gas within the state, except by corporations organized thereunder by charters providing that such gas shall not be transported out of the state, nor sold or delivered to any one else to be taken out of the state, is void as an attempt to interfere with interstate commerce, in violation of the commerce clause of the federal Constitution. Kansas Natural Gas Co. v. Haskell, 172 Fed. 545, 560 (quoting and adopting the definition in Hopkins v. United States, 19 Sup. Ct. 40, 171 U. S. 578, 43 L. Ed. 290; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347).

"'Commerce' undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribed rules for carrying on that intercourse. That which belongs to 'commerce' is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state." A state law prohibiting the docking of horses and the importation and use of them, in so far as it prohibits the importing from other states, or the using of them while they are still owned by the person who brought them into the state, violates the commerce clause of the federal Constitution. Stubbs v. People, 90 Pac. 1114, 1115, 1120, 40 Colo. 414, 11 L. R. A. (N. S.) 1071, 122 Am. St. Rep. 1068, 13 Ann. Cas. 1025 (quoting and adopting definition in United States v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325).

The word "commerce," as used in Const. U. S. art. 1, § 8, means something more than traffic; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribed rules for carrying on that intercourse. Where legislation by Congress does not regulate commercial intercourse among the states, but only regulates certain phases of the intercourse between a person or corporation engaged in interstate commerce, and its employés, it cannot be maintained as constitutional. United States v. Scott, 148 Fed. 431, 434 (citing Gibbons v. Ogden, 9. Wheat. [22 U. S.] 189, 6 L. Ed. 23).

Commerce being intercourse, it is unimportant, in determining whether a transaction was interstate commerce, whether the negotiations were conducted by mail, by traveling salesmen, by telegraph, or by telephone. Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes importation from one such division to another, whether it be of goods, persons, or information, is a transaction of interstate commerce. United States v. Tucker, 188 Fed. 741, 743.

As business

See Business.

Exchange or sale of commodities

"Commerce" is defined as "the exchange of merchandise on a large scale between different places or communities." In re Opinion of Justices, 91 N. E. 405, 408, 204 Mass. 607, 27 L. R. A. (N. S.) 483.

"Commerce" is the interchange or mutual change of goods, productions, or property, of any kind between nations or individuals. City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co., 45 Iowa, 338, 349, 24 Am. Rep. 773.

"Commerce among the several states" includes not only the transportation of commodities from one state to another, but as well the sale of such commodities in one state to be transported into another. Corbin v. Houlehan, 61 Atl. 131, 133, 100 Me. 246, 70 L. R. A. 568.

According to the derivation, history, and use of the word "commerce," it is the exchange of property and includes the usual agencies of communication and transportation employed to effect the exchange. Thus it extends to whatever is used to move the property involved and the persons engaged in making the contract. People ex rel. Hatch v. Reardon, 77 N. E. 970, 977, 184 N. Y. 431, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515.

The common idea of commerce is reciprocal agreements by which one person delivers to another a material thing for money, which is a sale, or for another thing, which is an exchange. International Text-Book Co. v. Lynch, 69 Atl. 541, 543, 81 Vt. 101.

Ferryboat

A "ferryboat" is as much an instrument of commerce as a bridge. New York Cent. & H. R. R. Co. v. Board of Chosen Freeholders of Hudson County, 65 Atl. 860, 863, 74 N. J. Law, 367.

Franks

Gratuitous carriage by the issuing of franks by an express company to officers, agents, attorneys, or employés, cannot be said to be in no way connected with "commerce." United States v. Wells Fargo Exp. Co., 161 Fed. 606, 613.

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Freight and passenger traffic

"Transportation of persons and property is 'commerce.'" United States v. Southern Ry, Co., 164 Fed. 347, 348, 352.

Transportation of persons as well as of property is "commerce," and Congress may regulate their interstate transportation. Bennett v. United States, 194 Fed. 630, 631, 114 C. C. A. 402.

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." Holmes, J. Hanley v. Kansas City Southern R. Co., 23 Sup. Ct. 214, 187 U. S. 619, 47 L. Ed. 333.

Transportation for others as an independent business is "commerce," irrespective of the purpose of it. State v. Atlantic Coast Line R. Co., 47 South. 969, 984, 56 Fla. 617, 32 L. R. A. (N. S.) 639.

The transportation of oysters out of one state into another is "commerce" within the meaning of Const. U. S. art. 1, § 8, granting to Congress the right to regulate commerce with foreign nations and among the several states. D. E. Foote & Co. v. Clagett, 81 Atl. 511, 515, 116 Md. 228.

The construction by the city of New York of a subway devoted to the carriage of passengers is within a grant to the city by Greater New York Charter (Laws 1901, c. 466) §§ 83–88, for the general purpose of navigation, intercourse, and commerce; the word "commerce" embracing the carriage of passengers for hire. In re McClellan, 131 N. Y. Supp. 633, 638, 146 App. Div. 594.

The power to regulate commerce between the states and with foreign countries conferred on Congress by the federal Constitution includes the power to regulate the transportation of persons. United States v. Hoke, 187 Fed. 992, 994.

Shipments of live stock from growers, dealers, and traders in various states and territories to defendants, commission merchants at Kansas City, were solicited by the latter chiefly through personal solicitation of traveling agents and through advertisements. The course of business involved frequent loans to shippers in other states, secured by chattel mortgages on herds, and frequent drafts drawn by shippers on the defendants, and discounted at their local banks in other states on the strength of bills of shipment attached thereto. Shipments were made to Kansas City, and the loans or drafts paid from proceeds of sale, and the balance remitted to the shippers. Sales at Kansas City were made for shipment to markets in other states, as well as for slaughter at packing houses near by. The traffic was of immense proportions, and defendants were active promoters, and frequently interested parties, and gathered in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations covered the entire business, and extended over the whole field of operation. Held, that defendants were engaged in "commerce between the states," and were subject to the provisions of the law of July 2, 1890, against trusts and monopolies. United States v. Hopkins, 82 Fed. 529, 537.

Insurance

The business of life insurance conducted in the state by a foreign corporation under a certificate of authority from the state, collecting premiums and paying losses on policies and making loans to policy holders on the security of their policies, is not "commerce" within Const. U. S. art. 1, § 8. New York Life Ins. Co. v. Deer Lodge County, 115 Pac. 911, 912, 43 Mont. 243.

The statutes requiring foreign insurance companies only to take out licenses for their agents as a condition to doing business in the state do not violate the clause of the United States Constitution, giving Congress power to regulate interstate commerce; insurance not being commerce. Commonwealth v. Gregory, 89 S. W. 168, 170, 121 Ky. 256.

The business of insurance is not commerce in any proper sense, within the meaning of the Constitution of the United States, The commerce clause of the federal Constitution does not limit the power of the state to impose conditions on which a foreign insurance company may transact business in the state. Fisher v. Traders' Mut. Life Ins. Co., 48 S. E. 667, 669, 136 N. C. 217 (citing Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297).

Lottery tickets

"Commerce" among the states embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by telegraph. Lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state is a regulation of commerce among the several states. Champion v. Ames, 23 Sup. Ct. 321–325, 188 U. S. 321, 47 L. Ed. 492.

Navigation

The word "commerce," as used in the clause of the federal Constitution giving Congress power to regulate "commerce," includes navigation. United States v. Union Bridge Co., 143 Fed. 377, 391.

"Commerce" includes navigation, and the power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than that in which they lie. United States v. Greene, 146 Fed. 803, 822.

Const. art. 15, § 1, after authorizing the Legislature to establish harbor lines in front

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of cities, declares that the state shall not grant rights in the waters beyond such lines, nor relinquish control of any area lying between the harbor line and the line of ordinary high tide or such other line not less than 50 nor more than 600 feet from the harbor line as may be determined by the commissioners, but such area shall be reserved for "landings, wharves, streets and other conveniences of navigation and commerce." Section 2 directs that the Legislature shall provide for leasing the right to build wharves, docks, and other structures on the harbor areas, and Laws 1907, p. 674, c. 244, empowers railroads to appropriate lands by condemnation, but exempts harbor areas. Held, that the word "commerce" as used in section 1 included commerce by both land and sea, and that the words "other structures" in section 2 was equivalent in meaning to the words "other conveniences" in the first section; and hence neither the Constitution nor the statute precluded a railroad company from acquiring the right to cross the harbor area by obtaining a lease of the right of way from the state, provided that in doing so it did not interfere with navigation of the stream. State ex rel. Hulme v. Grays Harbor & P. S. Ry. Co., 103 Pac. 809, 811, 812, 54 Wash. 530.

Production of plays

The owning, controlling, and leasing of theaters, and the producing of plays and entertainments, and the booking of contracts for the production of plays, is not "trade or commerce" within Pen. Code, § 168, subds. 5, 6, prohibiting a conspiracy to commit any act injurious to "trade or commerce." People v. Klaw, 106 N. Y. Supp. 341, 350, 55 Misc. Rep. 72 (citing Webster's Dict. Stand. Dict.; Bouvier's Law Dict. vol. 2, 1127; Jacob's Law Dict.; United States v. Cassidy, 67 Fed. 698; United States v. Coal Dealers' Ass'n, 85 Fed. 252; Gibbons v. Ogden, 22 U. S. [9 Wheat.] 1, 6 L. Ed. 23; Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527).

Railroad and cars

"Commerce," in the constitutional sense, includes the instrumentalities by which commerce is carried on, and extends to the coal cars owned by a railway company engaged in interstate commerce, in which it receives from the tipple of the coal mines along its line coal purchased by it and used solely for its own fuel purposes. Interstate Commerce Commission v. Illinois Cent. R. Co., 30 Sup. Ct. 155, 159, 215 U. S. 452, 54 L. Ed. 280; Same v. Chicago & A. R. Co., 30 Sup. Ct. 163, 215 U. S. 479, 54 L. Ed. 291.

Railroad companies are "instruments of commerce, and their business is commerce itself," and such companies operate "public highways established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." Northern Securities Co. v. United States, 24 Sup. Ct. 436, 463, 193 U. S. 197, 48 L. Ed. 679 (quoting United States v. Trans-Missouri Freight Ass'n, 17 Sup. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, and citing Cherokee Nation v. Southern Kansas R. Co., 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co., 11 Sup. Ct. 490, 139 U. S. 79, 35 L. Ed. 97; Interstate Commerce Commission v. Brimson, 14 Sup. Ct. 1125, 154 U. S. 447, 38 L. Ed. 1047, 4 Interst. Com. R. 545; Smyth v. Ames, 18 Sup. Ct. 418, 169 U. S. 466, 42 L. Ed. 819; Lake Shore & M. S. R. Co. v. Ohio, 19 Sup. Ct. 465, 173 U. S. 285, 43 L. Ed. 702).

Sale of liquors

By the decisons of the federal Supreme Court, it is settled that intoxicating liquors are articles of "commerce," and, as such, while being transported from state to state, are within the protection of that clause in the Constitution of the United States which gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and thus are subject to the exclusive jurisdiction of Congress. State v. Intoxicating Liquors, 67 Atl. 312, 316, 102 Me. 385, 120 Am. St. Rep. 504.

Telegrams

Communication by telegram constitutes "commerce" within the regulation of federal authority in so far as it involves transmission of messages from one state to another, but it is subject also to state regulation so far as it concerns transmission of messages wholly intrastate. Postal Telegraph Co. v. State, 73 Atl. 680, 683, 110 Md. 608 (citing Postal Telegraph Company v. Umstadter, 50 S. E. 259, 103 Va. 742, 2 Ann. Cas. 513).

Intercourse between private parties by means of telegraphic communications is "commerce," although carried over routes which are post roads. State ex rel. Coleman v. Western Union Tel. Co., 90 Pac. 299, 316, 75 Kan. 609.

Use of mails

It may well be doubted whether the mere occupation of giving instruction by correspondence involving, among other things, the distribution of text-books and various additional outfits to points in the same and other states, is "commerce," and whether, the main purpose being classified as noncommercial, the incidents thereof must not also be classified in the same way. International Text-Book Co. v. Auburn, 155 Fed. 986, 987.

White slavery

Act June 25, 1910, c. 395, 36 Stat. 825, known as the "White Slave Traffic Act," making it a criminal offense to knowingly transport or to procure the transportation of

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women from one state into another for immoral purposes, is not unconstitutional as an attempted infringement of the police powers of the states, and is within the powers conferred on Congress by the commerce clause of the Constitution. United States v. Westman, 182 Fed. 1017, 1018.

COMMERCE AMONG STATES

See Commerce.

COMMERCIAL

The owners of land conveyed it to the state, and covenanted that certain remaining land belonging to them should not be sold for commercial, agricultural, manufacturing, or other purposes, but should be used and sold exclusively for permanent forestry, hotel, camp, and cottage purposes, and that all deeds given by either of such grantors should contain a clause binding the purchaser, his heirs and assigns, to a perpetual use of the lands for permanent forestry, hotel, camp, and cottage purposes. Held, that the term "commercial" should not be construed as limited only to "agricultural" but also as applicable to "manufacturing or other purposes," and hence a contract to cut timber from the reserved land for pulp manufacture was unauthorized: nor was it allowable by way of preparing the land for sale for camp and cottage purposes. People v. Thistlethwaite, 119 N. Y. Supp. 690, 692, 134 App. Div. 876.

COMMERCIAL AGENCY

A "commercial agency" is a person, firm, or corporation engaged in the business of collecting information as to the financial standing, ability, and credit of persons engaged in business, and reporting the same to subscribers or customers applying and paying therefor. Zugalla v. International Mercantile Agency, 142 Fed. 927, 930, 74 C. C. A. 97.

COMMERCIAL BUSINESS

Civ. Code, § 393 (25), providing that a corporation may be formed for the transaction of any "commercial business," authorizes a corporation for warehousing goods for shipment. Orient Ins. Co. of Hartford, Conn. v. Northern Pac. Ry. Co., 78 Pac. 1036, 1038, 31 Mont. 502.

COMMERCIAL CLAUSE

The clause of the federal Constitution prohibiting any state from laying any imposts or duties on imports or exports is what is known as the "commercial clause." State v. Bengsch, 70 S. W. 710, 720, 170 Mo. 81.

COMMERCIAL CORPORATIONS

A corporation engaged in leasing its own property and collecting rents therefor, with power to sue and be sued, to contract debts, and to dispose of its property, is a "moneyed, business, or commercial corporation," against which involuntary proceedings in bankruptcy may be had under Bankruptcy Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act June 25, 1910, c. 412, § 4, 36 Stat. 839. In re R. L. Radke Co., 193 Fed. 735, 737.

COMMERCIAL LAW

See, also, Law Merchant.

"Mercantile law is a system of jurisprudence recognized by all commercial nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world." Ross v. Jones, 22 Wall. (89 U. S.) 576, 594; Goodman v. Simonds, 20 How. (61 U. S.) 343, 364, 15 L. Ed. 934; Brooklyn City & N. R. Co. v. National Bank of Republic, 102 U. S. 14, 32, 26 L. Ed. 61.

COMMERCIAL PAPER

A note specifying no place of payment is not commercial paper as defined by Code 1896, §§ 869, 870, and hence whether transferred before or after maturity is subject to defenses. Holloway v. Darden, 53 South. 187, 188, 168 Ala. 256.

COMMERCIAL PARTNERSHIP

"Commercial or trading partnerships" are such as engage in trading in merchandise or in financial operations. Spotswood v. Morris, 85 Pac. 1094, 1103, 12 Idaho, 360, 6 L. R. A. (N. S.) 665.

"Commercial partnerships" are such as are formed for the buying and selling of personal property and the carrying of such property for hire by ships or other vessels. Shreveport Ice & Brewing Co. v. Mandel Bros., 54 South. 831, 832, 128 La. 314.

COMMERCIAL POWER

The "commercial power" conferred by the Constitution upon Congress is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. Kelley v. Great Northern R. Co., 152 Fed. 211, 222 (quoting and adopting statement in Sherlock v. Alling, 93 U. S. 101, 23 L. Ed. 819).

COMMERCIAL PROPERTY

Pension checks, or warrants, issued by a pension agent of the United States on an Assistant Treasurer, are commercial paper, and the right of the United States to recover from one to whom such a check was paid on a forged indorsement of the name of the payee is governed by the ordinary rules applicable to such paper. National Exch. Bank of Providence v. United States, 151 Fed. 402, 407, 80 C. C. A. 632.

COMMERCIAL RAILROAD COMPANY

By "commercial railroads" is meant those larger, more expensive, and more permanent lines or systems extending from town to town and city to city, accommodating a heavier

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and more miscellaneous traffic and requiring larger forces of employés, who are exposed to greater risks than is the case with street car lines and systems. McLeod v. Chicago & N. W. R. Co., 101 N. W. 77, 80, 125 Iowa, 270.

Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another, or between one place and another. They are usually not constructed upon the public streets or highways, except for short distances. Diebold v. Kentucky Traction Co., 77 S. W. 674, 676, 117 Ky. 146, 63 L. R. A. 637, 111 Am. St. Rep. 230, 4 Ann. Cas. 445 (citing 1 Lewis, Em. Dom. § 110a).

A "commercial railroad" is a railroad for general freight and passenger traffic between one town and another, and differs from a "street railway," in that the latter operates on public streets for the purpose of carrying passengers with ordinary luggage from one point to another on the street. An electric railway which was chartered under the general railway act and authorized to operate between two cities, and transport passengers, mail, express, and other matter, is a "commercial railroad," and not a "street railroad." City of Aurora v. Elgin, A. & S. Traction Co., 81 N. E. 544, 547, 227 Ill. 485 (citing 1 Lewis, Em. Dom. § 110a).

A municipal corporation has no power to levy an occupation tax on what is known as a "commercial railroad company" as distinguished from a "street railroad company." Town of Arlington v. Cent. of Georgia Ry. Co., 56 S. E. 1015, 1016, 127 Ga. 761.

"The fact that a railroad running through a coal section does most of its business in the hauling of coal does not make it any the less a 'commercial road' such as is contemplated by the General Statutes." Collier v. Union Ry. Co., 83 S. W. 155, 161, 113 Tenn. 96.

A "commercial railroad" is not a street railroad, and its use of a street constitutes a new and additional servitude upon the fee of the property owner to the center of the street. Greene v. Aurora Rys. Co., 157 Fed. 85, 86, 84 C. C. A. 589 (citing Wilder v. Aurora, De Kalb & R. Electric Traction Co., 75 N. E. 194, 216 Ill. 493, 526.

It is the nature of the business and manner of its authorized operation, and not the commercial character of the railroad, nor power that propels its cars, that determines whether it is in accord with legitimate highway purposes, or a new use incompatible therewith. The operation by a corporation, organized under the statute providing for the incorporation of street railway companies, of interurban cars on streets of a city with its permission for the carriage of passengers, express, and light freight, is not an additional servitude on the streets so as to entitle abutting owners to compensation therefor, though the company is a "commercial railroad." Kinsey v. Union Traction Co., 81 N. E. 922, 943, 169 Ind. 563.

The word "railway" or "railroad," when not qualified by the word "street" or other expression of similar import, has special reference to what are sometimes denominated "commercial railroads." McLeod v. Chicago & N. W. R. Co., 101 N. W. 77, 80, 125 Iowa, 270.

"Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, and methods of operation and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) Commercial railroads, and (2) street railroads. 'Commercial railroads' embrace all railroads for general freight and passenger traffic between one town and another or between one place and another. So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways, except for short distances. 'Street railroads' embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street." Where an electric street railway company was organized under the railroad law, as distinguished from the street railroad act, and by the terms of its charter was authorized to operate through several counties and transport passengers, their ordinary baggage, United States mail, express, and milk, it was a "commercial railroad," and was not entitled to lay its tracks in a street, the fee of which was in the abutting owners, without condemning a right to do so. Wilder v. Aurora, De Kalb & R. Electric Traction Co., 75 N. E. 194, 195, 216 Ill. 493 (quoting and adopting definition in 1 Lewis, Em. Dom. § 110a).

COMMERCIAL SYSTEM

In the "commercial system" of testing sugar with the polariscope, which is an instrument so adjusted that when a polarized light passes through a tube filled with a certain solution of sugar the scale indicates the percentage of pure sugar, the actual readings of the scale and the eyepiece of the polariscope are taken as showing the actual value of the sugar for sale or duty purposes; that is, the test was one made by reading by the eye. In the case of disagreement in the tests between the parties in interest, a settlement was reached by a third or compromise test. Under the later "treasury method," the test is not absolutely determined by the eye, but the regulations provide that the reading

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must be corrected by certain arbitrary additions as prescribed in a table prepared by the officers of the government, and that duty must be paid upon such increased value as shown by such corrections or additions. Bartram Bros. v. United States, 123 Fed. 327, 328.

COMMERCIAL TRAVELER

License taxation of "commercial travelers" selling by sample or by taking orders for future delivery is not germane to license taxation of "peddlers or hawkers" selling and delivering goods carried by them on foot or on horseback, or in vehicles, or on water craft. Beary v. Narrau, 37 South. 961, 962, 113 La. 1034.

The term "drummer," meaning a "traveling salesman," has come to have a fixed and proper place in our language as well as in our law. L. A. Becker Co. v. Alvey (Ky.) 86 S. W. 974, 976.

COMMERCIALLY

The word "commercially," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 134, prescribing the duty on sheets or plates of iron and commercially known as tin plates, cannot be construed as meaningless, and tin plates are "commercially" known as rectangular sheets of various sizes but do not include small disks. Shallus v. United States, 162 Fed. 653, 655, 89 C. C. A. 445.

COMMISSION

The idea of the word "commission" involves the meaning that a sum of money is paid to an agent for effecting a sale to a third person; and, while it is not customary for a seller to pay a commission to a purchaser, it is competent for a seller to offer a purchaser a rebate and call it a commission; but, where that is intended, the expression of the intention of the parties must be clear. Oliver Refining Co. v. Aspegren, 137 N. Y. Supp. 1057, 1059, 152 App. Div. 877.

The word "commission," as used in a contract with reference to the compensation, does not necessarily show that the contract was not one of sale, but of agency only. Undoubtedly that word is usually employed to mean "the compensation allowed agents, factors, executors, trustees, receivers, and other persons who manage the affairs of others in recompense for their services." Bouv. Law Dict. 340. Standing alone, the expression may be strong to show an agency. But in placing a construction upon this correspondence we must have regard to the entire agreement to determine the meaning of any part of it. Kelley, Maus & Co. v. Sibley, 137 Fed. 586, 590, 69 C. C. A. 674.

The words "commissions" and "profits," when used in relation to business of selling stock, are substantially synonymous. Van Tine v. Hilands, 131 Fed. 124, 127.

Under Const. art. 7, § 2 (Bunn's Ed. § 170), giving the Supreme Court jurisdiction to issue writs of mandamus, etc., only to inferior courts, "commissions" or boards created by law, "the words 'commissions' and 'boards' as used in connection with the term 'inferior courts,' mean such commissions or boards as judicial power may be vested in, pursuant to Const. art. 7, § 1 (Bunn's Ed. § 169); and the hearing and determination of matters by commissions from which appeals may be taken or to which writs of certiorari and other like writs lie appear to be the test." The word does not include the state insurance commissioner. Homesteaders v. McCombs, 103 Pac. 691, 694, 24 Okl. 201, 38 L. R. A. (N. S.) 1000, 20 Ann. Cas. 181.

Act of commission

The act of a railroad company in closing or obstructing a drain so as to damage lands and crops was an act of "commission," and not of "omission." Brown v. Louisiana & N. W. R. Co., 42 South. 656, 118 La. 87.

As fees

See Fees.

As interest

See Interest (On Money).

As profits

The words "commissions" and "profits," when used in relation to the business of selling stock, are substantially synonymous. Van Tine v. Hilands, 131 Fed. 124, 127.

As wages

See Wages.

COMMISSION (Of Officer)

See Special Commission.

Members of, as judges, see Judge.

The word "commission," in the phrase "that one held a commission as deputy sheriff," does not constitute such person a deputy sheriff, since, under Wilson's Rev. & Ann. St. 1903, § 3756, more is required to constitute one a deputy sheriff than the mere issuance and delivery of a commission. Robinson v. Territory, 85 Pac. 451, 453, 16 Okl. 241.

The term "commission," as used in Code Civ. Proc. § 1127, providing that whenever an election is annulled or set aside by the judgment of a superior court, and no appeal has been taken within ten days thereafter, the commission, if any is issued, is void and the office vacant, included a "certificate of election" issued to petitioner as superintendent of schools, so that, on no appeal being taken within ten days after judgment, declaring petitioner's certificate of election invalid in a contest regularly instituted, as authorized by Code Civ. Proc. §§ 1111–1127, the judgment rendered petitioner's certificate finally ineffectual as evidence of title to the office. Wilson v. Fisher, 82 Pac. 421, 422, 148 Cal. 13 (citing People ex rel. Finigan v. Perkins,

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26 Pac. 245, 85 Cal. 509, 512; People ex rel. Barker v. Shaver, 59 Pac. 784, 127 Cal. 347, 350; Bledsoe v. Colgan, 70 Pac. 924, 138 Cal. 34, 36, 39).

As court

See Court (Of Justice).

COMMISSION MERCHANT

See, also, Factor.

A person having possession and absolute control of merchandise shipped to him to sell and collect the price is a commission merchant. T. M. Sinclair & Co. v. National Surety Co., 107 N. W. 184, 186, 132 Iowa, 549.

A "selling agent," "factor," or "commission merchant" is one who sells goods which another person has delivered to him for that purpose and receives compensation for his services by a commission or otherwise. Ommen v. Talcott, 188 Fed. 401, 403, 112 C. C. A. 239.

The words "commission merchant" have a fairly well defined meaning. There is involved always in the meaning of "commission merchant" the authority to sell the merchandise or products consigned for his principal and the right to receive compensation therefor, usually called "commission." These consignments were usually made by the principal to his commission merchant at a remote point, where the owner would have no control, supervision, and but little information of the details of sales of his product and especially in the matter of weighing. The words as used in Rev. St. 1895, art. 4314, providing that no "commission merchant" or other person shall employ any person other than a public weigher to weigh produce sold and offered for sale, mean a person having possession of merchandise with authority to sell, not including a mere warehouseman. Hedgepeth v. Hamilton Warehouse Co., 140 S. W. 1084, 1085, 104 Tex. 496.

Broker distinguished

See Broker.

As warehouseman

Rev. St. 1895, art. 4314, provides that no factor, commission merchant, or other person shall employ any person other than a public weigher to weigh produce sold and offered for sale. Held, that the words "commission merchant" and "factor" mean a person having possession of merchandise with authority to sell, not including a mere "warehouseman," and that the statute had no application to a "warehouseman" weighing produce merely for sale or to loan money thereon. Hedgepeth v. Hamilton Warehouse Co., 140 S. W. 1084, 1085, 104 Tex. 496.

COMMISSIONER

See Insurance Commissioner; Live Stock Sanitary Commissioner; Special Commissioner.

As used in a constitutional provision that when private property is taken for public use the compensation therefor shall be ascertained by commissioners appointed, etc., "commissioners" means commissioners clothed with such powers as prior to the adoption of the Constitution they had been clothed with; that is, the right to decide all questions by a majority vote. Serrell v. Oakland Probate Judge, 65 N. W. 107, 108, 107 Mich. 234.

As city officer

See City Officer.

Office of trust

See Office of Trust.

As officer

See Officer.

As referee

In an action on a deficiency judgment on mortgage foreclosure, the word "referee," as used in an allegation that the sale was made by a referee, is synonymous with "commissioner," within Code Civ. Proc. § 726, requiring a foreclosure sale to be made by a commissioner when not made by the sheriff. Hibernia Savings & Loan Society v. Boyd, 100 Pac. 239, 241, 155 Cal. 193.

COMMISSIONERS' COURT

"The name 'Commissioners' Court' is as distinctly the name of that court as is the 'District Court' the name of the court presided over by the district judge. * * * While the district and county courts were established for the trial of litigated cases, the commissioners' court is a political body; the powers and duties of its members being largely legislative and ministerial." Robinson v. Smith County, 76 S. W. 584, 585, 33 Tex. Civ. App. 251.

COMMISSIONER'S PRECINCT

As political subdivision, see Political Subdivision.

COMMIT

See Did Commit Fornication.

COMMIT SUICIDE

See, also, Suicide.

"'Die by his own hand,' 'die by suicide,' and 'commit suicide,' are synonymous with 'voluntary suicide.'" Campbell v. Order of Washington, 102 Pac. 410, 412, 53 Wash. 398 (quoting and adopting definition in Grand Legion of Select Knights, A. O. U. W., v. Korneman, 63 Pac. 293, 10 Kan. App. 577).

COMMITMENT

"A 'commitment' means a judicial order." State ex rel. Million v. Allen, 86 S. W. 144, 187 Mo. 560.

"A 'commitment' is a warrant, order, or process by which a court or magistrate di-

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rects a ministerial officer to take a person to prison or to detain him there." People ex rel. Bidwell v. Pitts, 97 N. Y. Supp. 509, 510, 111 App. Div. 319 (quoting People ex rel. Allen v. Hagen, 170 N. Y. 46, 49, 62 N. E. 1086).

The detention of one held under legal process in any suitable place until he may be tried or properly committed to some reformatory or penal institution is not deemed a "commitment" to jail; and the placing of a delinquent girl in the custody of the sheriff, after she had escaped from the custody of the constable having her in charge to take to the state industrial school, when she was placed in the women's ward at the jail with two other women above 18 years of age, was not a "commitment," contrary to P. S. 6116, providing that a child under the age of 16 years, committed to a jail, shall be kept separate from older persons committed to await trial, or on conviction for crime; the word "committed" being used in the statute in its technical sense, in view of section 6115, which uses the word in an obviously technical sense. In re Edson, 82 Atl. 664, 665, 85 Vt. 366.

In Penal Law (Consol. Laws 1909, c. 40) § 1692, relating to rescue, the terms "commitment," "conviction," and "sentence" relate to a case where an officer or another holds a prisoner under lawful custody after he has been judicially held under a commitment, conviction, or sentence for misdemeanor. People v. Marks, 135 N. Y. Supp. 523, 525, 75 Misc. Rep. 404.

As process

See Process.

As special proceeding

See Special Proceeding.

COMMITTED

In Act March 3, 1897, c. 395, 29 Stat. 695, giving jurisdiction of suits for the infringement of letters patent to the Circuit Court of the district where defendant shall have committed acts of infringement and have a regular and established place of business, "committed" relates to a time prior to the bringing of a suit, while the words "have a regular and established place of business" refer to the time when the suit is brought. Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476, 483.

Under an indictment alleging the grand jury's return of indictment against the defendant of having committed the crime of grand larceny in the first degree, "committed as follows," the words "committed as follows," following the allegation that defendants were indicted by the grand jury, are equivalent to "which said crime was by them committed as follows." So that the indictment is sufficient as charging a crime, though the introductory charge be rejected as surplusage, or as insufficient but as charging the crime by inference and recital only. State v. King, 92 N. W. 965, 967, 88 Minn. 175.

COMMITTEE

See Party Committee; Township Committee.

Where testatrix bequeathed a legacy to her incompetent brother's trustee, in trust for the brother's benefit, a description of the trustee as the beneficiary's "committee" was equivalent to a designation as trustee. Boreing v. Faris, 104 S. W. 1022, 1024, 127 Ky. 67.

A deed in consideration of an amount specified, paid by persons named, "a committ of the Society cald Perticuler Baptist, or their successors in that office for the time being," granting to the persons named land described, "to have and to hold" to the persons named, and "to their successors in office," and covenanting with the persons named and their successors in office that grantor was lawfully seised in fee and had good right to convey, and would forever warrant and defend, conveys the land to grantees, not in their individual right, but as trustees; the word "committ" meaning "committee," and being equivalent to trustees, and the words "successors in office" providing for a continuance of the trust. Hamlin v. Perticuler Baptist Meeting House, 69 Atl. 315, 318, 103 Me. 343.

COMMITTEE OF THE WHOLE

The practice of conducting business through a "committee of the whole" has for many years prevailed in legislative and deliberative bodies. Such a committee is no more than the assembly or body itself transacting a part of its business through what is termed the committee of the whole. The committee, therefore, as its name implies, amounts to this: That the particular body or assembly is carrying on a part of its legislative or deliberative functions as a committee composed of all its members. The committee, as is well known, cannot be in session unless the legal or parliamentary body of which it is composed is in session. It cannot adjourn to meet again at some other time or place. Whenever it rises, it must at once report its conclusions to the main body, and that body either rejects, approves, or modifies any matter reported to it. It is quite true that, since a majority of the committee is also generally a majority of the whole body, any matter agreed to in committee of the whole will likely be agreed to when it comes before the main body. The committee of the whole has, in modern times, in legislative and deliberative bodies become almost a matter of necessity. When the main body resolves itself into such committee, it does so for the purpose of escaping from the restraint that is placed upon its members under the rules governing the pro-

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cedure of the main body. Acord v. Booth, 93 Pac. 734, 735, 33 Utah, 279.

"Committee of the whole" is defined as a meeting of a legislative body consisting of all the members sitting in a deliberative, rather than a legislative character, for formal consultation and preliminary consideration of matters awaiting legislative action. The consideration of an ordinance by the city council in committee of the whole meets the requirements of a statute providing that no bill shall be considered unless referred to a joint or separate committee. Hallock v. City of Lebanon, 64 Atl. 362, 363, 215 Pa. 1 (quoting and adopting Cent. Dict.).

COMMITTEE ON APPEAL

As court, see Court (Of Justice).

COMMODATUM

When goods or chattels that are useful are lent to a friend gratis to be used by him, it is called a "commodatum," because the thing is to be returned in specie. Where a plaintiff allowed defendant to wear a diamond ring and diamond stud and sleeve buttons, and he did wear them presumably to decorate his person, this was a bailment for defendant's sole benefit such as is denominated in law "commodatum." Woods v. Latta, 88 Pac. 402, 405, 35 Mont. 9 (quoting and adopting definition in Jones, Bailm. 118; Van Zile, Bailments & Carriers, § 101).

COMMODITY

See Convenience or Commodity; Sale of Commodities.

Where one buys property outside of the state and stores it in the state awaiting a sale elsewhere, it is not in transit during its stay, but is a "commodity kept for sale" and is not exempt from taxation as subject to interstate commerce under St. 1898, § 1040. State ex rel. Globe Elevator Co. v. Patterson, 114 N. W. 441, 442, 134 Wis. 214.

Business privileges

Under Acts 1889, p. 141, c. 17, avoiding the enforcement of every contract whereby a combination, etc., is formed to prevent competition in the sale and purchase of commodities, the dealing in liquors contemplated by a lease of a saloon by a coal company with covenants not to permit the sale of liquor by any one else on its land and to redeem all its employés' checks which the lessee might take in payment for liquors in consideration of the payment as rent of two-thirds of the profits of the business is a dealing in "commodities." Texas & P. Coal Co. v. Lawson, 34 S. W. 919, 920, 89 Tex. 394.

Corporate franchise

The right to exist and carry on business as a corporate entity is a "commodity," subject to the power of the Legislature to lay an excise, under Const. pt. 2, art. 4, c. 1, § 1. Farr Alpaca Co. v. Commonwealth, 98 N. E. 1078, 1079, 212 Mass. 156.

The word "commodities," in the constitutional provision authorizing the Legislature to impose an excise upon any commodities within the commonwealth, includes the privilege of transacting business as a corporation, whether domestic or foreign. S. S. White Dental Mfg. Co. v. Commonwealth, 98 N. E. 1056, 1058, 212 Mass. 35, Ann. Cas. 1913C, 805.

Ice

Ice harvested and stored in icehouses by a corporation engaged in the sale thereof is a "commodity," within St. 1898, § 1040, as amended by Laws 1909, c. 70, providing for the assessment of personal property, including goods, merchandise, wares, commodities kept for sale, etc. State ex rel. Lake Nebagamon Ice Co. v. McPhee, 135 N. W. 470, 471, 149 Wis. 76 (citing 2 Words & Phrases, p. 1309).

Labor

Code, § 5060, prohibiting any combination to regulate the price "of any article of merchandise or commodity or to fix * * * the amount or quality of any article, commodity or merchandise to be manufactured, mined, produced or sold," does not, when construed as required by section 48 by giving to the words and phrases the meaning of approved usage of the language, cover combinations to fix the price of skilled or unskilled labor, and does not prevent physicians from combining to fix charges for professional services; the word "merchandise" referring primarily to those things which merchants sell, and the word "commodity" qualified by the words "manufactured, mined, produced, or sold," not including labor either skilled or unskilled, though the word "commodity" primarily means a convenience, profit, benefit, or advantage, and, in reference to commerce, comprehends everything movable—that is, sold or bought—except animals. Rohlf v. Kasemeier, 118 N. W. 276, 277, 140 Iowa, 182, 23 L. R. A. (N. S.) 1284, 132 Am. St. Rep. 261, 17 Ann. Cas. 750.

In the light of the history of legislation relating to agreements and combinations to fix and regulate wages, the often-declared rule of public policy with reference thereto, the purposes for which combinations are specifically forbidden by the statute, and the fact that such combinations affect production and the price of commodities but indirectly, labor, whether physical, intellectual, or a combination of the two, is not an article of trade, manufacture or use or an article, "commodity," or utility, which enters into the manufacture of any article of utility, within the meaning of those words as used in Minnesota anti-trust statute (Gen. Laws Minn. 1899, c. 359, p. 487; Rev. Laws 1905, §

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5168), and combination to fix and regulate the prices which shall be charged for wages, and other forms of personal service, are not within the prohibitions of the statute. State v. Duluth Board of Trade, 121 N. W. 395, 412, 107 Minn. 506, 23 L. R. A. (N. S.) 1260 (citing Rohlf v. Kasemeier, 118 N. W. 276, 140 Iowa, 182, 23 L. R. A. [N. S.] 1284, 132 Am. St. Rep. 261, 17 Ann. Cas. 750; Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; Commonwealth v. Hunt, 4 Metc. [45 Mass.] 134, 38 Am. Dec. 346; Rogers v. Evarts, 17 N. Y. Supp. 268; United States v. Moore, 129 Fed. 630; Hunt v. Riverside Co-Operative Club, 104 N. W. 40, 140 Mich. 538, 112 Am. St. Rep. 420; Cleland v. Anderson, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 66 Neb. 252, 5 L. R. A. [N. S.] 136; State v. Phipps, 31 Pac. 1097, 50 Kan. 609, 18 L. R. A. 657, 34 Am. St. Rep. 152; Beechley v. Mulville, 70 N. W. 107, 71 N. W. 428, 102 Iowa, 602, 63 Am. St. Rep. 479; Queen Ins. Co. v. State, 24 S. W. 397, 86 Tex. 250, 22 L. R. A. 483; People v. Fisher [N. Y.] 14 Wend. 9, 28 Am. Dec. 508; More v. Bennett, 29 N. E. 888, 140 Ill. 69, 15 L. R. A. 361, 33 Am. St. Rep. 216).

Under Pen. Code, § 321, providing that every person, corporation, etc., who shall combine or form what is known as a trust, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, etc., the term "commodities" would not include a combination of laborers. State v. Cudahy Packing Co., 82 Pac. 833, 834, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717.

Sales of stock certificates

Under Const. pt. 2, c. 1, § 1, art. 4, authorizing the Legislature to impose reasonable excises on any produce, goods, wares, "commodities," and merchandise brought into, or produced, manufactured, or being within, the commonwealth, etc., the Legislature may impose a tax on sales of certificates of stock of domestic and foreign corporations, associations, or companies; such a transfer being an exercise of a right, within the meaning of the word "commodities," as used in the section. Opinion of the Justices, 85 N. E. 545, 196 Mass. 603.

Stocks and bonds

"Commodities" include all movable chattels which are the objects of commerce, unless, perhaps, animals may be excepted. It is broad enough to include stocks and bonds. People v. Federal Security Co., 99 N. E. 668, 669, 255 Ill. 561.

Trading stamps

The term "commodities," as used in Const. Mass. art. 4, § 1, authorizing the Legislature to impose reasonable duties and excises upon any produce, goods, wares, merchandise, and "commodities," does not include the selling, giving or delivering of trading stamps, in connection with the sale of articles, entitling the holder to receive other articles than those so sold, and St. 1904, p. 376, c. 403, § 1, levying an excise tax for carrying on such business, is unconstitutional. O'Keeffe v. Somerville, 76 N. E. 457, 458, 190 Mass. 110, 112 Am. St. Rep. 316, 5 Ann. Cas. 684.

Transmission of telegram

In the popular and received import of the word, a "commodity" is a tangible article, and the service or labor of transmitting a telegram is not a "commodity" within the meaning of Laws 1899, p. 1514, c. 690, providing for the prevention of monopolies in the manufacture, production, and sale of commodities, etc. In re Jackson, 107 N. Y. Supp. 799, 801, 57 Misc. Rep. 1.

COMMON

See Benefits Common to Other Property; Interest in Common; Wall in Common. See, also, Public.

What is "common" is generally known to all. Pickrell v. City of Carlisle, 121 S. W. 1029, 1033, 135 Ky. 126, 24 L. R. A. (N. S.) 193.

The word "common" is ordinarily understood to apply to the general public when not qualified by some word or phrase of limitation. Spokane Traction Co. v. Granath, 85 Pac. 261, 264, 42 Wash. 506 (quoting and adopting the definition in Kirkendall v. City of Omaha, 57 N. W. 752, 39 Neb. 1).

The word "public" in its common acceptation and use has all the significance of and is synonymous with the word "common." People ex rel. Clark v. Keeper of New York State Reformatory for Women at Bedford, 68 N. E. 884, 887, 176 N. Y. 465 (dissenting opinion).

COMMON ARRANGEMENT

That a defendant made contracts for the through carriage of interstate shipments and settlements therefor, solely with one railroad company, although such shipments passed over the lines of other companies also, sufficiently proves a "common arrangement" between the carriers for a continuous carriage. United States v. Standard Oil Co. of Indiana, 155 Fed. 305, 311.

Under the provision of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, that "the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property * * * under a common control, management or arrangement for a continuous carriage or shipment from one state * * * to any other state," as a general rule a "common arrangement" is established by proof of a shipment under a through bill of lading and

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a continuous interstate carriage thereunder, coupled with proof of concerted action among the connecting carriers with regard to the payment of the charges and the receipt and movement of the traffic, even if an agreed division of a single through rate is not shown. Standard Oil Co. of New York v. United States, 179 Fed. 614, 621, 103 C. C. A. 172.

In the concert of action, in the successive receipt and movement of traffic by connecting carriers under through bills of lading for continuous carriage is manifested the "common arrangement" contemplated by the interstate commerce laws, and no previous formal contract is necessary to bring the carriers under the provisions of the law. Chicago, B. & Q. R. Co. v. United States, 157 Fed. 830, 833, 85 C. C. A. 194.

A steamship company, which joins with a railroad carrier in making, filing, and publishing joint through rates for interstate traffic, is as to such traffic used under a "common arrangement" with the railroad company, within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, and subject to regulation and control by the Interstate Commerce Commission; but such power to regulate and control does not extend to the other port-to-port business of the company, whether interstate or intrastate. Under section 20 of the act as so amended, and as further amended by Act June 18, 1910, c. 309, § 14, 36 Stat. 555, the Commission has power to require reports from such company, and to prescribe a system of bookkeeping and accounting with respect to such joint traffic and directly relating thereto, but it has no power to extend such requirements to include other matters or business of the company having no direct relation to such joint traffic. Goodrich Transit Co. v. Interstate Commerce Commission, 190 Fed. 943, 957.

A carrier by water which has not joined in a tariff and division sheet filed and published by connecting railroad carriers for the through carriage of interstate shipments between two points does not become a party to a "common arrangement" for the carriage of such a shipment within the meaning of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847, by accepting and carrying the same under a through bill of lading issued by the initial railroad carrier stating the published tariff rate and the division of the charges in accordance therewith, nor by receiving its divisional part of such rate, where it had previously privately contracted with the shipper to "protect" a lower through rate, pursuant to which contract the shipment was made, and its return to the shipper of a part of its divisional share of the freight paid, in fulfillment of the contract, was not the "giving of a rebate" in violation of the act. Mutual Transit Co. v. United States, 178 Fed. 664, 667, 102 C. C. A. 164.

Defendant as shipper made an agreement with the Mutual Transit Company, which was a carrier by water only on the Great Lakes, by which the transit company agreed to protect a rate of 45 cents per hundred on a shipment of iron pipe from Philadelphia to Winnipeg, Man. The transit company routed the shipment over a railroad to a port on Lake Erie, thence over its own water line to West Superior, Wis., and from there over two railroads to Winnipeg. The shipment was made on through bills of lading issued by the receiving railroad carrier, in which a rate of 49½ cents was charged, that being the sum of its own published through rate to West Superior and the published rates of the other two railroad companies from there to Winnipeg, and such rate was paid by defendant. From the portion of such rate received by the transit company it refunded to defendant 4½ cents per hundred on the shipment. The transit company had not published nor filed any schedule of rates under the interstate commerce law. Held, that its participation in the transportation of the property under the through bills of lading and in the rate charged therein was not under a "common arrangement" between the carriers with respect to such shipment within the meaning of the act so as to make such rate the lawful rate as against the shipper, nor to render the latter subject to criminal prosecution for receiving a rebate under the Elkins Act of Feb. 19, 1903, c. 708, § 1, 32 Stat. 847. Camden Iron Works v. United States, 158 Fed. 561, 563, 85 C. C. A. 585.

COMMON BAIL

"Common bail" is bail given by merely nominal parties, and not by responsible parties, as in special bail. Preston v. McNeil Lumber Co., 143 Fed. 555, 557.

COMMON BARRATOR

"A 'common barrator' is a common mover or exciter or maintainer of suits, quarrels of parties either in courts or elsewhere: * * * First, in the disturbance of the peace; second, in taking and keeping possession of lands in controversy not only by force but also by subtlety and deceit, and most commonly by suppression of truth and right; thirdly, by false inventions and sowing of calumination, rumors, and reports whereby discord and disquietitude may grow up between neighbors." Ingersoll v. Coal Creek Coal Co., 98 S. W. 178, 182, 117 Tenn. 263, 9 L. R. A. (N. S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829 (quoting and adopting definition in Coke, Litt. 368).

COMMON BENEFITS

"The term 'general benefits,' when unqualified, should probably be accepted in the

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same sense as the term 'common benefits'; that is to say, when there is no limitation expressed, it should be deemed applicable to the general public rather than as embracing, as general, but a limited part of the public." Spokane Traction Co. v. Granath, 85 Pac. 261, 263, 264, 42 Wash. 506 (quoting and adopting Kirkendall v. City of Omaha, 57 N. W. 752, 39 Neb. 1).

COMMON BOUNDARY

Code Supp. 1902, § 2539, declares fish seines kept to catch fish contrary to law to be a common nuisance, and requires their seizure and destruction. Section 2540 prohibits the catching of fish other than minnows for bait from any of the waters of the state by any other means than a hook and line, and section 2547 declares that the prior sections shall not apply to fishing in the Mississippi river. Act Cong. March 3, 1845, c. 48, 5 Stat. 742, gives to a state concurrent jurisdiction on the Mississippi river and every other river bordering on the state so far as it shall form a "common boundary" to such state and any other state then or thereafter to be formed bounding the same. Held, that the term "common boundary," as applied to the Mississippi river, meant the common way of commerce, exclusive of the nonnavigable waters, belts, streams, etc., emerging from the main river and flowing inland; and hence seine fishing on a nonnavigable slough formed by the separation of a part of the river from the main body and cutting off a large body of land wholly within the state of Iowa was prohibited. Little v. Green, 123 N. W. 367, 370, 144 Iowa, 492, 25 L. R. A. (N. S.) 649.

COMMON CARRIER

See, also, Forwarding Carrier; Private Carrier; Public Carrier; Telephone Company.

A "common carrier" is one who transports such passengers as choose to employ him from place to place for reward. Burke v. State, 119 N. Y. Supp. 1089, 1104, 64 Misc. Rep. 558.

A "common carrier" is one who, by virtue of his business or calling, undertakes for compensation to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him; and every one who undertakes to carry and deliver for compensation the goods of all persons indifferently is, as to liability, to be deemed a "common carrier." United States v. Ramsey, 197 Fed. 144, 146, 116 C. C. A. 568.

"A 'common carrier' is one who holds himself out in common, that is, to all people alike, that he is engaged in the business of transporting persons, or certain kinds of property, and is prepared and ready to carry for all who apply, on the same terms." Cleveland, C., C. & St. L. R. Co. v. Henry, 83 N. E. 710, 712, 170 Ind. 94.

A "common carrier" is one who undertakes as a public employment the transportation of goods for persons generally from place to place, to be delivered at the place appointed, for hire or reward, and with or without a special agreement as to price. Carpenter v. Baltimore & O. R. Co. (Del.) 64 Atl. 252, 253, 6 Pennewill, 15 (quoting and adopting definition in McHenry v. Philadelphia, W. & B. R. Co. [Del.] 4 Har. 448).

A "common carrier" is one who openly professes to carry for hire the goods of all who choose to employ him, and whose duty it is to carry for all who comply with the terms as to freight, etc.; while a "private carrier" is one who, without being engaged in the business generally, undertakes to carry goods for hire in a particular case. The Cape Charles, 198 Fed. 346, 349.

One holding out to the public as ready to undertake for hire the transportation of goods and so inviting custom of the public is a "common carrier." Lloyd v. Haugh & Keenan Storage & Transfer Co., 72 Atl. 516, 517, 223 Pa. 148, 21 L. R. A. (N. S.) 188.

A "common carrier" is one whose business it is to carry chattels for all persons who may choose to employ and remunerate him: and this applies to carriers by land and water without regard to distance or motive power. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575, 578.

The tests whether a carrier is a "common carrier" are: First, he must be engaged in the business of carrying goods for others as a public employé, and so hold himself out; second, he must undertake to carry goods of the kind to which his business is confined; third, he must undertake to carry by the methods by which his business is conducted and over his established roads; fourth, transportation must be for hire; and, fifth, an action must lie against him if he refused without reason to carry such goods for those willing to comply with his terms. Santa Fé, P. & P. Ry. Co. v. Grant Bros. Const. Co., 108 Pac. 467, 469, 13 Ariz. 186.

A "common carrier" is a public carrier. He engages in a public employment and takes upon himself a public duty and exercises a sort of public office. His duty being public, the correlative right is public. This public right is a common right, and a common right signifies a reasonably equal right. Hilton Lumber Co. v. Atlantic Coast Line R. Co., 53 S. E. 823, 828, 141 N. C. 171, 6 L. R. A. (N. S.) 225 (quoting and adopting definition in McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72).

There are two kinds of carriers, a common carrier and a private carrier; a com-

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mon carrier being one who undertakes to transport goods for the general public, and is compelled to do so by law. O'Rourke v. Bates, 133 N. Y. Supp. 392, 393, 73 Misc. Rep. 414.

The term "common carrier," as used in Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, is to be given its ordinary meaning of one engaged in the actual work of transportation; and a corporation not so engaged is not within the statute merely because it is authorized by its charter to engage in such business. United States v. Union Stockyard & Transit Co. of Chicago, 192 Fed. 330, 341.

A railroad's liability as "common carrier" does not cease until the goods are deposited in a depot or warehouse. Pennsylvania R. Co. v. Naive, 79 S. W. 124, 125, 130, 112 Tenn. 239, 64 L. R. A. 443.

"All persons who transport goods from place to place for hire for such persons as see fit to employ them, whether usually or occasionally, whether as a principal or an incidental and subordinate occupation, are 'common carriers.'" Hahl v. Laux, 93 S. W. 1080, 1081, 42 Tex. Civ. App. 182.

The word "carrier," in Civ. Code Prac. § 73, providing that an action against a common carrier for an injury to a passenger or other person must be brought in a county in which the defendant resides or in which the plaintiff is injured or in which he resides, if he resides in the county into which the carrier passes, applies not alone to the operation of trains, but includes a railroad preparing to operate trains into a county and having a roadbed with ties and rails thereon therein. Louisville, H. & St. L. R. Co. v. Sanders' Adm'r (Ky.) 92 S. W. 937, 938.

"No one should be treated as a 'common carrier' unless he has in some way held himself out to the public as a carrier in such manner as to render himself liable to an action if he should refuse to carry for any one who wished to employ him in the particular kind of service which he thus proposes to undertake; otherwise he does not come within the description, nor can he be subjected to the liability of the common carrier when the goods have been lost without negligence." Where, in an action for loss of a cargo of brick towed by one of defendant's steamers, defendant denied that it was a "common carrier," the court should have charged on such issue that, if defendant had expressly and publicly offered to carry for all persons indiscriminately, or by its conduct and manner of business it held itself out as ready to carry for all on such trips as the boat was then making, it was a "common carrier," and plaintiff was entitled to recover, though there was no negligence on defendant's part in the loss of the brick, but that if it had not offered to carry for all persons indiscriminately, etc., but merely carried the brick in pursuance of a special employment, it was not a "common carrier," nor liable, in the absence of negligence. Bassett & Stone v. Aberdeen Coal & Mining Co., 88 S. W. 318, 320, 120 Ky. 728 (quoting and adopting definition in Hutch. Carr. § 55).

"A 'common carrier' has been defined to be one who undertakes for hire to transport goods of such as choose to employ him from place to place." A continual practice by owners of a stage coach of carrying parcels of merchandise for hire will make them common carriers. Beckman v. Shouse (Pa.) 5 Rawle, 179, 187, 28 Am. Dec. 653.

A corporation is none the less a "common carrier," as defined by Gen. St. 1894, § 379, because its articles do not in terms prescribe that one of its powers is to carry freight. In re Minneapolis & St. P. Suburban Ry. Co., 112 N. W. 13, 16, 101 Minn. 132.

To constitute a "common carrier," it is not essential that the person or corporation undertaking such service own the means of transportation; it being sufficient that a contract is made by which the carrier agrees to transport and deliver the goods. J. H. Cownie Glove Co. v. Merchants' Dispatch Transp. Co., 106 N. W. 749, 750, 130 Iowa, 327, 4 L. R. A. (N. S.) 1060.

Belt line and terminal railroad companies

A belt line railway company, chartered as a railroad company, owning four or five locomotives and one flat car and about 14 or 15 miles of track, which makes connection with various railroad companies, and switches cars for these companies to stockyards and other railroad connections, but which has no depot or loading facilities, furnishes no cars, makes no charges to shippers or contract with them, and is paid for its services by the railroad companies, is not a "common carrier" within the meaning of Acts 1905, p. 29, c. 25, § 1, providing that any common carrier doing business as such in the state may be sued for any cause arising out of transportation in any court of competent jurisdiction in any county in which such carrier does business, or has an agent or representative. Texas & P. R. Co. v. Henson, 121 S. W. 1127, 1128, 56 Tex. Civ. App. 468.

A "common carrier" of personal property is one who undertakes for hire to transport from place to place the goods of others who may choose to employ him for that purpose, including a terminal railroad company owning no cars of its own and transporting only the railroad cars of other companies. United States v. Sioux City Stock Yards Co., 162 Fed. 556, 560.

Carriage as part of business only

One who agrees to cut, prepare, and transport to market dock sticks, spars, etc., for another is not while transporting the tim-

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ber acting as a "common carrier." Pike v. Nash, *40 N. Y. 335, 338.

As carrier as a business

If one is accustomed to undertake, for hire, to transport the goods of those who choose to employ him, though it be not his constant or usual, but only an occasional, occupation, he is a "common carrier" within the rule laid down in Chevaillier v. Strahan, 2 Tex. R. 115, "that all persons who transport goods from place to place, for hire, for such persons as see fit to employ them, whether usually or occasionally, whether as principal or incidental or subordinate occupation, are common carriers, and incur all their responsibilities"—at least, whenever he holds himself out in any way to the public as a carrier, or undertakes as a matter of business and profit, the transportation of goods. But because one whose principal occupation is farming does this occasionally and at certain seasons only, he is not necessarily to be deemed to incur the responsibility of a common carrier, at all seasons, and in reference to every contract he may make to carry goods under whatever special circumstances. Haynie v. Baylor, 18 Tex. 498, 507 (citing 1 Pars. Cont. 639 et seq. and notes; Ang. Carr. § 72).

"A 'common carrier' is one who undertakes to transport from place to place for hire the goods of such persons as think fit to employ him" as the proprietors of wagons, barges, lighters, merchant ships, railway companies, or other instruments for the public conveyance of goods. To make one a common carrier, his business of carrying must be habitual and not casual, and his undertaking must be general and for all people indifferently, and must be evidenced by his known notice or by his known habitual continuance in such business. He must assume to be the servant of the public. One who follows wagoning for a livelihood, and gives general notice that he will take goods for transportation whether for a year, a season, or a less time, is a "common carrier"; but a wagoner who undertakes to transport goods by a single special contract and to deliver them in good order and condition unavoidable accidents excepted, though not a common carrier, is responsible on his contract as one. Fish v. Chapman, 2 Ga. 349, 352, 353, 354, 46 Am. Dec. 393 (citing 2 Kent, Comm. 598; Story, Bailm. § 495).

Ditch company

A ditch company is not in the strict legal sense of the term a "common carrier." Wright v. Platte Val. Irr. Co., 61 Pac. 603, 606, 27 Colo. 322.

Elevators in buildings

A company operating an elevator in its office building for the use of tenants and their visitors is a common carrier of passengers for hire. Goldsmith v. Holland Bldg. Co., 81 S. W. 1112, 1114, 182 Mo. 597.

Persons operating elevators for public use in stores are common carriers of passengers, and bound to exercise the highest practicable care used by prudent men in operating elevators to prevent injury to passengers. Hensler v. Stix, 88 S. W. 108, 111, 113 Mo. App. 162.

The owner of a building operating a freight elevator in which a person engaged in moving the effects of a tenant from the building is riding according to custom is a "common carrier," and the relation of carrier and passenger exists. Orcutt v. Century Bldg. Co., 99 S. W. 1062, 1064, 201 Mo. 424, 8 L. R. A. (N. S.) 929 (citing and adopting Beidler v. Branshaw, 65 N. E. 1086, 200 Ill. 425; Springer v. Ford, 59 N. E. 953, 189 Ill. 430, 52 L. R. A. 930, 82 Am. St. Rep. 464).

A landlord who maintains an elevator in his private building for the use of tenants and their employés and customers is not a common carrier, nor bound to the same degree of care as that imposed upon a common carrier, but is bound only to exercise reasonable care for the safety of those who enter upon his premises and use the elevator. Edwards v. Manufacturers' Bldg. Co., 61 Atl. 646, 27 R. I. 248, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37, 8 Ann. Cas. 974.

The owner of an office building, who maintains and operates therein a passenger elevator for the use of his tenants and the public who choose to use the same, is, as to those who ride in the elevator, a "common carrier of passengers" for hire. Ohio Val. Trust Co. v. Wernke, 84 N. E. 999, 1002, 42 Ind. App. 326.

Express and messenger companies

Express companies are "common carriers." Southern Exp. Co. v. Ramey, 51 South. 314, 315, 164 Ala. 206; American Exp. Co. v. United States, 29 Sup. Ct. 315, 317, 212 U. S. 522, 53 L. Ed. 635.

"The general rule of law is that express companies are 'common carriers,' and, in the absence of a contract limiting their liability, it is an insurer of the safe delivery of goods which they receive for carriage." Boehrer v. Juergens & Anderson Co., 113 N. W. 655, 657, 133 Wis. 426 (citing Marshall v. American Exp. Co., 7 Wis. 1, 73 Am. Dec. 381).

Where a bill for rent was intrusted to a messenger furnished by a messenger company, and the amount collected by the messenger, the company did not become a "common carrier" and insurer of the bill and the money. The knowledge of the company that messengers sent out by it were sometimes employed to carry money does not render the company a "common carrier," where the company exercises no control over the messenger during his employment by a patron. Haskell v. Boston Dist. Messenger Co., 76 N. E. 215,

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216, 190 Mass. 189, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324, 5 Ann. Cas. 796.

The status of an express company as a "common carrier" is fixed by Acts 1891-92, p. 971, c. 614, § 18, providing that the term "common carriers" shall include express companies chartered by this or any other state and doing business in the state. Shannon's Adm'r v. Chesapeake & O. Ry. Co., 52 S. E. 376, 377, 104 Va. 645.

Under Act Cong. June 29, 1906, § 1, the term "common carrier" includes express companies. Chicago, R. I. & P. Ry. Co. v. Beatty, 118 Pac. 367, 368, 126 Pac. 736, 34 Okl. 321, 42 L. R. A. (N. S.) 988; United States v. American Express Co., 199 Fed. 321, 322.

A special contract with an express company exempting it from liability for loss or damage except such as shall have occurred from fraud or gross negligence changes the relation of the parties, and the carrier becomes as to that transaction an ordinary bailee and private carrier for hire. Moriarty v. Harden's Express (N. Y.) 1 Daly, 227, 230.

Companies engaged in supplying messenger service to the public are to a certain extent common carriers, must serve impartially all who require their services, are liable on proof of negligence; and under some circumstances, and always by special contract, they may make themselves insurers. White v. Postal Telegraph & Cable Co., 25 App. D. C. 364, 367, 4 Ann. Cas. 767.

A common carrier is one who undertakes for hire or reward to transport from place to place the goods of those who choose to employ it, and an express or teaming company which owns horses and wagons and hires teamsters, by means of which merchandise is carried throughout a city for the public generally, is a common carrier within the meaning of an ordinance requiring the licensing of public carts, notwithstanding such express or teaming company exercises a discretion as to the person or persons whom it will serve. Hastings Express Co. v. City of Chicago, 135 Ill. App. 268, 273.

Under Rev. Civ. Code S. D. 1903, § 1577, providing that every one who offers to carry persons, property, or messages is a "common carrier," an express company offering to carry money for hire is a "common carrier of money." Platt v. Le Cocq, 150 Fed. 391, 397.

Ferryman

A ferryman is a "common carrier." Smith v. Seward, 3 Pa. 342, 345.

A ferryman is a common carrier of goods, and like other common carriers is an insurer of the property committed to his care, and is responsible for all injuries to it except such as may be caused by the act of God or a public enemy. The ferryman's liability as a common carrier is not relieved or lessened by the fact that the goods are usually accompanied by the owner. His responsibility in regard to animals is the same as in the case of other property, except where the loss or injury is due to the animal's own restiveness or viciousness of temper. Bauer v. Verona Ferry Co., 33 Pa. Super. Ct. 607, 609.

A corporation incorporated under Comp. Laws, §§ 6646-6659, to own and operate ferries on a river, which owns and operates an amusement park and steamers for the transportation of persons to and from the park, is not a common carrier while engaged in transporting such persons, and may refuse transportation to any one at its pleasure. Meisner v. Detroit, B. I. & W. Ferry Co., 118 N. W. 14, 15, 154 Mich. 545, 19 L. R. A. (N. S.) 872, 129 Am. St. Rep. 493.

Hackmen and truckmen

A drayman who is directed by a shipper to take her goods to the depot and ship them is a "common carrier." Benson v. Oregon Short Line R. Co., 99 Pac. 1072, 1074, 35 Utah, 241, 136 Am. St. Rep. 1052, 19 Ann. Cas. 803 (citing 2 Words and Phrases, p. 1317).

A "common carrier" is one who undertakes for hire to transport the goods of such as choose to employ him, and ordinarily carters and expressmen engaged in carrying freight to and from a depot or warehouse, or between places in the same locality, or between different localities, are common carriers. One holding himself out as engaged in the general business of moving household goods from one residence to another in a city, for all who choose to employ him, is a "common carrier." Collier v. Langan & Taylor Storage & Moving Co., 127 S. W. 435, 441, 147 Mo. App. 700.

Holding company

A holding company is not a "common carrier," within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, because of the fact that it owns all of the stock of a corporation which is such a common carrier. United States v. Union Stock Yard & Transit Co. of Chicago, 192 Fed. 330, 342; O'Malley v. Board of Com'rs of Riley County, 121 Pac. 1108, 86 Kan. 752, Ann. Cas. 1913C, 576.

Private railroad

"A private railroad established as an incident to a private business is not a 'common carrier.'" A spur railway line built by a lumber company on its own land, forming a connecting line between a railroad and its mill, some miles distant, to transport its own products to the railroad for shipment, which had no rolling stock except an engine and logging cars, and which did not hold itself out to do carrying for the public, is not a "common carrier." E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co., 170 Fed. 240, 249, 95 C. C. A. 436 (quoting and adopting

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definition in McKivergan v. Alexander & Edgar Lumber Co., 102 N. W. 332, 124 Wis. 60; Moore, Carr. p. 72, § 35).

One who constructs a railroad switch, under Ky. St. 1909, § 815 (Russell's St. § 5352), authorizing the owner of a coal mine within three miles of a railroad to condemn a right of way for a railroad switch to get his product to market, and providing that the owner of such road shall be, so far as they are applicable, governed by the laws relating to other railroads, is not a "common carrier," in contravention of Const. § 210, providing that no corporation engaged in the business of common carrier shall own a mine, so that it can either ship or permit to be shipped by the lessees of its mine all products thereof free of charge. Straight Creek Coal Mining Co. v. Straight Creek Coal & Coke Co., 122 S. W. 842, 844, 135 Ky. 536.

Pullman company

"While the Pullman Company may not be technically a 'common carrier,' still we think it comes within the scope and meaning of this act [an act providing that no carrier is required to admit any passenger to his car or means of transportation]. A sleeping car is obviously a public means of transportation." Allen v. Pullman's Palace Car Co., 24 Sup. Ct. 39, 42, 191 U. S. 171, 48 L. Ed. 134.

Railroad company

The fact that one has a private arrangement with a railroad whereby he can ride on freight trains does not render the road's relation to him other than that of a "common carrier." Gardner v. St. Louis & S. F. R. Co., 93 S. W. 917, 919, 117 Mo. App. 138.

Under the facts of this case, it is held that a railway company holding itself out to the public as ready, and as undertaking, to do switching which requires it to have its rails and right of way and go upon the rails and right of way of another company with which it has no express contract relating either to compensation for switching or to track rights, is a "common carrier," and as such must switch cars without discrimination against a disfavored shipper. Larabee Flour Mills Co. v. Missouri Pac. Ry. Co., 88 Pac. 72, 76, 74 Kan. 808.

A railroad company is not a "common carrier" of the sleeping cars of another, and may impose terms on which it will haul such cars. Denver & R. G. R. Co. v. Whan, 89 Pac. 39, 41, 39 Colo. 230, 11 L. R. A. (N. S.) 432, 12 Ann. Cas. 732.

Under Const. art. 10, § 2, providing that all railroads are public highways and all railway companies are common carriers, a railroad company doing a general business was also a common carrier in switching cars over its switch tracks to and from warehouses situated on its spurs and switches, and delivering them upon the transfer tracks of other railroad companies in the same town. Kansas City Southern Ry. Co. v. Rosebrook-Josey Grain Co., 114 S. W. 436, 439, 52 Tex. Civ. App. 156.

Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139, creating the Railroad Commission, defining the term "common carrier" as one operating as a common carrier any railroad, spurs, terminal facilities necessary in the transportation of persons or property, and defining the term "railroad" as meaning all railroads, provided that the act shall not apply to any logging or other private railroad not doing business as a common carrier, and conferring on the Commission jurisdiction over side tracks and branches, in so far as the same are used by common carriers, includes branch roads built by railroads for lumbermen. Detroit & M. R. Co. v. Michigan R. R. Commission, 137 N. W. 329, 332, 171 Mich. 335.

Special employment

Under the rule of the American courts of admiralty a lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a "common carrier" with respect to such goods, but a "private carrier," and liable only as a bailee for hire. The Wildenfels, 161 Fed. 864, 866, 89 C. C. A. 58.

A person employed by a liquor dealer to carry liquors to the place of residence of the customers, deliver the liquors, and collect the price, is not a "common carrier." United States v. Lackey, 120 Fed. 577, 579.

Stockyard company

A stockyards company maintaining tracks connecting with the tracks of railroad companies, and which by its own locomotives and servants transports cars containing interstate shipments to and from the tracks of the railroad companies, is a "common carrier" engaged in interstate commerce, though it collects compensation only from the railroad companies and is paid under a contract between it and them. Union Stockyards Co. of Omaha v. United States, 169 Fed. 404, 94 C. C. A. 626.

A stockyards company owning stockyards and doing what is known as a terminal business, having switch tracks encircling its yards and connecting therewith and with trunk line railroads so that all cars of stock in and out of its yards must pass over its tracks, which it alone operates with its own engines and crews, which issues no bills of lading and receives no part of the freight paid the trunk line railroads, but charges a fixed price per car for all cars moved from the connection therewith to its yards or to packing houses, is a railroad company and a common carrier of freight for hire with the rights, duties, and obligations of a common carrier for hire, and subject to the provisions of Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607, where it partici-

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pates in the carriage of an interstate shipment. United States v. St. Joseph Stockyards Co., 181 Fed. 625, 626.

A stockyards company, authorized by its charter to build and operate a railroad, and which did build and operate one in interstate commerce, on leasing its equipment for a term of years to an independent operating company, ceased to be a "common carrier" engaged in interstate commerce, within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, and is not subject to the provisions of the act as such because it receives as rental a share of the net earnings of its road, nor because the owner of a majority of its stock also owns a majority of the stock of the lessee. United States v. Union Stockyard & Transit Co. of Chicago, 192 Fed. 330, 342.

A stockyard company, which receives live stock from carriers at its yards, pens, feeds, and cares for the same, and maintains a public market for its sale, and which unloads and reloads it when required, receiving fixed prices for its services, is not a "common carrier," within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584. United States v. Union Stockyard & Transit Co. of Chicago, 192 Fed. 330, 341.

A union stockyards company operating 35 miles of railroad, over which are hauled all cars offered for shipment by any industry located on the line of the road and all cars consigned to such industry, and all cars from one railroad to another in course of shipment from one state to another for which an arbitrary switching charge is made in operating such road, is a common carrier engaged in interstate commerce within safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531, amended by Acts April 1, 1896, c. 87, 29 Stat. 85, and March 12, 1903, c. 976, 32 Stat. 943). United States v. Union Stock Yards Co. of Omaha, 161 Fed. 919, 923.

A stockyards company owned about 35 miles of railway track, including what was known as a transfer track. Several private industries were conducted adjacent to the premises of the company. The transfer track connected with the track of several railroads. The stockyards company was engaged in the carrying of freight in car load lots. Cars billed to the stockyards or the industries adjacent thereto were placed on the transfer track by the railroad over whose line shipped, and from there hauled by the stockyards company, with its own engines, to the pens or sheds in the yards, or to the industries which were to receive the freight. Outgoing cars were hauled by the stockyards company to the transfer track, where they were received by a railroad. The railroads for such service were charged $1 per car. The stockyards company did not deal with the general public, but only with the railroads and the industries located adjacent to its premises, and with the consignees and consignors of live stock who received shipments or loaded shipments in its yards. It transported freight over its own tracks from one industry to another, and was not engaged in the production of commodities. Its vocation was purely one of service to others, and, with the exception of feeding live stock in transit, the service rendered was the transportation of freight. Held, that the stockyards company was a common carrier within the constitutional amendment adopted at the general election in 1906, creating a state railway commission, and Laws 1907, p. 320, c. 90, § 4, defining a common carrier to be any corporation, etc., owning, operating, etc., any railroad, etc. State ex rel. Winnett v. Union Stockyards Co. of Omaha, 115 N. W. 627, 631, 81 Neb. 67.

Street railway

Street railway companies are common carriers of passengers. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. Lincoln Traction Co. v. Heller, 100 N. W. 197, 199, 72 Neb. 127 (citing Lincoln St. Ry. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736); Hurley v. Metropolitan St. R. Co., 96 S. W. 714, 715, 120 Mo. App. 262 (citing Nelson v. Metropolitan St. R. Co., 88 S. W. 1119, 113 Mo. App. 702; Ridenhour v. Kansas City Cable Ry. Co., 13 S. W. 889, 14 S. W. 760, 102 Mo. 270); Chicago Union Traction Co. v. Chicago, 65 N. E. 451, 461, 199 Ill. 484, 59 L. R. A. 631 (citing North Chicago St. Ry. Co. v. Williams, 29 N. E. 672, 140 Ill. 275; Same v. Wrixon, 51 Ill. App. 307; Same v. Cook, 33 N. E. 958, 145 Ill. 551); Denham v. Washington Water Power Co., 80 Pac. 546, 547, 38 Wash. 354.

Telegraph or telephone company

A telephone like a telegraph company is a "common carrier" of news. State v. Cumberland Telephone & Telegraph Co., 86 S. W. 390, 391, 114 Tenn. 194; State ex rel. Goodwine v. Cadwallader, 87 N. E. 644, 647, 89 N. E. 319, 172 Ind. 619; Brandon v. Cumberland Telephone & Telegraph Co., 143 S. W. 11, 12, 146 Ky. 639; Mooreland Rural Telephone Co. v. Mouch, 96 N. E. 193, 195, 48 Ind. App. 521.

A telegraph company is a "common carrier" by statute. Blackwell Milling & Elevator Co. v. Western Union Tel. Co., 89 Pac. 235, 236, 17 Okl. 376, 10 Ann. Cas. 855.

A telephone company is a "common carrier" within Civ. Code, § 73, providing for the bringing of actions against a "common car-

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rier." Louisville Home Telephone Co. v. Beeler's Adm'r, 101 S. W. 397, 401, 125 Ky. 366.

A telegraph company is in the nature of a common carrier, and, subject to reasonable regulations, is required to receive and promptly transmit and deliver all messages tendered in good faith. Cogdell v. Western Union Tel. Co., 47 S. E. 490, 491, 135 N. C. 431.

Public telephone lines are "common carriers," and by Burns' Ann. St. 1908, § 5802, telephone companies must supply all applicants within local limits with telephone connections and facilities without discrimination. Home Telephone Co. v. North Manchester Telephone Co., 92 N. E. 558, 47 Ind. App. 411.

Under Civ. Code, §§ 1576, 1577, a carrier of messages by telegraph is a "common carrier," and required to use "the utmost diligence." Lothian v. Western Union Telegraph Co., 126 N. W. 621, 622, 25 S. D. 319.

A telephone company is a "common carrier" of communication, and as such must supply all alike who are situated alike, without discrimination. Southwestern Telegraph & Telephone Co. v. Danaher (Ark.) 144 S. W. 925, 927.

Where title to Laws 1907, c. 90, recited that the act created and defined powers of railway companies and common carriers, etc., and in the act defined telegraph companies as common carriers, it substantially complied with Const. art. 3, § 11, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title. Western Union Telegraph Co. v. State, 124 N. W. 937, 940, 86 Neb. 17.

Code 1906, § 5007, being part of chapter 145, relating to trusts and combines, and providing that, in a suit by any person injured by a trust or combine, proof that such person has been compelled to pay more for services rendered by a public service corporation by reason of such combine than he would have been compelled to pay but for such agreement or combine, shall be conclusive evidence of damage and of unlawful purpose, does not indicate an intention of the Legislature that the anti-trust laws should apply to discriminations in rates made by a telephone company, defined to be a "common carrier" by the laws for the supervision of common carriers. Cumberland Telephone & Telegraph Co. v. State ex rel. Attorney General, 54 South. 446, 450, 99 Miss. 1; Same v. McCorkle (Miss.) 54 South. 450; Same v. Patrick & Smith, Id.; Same v. J. Y. Harris & Co., Id.; Same v. McDade, Id.

Toll bridge

The owner of a toll bridge is not a "common carrier," for in general he has no possession or control over the goods passing over it, and he is not like a stageowner or a railroad company, yet he is under the duty to keep the bridge in a reasonably safe condition for travel, and is only liable for negligence in failing to so keep it. Gibler v. Terminal R. R. Ass'n of St. Louis, 101 S. W. 37, 39, 203 Mo. 208, 11 Ann. Cas. 1194.

Towboats, tugs, etc.

A towing tug is not a "common carrier" nor an insurer, and is bound only to the exercise of reasonable skill and care taking into consideration the fact that it contracts as an expert and is bound to know the channel and its usual currents and dangers and to avoid obstructions which ought to be known to men experienced in its navigation. The El Rio, 162 Fed. 567.

"A tug is not, in relation to its tow, a 'common carrier,' being only bound to the exercise of ordinary care." A contract of towage by which the tow assumes all risks, releases the tug from the liability for her own negligence resulting in injury to the tow. The Oceanica, 170 Fed. 893, 894, 96 C. C. A. 69 (quoting and adopting definition in The Margaret, 94 U. S. 495, 24 L. Ed. 146).

Wharfage business

A corporation created to carry on, conformably to a municipal ordinance and a confirmatory statute intended to secure public shipping facilities, a wharfage business at a seaport and to furnish terminal facilities for a railway and steamship system of which it forms a part and by which it is controlled through a holding company, is a common carrier, and as such is subject to the jurisdiction of the Interstate Commerce Commission acting in the exercise of its authority, under the act to regulate commerce, to prohibit undue preferences. Southern Pac. Terminal Co. v. Interstate Commerce Commission, 31 Sup. Ct. 279, 286, 219 U. S. 498, 55 L. Ed. 310.

COMMON CARRIER OF BANK BILLS

A "common carrier" is one carrying passengers, or goods, wares, and merchandise for compensation or hire. A river steamboat carrying goods, wares, and merchandise and passengers, but not ordinarily or usually engaged in the business of carrying bank bills, is not a common carrier of bank bills. Lee v. Burgess, 9 Bush (72 Ky.) 652–655 (citing 2 Pars. Cont. 163).

COMMON CARRIER OF CATTLE

A "common carrier" of goods which transports live stock is as to the latter property also a common carrier. Central of Georgia Ry. Co. v. Hall, 52 S. E. 679, 681, 124 Ga. 322, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170 (citing Hutchinson on Carriers [2d Ed.] § 221).

COMMON CARRIER OF PASSENGERS

"A 'common carrier of passengers' is one who is engaged in a public calling which imposes upon him the duty to serve all without discrimination." Birmingham R., Light & Power Co. v. Adams, 40 South. 385, 386, 146 Ala. 267, 119 Am. St. Rep. 27 (citing 6 Cyc. p. 533).

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A "common carrier" of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a "common carrier" it is necessary that he should hold himself out to the community as such. A livery stable keeper, who lets a conveyance for a special journey, and furnishes a driver therefor, is merely a private carrier for hire, and is bound only to exercise that degree of care and skill in the selection of a vehicle, team, and driver which a prudent man would bestow in such a matter, and is not liable for injuries caused to a person in the vehicle, occasioned by negligent driving. McGregor v. Gill, 86 S. W. 318, 319, 114 Tenn. 521, 108 Am. St. Rep. 919 (quoting and adopting definition in Nashville & C. R. Co. v. Messino, 1 Sneed [33 Tenn.] 220).

The state owned and operated an inclined railway at a park. It posted notices calling attention to the railway, the fare charged to ride thereon, had ticket offices, maintained the structure, provided the cars and machinery which ran them, and received the revenue of its operation. Held, that the state was a common carrier of passengers for hire, subject to liability as such. Burke v. State, 119 N. Y. Supp. 1089, 1104, 1105, 64 Misc. Rep. 558.

One who occasionally carriers a passenger as a matter of special accommodation and agreement does not thereby become a "common carrier of passengers"; he only becomes such when the carrying of passengers becomes an habitual business. The fact that a railroad had been in the habit of occasionally transporting some passengers upon freight trains did not make such railroad a common carrier of passengers upon such freight trains. Murch v. Concord R. Corp., 9 Fost. (29 N. H.) 9, 42, 61 Am. Dec. 631.

Elevators in buildings

A company operating a passenger elevator in a large building used by tenants is a "common carrier of passengers." Ohio Val. Trust Co. v. Wernke, 84 N. E. 999, 1002, 42 Ind. App. 326.

COMMON COUNTS

The "common counts" charge a general right to money based on something that has been done, that is, fully performed, so that nothing remains but the payment of the money so earned; hence a real estate commission fully earned under express contract may be recovered under the common counts. Risley v. Beaumont, 59 Atl. 145, 146, 71 N. J. Law, 372.

COMMON DESIGN

As used in an instruction to a jury that "a 'common design' and unlawful purpose by two or more persons is the essence of the charge of conspiracy, and this common design or unlawful purpose must be proved in order to warrant a conviction, either by direct evidence, or by proof of such circumstances as naturally tend to prove it and sufficient in themselves to satisfy the jury of the existence of such common design beyond a reasonable doubt," the phrases "common design" and "unlawful purpose" must be construed as having been used as synonymous. Imboden v. People, 90 Pac. 608, 622, 40 Colo. 142.

COMMON EARTHENWARE

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 94, 30 Stat. 156, providing for "common yellow * * * earthenware," "common" is not a commercial, but a descriptive, term; and Sarreguemines ware, which is of a superior quality, is not within said provision. United States v. Reugger, 167 Fed. 142, 143.

So-called "carmelite ware," consisting of earthen cooking ware of a dark brown color, some of the articles having a white lining and some no lining, are not within the provision for "common * * * brown * * * earthenware," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 94, 30 Stat. 156. G. M. Thurnauer & Co. v. United States, 165 Fed. 62.

COMMON EMPLOYMENT

An employment is "common" to the servants of the same master, where performed as part of the duty owed by them to the common master. Laragay v. East Jersey Pipe Co., 72 Atl. 57, 59, 77 N. J. Law, 516.

The essence of "common employment" within the fellow-servant rule is a common employer and payment from a common source, and all who work for a common master or who are subject to a common control or derive their compensation from a common source and are engaged in the same general employment, working to accomplish the same general end, though it may be in different departments or grades of it, are coemployés. A member of a railroad fence gang and the foreman are fellow servants. Sartin v. Oregon Short Line R. Co., 76 Pac. 219, 220, 27 Utah, 447.

Whether an employment is common in the legal sense, so as to render employés fellow servants, is not determined by the character of work done by each, but by the purpose towards which the work is directed, and, if the purpose be a common one and the work of each servant be but complementary to that of the other in accomplishing the general purpose, it is a common employment. Sloppy v. Pennsylvania R. Co., 77 Atl. 1010, 1011, 228 Pa. 636.

COMMON FAME

"Common fame," which serves to establish a character either of a person or thing, is competent evidence to substantiate an issue as to whether a house in question is habitually used as a disorderly house. State v. McGinnis, 108 Pac. 132, 133, 56 Or. 163 (citing 3 Words and Phrases, p. 2672).

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COMMON FIELDS

The terms "common fields" and "commons" are of French origin, and were used in Acts Cong. June 13, 1812, c. 99, 2 Stat. 748, May 26, 1824, c. 184, 4 Stat. 65, and Jan. 27, 1831, c. 12, 4 Stat. 435, relating to title to such lands in Louisiana Purchase territory—"common fields" to designate fields cultivated outside a village by the inhabitants, in severalty, though generally under a common fence; and "commons" to designate a large body of land held in common and used for pasturage, fuel, etc. City of St. Louis v. St. Louis Blast Furnace Co., 138 S. W. 641, 643, 235 Mo. 1.

COMMON GAMBLER

Whoever, for the purpose of gaming with cards or otherwise, travels about from place to place, or frequents any place where gambling is permitted, or engages in gambling for livelihood, is a "common gambler." Burns' Ann. St. 1901, § 2180. Bickell v. State, 70 N. E. 548, 32 Ind. App. 656.

A person who deals faro once may not be a "common gambler," but he may be taken and held to be such or, in other words, may rank as a common gambler in point of criminality where the statute expressly so provides. State v. Melville, 11 R. I. 417, 418.

Under Penal Law, § 970, which provides that a person "who engages as dealer, gamekeeper or player in any gambling or banking game, where money or property is dependent upon the result," is a "common gambler," a person participating in a game of draw poker, and who, before the hand is opened, takes off one or two chips or checks from the pile in the center of the table, and places them in front of him in a separate pile from the chips he is playing with, so distinguishes his conduct from that of the other players as to justify a finding that he was a common gambler. People v. Bright, 96 N. E. 362, 363, 203 N. Y. 73, Ann. Cas. 1913A, 771.

Pen. Law, § 970, provides that a person who "engages" as player, gamekeeper, or dealer in any gambling or banking game, where money or property is dependent on the result, is a "common gambler." Code Cr. Proc. § 399, provides that a conviction cannot be had on the testimony of an accomplice, unless corroborated by such other evidence as tends to connect the defendant with the commission of the crime. The only witness in a prosecution under section 970 was a person who had participated in a game of draw poker at which defendant, before the hand was opened, took one or two chips from the pile in the center of the table, and put them in a separate pile from the chips he was playing with, and had himself acted as dealer when it came to his turn to deal. Held, that the phrase "who engages" means something more than occasional participation, and imports some continuity of practice, just as the word "common" implies that a common gambler is a person who customarily, or habitually, or frequently carries on the gambling practices in violation of the statute, as a money-making pursuit; and hence that the witness was not an accomplice whose testimony required corroboration. People v. Bright, 96 N. E. 362, 364, 203 N. Y. 73, Ann. Cas. 1913A, 771.

COMMON HIGHWAY

The provision in Const. art. 9, § 1, that navigable waters therein referred to "shall be common highways and forever free," etc., does not refer to physical obstructions of the waters, but refers to political regulations which would hamper the freedom of commerce. In re Southern Wisconsin Power Co., 122 N. W. 801, 807, 140 Wis. 245.

Under Rev. Code 1852, p. 491, c. 60, § 1, as amended in 1893, "all public roads, causeways and bridges heretofore laid out as such, or made by lawful authority, or which have been used as such, and maintained at the public charge for twenty years, are declared to be 'common highways.'" The provision relates only to public highways existing when the act was passed and was intended to modify the common-law rule respecting roads claimed to be such by the indulgence of landowners, so as to prevent forfeiture of their lands. State v. Southard (Del.) 66 Atl. 372, 373, 6 Pennewill, 247.

COMMON INFORMERS

As informer, see Informer.

A "common informer" is one who, without being specially required by law or by virtue of his office, gives information of crimes, offenses, or misdemeanors which have been committed, in order to prosecute the offender. Bryant v. Skillman Hardware Co., 69 Atl. 23, 24, 76 N. J. Law, 45 (quoting and adopting definition in Bouv. Law Dict.).

"It would seem at the common law actions to recover penalties prescribed by the law were often prosecuted by what was known as 'common informers.'" Williams v. Wells, Fargo & Co. Express, 177 Fed. 352, 355, 101 C. C. A. 328, 35 L. R. A. (N. S.) 1034, 21 Ann. Cas. 699 (citing 3 Bl. Comm. [Coolidge Ed.] 160).

COMMON INJURY

"Common injury," within the rule that for damages arising from a purely public nuisance producing no special damage to one as distinct from the rest of the public there can be no action, means an injury of the same kind and character and such as naturally arises from the nuisance. Wilcox v. Henry, 77 Pac. 1055, 1057, 35 Wash. 591.

"By 'common injury' is meant an injury of the same kind and character, and such as naturally and necessarily arises from a giv-

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en cause, but not necessarily similar in degree or equal in amount. If the injury is the same in kind to all, it is a common injury, although one may actually be injured or damaged more than another." The injury or damage to one landowner from an unauthorized, illegal assertion by another landowner of a right to the exclusive possession of public land, is an injury suffered in common with all members of the public whose live stock grazes in the vicinity of such public lands, and, if a nuisance, is a public nuisance, which cannot be enjoined by the individual landowner unless he shows some special injury peculiar to himself, differing in kind, and not merely in extent and degree, from the general injury to the public. Anthony Wilkinson Live Stock Co. v. McIlquam, 83 Pac. 364, 371, 14 Wyo. 209, 3 L. R. A. (N. S.) 733 (quoting and adopting Wood on Nuisances, § 69).

COMMON LABORER

One who seeks to assert a laborer's lien for work performed under an employment as "superintendent and general manager" of a sawmill does not show a right to foreclosure; he not being a common laborer. Cox v. Fletcher & Adams, 63 S. E. 61, 5 Ga. App. 297.

To speak in a judicial decision of a witness who merely undertook to qualify himself by saying that he had been on the railroad off and on for 12 or 15 years, as being a "common laborer," was to use the phrase quoted as merely descriptio personæ. It could not have been intended to mean that a common laborer was not qualified to speak of the rate of speed of a going railroad train, since a common laborer, as such, on the witness stand in a nonexpert matter, is under no ban known to the law. Stotler v. Chicago & A. R. Co., 98 S. W. 509, 514, 200 Mo. 107.

COMMON LANDS

The phrase "common lands," in Laws 1818, c. 155, relative to the power by town trustees over common lands of the town, designates lands held in common by the proprietors and not in any technical sense, and the term is used interchangeably with the term "undivided lands." Trustees of Freeholders, etc., of Town of Southampton v. Beets, 47 N. Y. Supp. 697, 700, 21 App. Div. 435.

COMMON LAW

The "common law" imports a system of unwritten law, not evidenced by statute, but by tradition, and the opinions and judgments of the sages of the law. State ex rel. O'Malley v. Musick, 130 S. W. 398, 402, 145 Mo. App. 33.

The term "common law" does not have a fixed meaning, the law varying in different centuries and states; but, viewed objectively and at large as a system of deducing from litigated instances just, reasonable, and consistent rules, the common law never changes. Metropolitan Casualty Ins. Co. v. Clark, 129 N. W. 1065, 1066, 145 Wis. 181, 37 L. R. A. (N. S.) 717.

That which is termed the "common law" is simply the "right reason of the thing" in matters as to which there is no statutory enactment. When it is misconceived, and wrongly declared, the common rule is equally subject to be overruled, whether it is an ancient or recent decision. Geddis v. Northwestern Trust Co., 122 N. W. 587, 590, 23 S. D. 531 (citing Wilson v. Leary, 26 S. E. 630, 120 N. C. 90, 38 L. R. A. 240, 58 Am. St. Rep. 778).

"The 'common law' includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature." Kansas v. Colorado, 27 Sup. Ct. 655, 667, 206 U. S. 46, 51 L. Ed. 956 (quoting 1 Kent. Comm. p. 471).

There is no "common law of the United States." When a common-law right is asserted, we look to the state in which the controversy originated. Judicial decisions of the state must determine how far the common law has been introduced in each state. Kennedy v. Delaware Cotton Co. (Del.) 58 Atl. 825, 828, 4 Pennewill, 477.

"The common law has been aptly called the 'lex non scripta,' because it is a rule prescribed by the common consent and agreement of the community as one applicable to its different relations, and capable of preserving the peace, good order, and harmony of society, and rendering unto every one that which of right belongs to him. Its sources are to be found in the usages, habits, manners, and customs of a people; its seat in the breast of the judges who are its expounders. * * * The common law of a country will never be entirely stationary, but will be modified and extended by analogy, construction, and custom, so as to embrace new relations." Moss Point Lumber Co. v. Board of Sup'rs of Harrison County, 42 South. 290, 309, 89 Miss. 448.

There is no common law of the United States. Rev. St. § 4965, imposing a penalty for infringement of the copyright of any map, picture, work of sculpture, etc., unlike section 4964, relating to books, does not give the proprietor a right to maintain a civil action at law to recover damages for the infringement, and, the exclusive right of property in such artistic productions being purely statutory, the remedy for infringement is limited to that prescribed by the statute; there being no common law of the United States which can be invoked to supplement such remedy. Walker v. Globe Newspaper Co., 130 Fed. 593, 596.

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As common law of England

According to Kent, the "common law" is the common jurisprudence of the people of the United States, and was brought with them as colonists from England, and established here so far as it was adapted to our institutions and circumstances. From the time of their acquisition by the United States until 1868, the "common law" was prevalent over the separate portions of the region from which the state of Kansas was erected, under all civilized forms of governmental organization established for them; and from 1855 until 1868 the "common law," not inconsistent with the Constitution of the United States, the Kansas-Nebraska act, or statute law, was the rule of action and decision, any law, custom, or usage to the contrary notwithstanding. Clark v. Allaman, 80 Pac. 571, 575, 71 Kan. 206, 70 L. R. A. 971.

The phrase "common law," as used in Rev. St. Wyo. 1899, § 2695, providing that the common law of England as modified by judicial decisions, so far as the same is of general nature and not inapplicable, and all declaratory or remedial acts or statutes made in aid thereof, or to supply defects therein, shall be the rule of decision in the state, does not include the judicial decisions of England on a subject rendered subsequently to the independence of America; but, as evidence of what the common law as adopted is, such decisions are entitled to respect and in particular cases may properly be regarded as conclusive. The common law of England at the time of its adoption by the statute had no relation to a master's liability for injuries to a servant. Hence the decisions of the English courts prior to the adoption of the employers' liability act are not binding on the courts in a case involving the right of a servant to recover of his master for injuries received while in the service of the master. Johnson v. Union Pac. Coal Co., 76 Pac. 1089, 1093, 28 Utah, 46, 67 L. R. A. 506.

The common law of England will be applied here when it is not changed by statute, unless new conditions or a different public policy demand that it be modified, and the adoption by the people of the state of such parts of the common law as were in force April 20, 1777, does not compel adoption of principles inapplicable to different circumstances. Town of Brookhaven v. Smith, 80 N. E. 665, 667, 188 N. Y. 74.

The phrase "common law as practiced and understood," as used in St. 1779, providing that the common law as it is generally practiced and understood in the New England states be established as the common law of the state, probably meant as considered or altered by statute or by judicial construction and as it was adapted to the local circumstances and usages. Under V. S. § 898, providing that so much of the common law of England as is applicable to the local situation and circumstances and not repugnant to the Constitution and laws shall be the law of the state, St. 9 Anne, c. 20, providing that in mandamus to municipal corporations and their officers relator may plead to or traverse the material facts contained in the return, to which defendant may reply, take issue, or demur, and authorize such further proceedings as could have been had if relator had brought his action on the case for a false return, is a part of the common law of Vermont, as is St. 4 Anne, c. 16, § 4, making it lawful for any defendant or tenant in any action or suit in a court of record to plead as many several matters in distinct pleas as he thinks necessary. Clement v. Graham, 63 Atl. 146, 148, 78 Vt. 290.

COMMON-LAW ACTION OR CASE

Mandamus is a common-law action. People ex rel. Baumann v. Gest, 148 Ill. App. 560, 565.

"Common-law cases" embrace only cases which were the subject of real, personal, or mixed actions according to the practice of the English common-law courts, and not those proceedings which were not known to the common law and are only authorized under statute, such as possessory warrants and the like. Lippitt v. City of Albany, 63 S. E. 33, 34, 131 Ga. 629 (citing and quoting De Lamar v. Dollar, 57 S. E. 85, 128 Ga. 57).

The phrase "common-law causes," as used in Rev. St. § 916, providing that the party recovering a judgment in any common-law cause in any Circuit or District Court shall be entitled to similar remedies on the same by execution or otherwise to reach the property of the judgment debtor as are provided in like causes by the laws of the state in which such court is held, does not apply to judgments in criminal cases. Allen v. Clark, 126 Fed. 738, 740, 62 C. C. A. 58.

COMMON-LAW ARBITRATION

See Arbitration.

COMMON-LAW ASSIGNMENT

Under Comp. Laws, § 9539, providing that all assignments commonly called common-law assignments for the benefit of creditors shall be void unless they shall be without preferences as among creditors, and shall be of all the property of the assignor not exempt from execution, the term "common-law assignment for the benefit of creditors" imports a writing amounting to a conveyance of the title to all or substantially all of a debtor's property to another in trust for the purpose of closing out his business, converting his property into money and distributing it among his creditors to the extent of payment, if possible, and, if not, proportionally or with prescribed preferences. A debtor who had several creditors gave one of them an order on a school board which owed him money, as follows: "Board of Educa-

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tion City: Please pay to Norton Bros. or order the sum of five hundred and forty-two dollars, and charge same to my account, and oblige, Leonard Gonhue." The order was given with the agreement that the payees should collect the money, pay their own claim, and pay the remainder to certain other creditors of the drawer whose names were furnished. The aggregate of these claims was more than the amount of the order, and the drawer had other debts amounting to about $700 and other property worth from $200 to $300. Held, that the order was not a common-law assignment for the benefit of creditors within Comp. Laws, § 9539, providing that such assignments must be without preferences as among creditors, and must be of all of the property of the assignor. Charles Maloney & Co. v. Gonhue, 116 N. W. 436, 152 Mich. 325.

COMMON-LAW BOND

"Common-law bonds" and "statutory bonds" are to be distinguished, in that the latter conform to a statute, while the former do not, though so intended. City of Mt. Vernon v. Brett, 86 N. E. 6, 10, 193 N. Y. 276.

COMMON-LAW CRIMES

See Common-Law Murder.

Embezzlement as, see Embezzle—Embezzlement.

It is well settled that there are no "common-law offenses" against the United States. United States v. Hoover, 133 Fed. 950, 952.

There is no "common law" of the United States in criminal cases; each crime being the creation of the statute defining it. It is competent for Congress to designate that as perjury which, in a state where the common law prevails, would be treated as false swearing. United States v. Hardison, 135 Fed. 419, 422.

There are no "common-law crimes" in Ohio. Whenever the Legislature has deemed it necessary to penalize the acts of one which are done and performed after the commission of the principal offense, it has enacted statutes to meet the case, and such acts are made a substantive offense as distinguished from the relation of accessory after the fact as recognized at common law, as in cases for receiving stolen goods and the like. State v. Lingafelter, 83 N. E. 897, 898, 77 Ohio St. 523.

COMMON-LAW DEDICATION

See Dedication.

Statutory dedication distinguished, see Statutory Dedication.

COMMON-LAW JURISDICTION

See Error or Mistake as to Common-Law or Equity Jurisdiction.

Courts having "common-law jurisdiction," within the meaning of Rev. St. § 2165, relating to naturalization, are those which have the power to punish offenses, enforce rights, or redress wrongs recognized by the common law, or courts which are governed by the principles and rules of the common law. The term is used to distinguish courts which have some common-law jurisdiction from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law. Levin v. United States, 128 Fed. 826, 832, 63 C. C. A. 476.

COMMON-LAW LIEN

See Lien.

A "common-law lien" is "a right in one man to retain that which is in his possession belonging to another till demands of him (the person in possession) are satisfied. * * * It is founded upon the immemorial recognition of the common law of a right to it in particular cases, or it may result from the established usage of a particular trade." Nicolette Lumber Co. v. People's Coal Co., 62 Atl. 1060, 1061, 213 Pa. 379, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550, 5 Ann. Cas. 387.

"Common-law liens arise by implication of law, and not by express contract." Where a corporation advanced money to a bankrupt with which to purchase tobacco to be shipped to the corporation for sale, under an agreement that the corporation was to have a lien on the tobacco so purchased, and that the debt for advanced commissions, insurance, etc., was to be "paid out of the proceeds of the sales when made," the lien of the corporation was not a common-law lien, personal to the corporation, but was an equitable lien, which attached to the claim and passed to the corporation's successor, which purchased its assets on its insolvency. Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee, 78 S. W. 413, 415, 117 Ky. 478, 64 L. R. A. 219.

COMMON-LAW MARRIAGE

See Marriage Per Verba de Futuro Cum Copula.

A "common-law marriage" is one not consummated by ceremony but arising out of express contract or continued cohabitation as man and wife. In re Imboden's Estate, 107 S. W. 400, 404, 128 Mo. App. 555.

Under Code, § 3139, defining marriage as a civil contract, and section 3145, declaring who may solemnize marriages, a common-law marriage consisting of a present agreement to be husband and wife, followed by cohabitation as such, is valid. Pegg v. Pegg, 115 N. W. 1027, 1028, 138 Iowa, 572.

A "common-law marriage" is defined as any mutual agreement between the parties to be husband and wife in præsenti, especially where it is followed by cohabitation, if there is no legal disability on the part of either to contract matrimony. In re Wells'

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Estate, 108 N. Y. Supp. 164, 166, 123 App. Div. 79 (citing 2 Kent's Comm. 87; Rose v. Clark [N. Y.] 8 Paige, 574, 580).

To constitute a "common-law marriage" there must be an agreement expressed or implied to become man and wife, and, while cohabitation is one of the evidences of marriage, cohabitation without the agreement to become man and wife does not raise that relation. Where a man and woman commenced to cohabit at a time when the woman was the wife of another, and there was no evidence of any subsequent change in their intention as to the relations existing between them, the fact that after she secured a divorce they held themselves out as husband and wife was not sufficient to establish a common-law marriage. Edelstein v. Brown, 80 S. W. 1027, 35 Tex. Civ. App. 625.

A "common-law marriage" is not effected by occasional cohabitation after an express promise to have a marriage ceremony performed, which is not fulfilled, but cohabitation and reputation conjoined are the essential facts from which a presumption of common-law marriage arises. In re Callery's Estate, 75 Atl. 672, 673, 226 Pa. 469 (citing In re Yardley's Estate, 75 Pa. 207).

Living together as man and wife under a mutual agreement to live in the relation constitutes a "common-law marriage" under the laws of Texas, which do not make a license a prerequisite to a valid marriage. Knight v. State, 116 S. W. 56, 58, 55 Tex. Cr. R. 243.

An agreement to live together as husband and wife, made with the intention of being carried into effect, is not sufficient to constitute a "common-law marriage," unless it is acted upon by the parties living together as husband and wife. Sorensen v. Sorensen, 100 N. W. 930, 933, 68 Neb. 483.

A marriage may be good and valid at common law, though not solemnized in any particular form; it being sufficient if there is an actual and mutual agreement to enter into a matrimonial relation between parties capable in law of making such a contract. White v. Hill (Ala.) 58 South. 444, 447.

A "marriage" is valid at common law where the parties of marriageable ages and under no legal disability agree to live together as husband and wife, and the agreement is consummated by their living together as husband and wife. Porter v. United States, 104 S. W. 855, 857, 7 Ind. T. 616.

A common-law marriage prior to the act of 1905 (Laws 1905, p. 317), amending the law on the subject is established where what is done and said evidences an intention by the parties to assume the marriage status, and the parties thereupon enter into the relation of husband and wife. Herald v. Moker, 100 N. E. 277, 278, 257 Ill. 27.

The essential element of a "common-law marriage" is a mutual agreement of the man and woman to become then and thenceforth husband and wife. Wofford v. State, 132 S. W. 929, 931, 60 Tex. Cr. R. 624.

COMMON-LAW MURDER

"Common-law murder" may be committed without any actual design to take life, and drunkenness can be no defense to that charge; but, under a statute which divides murder into degrees, drunkenness may reduce a homicide from murder to manslaughter where it is so extreme as to prevent the existence of an intention to kill. State v. Rumble, 105 Pac. 1, 3, 81 Kan. 16, 25 L. R. A. (N. S.) 376.

COMMON-LAW REMEDY

Under federal Judiciary Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76, giving the federal District Courts admiralty and maritime jurisdiction, but "saving to suitors a common-law remedy, where the common law is competent to give it," the quoted clause is intended to save the right of action in those courts which follow the common law as distinguished from admiralty proceedings; the words "common-law remedy" not necessarily implying remedy obtainable in a common-law court, or being equivalent to "means employed to enforce a right or redress an injury," and they are not limited to such causes of action as existed at common law at the passage of such act. Johnson v. Westerfield's Adm'r, 135 S. W. 425, 427, 143 Ky. 10.

COMMON-LAW SPECIALTY

See Specialty.

There are two classes of specialty contracts in the English law—"common-law specialties" and "mercantile specialties." The first class includes bonds and covenants, i. e., instruments under seal; the second class includes bills and notes, and policies of insurance, and possibly other mercantile instruments. Purcell v. Armour Packing Co., 61 S. E. 138, 141, 4 Ga. App. 253.

COMMON-LAW WRIT

See Scire Facias.

COMMON NIGHT WALKER

The words "common night walker" have a technical meaning in law, and in a complaint charging such offense it is not necessary to allege particular acts; the offense not consisting of particular acts but of a habitual practice evidenced by a series of acts. State v. Russell, 14 R. I. 506.

COMMON NUISANCE

See Public or Common Nuisance.
Private nuisance distinguished, See Private Nuisance.

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COMMON OF WAYS IMPLIED

Most "common of ways implied" are ways from necessity, as, where one sells another land so surrounded by other land as to be inaccessible except by passing over such grantor's land, the law implies a grant of way over such land. Graham v. Olson, 92 S. W. 728, 729, 116 Mo. App. 272.

COMMON OR CORPORATE SEAL

A "common or corporate seal" at common law was the seal of a corporation by which the corporate body manifested its acts as such. Morrill's Adm'x v. Catholic Order of Foresters, 65 Atl. 526, 527, 79 Vt. 479.

COMMON PLEAS

See Court of Common Pleas.

COMMON PROSTITUTE

A woman who submits herself to indiscriminate sexual intercourse without hire is as much a "common prostitute" as one who does so solely for hire. State v. Thuna, 109 Pac. 331, 59 Wash. 689, 140 Am. St. Rep. 902.

COMMON PROSTITUTION

See House of Common Prostitution.

COMMON RIGHT

"It [common right] is so called because it exists in all the subjects by the common law, a universal custom; and is thus distinguished from the same right, claimed by a local custom in favor of the inhabitants of a particular place." Strother v. Lucas, 12 Pet. (37 U. S.) 410, 437, 9 L. Ed. 1137.

COMMON ROAD

Code, § 422, subd. 16, empowers the board of supervisors to discontinue any state or territorial highway, and subdivision 17 empowers them to establish or discontinue any county highway through or within the county. Section 751 empowers cities and towns to establish or vacate streets and alleys. Section 48, subd. 5, provides that the words "highway" and "road" include public bridges, and may be held equivalent to the words "county road," "county way," "common road," and "state road." Section 1507 provides that all public streets of villages are a part of the road. Held that, where a plat was made of land dividing it into lots, streets, and alleys prior to the incorporation of a town embracing the land platted, the streets and alleys became county roads subject to the jurisdiction of the board of supervisors, and though after the incorporation of the town the control may have passed to the city council, yet the incorporation of the town having been vacated, the control of the streets and alleys reverted to the board of supervisors. Chrisman v. Brandes, 112 N. W. 833, 835, 137 Iowa, 433.

The authority granted to a railroad by the territorial Legislature of Colorado, by act passed February 9, 1865 (Priv. Laws 1865, p. 111), to construct its railroad on or across "common roads" did not include streets of the several municipalities through which the road might pass. Colorado & Southern Ry. Co. v. City of Ft. Collins, 121 Pac. 747, 749, 52 Colo. 281, Ann. Cas. 1913D, 646.

COMMON SCHOOL

System of common schools, see System.
See, also, Public School.

"The word 'common,' as applied to schools, bears the broadest and most comprehensive signification. It is equivalent to 'public,' subject only to such general statutory regulations as are prescribed by the Legislature. They are 'common' to children in the sense public highways are common to all persons who choose to ride or drive thereon, observing only the law of the road." People ex rel. Brooklyn Children's Aid Soc. v. Hendrickson, 104 N. Y. Supp. 122, 124, 54 Misc. Rep. 337 (quoting and adopting People v. Board of Education of City of Brooklyn [N. Y.] 13 Barb. 400, 401).

A "common school," within Const. art. 9, §§ 2, 3, is one that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of a school district. School Dist. No. 20, Spokane County, v. Bryan, 99 Pac. 28, 29, 51 Wash. 498, 20 L. R. A. (N. S.) 1033.

Const. art. 6, § 2, declares that the Legislature shall encourage the promotion of intellectual, moral, scientific, and agricultural improvement by establishing a uniform system of common schools. Held, that the term "common schools" means free common schools. The phrase "common schools" is synonymous with "public schools." Both have been defined by lexicographers and by judicial interpretation to mean "free schools." In 25 Am. & Eng. Encyc. of L., it is said: "Common or public schools are, as a general rule, schools supported by general taxation, open to all of suitable age and attainments, free of expense, and under the control of agents appointed by the voters." Mr. Black, in his Law Dictionary, defines "common schools" to be "schools maintained at the public expense and administered by a bureau of the state, district, or municipal government, for the gratuitous education of the children of all citizens without distinction." Mr. Anderson, in his Law Dictionary, says: "Common or public schools are schools supported by general taxation, open to all free of expense, and under the control of agents appointed by the voters." Rapalje & Lawrence define "common schools" to be "public or free schools, maintained at public expense, for the elementary education of children of all classes." Mr. Bouvier, in his Law Dictionary, says that "common schools" are "schools for general elementary instruction, free to all the public." Chancellor Kent, in his Commentaries (vol-

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ume 2, p. 195), in discussing free common schools in the several states of the Union, on the continent, and in many European countries, uses the phrase "common schools" exclusively. Board of Education of City of Lawrence v. Dick, 78 Pac. 812, 814, 70 Kan. 434 (citing Jenkins v. Inhabitants of Andover, 103 Mass. 94; Merrick v. Inhabitants of Amherst [Mass.] 12 Allen, 509; Roach v. Board, etc., of St. Louis Public Schools, 77 Mo. 484; Collins v. Henderson, 74 Ky. [11 Bush.] 74; Irvin v. Gregory, 13 S. E. 120, 86 Ga. 605; Roach v. Board, etc., of St. Louis Public Schools, 7 Mo. App. 567; People v. Board of Education of City of Brooklyn [N. Y.] 13 Barb. 400).

Under the legislation relating to the public schools of the state, the charter of the city of Troy, a city of the second class, as amended, and the Constitution, providing for the establishment of a public school system, the schools of the city of Troy are common schools, and a part of the common school system of the state. In re Harris, 109 N. Y. Supp. 983, 985, 58 Misc. Rep. 297.

Graded schools are "common schools." Jeffries v. Board of Trustees of Columbia Graded Common School, 122 S. W. 813, 815, 135 Ky. 488.

College distinguished

The college created by Laws 1910, c. 119, creating a state normal college, is neither a "private school" nor a "common school," within Const. 1890, § 90, subd. "p," prohibiting any local law for the management or support of any private or common school. Turner v. City of Hattiesburg, 53 South. 681, 683, 98 Miss. 337; Same v. County of Forrest (Miss.) 53 South. 684.

"The phrases 'public schools' and 'common schools' have acquired under the legislation and practice a well-settled signification. They are never applied to the higher seminaries of learning, such as incorporated academies and colleges." In re Townsend, 88 N. E. 41, 43, 195 N. Y. 214, 22 L. R. A. (N. S.) 194, 16 Ann. Cas. 921 (quoting and adopting definition in Merrick v. Inhabitants of Amherst, 12 Allen [94 Mass.] 500).

The term "public schools," as used in Const. Okl. art. 13, § 5, providing that supervision of instruction in the public schools shall be vested in a board of education, means the "common schools" and does not include the University of Oklahoma; the terms having acquired in popular signification in the United States the same meaning and being used interchangeably, and there being nothing apparent in the nature and manner of the use of the term "public schools" in the Constitution to indicate that it is intended to attach to it any other signification than its well-known popular one. Regents of University v. Board of Education, 95 Pac. 429, 432, 20 Okl. 800; Elsberry v. Seay, 3 South. 804, 806, 83 Ala. 614; Jenkins v. Inhabitants of Andover, 103 Mass. 94.

High school

A high school is part of the uniform system of "common schools" provided for by Const. art. 6, § 2. Board of Education of City of Topeka v. Welch, 33 Pac. 654, 657, 51 Kan. 792.

Where a high school maintained by a district was a department of the common schools, under the Constitution, which declares that the General Assembly shall provide a system of free schools, the children of the district and of other districts of school age sustained no different relation to the high school from that sustained to any of the grades or other departments of the schools, but the entire system of schools altogether constituted the "common schools" of the district. People v. Moore, 88 N. E. 979, 980, 240 Ill. 408.

Model training school

A model training school, intended to be established by Laws 1907, p. 181, c. 97, by drafting as many pupils as are necessary from the school district in which each normal school is situate, is not a common school within Const. art. 9, §§ 2, 3, requiring that the revenue for common schools shall be exclusively applied to the use and support thereof, and hence so much of such chapter as provides (section 4) for an apportionment of the funds of the school district to the support of such training school contravenes the Constitution. School Dist. No. 20, Spokane County v. Bryan, 99 Pac. 28, 29, 51 Wash. 498, 20 L. R. A. (N. S.) 1033.

COMMON SHOW

Under section 51 of the Greater New York charter, and sections 305 and 352 of ordinances passed pursuant to such charter provision, providing that a license may be required of all common shows, and providing that a "common show" shall be deemed to include Ferris wheel, gravity steeplechase, chute, scenic cave, bicycle carrousel, scenic railway, striking machines, switchback, merry-go-round, puppet shows, ball games, and all "other shows of like character," the giving of a free moving picture show in an ice cream saloon and candy store, while not within the term "other shows of like character," is included in the words "common shows," since those words are not limited by the list given, but include many others not given. Weistblatt v. Bingham, 109 N. Y. Supp. 545, 546, 58 Misc. Rep. 328.

COMMON STOCK

Preferred stock distinguished

Stock Corporation Law, § 47, provides that "every domestic stock corporation may issue 'preferred stock' and 'common stock' and different classes of preferred stock, if the certificate of incorporation so provides,

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or by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose, upon notice such as is required for the annual meeting of the corporation. * * * And the corporation may, upon the written request of the holders of any 'preferred stock,' by a two-thirds vote of its directors, exchange the same for 'common stock,' and issue certificates for common stock therefor, upon such valuation as may have been agreed upon in the certificate of organization of such corporation, or the issue of such 'preferred stock,' or share for share, but the total amount of such capital stock shall not be increased thereby." Held, that the "preferred stock" represented a contribution of capital precisely the same as "common stock," differing only as to the preferred right of the holders to share in dividends or interest. People ex rel. S. Cohn & Co. v. Miller, 72 N. E. 525, 526, 180 N. Y. 16.

COMMON STREET

"A 'common street' and public highway are the same, and any way which is common to all the people may be called a highway." Skinner v. Town of Weathersfield, 63 Atl. 142, 143, 78 Vt. 410 (quoting and adopting definition in State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560).

COMMON SURETY

A "common surety" is one which is engaged in business for profit and on terms and conditions fixed by itself. Long Brothers Grocery Co. v. United States Fidelity & Guaranty Co., 110 S. W. 29, 31, 130 Mo. App. 421.

COMMON TOOLS OF TRADE

The phrase "common tools of trade," as used in an exemption statute, has uniformly been construed to refer, not to tools in common use by the debtor, regardless of their value, but to those simple and inexpensive appliances used in his trade. A dentist's chair is not exempt from levy and sale as a common tool of trade. Burt v. Stocks Coal Co., 46 S. E. 828, 829, 119 Ga. 629, 100 Am. St. Rep. 203.

COMMON TRAVELING PACE

Under Gen. Laws 1896, c. 74, § 5, as amended by Pub. Laws 1901, p. 336, c. 925, providing that every person who shall ride or drive faster than a common traveling pace in certain cities, or the compact part of any town, shall be fined, etc., a "common traveling pace" means a pace which is reasonable and proper considering the place and circumstances, an ordinary pace, a pace recognized by reasonable men as a common traveling pace. State v. Smith, 69 Atl. 1061, 1063, 29 R. I. 245; Same v. McCabe (R. I.) 69 Atl. 1064; Same v. Peterson, Id.; Same v. Samuels, Id.; Same v. Durfee, Id.; Same v. Knott, Id.

COMMON USAGE

The phrase according to "common usage," as used in Rev. St. § 866, authorizing the court to "grant a dedimus potestatem to take depositions according to 'common usage,' means according to the existing practice, whether at law or in equity; that is, by a commission upon interrogatories and cross-interrogatories, as was the common usage both at the time when section 866 was passed in 1874, and at the time of the passage of the judiciary act of 1789, in which substantially the same provision was enacted." Encyclopædia Britannica Co. v. Werner Co., 138 Fed. 461, 462 (quoting United States v. Fifty Boxes and Packages of Lace, 92 Fed. 602).

COMMON USE

A street railway company obtained from a borough the right to use a certain street; the borough reserving the right to reserve the "common use" of such street to another company in common with the first company, and the street being sufficiently broad to accommodate two parallel tracks. Held, that the "common use" of the street did not mean common use of the first company's tracks, and that the borough could not require a later company having permission to use the same street to so lay its track as to straddle the tracks of the other company. Commonwealth v. Bond, 63 Atl. 741, 742, 214 Pa. 307, 112 Am. St. Rep. 745.

COMMON WOMEN

"A condition attached to a devise to sons, that if at any time they should marry 'common women' then their interest in the estate devised should terminate, was void for uncertainty. The word 'common' means not excellent or distinguished in tone or quality; ordinary; commonplace; plebeian; hackneyed; coarse; low; unclean; or given to habits of lewdness. These are some of its accepted definitions, and we can easily see from them that its meaning has a very wide range and is capable of almost indefinite expansion. It certainly embraces a very large class of people of different types and characteristics, and, apart from any objection that, perhaps, may properly be urged against the condition as being too comprehensive by reason of the broad signification of the word which was used to describe the persons intended, it has not the element of certainty which the law requires, as it refers to different classes of individuals, without in any way indicating which one of those classes was meant." Watts v. Griffin, 50 S. E. 218, 220, 137 N. C. 572.

COMMONS

See, also, Park.

"The word 'commons,' as used in 2 Wagner's St. 1872, p. 1314, § 1 (Rev. St. 1899, § 6004; Ann. St. 1906, p. 3032), means lands included in or belonging to a town, set apart

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for public use." State ex inf. Rosenberger v. Town of Bellflower, 108 S. W. 117, 119, 129 Mo. App. 138 (quoting and adopting definition in State ex rel. Patterson v. McReynolds, 61 Mo. 203).

The terms "common fields" and "commons" are of French origin, and were used in Acts Cong. June 13, 1812, c. 99, May. 26, 1824, c. 184, and Jan. 27, 1831, c. 12, relating to title to such lands in Louisiana Purchase territory—"common fields" to designate fields cultivated outside a village by the inhabitants, in severalty, though generally under a common fence; and "commons" to designate a large body of land held in common and used for pasturage, fuel, etc. City of St. Louis v. St. Louis Blast Furnace Co., 138 S. W. 641, 643, 235 Mo. 1.

Rev. St. 1909, § 8529, provides that, if a majority of the inhabitants of a portion of a city or town desire incorporation, they may present a petition setting forth the metes and bounds of their city and town, and commons, and pray that they may be incorporated, and for the preservation and regulation of any commons. Held, that the word "commons," as so used, should not be construed to mean the narrow rectangular pieces of ground appertaining to French and Spanish villages as anciently established, and hence as obsolete and without effect, but to mean land held in common, according to modern acceptation, as by all the members of a community, a tract intended for pleasure, pasturage, etc., the use of which was to belong to the public or a number of persons, including parks, squares, and public grounds intended for general public purposes, and hence a petition for incorporation omitting all reference to "commons" was insufficient to confer jurisdiction on the county court to grant incorporation. State ex rel. Major v. Wood, 135 S. W. 932, 933, 934, 233 Mo. 357.

The word "commons," in Rev. St. 1889, § 1666, providing for the incorporation of towns and villages on petition of over two-thirds of the inhabitants, setting forth the metes and bounds of their village and commons, means public grounds belonging or appurtenant to the town or village, and not farms or agricultural lands in the vicinity. State ex rel. White v. Small, 109 S. W. 1079, 1081, 131 Mo. App. 470.

COMMONWEALTH

See Assertion of Title by the Commonwealth; Counsel for Commonwealth; Courts of this Commonwealth; Property of the Commonwealth.

COMMUNICATE

See Paid Communication.

Any communication, see Any.

"Made" signifies action; but, when a person has "communicated" to another a written statement by reading it to him and delivering it to him, that statement has been "made to" such other person, within the meaning of the law. The words "made to" do not necessarily imply that the one communicating and using the statement also composed it or made it up. "Made known" is a synonym of "communicate," according to Soule's Dictionary of English Synonyms, 84. The verb "make" has many significations and conveys many meanings, among which is "to put forth; give out; deliver." Also, "to inform; apprise." Century Dictionary. Thus when a person seeking credit hands to a merchant a materially false written statement concerning his financial condition, no matter who composed and signed it, if it be one calculated to deceive, and then reads it to such merchant, and thereby obtains property from him on credit, he has obtained property on credit upon a materially false statement in writing "made to" such person. In re Aldridge, 168 Fed. 93, 98, 99.

The word "communicating," when used to refer to the different portions of dwelling houses, whether constructed originally under one roof or not, means houses so connected by some structure forming a part of both as to afford a passageway without going into the yard or getting on the ground. Under an insurance policy covering a two-story frame building and its additions adjoining and communicating, a servant's house 150 feet distant from the two-story building, although occupied exclusively by domestic servants employed in the dwelling house and connected therewith by a system of call bells, was not an addition adjoining and communicating. North British & Mercantile Ins. Co. v. Tye, 58 S. E. 110, 112, 1 Ga. App. 380.

An indictment charging that defendant "did by a written communication threaten injury to A. G., etc.," is a sufficient allegation that there was a delivery to A. G., being substantially the words of the statute (L. O. L. § 1929); a threat being a declaration of a purpose to work an injury to another and designedly put forth by the individual making the threat, either directly or indirectly, so as to operate upon the mind of the person threatened, and a "communication" being that which is communicated or imparted; intelligence; news; a verbal or written message; and these two words in the indictment include not only the utterance of the threat, but also the bringing the same to the notice of the person threatened. State v. Scott, 128 Pac. 441, 442, 63 Or. 444 (citing 8 Words and Phrases, p. 8964).

COMMUNICATION OF DISEASE

As cruelty, see Cruelty.

COMMUNICATIONS

See Confidential Communication; Personal Communication; Privileged Communication.

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The terms "transactions" and "communications," as used in Code Civ. Proc. § 829, which provides that upon the trial of an action a party or person interested in the event shall not be examined as a witness in his behalf or interest, against the executor, administrator, or survivor of a deceased person, concerning a personal transaction or communication between the witness and the decedent, embraces every variety of affairs which can form the subject of negotiations, interviews, or actions between two persons, and includes every method by which one person can derive impressions or information from the conduct, condition, or language of another. Wilber v. Gillespie, 112 N. Y. Supp. 20, 25, 127 App. Div. 604 (quoting and adopting definition in Holcomb v. Holcomb, 95 N. Y. 316); Holland v. Holland, 90 N. Y. Supp. 208, 211, 98 App. Div. 366 (citing Holcomb v. Holcomb, 95 N. Y. 316).

A claimant against decedent's estate cannot prove by his own testimony either an express contract for services, which would be a "communication" with the deceased, nor an implied contract, by showing a "personal transaction" as services rendered. Knight v. Everett, 67 S. E. 328, 152 N. C. 118.

On the issue as to whether a will was the result of an insane delusion, conceived by testator towards his wife about the time of his mother's death, testimony of the wife that, while traveling to the mother's funeral on a train, the testator sat several seats behind his wife, and that every time she looked back at him he was "gazing" at her, was not inadmissible as being a "communication" with the testator. Lanham v. Lanham (Tex.) 146 S. W. 635, 638, 641.

The court did not err in permitting Mrs. Hilley, the plaintiff, to testify, over objections made, as follows: "Captain Hall [the husband and agent of Mrs. Hall, the defendant] came to my house while Mr. Shindlebower was living; was there while Mr. Shindlebower was there on one occasion before Shindlebower left only a few days. With Captain Hall was his son, Dr. Hall. Heard no conversation between my husband and Captain Hall, or Mr. Shindlebower and Captain Hall, on that occasion in regard to the property, except Captain mentioned something about the cistern. Captain Hall inquired of me the dimensions of the house. I gave them to him—how many rooms there were, and the sizes of them. Nothing said on that occasion by me and Mr. Hilley to Captain Hall with reference to the improvements, only what was said concerning the back porch and the cistern. My husband spoke to Mr. Hall's son; said we had one of the best cisterns in Polk county, as well as I recollect; said he put a good substantial porch there. Mr. Hilley just spoke up in this way—says: 'I have built one of the best cisterns in Polk county, and I have built a porch.'" This testimony was objected to on the grounds: (a) "That it occurred in the presence of W. M. Shindlebower. (b) That said testimony about improvements tended to set up the alleged title of the plaintiff, and to affect adversely the defendant's title; it appearing that W. M. Shindlebower was dead." Such conversation was neither a "transaction" nor a "communication" between the plaintiff and the deceased, or between the deceased and any one else. Ray v. Camp, 36 S. E. 242, 110 Ga. 818 (2); Reid v. Sewell, 36 S. E. 937, 111 Ga. 880 (1); Hall v. Hilley, 76 S. E. 566, 139 Ga. 13.

As confidential communications

Vituperative epithets and personal abuse transpiring between husband and wife alone are not communications within the rule excluding the testimony of husband or wife as to communications made between each other in the absence of any other person, and may be proved in an action for divorce. Meyer v. Meyer, 138 S. W. 70, 72, 158 Mo. App. 299.

Under Civ. Code Prac. § 606, prohibiting one to testify to a "communication" by a spouse, in a will contest, based on undue influence exercised over testatrix by decedent, her husband, it was improper to allow their grandson's former wife to testify that during her marriage her husband showed her letters from decedent in which he said that her husband should not have any share in decedent's or testatrix's estate unless he did certain things, and that her husband afterwards destroyed the letters; the word "communication" meaning any information acquired by one spouse from the other through the marital relation. Wall's Ex'r v. Dimmitt, 117 S. W. 299, 300, 132 Ky. 747.

In an action for the alienation of a husband's affections, statements to the wife by the husband in the absence of any other person, indicating that defendant was trying to separate the wife and the husband, are within Civ. Code Prac. § 606, forbidding either husband or wife to testify as to any communication between them during the marriage; the word "communication" embracing all knowledge on the part of one or the other, obtained by reason of the marriage relation, and which but for the confidence growing out of it would not have been known to the party. Leucht v. Leucht, 112 S. W. 845, 847, 129 Ky. 700, 130 Am. St. Rep. 486.

COMMUNITY

The term "community" or "neighborhood" is not susceptible to exact, geographical definition, but means, in a general way, where the person is well known and has established a reputation. In impeaching a witness by proof of bad character in the "neighborhood" or "community," the inquiry is not necessarily confined to the domicile, but may extend to any community or society in which

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he has a well-known or established reputation. Where a witness resided in Baltimore, but had an established business in Mobile and spent much of his time there, it was permissible to testify as to knowledge of his character in Mobile. Richard P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co., 49 South. 92, 93, 96, 159 Ala. 491.

Under Const. § 183 (Va. Code 1904, p. cclxvii), providing that the exemption of educational institutions from taxation conferred by subsection "d" shall not apply to any industrial school, individual or corporate, not the property of the state, which does work for compensation, or manufactures and sells articles in the community in which such school is located, provided that the school may do work for or sell its own products or any other articles to any of its students or employés, the sale of articles manufactured at such institute in the market of Newport News, located eight or nine miles from such institute, did not constitute a sale in the same "community," within such section, though the institute and the city were connected by an electric railway. Commonwealth v. Trustees of Hampton Normal & Agricultural Institute, 56 S. E. 594, 597, 106 Va. 614.

Act approved February 23, 1907, provides that whenever 50 or a majority of the owners, who are also the owners of a majority of the lands of any farming or other community or neighborhood within this state, which lands lie in one body, and are liable to overflow or damage from the waters of any unnavigable stream, and may be protected by the same system of works, desire to provide for the protection of such lands, they may petition the board of supervisors in the county in which the lands of the community or neighborhood and within the proposed district or the greater portion thereof are situated for the organization of such protection district. Held, that these provisions do not limit the area of any district to a territory which might afterwards be determined by a court to be a single community or neighborhood, or give the court power to declare the district organization invalid if it should find that the boundaries included two or more such communities or neighborhoods, as the term "community" refers rather to the people who reside in a given locality, in more or less proximity, than to the territory which includes them, and the term "neighborhood" describes a territory of indefinite size and without fixed limits, and therefore a district may be organized which embraces two or more communities or neighborhoods, provided the lands lie in one body, and are liable to damage from the same stream and may be protected therefrom by the same system of works. Keech v. Joplin, 106 Pac. 222, 227, 157 Cal. 1; Timmons v. Same, 106 Pac. 228, 157 Cal. 15; Lamb v. McMullen, 106 Pac. 220, 157 Cal. 14.

The location and operation of a railroad upon a public highway may occasion incidental inconvenience and injury to an abutting landowner, but, until it cuts off or materially interrupts his means of access to his property or imposes some additional burden on his soil, his injury is the same in kind as that suffered by the community in general and he cannot recover in an action therefor, and by the term "community in general" it is not meant those who use the street and yet reside at such a distance of the railroad as to suffer none of the annoyances incident to its construction and operation, but it means those who reside in the immediate vicinity of the railroad and are subject to the inconveniences incident to such a structure. Scrutchfield v. Choctaw, O. & W. R. Co., 88 Pac. 1048, 1049, 18 Okl. 308, 9 L. R. A. (N. S.) 496.

As partnership

See Partnership.

COMMUNITY DEBT

A debt incurred by the husband during the existence of the marriage relation is prima facie a "community debt," and, in the absence of evidence to the contrary, a judgment for the debt will be deemed to have established it as such. Dever v. Selz, 87 S. W. 891, 892, 39 Tex. Civ. App. 558.

A man, during his first marriage, acquired slaves constituting his separate property. After the death of his second wife, he executed an instrument, disclosing that during his second marriage he was, on a designated date, indebted to his children for the amount of the proceeds of a sale of the slaves, as their guardian, and executed a note to a daughter for the amount of her share, with interest from the designated date, and executed a deed of trust to secure such note, reciting that it was given for the daughter's portion of the slaves. Held, to show that he had given the slaves to his children, and that the obligation evidenced by the note was a community debt created during marriage, and the deed of trust was enforceable against the community property owned by himself and his second wife. A "community debt" is a liability made by a husband during marriage. Word v. Colley (Tex.) 143 S. W. 257, 259.

COMMUNITY HOUSE

See Apartment House.

A flat or flat house is really a "community house" designed for more than an individual and his household. Lignot v. Jaekle, 65 Atl. 221, 224, 72 N. J. Eq. 233 (quoting and adopting definition in Skillman v. Smatheurst, 40 Atl. 855, 57 N. J. Eq. 1).

COMMUNITY OF INTEREST

"'Community of interest,' in a common title or security, implies a mutual obligation not to impair it. It creates such a relation of trust and confidence that it is inequitable

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to permit one of the parties in interest to do anything to the prejudice of others, and when one of them obtains superior titles or liens he holds them in trust for the benefit of all who share in the common title or security, and who within a reasonable time after notice of his purchase contribute their share of his necessary expenditure." Booker v. Crocker, 132 Fed. 7, 8, 65 C. C. A. 627.

COMMUNITY OF PROFITS

"Community of profits," in reference to a partnership, means a proprietorship in them, distinguished from a personal claim upon the other associate; in other words, a property right in them from the start in one associate, as much as in another. Stipulating for a compensation in proportion to the profits or payable out of them will not confer the privileges or import the liabilities incident to a partnership, unless it confers a jus in re, as distinguished from a demand or chose in action. Altgelt v. Alamo Nat. Bank (Tex.) 79 S. W. 582, 586.

"Community of profits" means a proprietorship in them as distinguished from a personal claim upon the other associate. In other words, a property right in them from the start in one associate as in the other. Breinig v. Sparrow, 80 N. E. 37, 38, 39 Ind. App. 455.

COMMUNITY PROPERTY

Property acquired by either spouse after marriage is presumed to be "community property." Colpe v. Lindblom, 106 Pac. 634, 637, 57 Wash. 106.

The "community" arising under Civ. Code Porto Rico art. 1315, by virtue of marriage, embraced, under article 1392, all "the earnings or profits indiscriminately obtained by either of the consorts during the marriage," and also embraced, under article 1401, all "property acquired during the marriage by onerous title at the expense of the community property, whether the acquisition is made for the community or for only one of the consorts." Garzot v. Rios de Rubio, 28 Sup. Ct. 548, 555, 209 U. S. 283, 52 L. Ed. 794.

Separate property is defined by statute, and law provides that all other properties acquired after marriage by either husband or wife or both is "community property." From these provisions of the law limiting the separate property by description and proclaiming all other property not so limited and described as community property, it is held, in accordance with the elementary idea running through the community property system of laws, that all property acquired after marriage is presumptively community property. A homestead entry during the life of the wife, but on which the husband did not make final proof, or obtain patent, until after her death, was "community property." Ahern v. Ahern, 71 Pac. 1023, 1024, 31 Wash. 334, 96 Am. St. Rep. 912.

"The legal import of the words 'community property' is a community of property. Rev. Civil Code, 2402, declares that the community consists of 'the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; of the produce of the reciprocal labor and industry of both husband and wife,' etc. In the same manner the debts contracted during the marriage enter into the community, and must be acquitted out of the common property. Rev. Civil Code, 2403. At the dissolution of the community 'all effects which both husband and wife possess reciprocally are presumed common effects or gains' until the contrary is shown. Rev. Civil Code, 2405. It is provided by Rev. Civil Code, 2406, that 'the effects which compose the * * * community of gains are divided into two equal portions between the husband and the wife, or between the heirs at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by the husband and wife conjointly, although what has thus been brought in marriage by either the husband or wife be more considerable than that what has been brought by the other, or even although one of the two did not bring anything at all." Bartoli v. Huguenard, 2 South. 196, 197, 39 La. Ann. 411.

The amendment of March 3, 1893 (St. 1893, p. 71, c. 62), to Civ. Code, § 164, providing that where married women have conveyed land acquired prior to May 19, 1889, the husband, his heirs, or assigns shall be barred from suing to show that the land was community property, or to recover it after July 1, 1894, and the amendment of March 4, 1897 (St. 1897, p. 63, c. 72), making the provision applicable where a wife shall thereafter convey, and providing that, as to future conveyances, the action must be commenced within a year from the filing for record of the conveyances, were simply statutes of limitation, and did not change the presumption that land conveyed to a wife before the amendment of March 19, 1889 (St. 1889, p. 328, c. 219), which took effect May 19, 1889, by other than a deed of gift, was community property. Booker v. Castillo, 98 Pac. 1067, 1069, 154 Cal. 672.

If a wife inherited a lot from her father and her husband erected improvements thereon, the improvements would be "community property," so that the husband would have an interest in the property. Brady v. Maddox (Tex.) 124 S. W. 739, 743.

Where money acquired in the course of trade in another state is the separate property of the husband there, it will continue to be his property when brought into this state,

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as will property purchased here with it, whether real or personal, notwithstanding Ballinger's Ann. Codes & St. Wash. § 4490, providing that property acquired by a husband after marriage, otherwise than by gift, bequest, devise, or descent, is community property, since a contrary construction would destroy vested rights. Brookman v. Durkee, 90 Pac. 914, 915, 46 Wash. 578, 12 L. R. A. (N. S.) 921, 123 Am. St. Rep. 944, 13 Ann. Cas. 839.

While a title taken in the name of either spouse is presumably community property, such presumption is rebutted by evidence that the purchase price was the separate fund of the one in whom the title was taken, or by subsequent oral declarations and admissions of the separate character of the purchase, by the act of the parties in the treatment of the land as to voluntary liens, or by the expressed intention of the spouses at the time of the conveyance. Carpenter v. Brackett, 107 Pac. 359, 361, 57 Wash. 460.

Ballinger's Ann. Codes & St. §§ 4488–4490 (Pierce's Code, §§ 3875, 3867, 3876), providing that land acquired during marriage otherwise than by gift, bequest, devise, or descent shall be "community property," was applicable to land acquired by a husband from the federal government under the federal laws. Curry v. Wilson, 107 Pac. 367, 368, 57 Wash. 509.

"Community property," within the meaning of such statute, includes the interest remaining in property purchased by a husband in his own name mainly with his wife's money subsequent to their marriage, after allowing his wife an interest proportionate with the part of the purchase price paid by her. Hines v. Sparks (Tex.) 146 S. W. 289, 298.

Under Civ. Code, § 164, providing that all property acquired after marriage is "community property," the right to recover damages from a common carrier for injuries to a wife received while riding as a passenger on one of the carrier's trains is "community property." Justis v. Atchison, T. & S. F. R. Co., 108 Pac. 328, 329, 12 Cal. App. 639.

Property purchased in the name of a wife during the existence of the community becomes community property, unless the purchase is made by way of investment of paraphernal funds, or by way of administration of paraphernal property. Knoblock & Rainold v. Posey, 52 South. 847, 848, 126 La. 610.

Under the statute of this state (sections 2680, 3060, Rev. Codes), all property acquired after marriage by either husband or wife not defined by sections 2676 and 2679 as the separate property of the husband or wife is community property. Kohny v. Dunbar, 121 Pac. 544, 546, 21 Idaho, 258, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492.

A right of action against a railroad for personal injuries sustained by a husband after he and his wife have separated with the intention of never again living together as man and wife is "community property," one-half of which may be set apart to the wife on her obtaining a divorce from the husband. Ligon v. Ligon, 87 S. W. 838, 839, 39 Tex. Civ. App. 392.

The fact that a husband and wife are in possession of money after their marriage raises a presumption that it was acquired after marriage and constitutes "community property" under Civ. Code, § 164, declaring that all property acquired after marriage by either husband or wife is community property. Lynam v. Vorwerk, 110 Pac. 355, 13 Cal. App. 507.

Where title to land purchased with money earned after marriage is taken in the name of the wife the land is "community property" under the husband's control, so that an action for injury thereto may be maintained by him alone. Malmstrom v. People's Drain Ditch Co., 107 Pac. 98, 102, 32 Nev. 246.

Civ. Code, §§ 162, 163, define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterwards by gift, bequest, devise, or descent, and section 164 declares that all other property acquired after marriage by a husband or wife or both is community property. This section was amended in 1889 (St. 1889, p. 328, c. 219) by the addition of a provision that, whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title vests in her as her separate property. Held that, prior to the amendment, the presumption was that the property conveyed to either husband or wife after marriage by a conveyance other than a deed of gift vested the title in the community. Nilson v. Sarment, 96 Pac. 315, 318, 153 Cal. 524, 126 Am. St. Rep. 91.

The damages resulting from a personal injury to the wife are a part of the "community property." Paine v. San Bernardino Valley Traction Co., 77 Pac. 659, 660, 143 Cal. 654; Western Union Telegraph Co. v. Campbell, 81 S. W. 580, 581, 36 Tex. Civ. App. 276.

Under a statute providing that all property which the husband or wife may bring into the marriage, except land and slaves and the wife's paraphernalia, shall be common property of the husband and wife, if the parties were not man and wife when a land certificate issued to the man, if it had not ceased to be personal property, by its location, when they married, it became then "community property." Phillips v. Palmer, 120 S. W. 911, 913, 56 Tex. Civ. App. 91.

All property acquired under the régime of the community, whether in the name of one spouse or the other, is presumed to be

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community property, and the wife claiming it as hers must establish her claim by proof and the fact that title was taken in her name does not even raise presumption in her favor. Succession of Graf, 51 South. 115, 116, 125 La. 197.

COMMUTE—COMMUTATION

Of punishment

See Parole.

In a legal sense, to "commute" would mean to change from a higher to a lower penalty, to change the penalty from the hard work of a chain gang to work on a farm, for instance. Hence under Const. Ga. (Code 1873, § 5075), declaring that the governor shall have power to "commute" penalties, such power cannot be performed by county commissioners. McDonald v. State, 64 S. E. 1108, 1111, 6 Ga. App. 339.

Acts 32d Leg. c. 44, is not unconstitutional in authorizing district courts to suspend sentences in certain cases as an invasion of the right to "reprieve" or grant "commutations of punishment" reserved to the Governor by Const. art. 4, § 11, as a "reprieve" postpones the execution of a sentence to a day certain, whereas a "suspension" is for an indefinite time, and a "commutation" is the changing of the punishment assessed to a less punishment. Snodgrass v. State (Tex.) 150 S. W. 162, 164, 41 L. R. A. (N. S.) 1144 (citing 7 Words and Phrases, pp. 6115, 6116).

Of sentence

There is a technical difference between the "commutation of a sentence" and its mitigation; "commutation" being a change of punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. The reducing of the sentence of a court-martial, which dismissed a naval officer from the service, to suspension for five years on one-half sea pay to a reduction in rank to the foot of the list of officers of his grade is a mitigation of the sentence, within an act of Congress providing that every officer who is authorized to convene a general court-martial shall have power on revision of its proceedings "to remit or mitigate" but not to "commute" the sentence of any court he is authorized to approve or confirm. Mullan v. United States, 29 Sup. Ct. 330, 332, 212 U. S. 516, 53 L. Ed. 632 (citing Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. 549; Perkins Electric Switch Mfg. Co. v. Buchanan & Co., 129 Fed. 135).

The power of "commutation of sentence" is the power to change a greater punishment to a less punishment of which both are known to the law. People ex rel. Patrick v. Frost, 117 N. Y. Supp. 524, 526, 133 App. Div. 179.

Of taxes

"Commutation" is a passing from one state to another; an alteration; a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor, or of a single payment in lieu of a number of successive payments, usually at a reduced rate. The judicial sale of property under a decree of foreclosure for what it will bring, although it be less than the amount of the taxes assessed and delinquent against it, cannot be said to be a commutation of taxes, within the meaning of Const. art. 9, § 6, prohibiting the commutation of taxes. Woodrough v. Douglas County, 98 N. W. 1092, 1095, 71 Neb. 354.

COMMUTATION TICKET

The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns or cities and suburban towns. Interstate Commerce Commission v. Baltimore & O. R. Co., 12 Sup. Ct. 844, 848, 145 U. S. 263, 36 L. Ed. 699.

Passenger tickets sold by a carrier at reduced rates, good for a limited time only, held to be commutation tickets within Acts 1905, p. 96, c. 53, § 14, prohibiting unjust discrimination in rates, but permitting the sale of commutation tickets. Etter v. Cleveland, C., C. & St. L. R. Co., 86 N. E. 1020, 1023, 171 Ind. 581.

COMMUTATIVE CONTRACTS

A so-called mineral lease based on a royalty, in which the lessee does not obligate himself to develop the premises, and in which the lessee reserved the right to terminate the lease after finding oil or gas in paying quantities, is void, as to the lessor for want of consideration, under Civ. Code, arts. 1761, 1768, defining a contract as an agreement to give or permit another to do, or not to do, something; and a commutative contract is one in which what is done, given, or promised by one party is considered as an equivalent of what is done or promised by the other. Goodson v. Vivian Oil Co., 57 South. 281, 282, 129 La. 955.

COMPACT

"Compacted" means "closely and firmly united, as the parts or particles of solid bodies; having the parts or particles pressed or packed together; solid, dense." American Sulphite Pulp. Co. v. De Grasse Paper Co., 151 Fed. 47, 58 (quoting and adopting Cent. Dict.).

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The word "compactness" means the state or quality of being compact; firmness; close union of parts; while the word "form" refers to the external shape or configuration of a body; the figure as defined by lines and surfaces. In re Sherill, 81 N. E. 124, 139, 188 N. Y. 185, 117 Am. St. Rep. 841 (dissenting opinion, citing Cent. Dict.).

COMPACT PART OF TOWN

The phrase "near the compact part of a town" in Rev. St. c. 52, § 86, providing that no engine or train shall run across a highway near the compact part of a town at a speed greater than 6 miles an hour, unless the railroad maintains a flagman, a gate, or certain signals at such crossing, is not limited to the largest or principal compact part of a town, but applies to any compact portion, and includes a village with church, schoolhouse, engine house, store and dwelling houses, in all at least 25 buildings, and all situated within 350 feet of the central point. Moore v. Maine Cent. R. Co., 76 Atl. 871, 873, 106 Me. 297.

COMPANY

See Banking Company; Co.; Com.; Commercial Railroad Company; Construction Company; Express Company; Guaranty Company; Insurance Company; Investment Company; Joint-Stock Companies and Associations; Life Insurance Company; A Like Company; Mixed Company; Mutual Fire Insurance Company; Mutual Irrigation Company; Railroad Company; Safe Deposit Company; Stock Insurance Company; Street Railway Company; Surety Company; Telegraph Company; Terminal Company; Trading Stamp Company; Transmission Company; Transportation Company; Trust Company.

The word "company" does not necessarily mean a corporation, but may mean a firm, partnership, or individual. Atlantic Coast Line R. Co. v. State, 69 S. E. 725, 729, 135 Ga. 545, 32 L. R. A. (N. S.) 20.

The word "company" may be construed to include all corporations, companies, firms, or individuals when used in statutes passed in promotion of the public good, such as the enforcement of the collection of revenue, regulation of the exercise of quasi public franchises, and similar matters. As used in Revisal 1895, c. 61, prohibiting transportation companies from charging more than the legal and published rate allowed by law and chapter 20 dealing with cognate subjects and giving the corporation commissioners power to establish regulations as to companies engaged in domestic traffic, the term was intended to include all corporations, companies, firms, or individuals engaged as common carriers of freight, so that the law does not deny to corporate common carriers the equal protection of the law by arbitrarily imposing a penalty on corporations and not on individuals. Efland v. Southern Ry. Co., 59 S. E. 355, 357, 146 N. C. 135.

By common usage the use of "company" is as applicable to partnerships and to unincorporated associations as to corporations, and the mere name is no evidence of corporate existence. Owen v. Shepard, 59 Fed. 746, 749, 8 C. C. A. 244; Clark v. Jones, 6 South. 362, 363, 87 Ala. 474.

The use of the term "company" in a trading or manufacturing business does not necessarily import corporate existence. The word may be employed equally well by a corporation, a partnership, or an individual doing business under a trade-name. Keystone Pub. Co. v. Hill Dryer Co., 105 N. Y. Supp. 894, 55 Misc. Rep. 625.

As used in Ky. St. § 841, providing that no "company, association or corporation" of another state shall operate a railroad within this state until by incorporation it becomes a corporation citizen and resident of the state, the words "company, association or corporation" necessarily mean an association of natural persons into one common undertaking. Whether it be a partnership, spoken of as company, a joint-stock association, or a regularly chartered corporation, that composes the foreign railway company, when it comes into this state it must be and become a domestic corporation—a citizen and resident of this state—which can only be done by being created and organized under our law into a corporation. Davis' Adm'r v. Chesapeake & O. R. Co. (Ky.) 70 S. W. 857, 862.

Association

As association, see Association.

Code 1906, § 2559, specifies the concerns subject to the insurance laws as "all companies, partnerships, associations, individuals and fraternal orders whether domestic or foreign," and by section 2562 the word "company" as used in section 2606, prohibiting any "foreign insurance company" from doing business in this state until it shall have complied with its provisions, is defined to mean "all corporations, associations, partnerships, or individuals," etc. *Held*, that section 2562 shows that the provisions of the statute apply to insurance associations in the broadest possible way, and that section 2559 indicates a purpose to include within its provisions all organizations doing an insurance business of any kind on any plan. State v. Alley, 51 South. 467, 475, 96 Miss. 720.

The word "company," in an application for a mutual benefit certificate containing the question, "Has any * * * application to insure your life ever been made to any company * * * upon which a policy has not been issued?" refers only to regular insur-

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ance companies, and excludes fraternal associations; Civ. Code, § 451, declaring that benefit associations are not insurance companies within the insurance laws, recognizing a distinction between regular insurance companies and benefit associations. Lyons v. United Moderns, 83 Pac. 804, 807, 148 Cal. 470, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672.

Benevolent fraternal associations are not included in the class of insurance companies referred to in Rev. Laws 1905, § 1616, which provides that neither the application nor the by-laws shall be considered as a part of the contract, unless incorporated in the policy. Loudon v. Modern Brotherhood of America, 119 N. W. 425, 426, 107 Minn. 12.

One of the meanings of the word "company" is "an association of persons for the purpose of carrying on some enterprise or business," and one of the meanings of the word "association" is a "union of persons in a company or society for some particular purpose." Webst. Dict. So the word "association," when used with descriptive adjectives as the name of a business entity, is as much indicative of a corporation as the word "company" when so used. Some courts, in determining whether a particular name imported a corporation, have made no distinction between these two words. Georgia Co-Operative Fire Ass'n v. Borchardt & Co., 51 S. E. 429, 432, 123 Ga. 181, 3 Ann. Cas. 472.

Bridge company

Under Pub. Acts 1901, p. 236, Act No. 173, as amended by Pub. Acts 1903, p. 52, Act No. 45, authorizing specific taxation by state tax commissioners of the property of railroad companies, union station and depot companies, express companies, car loaning companies, stock car companies, refrigerator companies, and fast freight line companies; section 4, Act No. 173, p. 238, Pub. Acts 1901, making it the duty of the board to make an annual assessment of the property of such companies and "all other corporations owning, leasing, running, or operating any freight, stock, refrigerator, or other cars" not being exclusively the property of any railroad company paying taxes on its rolling stock, etc., and section 5, defining the term "company, corporation, or association" to refer to any railroad, union station and depot company, express company, car loaning or refrigerator or fast freight line company, and any or all other corporations subject to specific taxation under such act, a bridge company owning a bridge exclusively leased to a street railway company was not subject to specific taxation under such act. North Park Bridge Co. v. Township of Walker, 107 N. W. 711, 712, 143 Mich. 693.

Corporation

The name Americus Furniture & Undertaking "Company," indicates a corporation, and an allegation in a criminal accusation that the company is a corporation is surplusage and need not be proved. Ager v. State, 58 S. E. 374, 2 Ga. App. 158.

Under General Corporation Law (Consol. Laws 1909, c. 23) § 6, as amended by Laws 1911, c. 638, and Laws 1912, c. 2, requiring the names of corporations to bear some additional words of prefix or affix indicating their corporate character, the application of the American Cigar Lighter Company for leave to change its name to "Electric Cigar Lighter Company" must be denied; the word "company," though used colloquially as importing "corporation," not necessarily involving that meaning in law. In re American Cigar Lighter Co., 138 N. Y. Supp. 455, 456, 77 Misc. Rep. 643.

The words "Valdosta Foundry & Machine Company" import a corporation, and are sufficient as against a special demurrer on the ground that there is no party plaintiff. Charles v. Valdosta Foundry & Machine Co., 62 S. E. 493, 494, 4 Ga. App. 733.

Crew

Act June 14, 1906, c. 3299, § 1, 34 Stat. 263, makes it unlawful for aliens or any "company" not organized in the United States or authorized to fish in Alaska waters, "to catch or kill, or attempt to catch or kill, except with rod, spear or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States." Held, that the officers and crew of a vessel composed entirely of aliens may be considered a "company" within the meaning of the statute, and a single fine imposed upon them for its violation and made a lien on the vessel. The Tokai Maru, 190 Fed. 450, 457, 111 C. C. A. 282.

Holding company

A holding corporation controlling the stock of certain railroad companies executed a collateral trust deed to secure bonds issued by it, which deed provided that the proceeds of the bonds should be used, not only to make purchases of stock of railroad companies, and for betterments, improvements, and extensions of their properties, but for other purposes "of company." The deed also indicated that the operating companies had an existing bonded indebtedness, and a further provision dealing with the voting power of their stocks pledged to the trustee to secure the holding company's bonds provided that such power should not be exercised to increase the capital stock of such companies, or to create any but current obligations in addition to the above, and authorized bonded indebtedness of the operating companies, except in the instances specified. *Held*, that the "company" referred to in the quoted clause was the holding company, and that the provisions of the trust mortgage were sufficient to authorize the latter to loan the proceeds of its bonds to the operating companies to enable them to pay interest coupons on their bonded indebt-

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edness. Finance Co. of Pennsylvania v. New Jersey Short Line R. Co., 193 Fed. 507, 510.

Individuals

The word "companies," as used in Acts 1891, p. 297, c. 96, relating to franchises granted to companies for the operation of telephone lines, includes an individual or individuals as well as incorporated companies, so that a county court was authorized to consent to the placing of poles and wires for a telephone for public use along a county road by an individual. Lowther v. Bridgeman, 50 S. E. 410, 412, 57 W. Va. 306.

Partnership

Ballinger's Ann. Codes & St. § 4875, authorizing service of process on a nonresident corporation, "company" or "association" by delivering the summons and complaint to its secretary, cashier, or managing agent, when construed with section 4881, which was originally part of the same act with section 4875 (Laws 1893, p. 407, c. 127), and which provides that, where the action is against two or more defendants and summons is served on one of them, if the action is against defendants jointly indebted upon a contract, plaintiff may proceed against defendants served, unless the court otherwise directs, and, if he recovers judgment, it may be entered against all defendants jointly indebted so far only as it may be enforced against the joint property of all and the separate property of defendants served, does not authorize service of process on a nonresident partnership by delivering the summons and complaint to a resident superintendent and managing agent. Coughlin v. Pinkerton, 84 Pac. 14, 15, 41 Wash. 500.

State

The state is not a "company, association or corporation" within Const. 1870, art. 2, § 29, prohibiting giving or lending of the credit of counties or municipalities in aid of any person unless authorized by the electors, and hence bonds issued in aid of a state normal school, under Acts 1909, c. 580, need not be authorized under that section. Ransom v. Rutherford County, 130 S. W. 1057, 1065, 123 Tenn. 1, Ann. Cas. 1912B, 1356.

COMPARATIVE NEGLIGENCE

An instruction, in an action for injuries, that to authorize a recovery a person need not be wholly free from negligence, provided his negligence is but slight and the other party is guilty of gross negligence in comparison therewith, is erroneous as indorsing the doctrine of "comparative negligence." Franklin v. Engel, 76 Pac. 84, 85, 34 Wash. 480.

Contributory negligence, in most jurisdictions, is used as referring to such negligence on the part of plaintiff contributing to or causing the injury to himself as will prevent a recovery by him. In Georgia, there is a doctrine, sometimes called that of "comparative negligence," under which, if plaintiff is not without fault, but his negligence does not amount to such failure to use ordinary care as will prevent a recovery, he may recover damages of defendant in a proper cause, but the amount of his recovery will be reduced in proportion to the amount of default attributable to him. In this term, contributory negligence will generally be found to have been used in Georgia rather than in the sense of negligence which will prevent a recovery. Savannah Electric Co. v. Crawford, 60 S. E. 1056, 1057, 1058, 130 Ga. 421.

COMPARISON

"Comparison" is the act of bringing together for the purpose of observing, not only likenesses, but differences as well. A familiar mode of comparison is the contract. Succession of Baker, 55 South. 714, 717, 129 La. 74, Ann. Cas. 1912D, 1181.

COMPARISON OF WRITINGS

With reference to expert opinion as to handwriting, a "comparison of hands" may consist not only of a comparison of the disputed signature with one admitted to be genuine, but may also consist in the opinion of an expert who has seen signatures admitted to be genuine and whose only method of comparison is by recalling them with more or less distinctness and comparing them with the one presented for his opinion. In re Burbank's Will, 93 N. Y. Supp. 866, 879, 104 App. Div. 312 (quoting and adopting the definition in Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470).

COMPEL—COMPELLED

The provision of Rev. St. § 4075, that no physician or surgeon shall be "compelled" to disclose any information acquired in his professional capacity, which was necessary to enable him to prescribe for a patient, is for the benefit of the patient, and renders the information privileged, so that the physician not only cannot be "compelled" to disclose it, but will not be allowed to disclose it, without patient's consent. Boyle v. Northwestern Mut. Relief Ass'n, 70 N. W. 351, 353, 95 Wis. 312.

Make

Where defendant testified that his brother said he was going to "ask" decedent to apologize, but it was shown that defendant's mother stated that defendant's brother said he would "make" decedent apologize, an instruction that if defendant and his brother armed themselves with the intention of "compelling" decedent to apologize, and on his failing to do so killed him, they would be guilty of murder, was not objectionable in the use of the word "compelling," which was practically synonymous with "make";

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no witness having used the word "compel." Pipkin v. State, 97 S. W. 61, 63, 80 Ark. 617.

COMPENSATION

See Due Compensation; Extra Compensation; Full Compensation; Just and Adequate Compensation; Just Compensation; Reasonable Compensation.

Fair and just compensation, see Fair and Just.

Increase of salary or compensation, see Increase.

Other compensation, see Other.

"Compensation" means that which compensates for loss or privilege; a recompense for some loss. Champlain Stone & Sand Co. v. State, 123 N. Y. Supp. 546, 553, 66 Misc. Rep. 434.

"Compensation" is a recompense or reward for some loss, injury, or service, especially when it is given by statute. Holley v. City of Mt. Vernon, 126 N. Y. Supp. 460, 461, 141 App. Div. 823.

Mutual debts are extinguishable at common law, but by the civil law, under the doctrine of compensation, relief is granted by the reciprocal acquittal of debts between two persons who are indebted to each other; "compensation" being the extinction of debts for which two persons are reciprocally debtors to one another, by the credits for which they are reciprocally creditors to one another. Tuttle v. Bisbee, 120 N. W. 699, 701, 144 Iowa, 53.

As fees, salary, allowances, etc.

To "compensate" is to make suitable reward for services. The word as used by the makers of the Constitution relating to officers means a compensation or reward paid in return for the performance of an official duty. State v. Sheldon, 111 N. W. 372, 373, 78 Neb. 552.

The words "salary" and "compensation," in Const. art. 6, § 25, providing that the judges of the superior and circuit courts and the state's attorney of Cook county shall receive the same salaries payable out of the state treasury, as may be paid to the circuit judges and state's attorneys of the state and such other compensation, to be paid by the county of Cook, as may be provided by law, are used interchangeably. Cook County v. Healy, 78 N. E. 623, 625, 222 Ill. 310.

The surplus of moneys furnished the sheriff by the county for the policing of the jail, after paying the salaries of the deputy keepers, comprised "compensation" for services rendered as custodian of the jail, and therefore, under the above act of 1905, belonged to the county. Board of Chosen Freeholders of Hudson County v. Kaiser, 69 Atl. 25, 27, 75 N. J. Law, 9.

"'Compensation,' in its ordinary acceptation, applies not only to salaries, but to compensation by fees for specific services, and was so understood by the people whose votes made it a part of the organic law of the state." In so far as Ky. St. § 3948, as amended by Act March 23, 1908 (Acts 1908, p. 116, c. 44), provides for an annual appropriation for labor and materials necessary to keep buildings at the county seat, including the jailer's residence, owned by the county, in a clean, comfortable, and presentable condition, and heat and light the same, it increases the compensation of jailers who before such enactment were required to keep such property in such condition, and heat and light the jail and the jailer's residence at his own expense and without compensation therefor; and hence, under Const. § 161, forbidding a change in the compensation of a county officer during his term of office, the amended statute was inapplicable to jailers holding office when the act became effective. Frizzell v. Holmes, 115 S. W. 246, 248, 131 Ky. 373 (citing Commonwealth v. Carter [Ky.] 55 S. W. 701, which cited Bright v. Stone [Ky.] 43 S. W. 207).

"Salary" in its general sense is a compensation for services rendered by one to another, and because it may be stipulated for beforehand the word "salary" has no meaning not included in the word "compensation," and where an employé is paid a stipulated and fixed salary, and in addition thereto compensation at a fixed percentage on the amount of his sales or other considerations, the extra percentage whether called compensation or salary may together with the fixed salary be recovered in one common-law action. United Boxboard & Paper Co. v. McEwan Bros. Co. (N. J.) 76 Atl. 550, 554.

Const. § 161, providing that the compensation of any officer shall not be changed after his election, does not prohibit the fixing of the compensation of an officer after his election, where it was not fixed before; but, when once fixed, it cannot be changed during his term of office, and, while the Legislature may change his duties, by either increasing or decreasing them, it cannot change his compensation, which is the sum paid for all that he may be required to do as an officer; and where the "compensation" of an officer is salary the salary must remain the same throughout his term, and where the compensation is fees the same scale of fees must prevail for the same services, and where new duties are imposed, with fees attached, the incumbent cannot charge for the new duties. James v. Duffy, 131 S. W. 489, 490, 140 Ky. 604, 140 Am. St. Rep. 404.

"Salary" and "compensation" are treated as synonymous and used interchangeably in the Constitution, and section 20 of article

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8, relating to the "salaries" of judges should be construed as if it read "compensation." Marioneaux v. Cutler, 91 Pac. 355, 356, 32 Utah, 475.

The word "compensation," used in Civ. Code 1902, § 1030, providing that a magistrate may appoint a constable at a fixed salary or may direct his papers to the sheriff, who shall receive the same compensation for serving them as a constable would be entitled to, includes costs and fees as well as salary. Mullins v. Marion County, 51 S. E. 535, 72 S. C. 84.

Laws 1889, c. 263, provided that each of the several judges of the circuit courts of the state should receive $400 per annum as and for his necessary expenses in the discharge of his duties, in addition to his salary then provided by law, and that the act should apply to the several judges then in office. Held, that such allowance was not a part of the "compensation" of the judges within Const. art. 4, § 26, providing that the compensation of a public officer shall not be increased or diminished during his term of office. Milwaukee County v. Halsey, 136 N. W. 139, 141, 149 Wis. 82.

The word "compensation," as used in Sess. Laws 1909, c. 240, providing that county game wardens shall receive such compensation as the state game warden shall determine not to exceed $50 per month, includes pay for expenses incurred as well as for services rendered, and such compensation cannot in any one month exceed $50. Jenkins v. Hallstrom (S. D.) 138 N. W. 12, 14.

The common council of a city having adopted as an amendment to the city's special charter St. 1898, § 925—30, authorizing the council by ordinance to provide such salaries or compensation for the officers and employés of the city as it shall deem proper, provided that in cities of the second, third, and fourth classes no salary shall be paid to the mayor or members of the council, except when ordered by a vote of three-fourths of the members of the council, such provisions superseded all former portions of the city charter inconsistent therewith, and authorized the payment of salaries or compensation to the mayor and aldermen in common with other officers of the city, since, if any distinction was intended by the use of the words "compensation" and "salary," the restriction, and not the grant of authority, was limited thereby. State ex rel. Rudolph v. Hutchinson, 114 N. W. 453, 454, 134 Wis. 283.

The furnishing of meals to members of the Legislature attending the services on the dedication of the Grant monument in New York, as was done pursuant to a contract made by a committee authorized to attend to the matter, was a part of the state's expenses in making suitable recognition of the ceremony, and payment therefor cannot be regarded as "compensation" within Const. art. 2, § 8, prohibiting the members from receiving any compensation other than the statutory salary. Russ v. Commonwealth, 60 Atl. 169, 174, 210 Pa. 544, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825.

The term "compensation," as used in Const. art. 2, § 25, declaring that the "compensation" of any public officer shall not be increased or diminished during his term of office, is broad enough to include any kind of remuneration from the public treasury for a public officer by way of what is called "salary" or otherwise. State ex rel. Funke v. Board of Com'rs of Pierce County, 93 Pac. 920, 922, 48 Wash. 461.

"The terms 'fees,' 'compensations,' and 'commissions,' are distinguishable in meaning." Harrington v. Bayles, 82 N. Y. Supp. 379, 388, 40 Misc. Rep. 388 (citing Delavan v. Payn [N. Y.] 8 Paige, 459; Guinivan v. Carroll, 4 N. Y. Law Bul. 6; Innes v. Purcell (N. Y.) 2 Thomp. & C. 539; Hobart v. Hobart, 86 N. Y. 636; Race v. Gilbert, 6 N. E. 592, 102 N. Y. 298).

Compensation of a condemnation commissioner of New York appointed by a justice of the Supreme Court, not paid at stated times or in stated amounts, but allowed in bulk by a justice of the Supreme Court, is not "wages," "salary," or "earnings," within Code Civ. Proc. § 1391, providing that, where wages, earnings, or salary are due to the amount of $12 or more per week, an order directing execution may issue, which shall become a lien on such wages, the amount specified not exceeding 10 per cent. thereof, and shall be a continuing levy until the execution is paid. Jones v. Nicoll, 131 N. Y. Supp. 341, 342, 72 Misc. Rep. 483.

The compensation of an attorney for a savings bank, consisting of various sums paid to the bank from time to time for the examination of the titles to securities of applicants for loans from the bank, is in no sense a "salary," as that word means "a fixed sum to be paid by the year or periodically for services." Rebadow v. Buffalo Savings Bank, 117 N. Y. Supp. 282, 284, 63 Misc. Rep. 407.

Acts 1903, p. 84, in so far as it relates to judicial districts composed of one county, provides that a stenographer shall be appointed in such district, and fixes his compensation at $5 a day for each day he is in attendance; and by section 5 the clerk of the court is required to tax in each civil case a stenographer's fee of $3, which shall be paid by the clerk into the general fund of the county; and section 9 authorizes the appointment of a stenographer in judicial districts composed of more than one county, and provides that in every civil case in such district a stenographer's fee shall be taxed as provided for in section 5, and that the stenographer so appointed shall receive the compensation "hereinbefore provided" out of the fees collected for that purpose by the counties composing

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such judicial district, and that each county shall be liable only for such services as are rendered by the stenographer for the district court of the county sought to be charged. Held, that the phrase "compensation hereinbefore provided" refers to the amount of the per diem specified in the statute only, and the stenographer of a district composed of more than one county is not entitled to receive his fees out of the general fund of a county. Robertson v. Ellis County, 84 S. W. 1097, 1100, 38 Tex. Civ. App. 146.

As remuneration for injury

An instruction on damages in a personal injury action is not erroneous, because failing to use the word "reasonably" before "compensate," since the word "compensate" means equal remuneration, and could not carry with it authority to award more damages than were actually proved. Louisville & N. R. Co. v. Elliott, 52 South. 28, 30, 166 Ala. 419.

"Compensation" is the bottom principle of the law of damages, and consists in the restoration of the party injured, as near as may be, to his former position by allowing a money equivalent of his property which has been taken, injured, or destroyed. If the thing taken or destroyed can be replaced in the market, then that sum of money which will buy another like it will repair the injury. So, if property is injured but not destroyed, ordinarily the measure of damages, where the property can be repaired so as to be as it was before, is that sum which will restore the former condition. If the injury is such that it cannot be repaired by bestowing something upon or add it to the injured property, then the measure of damages would be the value of the property just before its injury and its market value afterward. The latter measure of damages is adopted, not as the ideal one, but as the surest of which the case is susceptible. Cincinnati, N. O. & T. P. R. Co. v. Falconer (Ky.) 97 S. W. 727, 728.

"The term 'compensation,' when applied to damages, has a fixed legal signification much more restricted than its general or common acceptation. In an action for personal injuries, where death does not ensue, it is confined to the expense of cure, the value of time lost, a fair 'compensation' for the physical and mental suffering caused by the injury, and for any permanent reduction of power to earn money." Louisville Gas Co. v. Fuller, 92 S. W. 566, 568, 122 Ky. 614 (quoting and adopting definition in Louisville, C. & L. R. Co. v. Case's Adm'r, 9 Bush [72 Ky.] 736).

Under Act April 4, 1868, limiting the amount to be recovered for wrongful death to "compensation for loss and damages pecuniarily suffered," no exemplary damages can be recovered for injuries resulting in death in an action by a parent. Palmer v. Philadelphia, B. & W. R. Co., 66 Atl. 1127, 1129, 218 Pa. 114.

A charge, in an action for the death of an engineer, that, if the jury should decide that the company was liable, then to consider the amount of damages that ought to be awarded plaintiff as compensation for the life of her husband, even if open to the criticism that it permitted a recovery for loss of the companionship of her husband when she was only entitled to recover the financial value of his life earnings or capacity to earn, was entirely remedied by other portions of the charge, making it clear that the court meant by the expression "compensation for the life of her husband" the value of his life as measured by his earning capacity, actual and prospective. Atlantic Coast Line R. Co. v. Jones, 63 S. E. 834, 837, 132 Ga. 189.

In an action by a street car passenger for injuries caused by an assault by the conductor, the court charged that, if the conductor's acts subjected plaintiff to bodily pain, he was entitled to recover such damages as the jury might believe from the evidence would compensate him for such bodily pain so suffered, if any, and if the conductor's acts were done willfully, and without reasonable justification and provocation, the jury might assess damages against defendant in such sum as they might believe from the evidence would be suitable punishment for defendant for such wrongful conduct, but that the jury could not allow punitive damages until they found that he was entitled to actual damages in such amount. The court further charged that, if the jury found for plaintiff, then, in assessing damages, they were not limited to physical injury inflicted, if any, but in addition thereto, if they found that the wrongful acts of the conductor were "malicious," i. e., the intentional doing of a wrongful act without cause or excuse, they might allow such punitive damages as would be a punishment and a wholesome warning to others. Held, that the word "compensation," as so used, should be construed as modified by the adjective "reasonable" or "actual," and that, in the absence of a request for a more specific instruction on the measure of damages, the instructions given were not objectionable as misleading. Mills v. Metropolitan St. R. Co., 137 S. W. 1006, 1008, 157 Mo. App. 529.

For taking property by eminent domain

"Compensation" in the law of eminent domain means a recompense in value, a quid pro quo, and must be in money. Oregon Short Line R. Co. v. Fox, 78 Pac. 800, 801, 28 Utah, 311.

The term "compensation," as used in the law allowing a seizure of property under right of eminent domain, and just "compensation" to the party whose property is taken, "imports that a wrong or an injury has been

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inflicted and must be redressed in money." City of Rawlins v. Jungquist, 94 Pac. 464, 467, 96 Pac. 144, 16 Wyo. 403 (quoting Sutherland, Damages [3d Ed.] § 1063).

While "compensation" and "damages" are sometimes used interchangeably to represent purchase money for rights acquired by eminent domain, "compensation" more properly signifies purchase money and "damages" indemnity for a trespass. Abernathy v. South & W. Ry. Co., 63 S. E. 180, 185, 150 N. C. 97 (citing Randolph, Em. Dom. § 222).

The compensation guaranteed to the owner whose property is taken for public use is its fair market value at the time of the taking for any use to which the property is adapted by its location, and for which it is available, not to be limited by the present use or the use for which it is sought to be taken. In re Simmons, 114 N. Y. Supp. 575, 577, 130 App. Div. 356.

"Compensation," as the term is used in the constitutional provisions against taking private property for public use without making a just compensation, means recompense or remuneration for the property which is taken or injured. In re Water Front on North River, 105 N. Y. Supp. 750, 757, 120 App. Div. 849 (quoting and adopting Cooley's Const. Lim. [7th Ed.] p. 822).

That there is a distinction, in regard to property taken for public use, between "compensation" (for property actually taken) and "damages" (to the remainder of it), is indicated by Code 1896, § 1718, providing merely that the compensation must not be reduced because of benefits. Town of Eutaw v. Botnick, 43 South. 739, 740, 150 Ala. 429.

The word "taken," as used in the charter of the town of Newborn, providing that the mayor and council shall have power to lay out and abolish streets and alleys and to extend and change the same as the public interest may require "by paying the owner just compensation for the property taken for any such purposes," means property actually seized or appropriated, and the word "compensation" means the value of property without reference to any agreement between the parties, and therefore the statute by implication empowers the municipality to condemn land for the purposes named in the charter. Stowe v. Town of Newborn, 56 S. E. 516, 127 Ga. 421.

An instrument, executed by an owner of a lot extending to the center of the street in front thereof, by which he consents to the maintenance of an elevated railroad in the street, and operation thereof "as the same is now constructed without compensation therefor," and releases all claim arising from the maintenance of the structure and the operation of the railroad "as now constructed and operated," is more than a mere license, and is effective at least as an estoppel for any compensation that might be awarded in condemnation proceedings, "compensation" being the word used in Const. 1894, art. 1, § 7, regulating the taking of private property, and, as used in the consent, indicating a continued invasion of the abutting owner's rights in the street without payment therefor. Smyth v. Brooklyn Union Elevated R. Co., 85 N. E. 1100, 1102, 193 N. Y. 335, 23 L. R. A. (N. S.) 433.

COMPENSATORY DAMAGES

"Compensatory damages" include such as will compensate the injured party for injuries to the person, expenses immediately resulting therefrom, loss of time, disabilities, loss of health, bodily pain, and mental suffering, including allowance on these accounts for the future. Huber v. Teuber (D. C.) 3 MacArthur, 484, 492, 497, 36 Am. Rep. 110.

"Compensatory damages" include all other damages than punitive and embrace not only special damages, as direct pecuniary loss, but includes injury to feelings, mental anguish, and damages to character or reputation. Green v. Western Union Tel. Co., 49 S. E. 165, 168, 136 N. C. 489, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349 (citing Hale, 106, 99).

Punitive damages are not recoverable against the sureties in an ordinary attachment bond in a suit brought on the bond. The damages recoverable on such bond are compensatory in their nature, such as loss or depreciation in value of the attached property, interest, costs, and expenses, including, under our statute, reasonable attorney's fees, and which are the proximate results of the attachment, when the order therefor has been wrongfully obtained. Floyd v. Anderson (Okl.) 128 Pac. 249, 250, 43 L. R. A. (N. S.) 788.

"The very term 'compensatory damages' implies that there must be actual loss before compensation can be given." Compensatory damages cannot be recovered of a railroad company for breach of a covenant to fence its track, when the land through which the railroad passes is used, not for stock, but only for cropping, and no damages are shown otherwise than the omission by the owner to graze stock on the land because of his fear of possible injury to it from train or loss of estimated profits by grazing over those from agriculture, which might have been realized if fences had been made. Douglass v. Ohio River R. Co., 41 S. E. 911, 916, 51 W. Va. 523.

"The term 'compensatory damages,' by necessary implication, intends a recompense or reward for some loss or service; a reimbursement for loss suffered by reason of injury or to property. They proceed from a sense of actual justice and are designed to repair that of which one has been deprived by the wrong of another." Mere fright unattended by any harmful results to the per-

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son frightened, in mind or body, furnishes no ground for the recovery of compensatory damages. Pullman Co. v. Lutz, 45 South. 675, 676, 154 Ala. 517, 14 L. R. A. (N. S.) 907, 129 Am. St. Rep. 67 (citing and quoting from 13 Cyc. p. 22).

Exemplary damages distinguished

While the damages to which a plaintiff may become entitled in an action of tort to the amount of his expenses in litigation in addition to his actual damages are in fact and in effect "compensatory damages" and not punitive, they are in practice variously termed "exemplary," "punitive," "vindictive," or "smart money," and, in an action for personal injuries in which plaintiff was entitled to recover such additional damages, it was not error to refer to them as "exemplary." Hull v. Douglass, 64 Atl. 351, 353, 79 Conn. 266.

The term "exemplary damages," as used in Comp. Laws, § 5398, providing that one selling intoxicating liquors to a minor shall be liable for both actual and exemplary damages, does not mean smart money, but means compensatory damages for wounded pride, mortification, injury to feelings, mental anxiety, and the like. Hink v. Sherman, 129 N. W. 732, 733, 164 Mich. 352.

Mental suffering

"Compensatory damages" are those by which the actual loss sustained is measured and the injured party recompensed therefor. "Compensatory damages" include all damages other than punitive, and thus embrace not only special damages but mental suffering. Ammons v. Southern Ry. Co., 52 S. E. 731, 732, 733, 140 N. C. 196 (citing Joyce on Damages, § 26; Hale, Damages, pp. 99, 106).

"An impression not infrequently exists, and is sometimes acted on, that in the large number of ordinary causes 'compensatory damages' should be confined to actual pecuniary loss, and that any recovery above actual loss in money or time, having definite pecuniary value, partakes of the nature of punitive damages. * * * 'Where the facts and nature of the action so warrant, actual damages include pecuniary loss, physical pain, and mental suffering,' etc." "Compensatory damages" include all other damages than punitive, thus embracing not only special damages as direct pecuniary loss, but injury to feelings, mental anguish, etc. Where a telephone company operating under a public franchise disconnected the telephone of a customer, who refused to pay an unjust demand, and who, to obtain a restoration of the telephone service, paid the sum demanded, and it appeared that the telephone service was for household purposes, the customer could for the wrong recover the damages resulting from the annoyance and inconvenience, together with the special damages resulting from the fact that the customer's father-in-law was at the time in a hospital, dangerously sick; the company at the time of the discontinuance of service having notice of that fact. Carmichael v. Southern Bell Telephone & Telegraph Co., 72 S. E. 619, 622, 157 N. C. 21, 39 L. R. A. (N. S.) 651, Ann. Cas. 1913B, 1117 (citing Osborn v. Leach, 47 S. E. 811, 135 N. C. 628, 66 L. R. A. 648).

In particular torts

The words "compensatory damage," as used in an action for the wrongful death of an employé, means such a sum of money as will fairly and reasonably compensate the estate of deceased for the destruction of his power to earn money which is the direct and natural result of gross negligence on the part of defendant. Illinois Cent. R. Co. v. Cane's Adm'x (Ky.) 90 S. W. 1061, 1064.

In an action of negligence for injuries received from an explosion, "damages" are of two kinds, "compensatory," such as make the wrong to be whole as of the time of the injury, or "punitive," where the tortious act is aggravated by evil motive, malice, violence, oppression, or fraud. The probable loss of profits to plaintiff which might have been earned except for the injury depends on so many contingencies that such damages are termed "speculative" and are not recoverable. James McNeil & Bro. Co. v. Crucible Steel Co., 56 Atl. 1067, 1070, 1071, 207 Pa. 493.

"Compensatory damages," in an action for general damages for defamation of character, injustice, and indignity, means such sum of money as will compensate plaintiff for the injury done to his feelings, his character, and his reputation. Times Pub. Co. v. Carlisle, 94 Fed. 762, 770, 36 C. C. A. 475.

"Compensatory damages" for a libel include reasonable compensation for any wrong done to the injured person's reputation, good name, or fame, and for any mental suffering caused thereby. Todd v. Every Evening Printing Co. (Del.) 66 Atl. 97, 99, 6 Pennewill, 233.

COMPETENCY

See Incompetent—Incompetency; Mental Competency.

"By 'competency' is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he is making the beneficiaries of his bounty. Imperfect memory caused by sickness or old age, forgetfulness of the names of persons he has known, idle questions in requiring a repetition of information, will not be sufficient to establish incompetency, if he has sufficient intelligence remaining to fulfill the above definition." Gibony v. Foster, 130 S. W. 314, 322, 230 Mo. 106 (quoting and adopting definition in Sehr v. Lindemann, 54 S. W. 540, 153 Mo. 288).

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A master is bound to exercise ordinary care to employ competent servants; "competency" in that sense meaning both capable and reasonably careful servants, which includes sober persons, where the work is such that an intoxicated person could not perform it without danger to himself and other employés. Columbia Creasoting Co. v. Beard, 89 N. E. 321, 323, 44 Ind. App. 310.

As respects the duty of a master to employ competent servants for the protection of fellow servants, the word "competency" should be given a comprehensive interpretation, so as to include within its range of meaning all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the common general employment. Swift Mfg. Co. v. Phillips, 69 S. E. 585, 8 Ga. App. 425.

"By 'competency' (to make a will) is meant intelligence sufficient to understand the act he (the testator) is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty." Hughes v. Rader, 82 S. W. 32, 52, 183 Mo. 630; Winn v. Grier, 117 S. W. 48, 55, 217 Mo. 420 (quoting and adopting definition in Sehr v. Lindemann, 54 S. W. 537, 540, 153 Mo. loc. cit. 288).

A testator is "competent" to make a will though he has exhibited numerous eccentricities such as unbounded belief in a patent medicine as a cure for all ills, wanting to make political speeches, getting up in the night, singing psalms in his room, taking the house dogs hunting and returning without any game, the exhibition of live stock at church meetings, failure to recognize acquaintances, a roaring in the head and disconnected conversations, where he has at all times been able to carry on his business and when making the will understood all that was said and done. Winn v. Grier, 117 S. W. 48, 55, 217 Mo. 420.

COMPETENT

See Fit and Competent; Legally Competent.

"Competent" means answering to all requirements; adequate; sufficient. Hart v. Hart (Tex.) 110 S. W. 91, 92 (citing 2 Words and Phrases, p. 1358).

"Competent" is the equivalent of "efficient," as used in an instruction in an action against a railroad company for personal injuries, which stated that it was the duty of defendant to provide efficient men for its service. Norfolk & W. R. Co. v. Ampey, 25 S. E. 226, 232, 93 Va. 108.

In an action against a master for injury to a servant from the negligent employment of an incompetent foreman, an instruction that a competent man is a reliable man; that "incompetency" means want of ability suitable to the task, or want of disposition to use one's experience and abilities properly; that incompetency may exist not alone in physical or mental attributes, but in the disposition to perform duties; and that, though a foreman may be physically and mentally able to do all that is required of him, his disposition may make him an incompetent man—is not misleading and is a correct statement of the law. Young v. Milwaukee Gaslight Co., 113 N. W. 59, 60, 133 Wis. 9.

For an applicant to office under the veteran's preference law (Laws 1907, p. 541, c. 374, § 1) providing that veterans in the United States service in the Civil War shall have a preference for appointment to public offices in cities and towns if competent to perform such services, to be "competent," he must possess every qualification essential to the prompt, efficient, and honest performance of the duties pertaining to the office to be filled. Dever v. Platt, 105 Pac. 445, 446, 81 Kan. 200.

The consent of the city of New York to the use of its streets by a corporation using lines of electric conductors to be placed underground is not a contract with the corporation, or a property right, which the city may not take without compensation, until the consent has been acted upon and subways have been constructed; and where the consent has been revoked before using, the corporation is not "competent to manufacture or supply electricity," within Laws 1887, c. 716, § 7, and is not entitled to mandamus under such chapter. In re New York Electric Lines Co., 126 N. Y. Supp. 331, 332, 69 Misc. Rep. 200.

COMPETENT APPRAISER

The fact that one selected as an appraiser in an insurance case had an intimate knowledge of the subject-matter and on that account a preconceived opinion did not of itself disqualify him, because it was such knowledge and such experience which made him the better qualified to ascertain the true value if he was free from bias and prejudice. In other words, this preconceived opinion as an expert, derived from personal inspection, did not make him other than a "competent and disinterested" appraiser within the meaning of the appraisal clause of the policy, providing for the selection of competent and disinterested appraisers to estimate the loss. National Fire Ins. Co. of Hartford, Conn. v. O'Bryan, 87 S. W. 129, 131, 75 Ark. 198, 5 Ann. Cas. 334.

COMPETENT BOOKKEEPER

A "competent bookkeeper" is one who is qualified by education and experience to examine and compare the various books kept by a bank, and trace the bearing of one en-

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try upon another in the different books. Mason v. Moore, 76 N. E. 932, 935, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240.

COMPETENT COURT

Within the meaning of the habeas corpus statute, a court has no jurisdiction, and so is not "competent," by its judgment to give force to an unconstitutional law. Servonitz v. State, 113 N. W. 277, 279, 133 Wis. 231, 126 Am. St. Rep. 955.

A de facto court is a "competent court" within the purview of Rev. Laws 1905, § 4587, providing that, if it shall appear on the return of a writ of habeas corpus that the prisoner is in custody by virtue of a process of a court duly constituted, he can only be discharged in certain cases. State ex rel. Bales v. Bailey, 118 N. W. 676, 678, 106 Minn. 138, 19 L. R. A. (N. S.) 775, 130 Am. St. Rep. 592, 16 Ann. Cas. 338.

COMPETENT EVIDENCE

"Competent evidence" means that which the nature of the fact to be proved requires. Goltra v. Penland, 77 Pac. 129, 133, 45 Or. 254 (quoting 1 Greenl. Ev. [14th Ed.] § 2).

Pen. Code, Alaska, § 128, making common fame "competent evidence" in support of an indictment for keeping a bawdy house, does not make common fame sufficient proof to warrant a conviction, and there must be some evidence direct or circumstantial that it was so kept. Botts v. United States, 155 Fed. 50, 51, 83 C. C. A. 646, 12 Ann. Cas. 271; Hall v. Same, 155 Fed. 52, 53, 84 C. C. A. 215.

An instruction that evidence of the declaration of a testator before and after the execution of a will is not admissible to prove the actual fact of undue influence being exercised upon the testator in making the will, but competent to establish the effect of external acts of undue influence, if any are shown, upon the mind of the testator, is improper as a charge upon the weight of the evidence, for the word "competent" means answering to all requirements, adequate, sufficient; and the word "establish" means "to fix or settle unalterably." Hence the instruction being about evidence, and the connection in which the term was used being with reference to evidence, the jury would naturally imply the word "evidence" in the term and construe the words as meaning "sufficient evidence to settle unalterably, or prove, the effect of the external acts of undue influence." Hart v. Hart (Tex.) 110 S. W. 91, 92.

COMPETENT INSPECTOR

The "competent inspector" which a railroad may be required to furnish for the proper and reasonable inspection of appliances used by his employés need not be a man of the highest efficiency, skill, and ability, but must be one in whose selection reasonable care has been taken to see that he is fit to perform the duties of his position. The term means such an inspector as prudently conducted and operated railroads use for the same sort of inspection. St. Louis, I. M. & S. R. Co. v. Reed, 122 S. W. 645, 648, 92 Ark. 350.

COMPETENT JURISDICTION

A court of competent jurisdiction is one having authority of law to do the particular act. Ex parte Justus, 104 Pac. 933, 935, 3 Okl. Cr. 111, 25 L. R. A. (N. S.) 483.

Under the habeas corpus act of the territory of Oklahoma (St. 1893, § 4578), excluding from its benefits persons committed or detained by virtue of any process issued on any final judgment of a "court of competent jurisdiction," a court of "competent jurisdiction" is one having power and authority of law at the time of acting to do the particular act. A court of "competent jurisdiction" for the trial of the crime of perjury consists of a presiding judge and a jury. It is not a court unless there be both judge and jury. The presence, actual or constructive, of a judge at every stage of the proceedings, is necessary, or the proceedings will be coram non judice. Where, during the trial of a prosecution for perjury and while the jury was in charge of the bailiffs deliberating on a verdict, the court was adjourned for two days, and the judge went into another county, and opened and held a term of court there, the term terminated by operation of law, as to that case, when the judge left the place where the court was by law required to be held, and went to the other county, and there opened court; the jury in his absence had no authority to consider the case; the jurisdiction, having been suspended by the dissolution of the court, could not be resumed by the return of the judge; and a verdict to return by the jury and a judgment thereon were not by a court of "competent jurisdiction," but were coram non judice and void. In re Patzwald, 50 Pac. 139, 143, 5 Okl. 789.

Pub. St. p. 416, § 23, subd. 1, providing that a guardian's sale shall not be avoided on account of any irregularity in the proceedings, if it shall appear that the guardian was licensed to make the sale by a probate court of "competent jurisdiction," signifies that the guardian was licensed to make the sale by the probate court of the county in which he was appointed. Montour v. Purdy, 11 Minn. 384, 404 (Gil. 278, 296).

Rev. Laws, c. 167, § 126, provides that an attachment of property on mesne process shall be dissolved by the appointment by "any court of competent jurisdiction in this commonwealth" of a receiver to take possession of the property, etc. Section 127 provides that, when at attachment has been so dissolved, the proceedings for the appointment of a receiver shall not thereafter be dismissed, and the receiver discharged, until all

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the assets which have come into his hands as receiver have been fully distributed, or the claim upon which the attachment was made has been fully paid and discharged, etc. Held, that the words "any court of competent jurisdiction in this commonwealth" means any court which is subject to the legislation of the commonwealth, and the act does not apply to receivers appointed by federal courts. Reynolds v. Enterprise Transportation & Transit Co., 85 N. E. 110, 112, 198 Mass. 590.

COMPETENT JUROR

Under Code 1906, § 2685, providing that any person otherwise competent who will make oath that he is impartial in the case shall be a "competent juror" in a criminal case, though he has an impression or opinion as to the guilt or innocence of accused, etc., light impressions which may fairly be supposed to yield to the testimony and leave the mind open to a fair consideration thereof do not disqualify a juror. Whitehead v. State, 52 South. 259, 260, 97 Miss. 537.

COMPETENT OFFICER

The word "competent," when used to indicate the qualifications which a public officer should possess, necessarily includes every qualification essential to the prompt, efficient, and honest performance of the duties pertaining to the office to be filled. An applicant to office under the Veterans' Preference Law (Laws 1907, c. 374, § 1), providing that veterans in the United States service in the Civil War shall have a preference for appointment to public office if "competent," must possess the qualifications essential to the prompt, efficient, and honest performance of the duties pertaining to the office to be filled. Dever v. Platt, 105 Pac. 445, 446, 81 Kan. 200 (citing State ex rel. Taggart v. Addison, 92 Pac. 584, 76 Kan. 707).

An applicant for appointment under the Veterans' Preference Law, to be "competent" within the meaning of the law, must possess the qualities which are essential to the prompt, efficient, and honest performance of the duties pertaining to the office for which application is made. State ex rel. Taggart v. Addison, 92 Pac. 581, 584, 76 Kan. 699.

"Competent" is a comparative term as applied to the qualifications for office, and must be construed in the sense of fully capable of adequately rendering all the services demanded. The word "competent," in Laws 1907, c. 374, relative to the employment of ex soldiers and sailors, is necessarily a comparative word, and the utmost good faith by the appointing power is demanded in the rejection of applicants qualified under the preference law. State v. Addison, 96 Pac. 66, 68, 78 Kan. 172.

COMPETENT PERSON

The adjective "competent" has a variety of meanings depending on the connection in which it is used, and it does not mean "disinterested" in all cases. Competency may have reference to fitness, qualification, sufficient ability and training to sucessfully execute the work to be undertaken. The term "competent," as used in Rev. St. 1898, § 1379—13, providing for the appointment of three competent persons as drainage commissioners, does not mean disinterested, and owners of land within the proposed district are not disqualified. In re Cranberry Creek Drainage Dist., 107 N. W. 25, 26, 128 Wis. 98 (citing Crabb, Eng. Synonyms; Stand. Dict.; 2 Words & Phrases, p. 1358; Bowes v. Haywood, 35 Mich. 241; In re Pacheco's Estate, 23 Cal. 476; Ætna Ins. Co. v. Stevens, 48 Ill. 33; Tenney v. State, 27 Wis. 387).

The requirement of Local Improvement Act, § 38, that the person appointed to make an assessment for a street improvement shall be a "competent person," "means only that he shall be free from legal disqualification. The law has established no standard ability or experience, and the word 'competent' is not used with reference to those qualities." On the hearing of objections to the confirmation of an assessment, evidence to show the business qualifications of the person appointed to make the assessment is inadmissible. City of Marengo v. Eichler, 91 N. E. 758, 759, 245 Ill. 47.

COMPETENT SCALER

The court below properly instructed that a "competent" scaler of logs within the meaning of a contract was not such a person as would commit no mistakes or errors in rejecting logs that he ought to have accepted, or in accepting logs that he ought to have rejected, but an average man, as competent as such men ordinarily are who are employed in that capacity. The instruction did not fix too low a standard of competency. McIlquham v. Barber, 53 N. W. 902, 905, 83 Wis. 500.

COMPETENT SERVANT

A "competent servant" is one reasonably safe for the performance of the duties assigned to him, considering the nature of the work and the safety of his coemployés. Warren v. Harlan & Hollingsworth Corp. (Del.) 84 Atl. 215, 220.

COMPETENT TRIBUNAL

The "competent tribunal" referred to in 1 Ballinger's Ann. Codes & St. § 393, relating to the duties of county auditor, providing that he shall audit all claims, demands, etc., chargeable against the county except such cost or fee bills as are by law to be examined or approved by some other judicial tribunal or officer, and that he shall draw a warrant for cost bills and other lawful claims duly approved by the competent tribunal designated by law for their allowance, clearly refer to the judicial tribunal, or officer as used in the same section, and means a court or judge.

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State ex rel. Egbert v. Blumberg, 89 Pac. 708, 709, 46 Wash. 270.

Under the provision of the Denver city charter giving property owners an opportunity to be heard before the city council in relation to an assessment, holding that the hearing contemplated must be before a board or tribunal competent to administer proper relief, the word "competent," as employed in such provision, cannot convey the meaning that where the judgment of the city council is not final, but its action is subject to revision by the board of public works, therefore it is not a competent tribunal. City of Denver v. Londoner, 80 Pac. 117, 119, 33 Colo. 104.

COMPETENT WITNESS

In the statutes relating to the attestation of wills, the phrase "'competent witness' means a person not legally disqualified by reason of mental incapacity, interest, or conviction of crime, from testifying in courts of justice, but who at the time of subscribing the will would be competent to testify to the facts attested in a proper proceeding to probate the will." Under Burns' Ann. St. 1908, § 522, specifying who are incompetent as witnesses, a nominated executor was not an incompetent attesting witness merely because the will might be drawn into private litigation between heirs and beneficiaries by a suit to which he became a voluntary party. Hiatt v. McColley, 85 N. E. 772, 774, 171 Ind. 91 (citing Belledin v. Gooley, 60 N. E. 706, 157 Ind. 49, 50; Jenkins v. Dawes, 115 Mass. 601; Morrill v. Morrill, 53 Vt. 78, 38 Am. Rep. 659; In re Holt's Will, 57 N. W. 219, 56 Minn. 33, 22 L. R. A. 481, 45 Am. St. Rep. 434; In re Noble, 15 N. E. 850, 124 Ill. 266, 270; Fuller v. Fuller, 83 Ky. 345, 349; Sears v. Dillingham, 12 Mass. 358, 362; Sparhawk v. Sparhawk, 10 Allen [92 Mass.] 155; Meyer v. Fogg, 7 Fla. 292, 68 Am. Dec. 441; Richardson v. Richardson, 35 Vt. 238; Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Snedeker v. Allen, 2 N. J. Law, 35; Lippincott v. Wikoff, 33 Atl. 305, 54 N. J. Eq. 107; Coalter's Ex'r v. Bryan, 1 Grat. [42 Va.] 18; Vansant v. Boileau [Pa.] 1 Bin. 444; Snyder v. Bull, 17 Pa. 54; In re Jordan's Estate, 29 Atl. 3, 161 Pa. 393; Jones v. Larrabee, 47 Me. 474; Stewart v. Harriman, 56 N. H. 25, 22 Am. Rep. 408; In re Lyon's Will, 71 N. W. 362, 96 Wis. 339, 65 Am. St. Rep. 52; Children's Aid Soc. of City of New York v. Loveridge, 70 N. Y. 387; In re Wilson's Will, 8 N. E. 731, 103 N. Y. 374; Loder v. Whelpley, 18 N. E. 874, 111 N. Y. 239; In re Coleman's Will, 19 N. E. 71, 111 N. Y. 220; In re Gagan, 21 N. Y. Supp. 350, 66 Hun, 632; Davenport v. Davenport, 41 South. 240, 116 La. 1009, 114 Am. St. Rep. 575.

A four year old child, apparently utterly unable to realize the meaning of an oath, is not a "competent witness." Mays v. State, 127 S. W. 546, 547, 58 Tex. Cr. R. 651.

COMPETING

Where, by a railway charter, a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads which has remained unexecuted, it is within the power of the Legislature to declare by subsequent acts that the power shall not extend to the purchase, lease, or consolidation with parallel or competing lines, and a contract by which one railroad agrees to guaranty the bonds of a parallel competing road, in consideration of which half the stock of the latter road is to be transferred to the stockholders of the former road or to a trustee for their use, is within Laws Minn. 1874, c. 29, providing that no railroad shall consolidate with, lease, purchase, or in any way control any parallel or competing line. Pearsall v. Great Northern R. Co., 16 Sup. Ct. 705, 713, 161 U. S. 646, 40 L. Ed. 838.

A railroad's main line ran southeasterly from N. to C. and a division ran from H. in the same direction to N. Its line of leased road began at Paducah and ran southeast to Hollow Rock, and there crossed the division, and thence ran in a southwest direction to Memphis. Held, with reference to a map filed as an exhibit, that whether considered as one or two roads, and whether its termini be regarded as Memphis and Texas, Tenn., or Memphis and Paducah, there was no competition possible between them save for a comparatively short distance, and that the lines were not parallel or "competing"; the mere intersection with another line not being the sort of competition which concerns the public. Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299, 317, 33 C. C. A. 517.

Where one line of railroad would traverse the same territory and follow for its entire length practically the same route over which another road was authorized by proclamation to construct its projected line of road, the roads are "competing lines," under Code 1892, § 3587, and Acts 1898, p. 95, c. 80, both of which forbid parallel or competing railroads to consolidate. State v. Mobile, J. & K. C. R. Co., 38 South. 732, 737, 86 Miss. 172, 122 Am. St. Rep. 277.

The prohibition in the Constitution against consolidation of competing railroad companies applies to a railroad company organized before the adoption of the Constitution. State ex rel. Leese v. Atchison & N. R. Co., 38 N. W. 43, 45, 24 Neb. 143, 8 Am. St. Rep. 164.

Two connecting roads running from Butte to Anaconda, were controlled by the Northern Pacific and formed a route which was practically as direct a line between the two cities as the line of the railroad company which leased one of the roads. Held,

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that the lessor and lessee roads were "competing" lines in so far as the power to lease was concerned, though the lessor road was not parallel, and, if it stood by itself, there would be no competition. State v. Montana R. Co., 53 Pac. 623, 625, 21 Mont. 221, 45 L. R. A. 271.

The consolidation of railroad companies owning and operating lines used in terminal business only is not repugnant to Const. art. 12, § 17, forbidding the consolidation of railroad companies whose lines are parallel or "competing." State ex inf. Attorney General v. Terminal Ass'n of St. Louis, 81 S. W. 395, 396, 182 Mo. 284.

Railroad companies having a through and separate line between two points are "competing" companies between such points, within the rule that contracts tending to stifle competition or create or foster monopolies are invalid, and agreements between such roads for division of earnings are not valid. Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 6 South. 888, 889, 41 La. Ann. 970, 17 Am. St. Rep. 445.

A railroad by its relations to other roads may be a "competing" line with a road with which it is not parallel and does not connect, within the meaning of an act forbidding it to consolidate with a competing road. East Line & R. R. Ry. Co. v. State, 12 S. W. 690, 694, 75 Tex. 434.

Two belt lines of railway intended principally to connect the termini of railroads in East St. Louis with the river transfers to St. Louis, not geographically parallel, and neither touching all the places touched by the other and not competing in respect to local industries because not having access to them, but cutting rates against each other in the principal business and finally brought under the same management, are "competing" lines within Const. Ill. art. 11, § 11, forbidding consolidation of competing lines. East St. Louis Connecting R. Co. v. Jarvis, 92 Fed. 735, 742, 34 C. C. A. 639.

Const. Pa. art. 17, § 4, forbidding the consolidation, by purchase or lease, of any railroad, canal, or other transportation companies owning, or having under their control parallel or "competing" lines, does not apply to street railway companies, since street railways, though parallel, cannot be "competing" in the sense of the mischief intended to be prevented. The travel over parallel streets is not necessarily a "competing" travel. Each street has travel of its own which is conducted upon its own railway. That travel may be almost entirely conducted without competition with the travel on another, though parallel, street. Two roads would be "competing" if laid upon the same street and running in the same direction. Gyger v. Philadelphia City P. Ry. Co., 20 Atl. 399, 400, 136 Pa. 96.

Under the Constitution prohibiting railroads from controlling "competing" or parallel lines, an agreement forming a traffic association between a number of railroads for the purpose of "preventing sudden and extreme changes in rates," by which a managing committee is authorized to fix freight rates, no member being allowed to reduce them, is illegal, though a unanimous vote is required to establish the rates, which may be reduced as provided by the agreement, and though punishment is provided for violating the agreement and any member is at liberty to withdraw upon notice. Gulf, C. & S. F. Ry. Co. v. State, 10 S. W. 81, 84, 72 Tex. 404, 13 Am. St. Rep. 815, 1 L. R. A. 849, 2 Interst. Com. R. 335.

Where the Railroad Commission has established rates for a street railway company, and it does not appear that other lines, operating in a part of the territory covered by its lines, have station facilities at any of the points affected by the established rates except at one or two places, or that they are seeking to handle the traffic or had time schedules to handle it, and where it appears that people living in territory outside of those places must travel on the appellant's line or be deprived of direct access by railway into certain towns, such other lines are not "competing lines"; and hence the order of the commission, reducing rates below the rates permitted to be charged by such other roads, cannot be discrimination. Puget Sound Electric Ry. v. Railroad Commission of Washington, 117 Pac. 739, 749, 65 Wash. 75, Ann. Cas. 1913B, 763.

Where a foreign railroad reached the termini of a local road, but its line between such termini was longer and more indirect, requiring a change of cars and ferrying and ran no through trains between such termini, solicited no through business, and provided no terminal facilities at one terminus, and did not make any freight or passenger rates to compete with the local road, the two roads were not parallel or "competing lines." Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co., 75 N. E. 562, 566, 217 Ill. 504.

By the terms of Gen. Code Ohio, § 8806, allowing a railroad to acquire stock in another line, no road or line may be termed competing until it is constructed. Competition as between railroads, necessarily relates to transportation, and, in respect to transportation, the term "competing" signifies a road complete and ready for operation. Mannington v. Hocking Val. R. Co., 183 Fed. 133, 150.

A "competing" line of railroad, within Const. 1874, art. 17, § 4, forbidding the control of parallel and competing lines by any company, includes a projected road, surveyed and laid out, and in process of construction, if such road when completed and in opera-

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tion would actually compete with the road seeking control. Commonwealth v. South Pennsylvania R. Co., 1 Pa. Co. Ct. R. 214, 221.

Railroads approaching their connecting point almost at right angles are not parallel and "competing" lines, and hence contracts between them to interchange traffic and cars, sell coupon passenger tickets, make through bills of lading, and apportion their earnings, is not forbidden by the Constitution. Cumberland Val. R. Co. v. Gettysburg & H. Ry. Co., 35 Atl. 952, 954, 177 Pa. 519.

Stock in a Georgia railroad corporation was registered in the name of a foreign corporation and its voting power was held by another foreign corporation, neither of which was a carrier; but the voting power was controlled by a foreign carrier corporation competing with the railroad as to interstate traffic, though not as to domestic traffic. No contract affecting such stock was shown to have been made by the parties in Georgia or with any Georgia corporation. It was held that the right to vote on such stock was not affected by the Georgia Constitution, declaring illegal all contracts with corporations which may lessen competition. Clarke v. Richmond & W. P. Terminal Railway & Warehouse Co., 62 Fed. 328, 334, 10 C. C. A. 387.

Where separate lines of railway start out at right angles from a seaport, transport freight and passengers from widely separate sections of two states, and no point on either road can be reached in any reasonable time by a passenger starting out on the other, a consolidation of such roads does not tend to defeat competition merely because both lines cross two shallow rivers on which steamboats carrying freight and passengers occasionally ply; the occasional delivery of freight by the roads to the steamboats not constituting a competitive business within the meaning of the law. Dady v. Georgia & A. Ry., 112 Fed. 838, 844.

COMPETITION

See Reasonable Competition; Unfair Competition.

"Competition" means selection and not inclusion, and the courts interfere therewith only when it becomes combined force seeking to injure another. Heim v. New York Stock Exchange, 118 N. Y. Supp. 591, 596, 64 Misc. Rep. 529.

"Monopoly" and "competition" being the exact opposites, anything tending to destroy competition tends toward monopoly. State v. Central Lumber Co., 123 N. W. 504, 512, 24 S. D. 136, 42 L. R. A. (N. S.) 804.

"The law does not visit with its reprobation a fair 'competition' in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by 'an open declaration of his intention to compete with the other in the market." Brown Chemical Co. v. Meyer, 11 Sup. Ct. 625, 627, 139 U. S. 544, 35 L. Ed. 247.

At common law a trader may, to obtain another's customers, use any means not involving violation of the criminal law, or amounting to fraud, duress, or intimidation, and he may boast untruthfully of the merits of his wares so long as it does not amount to a slander or willful misrepresentation of the quality of a rival product, or a libel on the character, business standing, and credit of a rival, and Const. Ala. 1901, § 103, empowering the Legislature to prevent unreasonable competition, does not narrow the play of the law of "competition" as defined at common law. Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 Fed. 553, 561.

In order to establish "competition" between two roads, it is necessary that the "two roads in question tend in the same direction or to the same commercial center." Webster defines "competition" to be "the act of seeking or endeavoring to gain what another is endeavoring to gain at the time; rivalry; mutual strife for the same object." State v. Port Royal & A. Ry. Co., 23 S. E. 363, 369, 45 S. C. 413 (quoting Burke v. Big Four [Ohio] 22 Wkly. Law Bull. 14).

The word "competition," in Const. art. 4, § 2, par. 4 (Civ. Code, § 5800), prohibiting the Legislature from authorizing any corporation to buy stock in any other corporation or to make any agreement with such corporation which may defeat or lessen competition in their respective businesses or to encourage monopoly, is used in its common-law sense, and the competition, so far as applicable to railroads which the provision is designed to prevent, is competition between lines of railroad viewed with reference to their general business in and through the territory traversed by them, and not competition which may incidentally exist at mere points or particular places, and a combination of railroad lines is not violative of the Constitution, though it may lessen or defeat competition at some point or points, if as a general result, the public at large, as distinguished from people of special or particular communities, is, in consequence, benefited. State v. Central of Georgia R. Co., 35 S. E. 37, 38, 109 Ga. 716, 48 L. R. A. 351.

The word "competition," in Const. art. 4, § 2, par. 4 (Civ. Code, § 5800), prohibiting the Legislature from authorizing any corporation to buy stock in any other corporation or to make any contract with any such corporation or to make any contract with any

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such corporation which may defeat or lessen "competition" in their respective businesses, is applicable to all corporations including street railroad corporations, and whether a combination between street railroads defeats or lessens competition to the injury of the public is at least a question of fact, and in its application the court must be governed by the fundamental principle as to whether there is such a creation of a monopoly or defeating of competition as will result in injury to the public. Trust Co. of Georgia v. State, 35 S. E. 323, 330, 109 Ga. 736, 48 L. R. A. 520.

COMPETITOR

A labor organization seeking to compel a manufacturer to unionize his plant is not such a "competitor" in the labor market as to justify it in enticing employés to leave the service of their master, or to induce persons seeking employment with him. from so doing, when the enticer does not employ labor. The competition which the law upholds must be honest competition, and not a malicious attempt to injure another. George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n of United States and Canada, 66 Atl. 953, 954, 72 N. J. Eq. 653.

COMPLAIN

The meaning of the word "complain" is to express regret or pain. Southern Indiana R. Co. v. Davis, 69 N. E. 550, 553, 32 Ind. App. 569.

COMPLAINT

See Cross-Complaint; Mimeograph Complaint; Supplemental Complaint; Sworn Complaint.
Filing, as commencement of action, see Commencement of Action.

There is no material difference between the word "complaint" as signifying illness and "ailment." The object of asking "for what complaint" in a question to an applicant for insurance, "when, and by what physician, were you last treated, and for what complaint?" was not to ascertain if he ever had any serious illness or personal injury; such words were added to ascertain what the sickness was, without regard to its being serious or trivial, and to show what kind of attendance of a physician was referred to. McDermott v. Modern Woodmen of America, 71 S. W. 833, 840, 97 Mo. App. 636 (citing and quoting Providence Sav. Life Assur. Soc. v. Reutlinger, 25 S. W. 835, 58 Ark. 528).

In civil proceedings

The term "complaint" is not always limited to the charges of crime or wrong, and it may be that as used in some statutes it comprehends oral as well as written allegations, but, whenever used, it means the making of a statement of facts as the basis for taking legal action. A sheriff acting under the statute for the protection of cattle against Texas fever can seize and quarantine cattle only on a complaint made to him that such cattle are capable of communicating the disease. A communication, addressed to him, which merely informs him that the live stock sanitary commission requests him to quarantine certain cattle, is not a "complaint," and does not protect him when sued in replevin for the cattle. Asbell v. Edwards, 66 Pac. 641, 642, 63 Kan. 610.

A hearing "upon complaint," within the meaning of the statute providing that if the orders of the railroad commissioners are not complied with the commissioners, "upon complaint," shall proceed to enforce the same, means a full hearing of which the railroad company has been notified and at which it may appear and participate. State ex rel. Taylor v. Missouri Pac. R. Co., 92 Pac. 606, 611, 76 Kan. 467.

The primary function of a complaint is to so plainly state the facts constituting the cause of action as to apprise the party sought to be charged of what the pleader relies on and intends to prove. Willison v. Northern Pac. R. Co., 127 N. W. 4, 111 Minn. 370.

"The, relief sought by the evidence was of an affirmative character, as much so as payment, set-off, settlement, accord and satisfaction, or account stated. It was in the nature of a 'counterclaim,' which is defined by statute to be 'any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant or which would tend to reduce plaintiff's claim or demand for damages.' Rev. St. 1894, § 353. The pleading denominated a 'counterclaim' is not in the nature of a complaint against the plaintiff." Tron v. Yohn, 43 N. E. 437, 438, 145 Ind. 272 (citing and adopting Branhan v. Johnson, 62 Ind. 259; Wills v. Browning, 96 Ind. 149; Brower v. Nellis, 33 N. E. 672, 6 Ind. App. 323; Rev. St. 1894, § 350).

In criminal proceedings

The requirement by Rem. & Bal. Code, § 2457, that prosecution for adultery shall be commenced only on "complaint" by the injured spouse, is mandatory, and a formal complaint by such person is necessary; the word "complaint" being used in its strict legal sense. State v. La Bounty, 116 Pac. 1073, 64 Wash. 415.

A "complaint" for a crime is a formal allegation or charge, preferred by some one against another, to an appropriate court or officer. The fact that a wife testified before a grand jury, in obedience to a subpœna, on the question of her husband's adultery, does not show a complaint made by her, within Code, § 4008, providing that no prosecution can be commenced but on the complaint of

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the husband or wife. State v. Stout, 32 N. W. 372, 373, 71 Iowa, 343, 344.

Under Pen. Code, §§ 811, 812, providing for the verification of facts by complainant prior to the issuance of a warrant of arrest by a magistrate, the instrument on which the warrant is authorized is not a "complaint" in the sense of a pleading, but is more like a deposition only, stating the facts verified by the informant. People v. Sacramento Butchers' Protective Ass'n, 107 Pac. 712, 716, 12 Cal. App. 471.

Under Rev. Laws, c. 212, § 36, authorizing the arrest without warrant for drunkenness in a public place, and St. 1905, c. 384, § 1, requiring an officer arresting one for drunkenness without warrant to make complaint to the court having jurisdiction of the offense, the arrest is only preliminary; and, though "complaint" means the oral allegations by the officer, which are reduced to writing in proper form by the magistrate or court, the officer is liable to an action for assault and false imprisonment, unless he makes the complaint. Horgan v. Boston Elevated R. Co., 94 N. E. 386, 387, 208 Mass. 287.

Same—As deposition

The word "complaint" in Act 1905, amending Pen. Code, § 872, providing that if it appeared from the examination of accused that a public offense had been committed, and there was cause to believe him guilty thereof, the magistrate should indorse on the deposition an order for his commitment, etc., is synonymous with the word "deposition" as used in the Code prior to its amendment. People v. Lapique, 103 Pac. 164, 165, 10 Cal. App. 669.

Same—Indictment distinguished

As indictment, see Indictment.

The word "complaint," in St. 1886, c. 87, §§ 2, 3, as extended in St. 1895, c. 438, Rev. Laws, c. 106, § 62, and St. 1909, c. 514, §§ 112, 113, providing a fine for failure to pay employés weekly, etc., means a complaint as distinguished from an indictment. Commonwealth v. New York Cent. & H. R. R. Co., 92 N. E. 766, 769, 206 Mass. 417, 19 Ann. Cas. 529.

In justice court

Under Rev. St. 1887, § 4668, a "complaint" in a justice's court is a concise written statement of the facts constituting plaintiff's cause of action or a copy of the account, note, bill, bond, or instrument on which the action is based. Purdum v. Neil, 77 Pac. 631, 632, 10 Idaho, 263.

Of crime

A statement made by prosecutrix in a rape case four months after the alleged assault, and not voluntarily, but in response to a demand for explanation of her condition, is not a "complaint" but a mere explanation. State v. Bebb, 101 N. W. 189, 190, 125 Iowa, 494.

COMPLAINANT

"'Complainant' is a term usually applied to describe the complaining party in an equity suit, * * * and the plaintiff is always a 'complainant.'" The complaint in an action determines whether the action is at law or in equity; it being immaterial whether the complaining party is described as plaintiff or as "complainant." Motley, Green & Co. v. Detroit Steel & Spring Co., 161 Fed. 389, 393.

A witness appearing voluntarily before the grand jury and testifying relative to double voting will not be treated as the "complainant," thus rendering his evidence on the trial incompetent, on the ground that he is entitled to half the penalty, where the record does not show that he was the complainant. The complainant must be such throughout; he cannot be a complainant at one stage of the proceedings and cease to be such at another. State v. Bailey, 21 Me. 62, 67.

COMPLEMENT

As used in Laws 1905, p. 163, c. 103, § 6, providing that one who has not purchased one complement of school land may buy not to exceed eight sections or such part thereof as will complete his complement, the word "complement" clearly means eight sections. Ross v. Terrell, 90 S. W. 1093, 1094, 99 Tex. 502.

A complement of a number is the difference between that number and a higher power of ten; for example the complements of 25 are 75 (100–25), 975 (1,000–25), etc. Comptograph Co. v. Mechanical Accountant Co., 140 Fed. 136.

COMPLETE—COMPLETION

See For the Completion of; Incomplete; Not Completed.

Erected as completed, see Erected.

"Complete" means filled up; with no part, item, or element lacking; free from deficiency; entire; perfect; consummate. Town of Checotah v. Town of Eufaula, 119 Pac. 1014, 1017, 31 Okl. 85.

"The word 'complete' is generally defined to mean: to finish; to perfect; to bring to a desired condition of something already commenced, rather than the bringing into existence of something new." An assignment of patents, including all inventions which might thereafter be "completed," held not to include inventions which had not been conceived at the time the assignment was executed. Davis & Roesch Temperature Controlling Co. v. Tagliabue, 159 Fed. 712, 713, 86 C. C. A. 466.

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"Substantial" as well as "complete" performance means performance according to the terms of the agreement, not the doing of some act which is as advantageous financially to the promisee as the agreed act would have been. Clough v. A. J. Stillwell Meat Co., 86 S. W. 580, 582, 112 Mo. App. 177.

The word "completed" in the phrase "to be completed in workmanlike style for the sum set opposite," as used in a contract, does not mean that nothing is to be paid until the job is finished, nor refer to a limit of time with regard to payment, but means that the work throughout is to be done in a workmanlike manner. Ganong & Chenoweth v. Brown, 40 South 556, 557, 88 Miss. 53, 117 Am. St. Rep. 731.

Under St. 1898, § 926—11, as amended by Laws 1903, cc. 228, 428, authorizing a city to vote bonds "for the erection, construction and completion" of school buildings, a city may issue bonds for the erection, construction, and equipment of a manual training school, since a school building is not completed within the statute until it is ready for use and occupancy, and since the word "completion" must be given some force, and is not synonymous with the words "erection" and "construction." Maxcy v. City of Oshkosh, 128 N. W. 899, 912, 144 Wis. 238, 31 L. R. A. (N. S.) 787.

The word "completing" has substantially the same meaning as the word "constructing" as used in a bond conditioned for the full and faithful performance of a contract, which provided for the construction and equipment of two steamers within a fixed period, according to certain plans and specifications, providing that on failure so to do the other party might complete the same by contract. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 Fed. 685, 689.

The precise meaning of the words "to complete" or "for the completion of," when used in statutes appropriating money for public work, is sometimes uncertain and indefinite, and the idea intended to be conveyed by them may depend upon the connection in which they are used and the object to which they refer. Claimants having contracted to construct a state capitol, but having failed to do so satisfactorily, the Legislature passed Act May 12, 1909, to provide for carrying forward the work of the new state capitol, making appropriations therefor, and paying any sums that might be found due the former contractors, for the appointment of a capitol commission, and defining its duties, and appropriated by section 6 for the purpose of "completing" the work covered by claimants' prior contract, subject to certain changes, $330,000. Sections 7 and 8 directed the new capitol commission to remove all defective work and materials already done, and appropriated $175,000 for replacing such work. By section 12 the commission was required to certify to the State Auditor the amount which might be found due claimants by the commission created to settle the controversy with them, under Act of April 20, 1909, sufficient money being appropriated to pay the award of such commission. Held, that such act did not appropriate any money to pay claimants' claims for work done on the capitol under their contracts, except in accordance with the findings of the commission, under the Act of April 20, 1909, since the appropriation carried by section 6 was limited to future activities looking to the completion of the work, the words "to complete" not being broad enough to cover work already done but to signify the finishing of unfinished work. Jobe v. Caldwell & Drake, 125 S. W. 423, 427, 93 Ark. 503.

As completion of substantial part

The "completion" of a contract to do the plumbing in a building, within 60 days after which B. & C. Comp. § 5644, requires the claim for a lien to be filed, is the time when the contractor substantially completed it, supposed he had finished the work, got the city plumbing inspector to examine and pass on the work, and took his tools and men away and not the time when, several months later, after a dispute as to amount due, he did a few hours work, nor the time when thereafter the plumbing inspector issued his certificate, though by the contract the work was to be done to his satisfaction as regards quality. Coffey v. Smith, 97 Pac. 1079, 1081, 1082, 52 Or. 538.

The excavation of a tunnel and its completion to a temporary grade, over which is laid a temporary track which is but a few inches from the level of the regular grade, the tunnel being completed, except for timbering and completing the excavation to the regular grade, is a substantial completion of the portion of the tunnel so excavated, within the rule making the completed portion of the tunnel an appliance and means to prosecute the work, furnished by the master, which he is bound to use ordinary care to render a safe place in which to work. McRae v. Erickson, 82 Pac. 209, 210, 1 Cal. App. 326.

Of building

Where one having a building constructed was under his contract entitled to change the work, and thereafter sold the building, agreeing to "complete" it according to the plans and specifications, the word "complete" referred to the work necessary to finish the building and not to the work already done, but after the contract of sale, the vendor had no right to depart from the plans and specifications, under his reserved right to make changes. Marx v. Oliver, 92 N. E. 864, 867, 246 Ill. 316.

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Where a building contract calls for completion by a certain date, and the building is completed by that date except as to a platform, the construction of which was postponed by request of the owners and afterwards erected promptly on request and in the manner directed by their superintendent acting under their instructions, the building is "completed" at the required date within the meaning of the contract. Iron Clad Mfg. Co. v. Stanfield, 76 Atl. 854, 858, 112 Md. 360.

A lien is not allowed for the construction of a sidewalk called for in a building contract, and the completion of the building, within L. O. L. § 7420, fixing the time for filing lien notices after the completion of the work does not depend on finishing the sidewalk. Where the rights of the owner, who relied on the completion by the contractor of the building, and paid the contract price, are involved, the fastening of an electrical switch or the placing of a pipe through a wall should not be regarded, in determining the time of the completion of the building, within L. O. L. § 7420. Sarchet v. Legg, 118 Pac. 203, 204, 60 Or. 213.

Within the Mechanics' Lien Law authorizing the filing of liens within two months after the completion of buildings, the word "completion," in the absence of any statutory qualifications or definition, means actual completion, dated from the time when the last work is done. Where an owner accepted a building from the principal contractor, who had completed his contract, this did not start the statute running as against one furnishing material to such contractor, where, at the time of the acceptance, the building was not completed because there had been placed therein a certain grate mantel and tiling, subsequently placed therein by another contractor. Lichty v. Houston Lumber Co., 88 Pac. 846, 847, 39 Colo. 53.

Abandonment of an enterprise will come fairly within the meaning of the term "completion" within the meaning of the Mechanic's Lien Law making the filing of a statment premature if filed before "completion" of the building; this being an equitable construction of the term. Catlin v. Douglass, 33 Fed. 569, 570.

Of contract

The uncovering by a subcontractor for the plumbing of a building of a sewer pipe for inspection by the city officials, made necessary for want of inspection before the pipe was covered, is not work in the "completion of the contract," within the statute fixing the time for the filing of a lien claim after the completion of the contract. Schade v. Alton, 121 Pac. 898, 899, 61 Or. 187.

The complaint of an original contractor for a mechanic's lien for work, under a contract to do the plumbing in a building, fails to show that the contractor filed his claim for a lien within 60 days "after completion of his contract," the time limited therefor by B. & C. Comp. § 5644, it averring that he filed it within 60 days after "completion of the building." Coffey v. Smith, 97 Pac. 1079, 1081, 1082, 52 Or. 538.

A lien law, providing that the notice of a mechanic's lien may be filed within 90 days after the completion of the contract, means within 90 days after the substantial completion of the contract. Delany v. Carpenter, 114 N. Y. Supp. 990, 991, 62 Misc. Rep. 416.

Act Feb. 24, 1905, c. 778, 33 Stat. 811, amending Act Aug. 13, 1894, c. 280, 28 Stat. 278, provides that, if no suit is brought on a federal contractor's bond by the United States within six months from the completion and final settlement of the contract, any included creditor may sue, provided such suit shall not be commenced until after the complete performance of the contract and final settlement thereof and shall be commenced within one year after such final settlement and performance and not later. Held, that the words "completion and final settlement," as used in such provision, were not equivalent, though the latter may by inference be held to include the former, but that both constitute an essential prerequisite to a subcontractor's right to sue, and hence where a contract was still open and unsettled as late as July 12, 1909, a suit on the contractor's bond, begun October 21st following, was premature and unsustainable. Stitzer v. United States, 182 Fed 513, 518, 105 C. C. A. 51.

Act Feb. 24, 1905, c. 778, 33 Stat. 811, amendatory of Act Aug. 13, 1894, c. 280, 28 Stat. 278, provides that a contractor with the United States for any public work shall give a bond in usual form with the additional obligation that the contractor shall pay all persons supplying labor or material for the work; that, in case of suit thereon by the United States, any creditor having a claim for labor or materials may intervene therein and have his claim adjudicated and paid, "subject, however, to the priority of the claim and judgment of the United States"; that, in case no suit is brought by the United States within six months from the completion and final settlement of the contract, any such creditor may bring suit on the bond in the name of the United States for the benefit of himself and all other similar creditors, provided that such suit "shall not be commenced until after the complete performance of said contract and final settlement thereof and shall be commenced within one year after the performance and final settlement of said contract and not later." A contractor who had given such bond, and whose contract contained the usual provision giving the United States in case of his default the right to have the contract completed at his cost, be-

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came insolvent and abandoned the work. Held, that such abandonment was not a "complete performance of said contract" which gave a right of action to creditors for labor and materials on the bond under the statute, which contemplates a completion of the work, whether by the contractor or the United States, and a final settlement to determine the prior rights and claim of the United States under the contract and the lapse of six months thereafter for the bringing of suit to enforce such rights against the bondsmen before an action can be maintained by such creditors. United States v. Winkler, 162 Fed. 397, 401.

In an action on a bond for the performance of a contract which provided for the construction of two steamers within a fixed period, according to certain plans, and that on failure to do so the United States might complete the same, the declaration alleged the steamers were not completed, that the contractor abandoned the contract, that a new contract was thereupon made, and they were completed thereunder. Held, that a demurrer to the declaration, for the reason that the new contract was for the construction and completion of said steamers, whereas under the original contract it should have been for their completion only, would not lie, the words "construction" and "completion" having substantially the same meaning. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 Fed. 685, 688.

Of public improvement

Lien Law, § 12, provides a lien on the amount due the contractor from a city under a contract for the construction of a public improvement for material or labor furnished for such improvement by giving notice of such lien to specified officers before the improvement is completed and accepted by the city or within 30 days thereafter. Held that, with reference to the time for filing a notice of lien, the improvement is completed when it is turned over to and accepted by the city on the architect's certificate, though a specified sum is retained for one year by the city under the contract, as a guaranty, and a further sum is retained for uncompleted work specified. Milliken Bros. v. City of New York, 120 N. Y. Supp. 841, 844, 135 App. Div. 598.

Of railroad

A contract to build a "complete railroad" does not impose on the contractor an obligation to equip it with rolling stock. Central Trust Cor. v. Condon, 67 Fed. 84, 91, 14 C. C. A. 314.

The word "completion," in a statute empowering county commissioners to subscribe stock when necessary to aid in the "completion" of any railroad, is not synonymous with "construction" and does not authorize the issuance of policies in aid of a railroad not then begun. Graves v. Board of Com'rs of Moore County, 47 S. E. 134, 136, 135 N. C. 49.

To entitle a railroad company to receive county bonds in payment of the county's subscription to the capital stock of the railroad company, on condition that the railroad company should receive the bonds when its road should be "completed" as first class, and in operation by lease or otherwise, the road, if constructed according to the terms of the contract, need not have been perfect in every respect at the prescribed date for its completion, but it should have been completed and in operation at that date in such a manner that it might be properly and regularly used for the purpose of transporting freight and passengers. Southern Kan. & P. R. Co. v. Towner, 21 Pac. 221, 224, 41 Kan. 72 (citing Brocaw v. Board of Com'rs of Gibson County, 73 Ind. 543; Freeman v. Matlock, 67 Ind. 998).

The word "completed," in an agreement to pay money when a railroad is completed, may have a different meaning from what it would have in a contract for the construction of the road. In a contract for construction it would mean a completion in accordance with the specifications, but in a contract to pay money in aid of a railroad, if "completed," by a date specified a less perfect construction might specify the intent of the parties provided the road is in condition to be opened for regular passenger and freight traffic and is actually in use. Tower v. Detroit, L. & L. M. R. Co., 34 Mich. 328, 338.

Of sale

"A sale on credit is a complete sale." Therefore a sale of whisky in Georgia since January 1, 1908, whether for cash or on credit, or whether subsequently paid for or not, constitutes a violation of law. Finch v. State, 64 S. E. 1007, 6 Ga. App. 338 (citing Acts 1907, p. 81; Civ. Code 1895, § 3526; Lupo v. State, 45 S. E. 602, 118 Ga. 759; Cook v. State, 53 S. E. 104, 124 Ga. 653).

Plaintiff contracted to furnish certain pumping machinery, to be installed in the hull of a dredge being constructed by defendant. The contract further provided that plaintiff should install the machinery at its own expense; that defendant should afford the facilities of its yards for such installation and furnish men and material for that purpose at cost; that defendant should keep the machinery insured for the benefit of plaintiff; and that it should pay one-third of the price when the machinery was delivered, one-third when it was installed on board the dredge, and the balance on completion of the test by the party for whom the dredge was being constructed. Held that, on delivery of the machinery and payment of the first installment of the purchase price, there was a "completed sale," and not a mere bailment, of the machinery to defendant. William R.

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Trigg Co. v. Bucyrus Co., 51 S. E. 174, 176, 104 Va. 79.

Of street

Ordinarily, a public improvement such as the laying out, or widening, or extension of a street is not "completed," within the meaning of the statute providing for assessments for public improvements completed within six years before the passage of the statute, until it is put in condition for public use. New England Hospital for Women & Children v. Street Com'rs of City of Boston, 74 N. E. 294, 295, 188 Mass. 88.

Of work

Expenses of completion of work, see Expenses.

Where the liability of a contractor's surety was to continue until "completion and acceptance of the work," the time of the completion of the work should be construed as coexistent with the acceptance thereof, so that the surety's liability continued until both contingencies occurred. Ætna Indemnity Co. v. Ryan, 103 N. Y. Supp. 756, 760, 53 Misc. Rep. 614.

Under Act April 23, 1889, § 3 (P. L. 44), providing that no assessment for paving, etc., shall be a lien on real estate for more than six months from the time of the "completion of such work," unless a claim for the same shall be filed in the office of the prothonotary within that time, the words "completion of such work," relate to the completion of the entire improvement authorized by the ordinance, and not merely the completion of the work in front of a property subject to a claim filed. Borough of Tarentum v. Moorhead, 26 Pa. Super. Ct. 273, 277; Same v. Dunlap, 26 Pa. Super. Ct. 281.

COMPLETE ABSTRACT

A "complete abstract," within the meaning of a contract for the sale of land, requiring the vendors to deliver a "complete abstract" to the vendees, means an abstract that is certified up to date by the abstractor. Davis v. Fant (Tex.) 93 S. W. 193, 195.

COMPLETE ALIBI

The word "complete" as applied to an alibi has no reference to the quality of the testimony on the subject, but only to the quantity. A witness testifies to a complete alibi when he swears to such a state of facts as to make the presence of the defendant at the scene of the crime reasonably impossible; to a partial or incomplete alibi when he swears to such a state of facts as to make the presence of the defendant at the scene of the crime in some degree improbable, though not reasonably impossible. A defendant has therefore offered a complete alibi when he has introduced witnesses who testify to a state of facts which render his presence reasonably impossible, whether the witnesses are, in the eyes of the jury, credible or not. Smith v. State, 61 S. E. 737, 738, 3 Ga. App. 803.

COMPLETE BARGAIN

A covenant to renew a lease at an appraised value, though unilateral in the sense that the tenant makes no agreement to make a new lease, can be enforced as a "completed bargain" to the extent of compelling an appraisal as the lease provides. Simon v. Schmitt, 118 N. Y. Supp. 326, 333.

COMPLETE CONTRACT

"The elements of a 'complete contract' are: A lawful subject-matter, a sufficient consideration, and the aggregatio mentium, or natural assent of the parties." A provision in a contract employing one to drill a well that he would, if a second well was drilled, do the work for a fixed compensation, was a mere offer which to become binding must be accepted by the employer. Kernan v. Carter (Ky.) 104 S. W. 308, 309 (quoting and adopting definition in Beach, Cont. § 1).

A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity. Following the general principles of equity, there is required a greater degree of "certainty" and definiteness for specific performance than to obtain damages at law. For specific performance is required that degree of "certainty" which leaves in the mind of the chancellor or court no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel done. The element of "completeness" denotes that the contract embraces all the material terms; that of "certainty" denotes that each one of these terms is expressed in a sufficiently exact and definite manner. An "incomplete contract," therefore, is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may, indeed, embrace all the material terms, but one or more of them is expressed in so inexact, indefinite, or obscure language that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect. Van Dyke v. Norfolk Southern R. Co., 72 S. E. 659, 665, 112 Va. 835 (citing 6 Pom. Eq. Jur. § 764).

COMPLETE DETERMINATION

The phrase "complete determination of the controversy," as used in Code Civ. Proc. § 452, providing that the court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others, but, where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in, means that when there are persons not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, such

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other persons must be made parties. Shanks v. National Casket Co., 88 N. Y. Supp. 839, 841, 95 App. Div. 187.

COMPLETE DOMINION

"A married woman incidental to her ownership of a separate estate had power of disposing of her property in equity as a feme sole. It was competent for her to exercise such right in favor of her husband, which power of a married woman in equity over her separate estate is described as 'complete dominion' over her separate property." Mathewson v. Mathewson, 63 Atl. 285, 289, 79 Conn. 23, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027 (quoting Imlay v. Huntington, 20 Conn. 146).

COMPLETE EDUCATION

A contract by a former husband with his divorced wife to pay for the "complete education" of the children of the marriage will be construed with reference to the social and financial standing of the parties at the time and in the light of all the surrounding circumstances, and where the former husband was worth about $15,000 and a son had been given a six-year preparatory course costing $520, two years in the electrical and mechanical engineering department of a university of the state would be a compliance with the contract, and a three-year post-graduate course in a distant university costing $3,000 is not required. McGaw v. O'Beirne, 52 South. 775, 777, 126 La. 584.

COMPLETE HIS PURCHASE

The phrase "pay the purchase money into court," in an order requiring the purchaser to pay into court either the whole amount of his purchase money or such sum as would indemnify the mortgagee for the failure to complete the purchase, is synonymous with the phrase "complete his purchase." State Bank v. Wilchinsky, 112 N. Y. Supp. 1002, 1005, 128 App. Div. 485.

COMPLETE INVENTORY

A rough inventory taken in pencil and on tablet paper, subject to revision and correction, and afterwards to be copied in ink in a bound book, according to custom, is not a "complete inventory" contemplated by the iron-safe clause of an insurance policy, to be kept in a fire proof safe or other place of security. St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co. of New Orleans, 37 South. 967, 969, 113 La. 1053.

COMPLETE RECORD

A clause in a fire policy, requiring the insured to keep a set of books which shall present "a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is not complied with where it appears that the only record of cash sales kept is a cash book, which only shows the amount of cash taken in at the end of each day, giving no indication of the source from which the cash is derived, whether from such sales, from the payment of past-due bills, or what not. Everett-Ridley-Ragan Co. v. Traders' Ins. Co., 48 S. E. 918, 121 Ga. 228, 104 Am. St. Rep. 99.

COMPLETE TITLE

The "complete equitable title" which one may obtain under the mining laws of the United States accrues immediately upon purchase, as an entry entitling the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued. O'Connell v. Pinnacle Gold Mines Co., 131 Fed. 106, 110 (quoting and adopting definition in Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 12 Sup. Ct. 877, 145 U. S. 428, 36 L. Ed. 762).

COMPLETED CRIMINAL CONSPIRACY

A "conspiracy" in general terms is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. The act intended need not be punishable by indictment. The essence of the offense is the unlawful agreement and combination of the parties, and therefore it is complete whenever such combination is formed, though no act be done toward carrying the main design into effect. A combination and agreement between two or more persons willfully and maliciously to injure and destroy the property of a third person is a "completed criminal conspiracy," and is the subject of indictment: it not being necessary to the completion of the crime that the conspirators should determine in advance what particular property should be injured or destroyed. Lanasa v. State, 71 Atl. 1058, 1060, 109 Md. 602.

COMPLETED MANUFACTURED ARTICLE

Imports in the form of pieces of granite dressed, cut, and bored, ready to be assembled as ornamental garden lanterns, are not "dressed granite" under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 118, 30 Stat. 159, but should be classified as "completed manufactured articles," and as such are dutiable as unenumerated manufactured articles under section 6 (30 Stat. 205). A. A. Vantine & Co. v. United States, 159 Fed. 289.

COMPLETELY ORGANIZED

See County Completely Organized.

COMPLICATION

A broken sternum was not a "complication" within an accident policy provision for indemnity for fractured "ribs with complications." Hastings v. Bankers' Accident Ins.

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Co. of Des Moines, 119 N. W. 79, 80, 140 Iowa, 626.

COMPLY—COMPLIANCE

See Substantial Compliance.

The words "complied with," as used in Rev. St. 1895, art. 2673, subd. 8, requiring a guardian on a sale of the ward's real estate to report to the court within 30 days thereafter whether the purchaser had complied with the terms of the sale, mean "perfected or carried into effect, completed," and convey the idea that the consideration of the purchase had been made complete. McMinn v. Cope (Tex.) 112 S. W. 809, 811 (citing 2 Words and Phrases, p. 1370).

A complaint on a fraternal benefit certificate, which alleges that the member "complied with" the conditions of the certificate, alleges performance of the contract, within Burns' Ann. St. 1908, § 376, providing that it shall be sufficient to allege generally that the party performed the conditions on his part. Supreme Tent, Knights of the Maccabees of the World, v. Ethridge, 87 N. E. 1049, 1050, 43 Ind. App. 475.

As used in Ky. St. § 753, providing that, if the insurance commissioner is of the opinion on examination of other evidence that foreign insurance company has failed to comply with the law, he shall revoke or suspend all certificates of authority granted to it or its agents, have the same meaning as the words "fully complied with the laws of this state," as used in section 634, providing that the commissioner on being satisfied that the company has fully complied with the laws of the state shall furnish to such agents as the company directs a license to transact business as agent, etc. Mutual Life Ins. Co. of New York v. Prewitt, 105 S. W. 463, 465, 127 Ky. 399.

COMPONENT MATERIAL

See Single Component Material.

Fabrics in chief value of flax, but in part of wool, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 346, 30 Stat. 181, relating to goods "the component material of chief value" in which is flax, and not under Schedule K, par. 366, 30 Stat. 184, relating to cloths "in part of wool." United States v. Walsh, 154 Fed. 749, 750 (citing Hartranft v. Meyer, 10 Sup. Ct. 751, 135 U. S. 237, 34 L. Ed. 110).

COMPOSITION

See Musical Composition.

Bankr. Act July 1, 1898, § 12a, authorizing the bankrupt to offer a "composition" after, but not before, he has been examined in open court or at a meeting of his creditors and has filed in court the required schedule and list of creditors, and providing for its acceptance by the creditors, does not authorize a composition prior to or without an adjudication. In re Back Bay Automobile Co., 158 Fed. 679, 684.

A "composition agreement" is one made upon a sufficient consideration between an insolvent or embarrassed debtor and his creditors, or a considerable proportion of them, whereby the latter for the sake of immediate or sooner payment agrees to accept a dividend less than the whole amount of their claim, to be distributed pro rata, in discharge and satisfaction of the whole. Reynolds v. Pennsylvania Oil Co., 89 Pac. 610, 612, 150 Cal. 629.

A "composition with creditors" has been defined to be an agreement made by a debtor, either insolvent or in embarrassed circumstances, with two or more of his creditors, by which it is agreed, on the one side, that each of the creditors who enters into the agreement shall be paid a specified amount or percentage, in either case less than the whole, of their respective claims, or that all of a specified portion of the debtor's property shall be applied toward the payment of those claims pro rata, while, on the other side, the creditors agree to accept in satisfaction of their claims whatever is thus proffered. Abe Block & Co. v. Largent (Tex.) 135 S. W. 1078, 1079.

A "composition with creditors" is an arrangement between a debtor and creditors, the latter agreeing with the debtor, and mutually between themselves, to receive and the debtor to pay, a certain part or portion of the demands due the several creditors in full payment and in discharge of the debt. An agreement between a debtor and a single creditor, whereby the latter agrees to discharge the former on the payment of a less sum than the whole debt, is void for lack of consideration. But composition agreements between a debtor and several creditors are sustained on the theory that the mutual covenants and agreements between the several creditors by which they relinquish their claim on payment of a part constitute a consideration sufficient to support the agreement. Anderman v. Meier, 98 N. W. 327, 328, 91 Minn. 413.

COMPOSITION METAL

"Composition metal" is a commercial designation for all composite metals of copper, tin, lead, and spelter containing 70 per cent. or more of copper, and articles made of that metal are not "old brass" within the commercial meaning of that term. "Composition scrap" is the commercial designation which includes old cannon and various other articles made of composition metal which are dealt in by the old-metal trade. Downing v. United States, 122 Fed. 445, 446, 58 C. C. A. 427.

So called "flitters," made from sheets of copper and zinc, and reduced to a fine con-

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dition for use in the same manner as bronze powder, is "composition metal," within Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 533, 30 Stat. 197, admitting free of duty all composition metal of which copper is a component material of chief value. Geo. Meier & Co. v. United States, 128 Fed. 472, 473.

The article commercially known as "flitters," produced from the thin sheets which constitute the composition metal of commerce, by a process of manufacture that makes it no longer available for the uses to which composition metal of trade is put, but adapts it for other uses, is not free of duty as "composition metal," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 533, 30 Stat. 197, but is dutiable as manufactures of metal under paragraph 193, § 1, Schedule C, of said act (30 Stat. 167). United States v. George Meier & Co., 136 Fed. 764, 765, 69 C. C. A. 421 (citing Erhardt v. Hahn, 55 Fed. 273, 5 C. C. A. 99; De Jonge v. Magone, 16 Sup. Ct. 119, 159 U. S. 562, 40 L. Ed. 260; Grempler v. United States, 107 Fed. 687, 46 C. C. A. 557; United States v. Binney, 82 Fed. 992, 27 C. C. A. 347; Boker v. United States, 97 Fed. 205, 38 C. C. A. 114; United States v. Leonard, 108 Fed. 42, 47 C. C. A. 181; Marsching v. United States, 113 Fed. 1006).

COMPOSITION SCRAP

See Composition Metal.

COMPOUND

See Alcoholic Compounds; Chemical Compound; Compromise.

In view of Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 770, providing that the term "blend" shall be construed to mean a mixture of like substances, and regulation 27a made under the authority of such act and providing that the terms "mixture" and "compound" are interchangeable, "blend" is a "compound," but a "compound" may or may not be a "blend." In other words, the term "compound" does not necessarily denote a mixture of unlike substances. The term "Compound White Pepper" does not so naturally imply to the average purchaser a mixture of white pepper with an ingredient other than pepper as to make it a proper branding, where the statement of its ingredients is so placed and in such type as not to be readily noticed by the purchaser, and as to be calculated and intended to deceive and mislead the latter. Frank v. United States, 192 Fed. 864, 869, 113 C. C. A. 188.

Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 770, provides that the term "blend" shall be construed to mean a mixture of like substances. Regulation 27a, made under the authority of the act, provides that the terms "mixtures" and "compounds" are interchangeable, and indicate the result of putting together two or more food products. Held, that a blend is a compound, but a compound may or may not be a blend; in other words, that the term "compound" does not necessarily denote a mixture of unlike substances. Frank v. United States, 192 Fed. 864, 869, 113 C. C. A. 188.

Under a claim in a patent, reading "as a new article of manufacture, a compound of the crystalizable blood pressure raising constituent of the suprarenal glands substantially free from noncrystalizable constitutents thereof, which is soluble in water and which when in a water solution is practically inert to the oxygen of the air," etc., the word "compound" indicates atomic association in a single molecule. Parke-Davis & Co. v. H. K. Mulford Co., 189 Fed. 95, 110 (quoting and adopting definition in Eleventh Edition of the Encyclopedia Britannica, subtit. Chemistry).

In Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 2, 30 Stat. 151, relating to alcoholic compounds, the word "compound" is not limited by any trade usage or technical adaptation, but is used in its common broad sense of being any union or mixture of elements, ingredients, or parts, as fine-cut herbs commingled with alcohol and constituting to some degree an infusion. United States v. Stone & Downer Co., 175 Fed. 33, 37, 99 C. C. A. 49.

The provisions of War Revenue Act June 13, 1898, § 20, 30 Stat. 456, that the stamp taxes provided for in Schedule B "shall apply to all medicinal articles compounded by any formula, published or unpublished," but that they shall not apply to any uncompounded medicinal drug or chemical, contemplate a compound made after some formula and a natural product, such as papain, which is prepared from the juice of the pawpaw and cannot be made artificially, although it may be a chemical compound, is not "compounded" within the meaning of the statute, and is not taxable, whether used as the basis of a plaster, or prepared in the form of tablets or pills by being mixed with an excipient which has no medicinal effect. Johnson & Johnson v. Herold, 161 Fed. 593, 604.

The manufacture of buchu gin by pouring pure gin on a bed or mat of buchu leaves and allowing it to percolate through; then adding distilled water and syrup, the gin comprising some 50 per cent. or more of the compound, which is 46 per cent. alcohol and designed for use as a beverage, constitutes a "compounding or adulterating" within St. 1909, § 4114A et seq., imposing a license tax of 1¼ cents a wine gallon on such business. Dr. C. Bouvier Specialty Co. v. James, 118 S. W. 381, 133 Ky. 580.

As discharge of debt

The word "compound" in Rev. St. 1899, § 897, allowing a creditor to compound with debtors and release them from further lia-

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bility, means the same as compromise, so that there must be consideration for the compounding. De Buhr v. Thompson, 114 S. W. 557, 558, 134 Mo. App. 21.

"To compound" is to compromise or make a composition whereby a creditor discharges his debtor on payment of a smaller sum than that actually owing. Williams-Thompson Co. v. Williams, 78 S. E. 409, 410, 10 Ga. App. 251.

COMPOUND INTEREST

Computing interest with annual rests constitutes compound interest. Bullis v. Somerville, 117 S. W. 736, 745, 218 Mo. 624.

An agreement turning interest after maturity into principal, bearing interest, is not compounding interest. Wigton v. Elliott, 111 Pac. 713, 714, 49 Colo. 115.

COMPOUND LARCENY

The crime of larceny from a store (B. & C. Comp. § 1799) is a compound larceny, consisting of simple larceny (section 1798), aggravated by the circumstance of taking the property from a store, in which the value of the property is not an ingredient of the offense, as in case of simple larceny. State v. Reyner, 91 Pac. 301, 302, 50 Or. 224.

COMPOUND PLEA

A "compound plea" is where two or three matters of defense are set up in the conjunctive form. A plea alleging that the plaintiff negligently attempted to leave the car in an improper manner and at an improper time and place, and as a proximate result thereof was injured, was a "compound plea." Southern R. Co. v. Burgess, 42 South. 35, 38, 143 Ala. 364.

COMPOUNDING A CRIME

See Compounding a Felony.

COMPOUNDING A FELONY

"Thief bote" is when a party robbed not only knows the felon but also takes his goods again, or other amends, upon agreement not to prosecute and is frequently called "compounding of felony" and formerly was held to make a man an accessory. State v. Hodge, 55 S. E. 626, 627, 142 N. C. 665, 7 L. R. A. (N. S.) 709, 9 Ann. Cas. 563 (quoting and adopting definition in Blackstone [4 Comm. 134], and citing Russell, Crimes, 194; Bishop, Crim. Law, 648; Bl. Law Dict. 240; 8 Cyc. 492).

Under Pen. Code, N. Y. § 125, defining the compounding of a crime, notes given by an employé for money embezzled from his employer, and signed by an indorser on an understanding with the payee that the principal would not be prosecuted, are in part for an illegal consideration, and, as against the indorser, are void. In re Lawrence, 166 Fed. 239, 242, 92 C. C. A. 251.

COMPOUNDING PENALTIES

"The 'compounding of penalties' is an offense at common law, of dangerous tendency, highly derogatory to public example, and prosecutions are no more to be improperly suppressed by public informing officers than by common informers." State v. Wilson, 67 Atl. 533, 534, 80 Vt. 249 (quoting and adopting definition in Town of Hinesburgh v. Sumner, 9 Vt. 23, 31 Am. Dec. 599).

COMPRISE

The term "comprise" means embraced or included. De Nobili v. Scanda, 198 Fed. 341, 346.

COMPROMISE

Offer of compromise distinguished from admission, see Admission.

A "compromise" is an agreement between two or more persons, who, to avoid a lawsuit, amicably settle their differences on such terms as they can agree upon. Armijo v. Henry, 89 Pac. 305, 308, 14 N. M. 181, 25 L. R. A. (N. S.) 275; City of Anadarko v. Argo, 128 Pac. 500, 501, 35 Okl. 115.

A "compromise" is any adjustment of matters in dispute by mutual concession without resort to law. Matthews v. Matthews, 49 Me. 586, 587.

The words "or to compromise or compound any debt or claim" owing by the estate of their testator or intestate, in Laws 1893, p. 200, c. 100, amending Laws 1888, p. 928, c. 571, by which the surrogate was granted power to authorize executors and administrators to compromise or compound any debt or claim, indicate an intent of the Legislature to confer power on the surrogate to permit a settlement or compromise of the claim, either made for or against the estate. In re Gilman's Estate, 87 N. Y. Supp. 128, 129, 92 App. Div. 462.

Compromise is a species of novation, and it is a condition that neither the original claim nor the subsequent agreement shall be illegal. Wadsworth v. Board of Sup'rs of Livingston County, 115 N. Y. Supp. 8, 18.

The phrase, by way of "compromise of all matters in controversy in this suit" between the plaintiff and the defendant, Pullman Palace Car Company, found in the agreement entered into between them, and upon which a judgment was rendered, clearly imported a settlement by compromise of the entire subject-matter of the litigation; such an agreement releasing the railroad company from any liability for the ejection, which was the subject of the suit. Blake v. Kansas City Southern R. Co., 85 S. W. 430, 433, 38 Tex. Civ. App. 337.

Plaintiffs, who sold sheep to defendant, claimed that defendant was to pay the freight charges. Defendant, upon ascertain-

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ing the number of the sheep, paid the amount to plaintiffs' agent during their absence. No freight bills were then presented, or mentioned, and no question as to the terms of the contract had then arisen. The agent might have assumed that defendant would pay the freight direct to the railroad company or later settle with plaintiffs. Held, that receipt of the check might properly be considered by plaintiffs as payment of that portion of the price then ascertainable, and it did not amount to a compromise of a disputed claim. Beach v. Schroeder, 107 Pac. 271, 274, 47 Colo. 312.

COMPROMISE VERDICT

While jurors may properly give great weight to the opinions of the other jurors, and may make reasonable concessions as a result of argument and persuasion, a verdict arrived at by their surrender of conscientious convictions upon a material question by some of the jurors in return for a life surrender by others is a "compromise verdict," and invalid. Simmons v. Fish, 97 N. E. 102, 105, 210 Mass. 563, Ann. Cas. 1912D, 588.

COMPULSION

COMPULSORY ARBITRATION

The appraisers appointed under Rev. St. § 3084, made applicable by section 2915 in proceedings by a city to condemn land for waterworks, providing that compensation to be paid the owner shall be ascertained by three disinterested appraisers appointed by the district court or the judge thereof, are not a court of arbitration or a compulsory board of arbitration within the meaning of either Const. art. 5, § 1, vesting the judicial power in certain courts, including courts of arbitration, or section 28, authorizing appeals to the Supreme Court from decisions of compulsory boards of arbitration; the tribunals referred to in such sections being those contemplated by the constitutional provision authorizing the Legislature to establish courts of arbitration to hear controversies between labor organizations and their employers. Edwards v. City of Cheyenne, 114 Pac. 677, 683, 122 Pac. 900, 19 Wyo. 110.

COMPULSORY PAYMENT

A payment is deemed "compulsory" when made to free property from an actual and existing duress imposed on it by the party to whom the money is paid, or to prevent a seizure by a party armed with apparent authority to seize the property. Goodhue v. Hawkins (Tex.) 133 S. W. 288, 292.

The doctrine of contribution rests upon a payment which is compulsory, in the sense that there must be a legal obligation to pay; and a payment by a mere volunteer is not compulsory, and gives rise to no right of contribution in favor of such voluntary payor. Yore v. Yore, 144 S. W. 847, 850, 240 Mo. 451.

Where the payee of a note indorsed it for the accommodation of the maker before delivery and the maker failed to pay, payments made on the note by the indorser were not voluntary, as the indorsement under Laws 1897, c. 612, §§ 113, 116, was the agreement of the indorser that on due presentment the note should be paid, and that, if it were dishonored and the necessary proceedings taken, he would pay to the holder. A payment is compulsory when the party making it cannot legally resist it. Blanchard v. Blanchard, 94 N. E. 630, 631, 201 N. Y. 134, 37 L. R. A. (N. S.) 783.

COMPULSORY PROCESS

The right of accused to "compulsory process" for witnesses in his favor, conferred by Const. 1901, § 6, means the right to ordinary compulsory process by subpœna, and not necessarily to extraordinary compulsory process by attachment in case a subpœna, duly served, is not obeyed. Sanderson v. State, 53 South. 109, 110, 168 Ala. 109.

The right to "compulsory process" referred to in the Constitution is the right of accused persons to demand the issuing of subpœnaes for their witnesses and of having the same served. The right to have attachments issued to compel the attendance of witnesses exists only when circumstances and conditions are such as to call legally for that writ. State v. Stewart, 41 South. 798, 802, 117 La. 476 (citing State v. Allemand, 25 La. Ann. 526; State v. Comstock, 36 La. Ann. 310; 3 Wig. Ev. § 2191; 4 Wig. Ev. § 2595; 3 Rice, Ev. § 188).

COMPUTATION

Acts Ex. Sess. 1890, p. 50, c. 24, as amended by Acts 1897, p. 141, c. 17, relating to the purity of elections, provides that it shall apply to towns, cities, and civil districts having a population of 2,500 or more computed by the federal census of 1890, or which may afterwards have that number or over by any subsequent federal census. Acts Ex. Sess. 1890, p. 59, c. 25, providing for the registration of voters, declares that it shall apply to civil districts having a population of 2,500 computed by the federal census of 1880, or which may thereafter have that number or over computed by any subsequent federal census. Held, that "computation" was not used in the sense of "enumeration," so that, where civil districts which did not have a population of 2,500 in 1890 were subsequently consolidated by Acts 1907, p. 284, c. 102, and the districts as consolidated, by adding their inhabitants according to the census of 1900, contained more than 2,500 inhabitants, the acts immediately became applicable thereto. McMinn County v. Allen (Tenn.) 105 S. W. 67, 68.

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CONCEAL—CONCEALMENT

See Artful Concealment; Fraudulent Concealment.

Decedent cannot be deemed to have concealed an imported violin, brought into the United States without payment of duty in violation of the customs laws, within Act June 22, 1874, c. 391, § 22, 18 Stat. 190, which provides that the time of the concealment of property shall not be considered within the limitation fixed for bringing suit to recover a penalty or forfeiture accruing under the customs laws, where decedent exhibited the violin to many guests, including well-known violinists, at musicales. United States v. One Stradivarius Kieserwetter Violin, 197 Fed. 157, 159, 116 C. C. A. 594; United States v. Phillips, 196 Fed. 574; In re Doyle, 199 Fed. 247.

In Bankr. Act July 1, 1898, c. 541, § 14b (4), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, which makes it a ground for refusing a discharge that a bankrupt has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition * * * concealed or permitted to be * * * concealed any of his property with intent to hinder, delay or defraud his creditors," the word "concealed" includes a continuous concealment, and a bankrupt who concealed property from his creditors while insolvent before the four-month period, and kept the same concealed until within the four months, and until it was discovered by another, is not entitled to a discharge. In re James, 181 Fed. 476, 478, 104 C. C. A. 224.

H., in January, 1906, purchased a violin in London, to be delivered in New York or Boston free of all expense. It was delivered shortly thereafter without duty being paid thereon. H. thereafter habitually kept it in his drawing-room where it was used, displayed and admired by various artists at Sunday afternoon concerts held by H. It was never absent but always present in the house of H., though the revenue officers acquired no information concerning its wrongful importation until July, 1910. Held, that such lack of information by government officers, and the fact that H. knew or had reason to believe the instrument had been imported without paying duty, did not constitute "concealment" so as to bar limitations prescribed by Act Cong. June 22, 1874, c. 391, § 22, 18 Stat. 190, requiring an action to forfeit merchandise unlawfully imported, within three years, provided that the time of the absence from the United States or concealment of property shall not be a part of the period of limitation. United States v. One Stradivarius Violin, 188 Fed. 542, 543.

Gen. St. 1902, § 880, providing that when the effects of defendant are "concealed in the hands of his agent or trustee so that they cannot be found or attached," etc., plaintiff may garnishee the agent or trustee, and thereby secure all effects of defendant in the hands of his agent or trustee, do not mean that personalty can only be reached by garnishment when it is hidden from sight by the agent or trustee. Sutherland v. Brown, 81 Atl. 1033, 1035, 85 Conn. 67.

Ann. Code 1892, § 2731, provides that in every case of a "concealed fraud" the right to bring suit in equity for the recovery of land shall be deemed to have accrued at the time when the fraud was, or with reasonable diligence might have been, first known. Section 2749 makes the same provision as to personal actions. Section 2762 provides that, whenever there is concurrent jurisdiction at law and equity, provisions relative to limitations at law shall apply to suits in chancery. Land was deeded to a city for a money consideration, and the deed provided that it should be held by the city for burial purposes and no other, and after an abandonment of use for burial purposes the grantors sued in equity for a reconveyance and accounting or for an injunction. Held, that complainants could have no relief against the 10-year statute of limitations on the ground of concealed fraud; concealment in such a case being impossible. Thornton v. City of Natchez, 41 South. 498, 501, 88 Miss. 1.

A debtor's voluntary transfer of his property, without consideration, to his wife, for the purpose of defrauding his creditors and placing the property beyond their reach, while he continues in the full use and enjoyment thereof and the receipt of its rents and profits, with a failure to disclose the true facts regarding the property in his schedule in bankruptcy, or surrender it to his trustee, renders him guilty of having "concealed, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy," within the meaning of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 544. In re Dauchy, 122 Fed. 688, 693.

Where a debtor retained a sum of money derived from a fraudulent conveyance for several months prior to the filing of a bankruptcy petition against him, and he did not inform the court where or how it was kept, but declared that since the filing of the petition he had invested it in distant states, such sum should be treated as "concealed assets," and deducted from his available assets, for the purpose of determining his insolvency. In re Shoesmith, 135 Fed. 684, 687, 68 C. C. A. 322.

Design or intent imported

The "concealment" of facts by a party to a contract, which amounts to fraud, implies design or purpose, and mere silence is not itself concealment. Barrett v. Lewiston, B. & B. St. R. Co., 85 Atl. 306, 308, 110 Me. 24.

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To "conceal" means purposely to keep from sight or discovery. Where an application for a life insurance policy expressly made a part of the policy, contained a stipulation limiting the time within which any action should be brought, a complaint in an action on the policy, alleging that insurer "purposely and willfully concealed" from plaintiff the contents of the application to induce delay in bringing suit until after the expiration of the time limited, was insufficient for failing to aver facts on which to predicate relief from the consequences of the delay; the words "purposely" and "willfully" adding nothing to the charge that the insurer concealed the contents of the application. Gill v. Manhattan Life Ins. Co., 95 Pac. 89, 90, 11 Ariz. 232.

Pen. Code, § 32, defining "accessories" as those who after knowledge of the commission of a felony conceal it from the magistrate or protect the person charged with the crime, states the common-law rule that a person must know that he is assisting a felon or else he cannot be charged as an accessory, and the mere neglect to inform the authorities that a felony has been committed is not sufficient; the word "conceal" in the statute including some affirmative act on the part of the person looking to the concealment of the felony. Ex parte Goldman (Cal.) 88 Pac. 819, 820.

Under Kirby's Dig. § 1562, defining an "accessory after the fact" as one who, after a full knowledge that a crime has been committed conceals it from the magistrate, the word "conceals" implies some act or refusal to act by which it is intended to prevent or hinder the discovery of the crime; and for one to merely remain passively silent as to what was told him it not enough; and so does not make his testimony objectionable as that of an accomplice. Davis v. State, 130 S. W. 547, 549, 96 Ark. 7.

The word "conceal," as used in the provision of Bankr. Act 1898, § 29a, 30 Stat. 554, subjecting any person to criminal prosecution for "having knowingly and fraudulently concealed while a bankrupt or after his discharge from his trustee any of the property belonging to his estate in bankruptcy" is of plain import, and when coupled in an indictment with the words "unlawfully, knowingly, and fraudulently," clearly excludes unintentional acts. United States v. Comstock, 161 Fed. 644, 645.

Where a bankrupt assigned to the executrices of a decedent to be administered as the property of his estate, the assets of the bank, which she, in fact, owned, undoubtedly for the purpose of conserving it in some manner for her own use, retaining an equity in the same to redeem in case there was more property than sufficient to pay the creditors her intent concerning the bank and its assets must be regarded as one to conceal her property, whether she had any right to or control of all her property during the time of such concealment not being material as to the question of her intent. In re Glazier, 195 Fed. 1020, 1022.

As harbor or hide

If accused brought or assisted in bringing stolen cattle into T. county, and there had them shipped to market under an assumed name, he would be guilty of concealing the property in T. county within White's Ann. Code Cr. Proc. art. 237, permitting the prosecution of the offense of receiving and concealing stolen property in the county where the theft was committed, or into any other county into which the property was carried by the thief, or in any county in which it was received or concealed by the offender; the word "conceal" not meaning to hide, but the handling of property so as to mislead the owners in their search for it. Polk v. State, 131 S. W. 580, 582, 60 Tex. Cr. R. 150.

To "conceal" is to hide, withdraw, remove, or shield from observation, cover or keep from sight. Where a debtor retained a sum of money derived from a fraudulent conveyance for several months prior to the filing of a bankruptcy petition and did not inform the court where or how it was kept, but declared that since the filing of the petition he had invested it in distant states, such sum should be treated as "concealed assets" and deducted from his available assets for the purpose of determining his insolvency. In re Shoesmith, 135 Fed. 684, 687, 68 C. C. A. 322 (citing Cent. Dict.).

Bankruptcy Act July 1, 1898, c. 541, § 3a(1), 30 Stat. 546, provides that acts of bankruptcy by any person shall consist of having conveyed, transferred, "concealed," or removed, or permitted to be concealed or removed, any part of his property with intent to delay or defraud his creditors, or any of them. Held, that the word "conceal" means to hide or withdraw from observation, to carry or keep from sight, to prevent discovery of, or to withhold knowledge of; and hence a petition alleging that the bankrupt did deny and conceal ownership of a particular bank, so that the creditors, by virtue of deposits carried by them in the bank, were, by the acts and declarations of the bankrupt, misled into the belief that the bank belonged to another, and that within four months the petitioner concealed the assets of the bank by turning the same over to the executrices of decedent, to be by them administered as his property, sufficiently alleged concealment of property with intent to defraud creditors, and constituted an "act of bankruptcy." In re Glazier, 195 Fed. 1020, 1021.

Intentional withholding of facts

A "concealment," when applied to insurance, is the designed and intentional withholding of any fact material to the risk

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which insured in honesty and good faith ought to communicate. A concealment involves not only the materiality of the fact withheld, but the design and intention of insured in withholding it. A concealment, within a fire policy stipulating that it should be void if insured conceals any material fact concerning the insurance or the subject-matter thereof, involves not only the materiality of the fact withheld, and which he ought to have communicated, but also the design of insured in withholding it, and the facts alleged to have been concealed must be material and insured must have intentionally and fraudulently concealed them. Connecticut Fire Ins. Co. v. Colorado Leasing Min. & Mill. Co., 116 Pac. 154, 157, 50 Colo. 424, Ann. Cas. 1912C, 597.

"Ordinarily, to constitute legal 'concealment of a material fact' to the risk, such as would avoid a policy of insurance, there must be something more than the mere existence of such fact and failure on the part of the insured to disclose it. Where no specific inquiry has been made touching facts material to the risk, and there is no misrepresentation respecting the same on the part of the insured, and no intentional concealment thereof, their existence will not invalidate the policy. When the insurer issues the policy without inquiry, he assumes the risk, unless some unusual fact exists which affects the risk." Thus, a fire policy, providing that it shall be void if insured has concealed or misrepresented any material fact or circumstance concerning the insurance or the subject thereof, is not avoided by the fact that insured said nothing about a gambling concern being connected with his insured saloon; it not being shown that the fact that such a connection was regarded as increasing the risk was known by insured, or that he consciously neglected to speak of it, and no inquiry having been made of him concerning it. American Cent. Ins. Co. v. Nunn (Tex.) 79 S. W. 88, 89.

As secretion

An answer, in an action on an indemnity bond to save harmless a surety on a contractor's bond, which alleges that the surety, to induce the indemnitor to furnish the indemnity, falsely represented that the contract was an advantageous one, and that the contractor was solvent, that the contractor was insolvent, and known to be so by the surety, "which said fact was willfully concealed"; and that by virtue of the fraudulent misrepresentations "and concealments" the indemnitor was greatly damaged, etc., charges fraud through the suppression of truth by falsehood, and not its secretion by silence; the words "conceal" and "concealment" expressing an idea in consonance with the allegations of the defense of active fraud. American Surety Co. of New York v. Pacific Surety Co., 70 Atl. 584, 586, 81 Conn. 252, 19 L. R. A. (N. S.) 83.

The word "conceal," as used in the first part of the statute providing that whoever shall offer for sale any horse, knowing it to be broken winded, and shall conceal the existence of such disease from the person to whom he is offering the animal for sale, or shall employ any trick, artifice, drug, etc., to conceal the existence of such disease, and shall thereby effect the sale of such animal, shall be fined, etc., is not used in its primary sense, meaning to hide, to cover up, to withhold from observation, but is used in its secondary sense or meaning, which is to withhold from utterance, or declaration, to keep secret, to fail to disclose. The first purpose of a statute is to make it a crime of one to offer such an animal for sale, if the person so doing has knowledge of the defect, and conceals its existence from the one to whom it is offered for sale by failing to disclose the facts, while the second purpose is to prohibit the employment of any artifice to conceal the infirmity, and thereby effect a sale. Boyer v. State, 83 N. E. 350, 352, 169 Ind. 691 (citing 2 Words and Phrases, p. 1377; 8 Cyc. pp. 543, 544).

Silence or inaction

"The term 'conceal' implies something more than the mere failure to disclose. We do not, in general, speak of a person concealing a thing unless he is in some way called upon to produce it." Where persons were under no obligation to disclose to sureties on a bond facts showing embezzlement by the principal, a failure to disclose such facts was not a concealment so as to amount to fraud. Watertown Sav. Bank v. Mattoon, 62 Atl. 622, 624, 78 Conn. 388 (quoting and adopting definition in Bartholomew v. Warner, 32 Conn. 98, 103, 85 Am. Dec. 251).

Hurd's Rev. St. 1908, c. 83, § 22, provides that, if a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to sue discovers that he has a cause of action, and not afterwards. Held, that mere silence by the person liable is not concealment, but there must be some affirmative act or representation designed to prevent, and which does prevent, the discovery of the cause of action. Lancaster v. Springer, 88 N. E. 272, 275, 239 Ill. 472.

The information having shown knowledge of the felon's abode, an allegation that defendant "did 'conceal and keep secret' contrary to the law of the land" was insufficient as not showing a neglect to discover the felon and his place to the officers of justice. State v. Wilson, 67 Atl. 533, 534, 80 Vt. 249.

An owner of household furniture in an apartment leased the apartment as furnished to a tenant who entered into possession, and

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who held, in the apartment, the furniture, either under the lease or after its expiration. A creditor of the owner sued the owner, and garnisheed the tenant, who did not offer to surrender the furniture to the officer nor give permission to the officer to enter the apartment to take it. Held, that the property was sufficiently concealed within Gen. St. 1902, § 880; and, where the garnishee subsequently delivered the goods to the officer pursuant to an execution issued in the garnishment, a chattel mortgagee of the owner in a mortgage not filed until after the service of garnishment could not enjoin a sale of the chattels under the execution. Sutherland v. Brown, 81 Atl. 1033, 1035, 85 Conn. 67.

Where household goods claimed to have been purchased with the earnings of a bankrupt's wife and children were claimed both by her and the bankrupt to be her property, the bankrupt's failure to schedule the same did not constitute a concealment thereof precluding an allowance of exemptions to him from other property, though such goods belonged to him as a matter of law. In re Diamond, 158 Fed. 370, 371.

CONCEALED WEAPONS

See Carrying Concealed Weapons.

A person carrying a deadly weapon, a part of which only is concealed, carries a "concealed weapon," within Code 1906, § 1103, punishing one who carries concealed "in whole or in part" any deadly weapon; and a conviction may be had on proof that the weapon was only partially concealed. Martin v. State, 47 South. 426, 427, 93 Miss. 764.

Evidence merely that defendant, while riding in a wagon in which were two other persons, on the arising of a difficulty between him and another, took a pistol from a satchel under the wagon seat, is not sufficient to warrant a conviction of carrying a pistol "concealed upon or about his person." Commonwealth v. Sturgeon (Ky.) 37 S. W. 680.

Revisal 1905, § 3708, forbids the carrying of deadly weapons about the person, except on one's premises, and declares that the possession of a deadly weapon, if carried about the person, shall be prima facie evidence of concealment, if the accused is at the time off his premises. Held, in a prosecution for carrying a "concealed" pistol, where accused himself testified that he had the pistol in his pocket a part of the time, and that it was then hidden from view, his further testimony that "he did not intend to 'conceal' the pistol" was inadmissible. State v. Simmons, 56 S. E. 701, 702, 143 N. C. 613 (citing State v. McDonald, 45 S. E. 582, 133 N. C. 684; State v. Dixon, 19 S. E. 364, 114 N. C. 850; State v. Reams, 27 S. E. 1004, 121 N. C. 556; State v. Brown, 34 S. E. 549, 125 N. C. 704; State v. Woodfin, 87 N. C. 526; State v. Lilly, 21 S. E. 563, 116 N. C. 1049; State v. Erwin, 91 N. C. 545; Broom's Legal Maxims [8th Ed.] p. 506 et seq.; State v. Pigford, 23 S. E. 182, 117 N. C. 748; State v. Brown, 34 S. E. 549, 125 N. C. 704).

CONCEIVE

Under the forty-fourth rule of practice for the circuit court in common-law actions, objections to interrogatories, or their form, must be assigned in writing, before the commission issues or the deposition is taken; and the word "conceive," as used in such rule providing that objections to the form in which interrogatories are "conceived," etc., means expressed in a particular way—formulated. Canon v. Green, 47 South. 935, 56 Fla. 211.

CONCENTRATED COMMERCIAL FEEDING STUFF

Acts 1907, p. 355, c. 206, § 2, requires sellers of "concentrated commercial feeding stuff" to affix a label thereto reciting certain facts, section 6, makes the failure to do so a misdemeanor, and section 11 provides that the term "concentrated commercial feeding stuff" shall include wheat middlings, etc., but shall not include unmixed meals made directly from the entire grain of the wheat, etc. Held, that, since wheat middlings are a by-product containing only part of the wheat grain, it was a "concentrated commercial feeding stuff," within the statute, and the provisions of section 11 were not repugnant. State v. Weller, 85 N. E. 761, 171 Ind. 53.

CONCENTRATED MILK

See Milk.

CONCERN

See Going Business or Concern; Local Concern.

The word "concerned" in the statute providing that, where two or more persons are jointly concerned in the commission of a crime, either of them may be sworn as a witness in relation thereto, but his testimony shall not be used against him, is used in the sense of the word "participants." Under this statute and one making it an offense for legislators to accept railroad passes, a legislator cannot be compelled to testify as to his acceptance and use of a pass, for he alone in using it committed an offense. He was not entitled to refuse to answer questions put to him with reference to bribery, though jointly concerned. Ex parte Butt, 93 S. W. 992, 994, 78 Ark. 262.

Rev. St. § 601, provides that if the judge of any District Court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, it shall be his duty, on application by either party, to certify the case to another court. The judge

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before whom defendant was brought for trial on an indictment for suborning a witness at a hearing in bankruptcy to commit perjury while conducting a hearing in a bankruptcy case to discover assets, appeared to be angry and said in the presence of accused: "This is a nasty piece of business. This estate has been looted by some one"—and then turned to an officer of the court and directed that he use what was left of the estate, even to the last penny, to investigate the matter, and if any one, whoever he might be, had committed any act that could be reached and punished under the law, to institute proceedings against him. Held, that the judge merely performed his duty to direct an official inquiry of what appeared to be a criminal offense, and did not thereby become disqualified to try accused therefor, as being either "concerned in interest" or "of counsel" for the prosecution. Epstein v. United States, 196 Fed. 354, 355, 116 C. C. A. 174.

Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552, provides that a court of bankruptcy, on application of any officer, bankrupt, or creditor, may by order require a designated person, including the bankrupt, to appear before a referee or judge of any state court to be examined concerning the acts, conduct, or property of the bankrupt whose estate is in process of administration under the act. Held, that the words "concerning the property of a bankrupt" limit the examination to the discovery of the existence, whereabouts, or disposition of property, and hence did not authorize the court to compel an officer of a corporation in which the bankrupt had stock, which was admittedly in the bankrupt's possession, to give evidence as to his opinion concerning the value of the stock, and to produce in support thereof the records relating to the financial condition of the corporation. In re Seligman, 192 Fed. 750, 751.

As interested in

The "persons concerned" who are required by P. L. 1898, p. 718, § 13, to be cited on the filing of a caveat to the probate of a will, include not only those interested to support the probate, but also heirs at law and next of kin of the alleged testator. In re Young's Will, 59 Atl. 154, 155, 67 N. J. Eq. 553.

As relating or pertaining to

A newspaper published an article stating that plaintiff's father had been charged with using the mails to defraud in selling land, and would be arrested, giving the details of the fraudulent operations, and published a photograph of the members of his family, including plaintiff, his young daughter. Held, that the photograph published being a true likeness of plaintiff, its publication in connection with the article did not make the article "of or concerning" plaintiff, so as to constitute libel within Rem. & Bal. Code, § 292, making it sufficient to state generally in libel actions that the defamatory matter was published or spoken of or concerning plaintiff, which allegation plaintiff must establish. Hillman v. Star Pub. Co., 117 Pac. 594, 596, 64 Wash. 691, 35 L. R. A. (N. S.) 595.

CONCESSI

The words "dedi," "concessi," and "demisi," when used in a conveyance of real estate, import and make a conveyance in law. Headley v. Hoopengarner, 55 S. E. 744, 747, 60 W. Va. 626.

"If a man make a lease for years by the word 'concessi' or 'demisi' (which implies a covenant), if the assignee of the lessee be evicted, he shall have a writ of covenant." Wiggins v. Pender, 44 S. E. 362, 365, 132 N. C. 628, 61 L. R. A. 772 (quoting Rawle, Covenants for Title [5th Ed.] § 318).

CONCESSION

A rebate or concession from a part of a single rate whereby property is transported thereunder at a less rate than the established rate is a "concession" from the entire rate, and renders all transportation thereunder illegal. Armour Packing Co. v. United States, 153 Fed. 1, 9, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400.

In the federal statute forbidding carriers to offer, grant, or give, and shippers to solicit, accept, or receive, any rebate, concession, or discrimination in respect of transportation, etc., the word "concession" in and of itself implies a comparison with, a measurement by, and a departure from, a determined standard. Standard Oil Co. of Indiana v. United States, 164 Fed. 376, 390, 90 C. C. A. 364.

Under Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, making the willful giving of concessions by interstate carriers from the established and published tariff rates an offense, an indictment alleging that the established and published rate per car for bulk lime between two points was $70 per car of 40,000 pounds minimum, and that defendant charged and received for a specified car the sum of $64.75 and no more, sufficiently charged that defendant granted a "concession" prohibited by the statute, though the count did not use the word "concession" to describe the alleged rebate. Atchison, T. & S. F. R. Co. v. United States, 170 Fed. 250, 256, 95 C. C. A. 446.

The word "concession," as used in section 1 of the Elkins act, was apparently a "catchall" provision for any practice by either carrier or shipper which by any device whatever would tend to defeat the purpose of the law. The term "concession" does not necessarily imply that the shipper solicited a concession or privilege which the carrier could give. The statute is clearly violated if the defendant has accepted or received any

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"concession" or discrimination which resulted in the carriage of the freight in question at a less rate than that established under the act. United States v. Vacuum Oil Co., 153 Fed. 598, 604.

A royal title is the highest order of title known by any law, or principle, in the province of east Florida. Titles of this description were designed to convey the fee simple to the grantee. They were usually made by the acting governors of the province in the name of the king. They recited the grant to be in perpetuity, and also the specific metes and bounds of the land. This title may be said to correspond in character with that of a patent issued by our government. "Concessions without conditions" are understood to differ from a "royal title" only in this: That most of the latter recite the metes and bounds, whereas the unconditional concession, although definite in quantity and location of the land, is still subject to a survey, which, when made, was followed by maturing the concession by a royal title. There is also a peculiarity in the legal phraseology of a "royal title." In all the grants of this nature the legal right to the lands is asserted. Florida Town Imp. Co. v. Bigalsky, 33 South. 450, 453, 44 Fla. 771 (quoting from the report of the Land Commissioners of 1826).

CONCISE

"A plain and 'concise' statement of facts required by the statute does not refer so much to the style of the pleader as to his command of terse and simple English as to the attempt sometimes made to give a long and prolix history of the transactions on which the suit is based and incumber the pleadings with a multitude of impertinent allegations." McGlothlin v. Hemery, 44 Mo. 350, 354.

In the statutory rule of pleading requiring a "concise statement" of a cause of action, the term "concise statement" is a relative one, and it would be impossible to formulate a precise rule in any case. The statute must therefore be liberally construed. Fairall v. Cameron, 70 S. W. 929, 930, 97 Mo. App. 1.

CONCLUDE

CONCLUSION

In detinue for a mule claimed by plaintiff under a mortgage, plaintiff testified that he sold the mule to the mortgagor, who had had possession prior to the sale and execution of the mortgage, and that the mule was his up to the time that the mortgage was executed, and that it was "so understood." Held, that it was not error to refuse to exclude the expression "it was so understood," since, as used, it should be taken as synonymous with "agreement" and the statement of a fact, and not a "conclusion." Holman v. Clark, 41 South. 765, 767, 148 Ala. 286 (citing Griffin v. Isbell, 17 Ala. 184; Saltmarsh v. Bower, 34 Ala. 613; E. E. Shafer & Co. v. Hausman, 35 South. 691, 139 Ala. 237).

In an action for the death of a foreman in a lumber yard while riding on the footboard of an engine in consequence of the footboard being caught on a plank walk by the side of the track, a witness testified that decedent was day foreman, and that the witness was night foreman. His testimony showed that he was testifying from actual knowledge as to the duties of decedent, and he stated that he knew it to be a fact that decedent's duties were identical with his own, and that it was not decedent's duty to inspect or repair the track, and if it had been it would have been witness' duty also. Held, that the evidence was not objectionable as the "conclusion" of the witness. Kirby Lumber Co. v. Chambers, 95 S. W. 607, 610, 41 Tex. Civ. App. 632.

In a criminal case, testimony of a witness that, if certain persons had exchanged pistols, witness would have seen it, was inadmissible as "conclusion." Hammond v. State, 41 South. 761, 765, 147 Ala. 79 (citing Reeves v. State, 11 South. 296, 96 Ala. 33; East Tennessee, V. & G. R. Co. v. Watson, 7 South. 813, 90 Ala. 41; Ferguson v. State, 32 South. 760, 134 Ala. 63, 92 Am. St. Rep. 17).

"Lord Coke said the name 'estoppel' or 'conclusion' was given because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Steffens v. Nelson, 102 N. W. 871, 94 Minn. 365.

In an action to recover for transportation furnished by plaintiff to defendants, testimony of defendants as to whether or not they owed plaintiff for the transportation was not a "conclusion," but a collective fact, and competent. Owen v. McDermott, 41 South. 730, 148 Ala. 669.

The distinction between "ultimate facts" to be found by the jury and mere "conclusions" is an interesting one, as is evidenced by the following extract: "It sometimes happens that facts are so close to the line dividing inferential facts from evidentary facts that the only safe plan is to put them in the special verdict, where they can do no harm if they should turn out, in the opinion of the court, to be evidentiary facts, and where their absence might be fatal if they should turn out to be inferential facts." Republic Iron & Steel Co. v. Jones, 69 N. E. 191, 192, 32 Ind. App. 189 (quoting Louisville, N. A. & C. Ry. Co. v. Miller, 37 N. E. 348, 141 Ind. 550).

In an action for the loss of several barrels of molasses in shipment, testimony that the witness had inspected the shipment at a certain point, but was unable to stop the leakage, as all of the barrels seemed to be in good condition, and the leaking appeared to

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be from fermentation, was not a "conclusion of the witness." Houston & T. C. R. Co. v. Davis, 100 S. W. 1013, 45 Tex. Civ. App. 212.

In an action for the loss of several barrels of molasses in shipment, testimony that "some of the barrel heads showed to have been staved inwards by heavy blows from the outside" was not a "conclusion of the witness," but testimony as to a fact. International & G. N. R. Co. v. H. P. Drought & Co. (Tex.) 100 S. W. 1011, 1012.

Of trial

"Conclusion of trial," as used in Rev. St. 1895, art. 1365, declaring that any party taking exceptions during the trial shall reduce them to writing and present the bill of exceptions to the judge for his allowance and signature during the term and within ten days after the "conclusion of the trial," is not limited to the date of the rendition of the verdict and judgment, but extends to the date of the entry of the order overruling a motion for a new trial. Palmo v. S. W. Slayden & Co., 92 S. W. 796, 798, 100 Tex. 13.

CONCLUSION OF FACT

Where the conclusion describes a legal status or condition or a legal offense, it is ordinarily termed a "conclusion of law"; but, where the conclusion describes a condition or status not represented or designated by some definite legal term or rule, it is ordinarily deemed a conclusion of fact. Travelers' Ins. Co. v. Hallauer, 111 N. W. 527, 528, 131 Wis. 371.

CONCLUSION OF LAW

An allegation of an ultimate fact to be proved, although it be necessarily an allegation of a conclusion of fact, does not amount to an allegation of a conclusion of law. Moser v. Talman, 100 N. Y. Supp. 231, 234, 114 App. Div. 850 (dissenting opinion).

A "conclusion of law" is not a statement of fact upon which a liability can be predicated, and an allegation of indebtedness for money had and received is merely a conclusion of law and not a statement of fact. Tate v. American Woolen Co., 99 N. Y. Supp. 678, 679, 114 App. Div. 106.

Where the conclusion describes a legal status or condition or a legal offense, it is ordinarily termed a "conclusion of law"; but, where the conclusion describes a condition or status not represented or designated by some definite legal term or rule, it is ordinarily deemed a "conclusion of fact." Travelers' Ins. Co. v. Hallauer, 111 N. W. 527, 528, 131 Wis. 371.

It is a rule of pleading that, while it is not allowable to allege a mere "conclusion of law" containing no element of fact, yet it is proper not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which according to the common and ordinary use of language amounts to a mixed statement of fact, and of a legal conclusion. It may not be possible to finally define conclusion of law, so as to distinguish it from a pleadable ultimate fact; but it has been quite generally held that the question of negligence in a particular case is one of mingled law and fact, and a general allegation of negligence as applied to the act of a party is not a mere "conclusion of law," but a statement of an ultimate fact allowed to be pleaded. Jones v. Great Northern R. Co., 97 N. W. 535, 536, 12 N. D. 343.

An allegation that an act was negligently done is not a bare "conclusion of law," but is a conclusion of fact, and may be so pleaded without a statement of the facts constituting the negligence. Lowe v. Miller (Ky.) 104 S. W. 257, 258.

A finding in favor of a defense of limitations does not cease to be a "conclusion of law" because found among the findings of fact, but will be regarded according to its character, notwithstanding its misplacement. Towle v. Sweeney, 83 Pac. 74, 75, 2 Cal. App. 29.

CONCLUSIVE

See Final and Conclusive.

"Conclusive" means decisive; irrefutable. State v. Brandenberger, 130 N. W. 1065, 1070, 151 Iowa, 197.

The word "evident" means "clear to the vision, especially clear to the understanding, and satisfactory to the judgment." Its synonyms are: "Manifest, plain, clear, obvious, visible, apparent, conclusive, indubitable, palpable, notorious." So the word "conclusive" is synonymous with "evident" as used in the constitutional guaranty providing for bail except for capital offenses when proof is evident. State v. Kauffman, 108 N. W. 246, 20 S. D. 620.

Laws 1909, c. 152, provides that any elector, claiming that in taking a vote upon the question of licenses in a town the statutes were not complied with, may petition a judge of the superior court, who shall determine such question, and his decision thereon shall be conclusive. Held, that there is no right of appeal from such decision; the word "conclusive" as used meaning "final." In re Woodruff, 76 Atl. 294, 83 Conn. 330.

CONCLUSIVE EVIDENCE

" 'Conclusive evidence' is such evidence as, being uncontradicted, controls the decision." State ex rel. Railroad & Warehouse Com'rs v. Minneapolis & St. L. R. Co., 79 N. W. 510, 514, 76 Minn. 469 (quoting and adopting definition And. Law Dict. 421).

"Conclusive evidence" is that which is incontrovertible, that is to say, either not open or not able to be questioned, as, where it is said that a thing is conclusively proved, it means that such result follows from the

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facts shown as the only one possible; the term conclusive proof meaning either a presumption of law or evidence so strong as to overbear everything to the contrary. Thompson Lumber Co. v. Interstate Commerce Commission, 193 Fed. 682, 684.

CONCLUSIVE JUDGMENT

See, also, Res Adjudicata.

It is an essential requisite of a "conclusive judgment" that it should go to the merits of the controversy in hand, and that it be not based merely upon technical defects in the pleadings. Succession of Herber, 44 South. 888, 890, 119 La. 1064.

"Conclusive" is defined thus: "Shutting up a matter; shutting out all further evidence; not admitting of explanation or contradiction; putting an end to inquiry; final; decisive; putting an end to debate or question; leading to a conclusion or decision." Under a statute providing that bills and petitions in equity which are not pleaded to within the proper time shall, on ex parte motion of complainants, be taken as confessed, and a decree entered accordingly, which, if no motion to set aside be made within five days shall be "conclusive," a decree pro confesso has the same effect as a decree entered after appearance and hearing; and it is not beyond the powers of the court to vacate the same when properly moved thereto in accordance with a statute providing that in case of judgment by default or mistake, or in case of decrees in equity cases, the court shall have control over the same for the period of six months after the entry thereof, and may, for cause shown, set aside the same and reinstate the case. Masterson v. Whipple, 61 Atl. 446, 447, 27 R. I. 192 (quoting and adopting definition in 8 Cyc. p. 551).

A judgment is "conclusive" on the parties and privies as to facts which are alleged in the pleading as material allegations and actually tried, but not as to evidentiary facts. Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. City of Laconia, 65 Atl. 378, 379, 74 N. H. 82.

A judgment for defendant in ejectment by plaintiff, who alleged that he was the owner in fee, but that defendant was in possession, rendered on a directed verdict for defendant after the court, on motion of plaintiff, had taken from the jury the testimony of defendant, and after plaintiff had failed to prove title, is a judgment on the merits, and is conclusive on the question of title, within L. O. L. §§ 329, 337, requiring the jury to find, if the verdict be for defendant, that plaintiff is not entitled to possession, and that the judgment shall be conclusive as to the estate and the right to the possession thereof, so far as the same is determined. Carroll v. McLaren, 118 Pac. 1034, 1036, 60 Or. 233.

CONCLUSIVE PRESUMPTION OF LAW

A "conclusive presumption" of law is an inference which must be drawn from the proof of given facts, which no evidence may overthrow; while a "rebuttable presumption" is an inference which obtains until overthrown by proof. Barrow v. Territory, 114 Pac. 975, 976, 13 Ariz. 302.

CONCLUSIVE PROOF

Proof may be required to be clear and convincing without transcending the rule of preponderance. But the word "conclusive" has a larger meaning, and, when used in connection with the evidence required to prove a given fact, calls for a much higher degree of proof than has ever been held to be necessary in a civil action. Roberge v. Bonner, 77 N. E. 1023, 1024, 185 N. Y. 265 (citing Rosseau v. Rouss, 72 N. E. 916, 180 N. Y. 116, 121).

CONCRETE

See Small Concrete.

The term "concrete" is almost universally understood to be cement mortar with pebbles or broken stone imbedded in it, and the mortar is often referred to as the "matrix" and the imbedded fragments as the "aggregate." Concrete is a species of artificial stone. Donaldson v. Roksament Stone Co., 170 Fed. 192, 193.

"Concrete" is an artificial stone, the product resulting from a combination of sand or gravel or broken pieces of limestone with water and cement; a combination which requires ordinarily the use of both skill and machinery, so that a corporation engaged in making "concrete" in a shape adapted to use in finished form for a house, bridge, pier, arch, or abutment is engaged in manufacture. Friday v. Hall & Kaul Co., 30 Sup. Ct. 261, 262, 216 U. S. 449, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475.

A city ordinance, prohibiting the erection of any building within fire limits, except buildings constructed of "brick" or "stone," does not prohibit the construction of a concrete building, since "concrete" is either a species of brick, or is an artificial stone; and the ordinance is not in conflict with Rev. St. 1895, art. 523, authorizing cities to establish fire limits, and to prohibit the construction of buildings therein, except buildings of fireproof materials. Ex parte Morris, 120 S. W. 1007, 1008, 56 Tex. Cr. R. 533.

As stone

See Stone.

CONCUBINAGE

See Open Concubinage.

The word "concubinage" derives from the concubinatus of the Romans, a kind of marriage recognized by law, but of less dig-

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nity than the justæ nuptiæ, and not serving, like it, as the source of family and other legal relations. It ceased to describe legal marriage when the law came to recognize only one kind of marriage, but it continued to designate a status resembling marriage, and, at least in the civil law, does so to this day. "Pour qu'il y ait concubinage, il ne suffit pas d'un rapprochement passager et fortuit, c'est la fornication; le concubinage est, au contraire, permanent." Le Nouveau Demisart, vo. "Concubinage." The Grand Dictionnaire of Larousse, vo. "Concubinage," after giving the history of what is meant by concubinage, declares concubinage to be "the status of a man and woman who live together as man and wife without being married"; and it adds: "We must not confound the concubine with the courtesan, or even with what is ordinarily a mistress. The concubine is an entirely different thing. It is the wife without the title; it is marriage without the sanction of the law." The Century Dictionary defines it as "the act or practice of cohabiting without legal marriage"; and it defines the word "cohabit" as "to dwell together; inhabit or reside in company; specifically, to dwell or live together as husband and wife." The Encyclopædia Britannica defines it as "living together as man and wife without legal marriage." The law dictionaries of Black and Bouvier define it as "a species of loose, informal marriage, which took place among the ancients, and which is yet in use in some countries. The act or practice of cohabiting in sexual intercourse without the authority of law or a legal marriage." These law dictionaries have taken their definition word from Merlin, rep. vo. "Concubinage." Webster defines it as "the cohabiting of a man and woman who are not legally married." Succession of Jahraus, 38 South. 417, 418, 114 La. 456.

An instruction was proper that the word "concubinage" meant sexual cohabitation with an unmarried female, and if accused took the girl from her father for the purpose of cohabiting with her for any length of time more than a single act of sexual intercourse, he is guilty, but if he did not take her from her father for that purpose, or if she was 18 years old or over, he is not guilty. State v. Baldwin, 113 S. W. 1123, 1126, 214 Mo. 290.

The term "concubinage," within Rev. St. 1899, § 1842, denouncing the taking away of a female under the age of 18 years from her father or mother, guardian, or other person having legal charge of her person for the purpose of concubinage, does not necessarily contemplate "concubinage" with the person charged with the offense alone. State v. Knost, 105 S. W. 616, 617, 207 Mo. 18.

Under Gen. St. 1901, § 2020, making it a crime to take away any female under the age of 18 for the purpose of concubinage, etc., the term "concubinage" means living together and having sexual relations as husband and wife, and the time during which such relations are intended to or actually do continue is immaterial. State v. Tucker, 84 Pac. 126, 127, 72 Kan. 481.

"'Concubinage' is the act upon the part of the woman of cohabiting with a man without ceremonial marriage, or consent and intent good at common-law." United States v. Bitty, 155 Fed. 938, 939.

Where a single woman consents to unlawfully cohabit with a man generally, as though the marital relation existed between them, without any limit as to the duration of such cohabitation, and actually commences to cohabit with him under that understanding, she becomes his "concubine," or, as expressed in modern times, his "kept mistress." Coy v. Humphreys, 125 S. W. 877, 880, 142 Mo. App. 92.

Prostitution distinguished

A statute punishing the taking away of any female under the age of 18 years from her father, etc., either for the purpose of prostitution or concubinage, is leveled at both "prostitution" and "concubinage," which are entirely separate and distinct offenses. "Concubinage" is defined by Webster to be "the cohabiting of a man and a woman who are not legally married; the state of being a concubine; a woman who cohabits with a man without being married"; and by the law dictionaries as a "species of loose, informal marriage, which took place among the ancients, and which is yet in use in some countries." State v. Adams, 78 S. W. 588, 590, 179 Mo. 334.

CONCUR

CONCURRENCE

Bill of Rights, § 18, provides that a grand jury shall be composed of twelve men, any nine of whom concurring may find an indictment. Snyder's Comp. Laws 1909, § 6687, provides that an indictment cannot be found without the concurrence of at least nine grand jurors. Held, that the words "concurring" and "concurrence" mean "assent" or "consent" indicated by affirmative action of the grand jury by a vote or ballot showing direct approval. Eubanks v. State, 114 Pac. 748, 752, 5 Okl. Cr. 325; Elder v. Same, 114 Pac. 752, 5 Okl. Cr. 693.

CONCURRENT

"Concurrent" means coincident or contemporaneous. Kelly v. Liverpool & London & Globe Ins. Co., 112 N. W. 870, 871, 102 Minn. 178 (citing 2 Words and Phrases, p. 1391).

The word "concurrent" has various meanings; and, while prosecutions by indictment and information are concurrent remedies in the sense that they are of equal dignity and

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may apply to the same object or offense, they are not concurrent in the sense that procedure by indictment or by information may be adopted at the same time. State v. Woods (N. D.) 139 N. W. 321, 323.

The term "concurrent with" as used in an Act of Congress declaring that the District Court of the United States shall have cognizance concurrent with the Circuit Courts of the United States of all cases at common law where the United States or any officer thereof shall sue, must be construed to give jurisdiction to the Circuit Courts in such case, if it did not previously exist. State v. Harden, 58 S. E. 715–733, 62 W. Va. 313.

A mortgage given by a purchaser before his deed was delivered and registered is subject to a purchase-money mortgage executed and registered at the time of the delivery and registration of the deed, though the first mortgage was first registered, for the purchaser had no title when he executed the first mortgage, and as the delivery of the deed and execution of the purchase-money mortgage were concurrent the title did not rest in the purchaser for any appreciable length of time, but passed immediately under the purchase-money mortgage, for "concurrent acts" are in law but one act. Hinton v. Hicks, 71 S. E. 1086, 1087, 156 N. C. 24.

CONCURRENT CONDITIONS

See Conditions Concurrent.

CONCURRENT COVENANTS

"Concurrent covenants" are those which by the terms of the contract are to be performed at the same time by each of the parties bound to perform them. Either party must be ready to perform to put the other in default. Thus under a contract for a sale of realty, if no stipulation is made as to the order of time in which the deed is to be delivered and payment made, these acts are concurrent. Neither party can treat the other as being in default either for the purpose of considering the contract as discharged or for bringing an action for damages. Hoard v. Huntington & B. S. R. Co., 53 S. E. 278, 281, 59 W. Va. 91, 8 Ann. Cas. 929.

"Concurrent covenants" are those where mutual conditions are to be performed at the same time. Kelly v. Liverpool & London & Globe Ins. Co., 112 N. W. 870, 871, 102 Minn. 178 (citing 2 Words and Phrases, p. 1391).

Where the conditions of a contract are such that the parties must perform their promises at the same time, they are known as "conditions concurrent." Neither party is bound to do the first act, but each must be able and ready to perform his own, and the one who is ready and able to perform has a right of action against the one who is not. If the obligations of the parties are mutual and dependent, then the refusal of one to perform without sufficient excuse is equivalent to an abandonment of the contract, and releases the other party from any duty to further recognize the obligations. Haydon v. St. Louis & S. F. R. Co., 93 S. W. 833, 845, 117 Mo. App. 76.

CONCURRENT INSURANCE

There is a wide distinction between "coinsurance" and "concurrent insurance"; the latter term being used to designate insurance placed in other companies covering the same risk, while there is no "coinsurance" where the insured does not bear a proportion of the risk. Oppenheim v. Fireman's Fund Ins. Co., 138 N. W. 777, 779, 119 Minn. 417.

"Concurrent insurance" is that which to any extent insures the same interest against the same casualty at the same time as the primary insurance, on such terms that the insurers would bear proportionately the loss happening within the provisions of both policies. It has been held that the word "concurrent," in relation to insurance, meant "running together," and in the connection used had the sense of co-operating, acting in conjunction, agreeing to the same act, and, in the absence of something in the context showing that the word was not used in its ordinary meaning, it must be understood to have been so used. To be concurrent the insurance must operate at the same time, upon the same property, and look to the indemnity of the insured in case of its loss or destruction from the casualty insured against. Kelly v. Liverpool & London & Globe Ins. Co., 112 N. W. 870, 871, 102 Minn. 178 (citing 2 Words and Phrases, p. 1391; East Texas Fire Ins. Co. v. Blum, 13 S. W. 572, 76 Tex. 653).

The word "concurrent" means acting in conjunction; agreeing in the same act; contributing to the same event or effect; cooperating; existing or happening at the same time, operating on the same subjects. Webster's International Dictionary. The term "concurrent" insurance, as used in a policy granting permission for insurance, cannot be construed as merely embracing the amount covered by the one policy in which the permission is granted, but necessarily embraces another amount or another policy, though it might under some circumstances include the former. None of the definitions give the word the precise meaning of "other," so that one can say that concurrent insurance necessarily means other insurance exclusively, but in every instance the word necessarily implies the existence of two or more things or conditions. L'Engle v. Scottish Union & National Fire Ins. Co., 37 South. 462, 465, 48 Fla. 82, 67 L. R. A. 581, 111 Am. St. Rep. 70, 5 Ann. Cas. 748.

A provision in a fire policy, "$150,000 total concurrent insurance permitted," is susceptible of more than one construction, and it must be construed to permit other insurance to the amount of $150,000; the word "concurrent" meaning "running with." Park-

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hurst-Davis Mercantile Co. v. Merchant Underwriters at the Indemnity Exchange, 86 N. E. 1062, 1064, 237 Ill. 492.

The words "concurrent herewith," as used in a fire policy for $4,500, which provided that it should be void if the insured should procure other insurance, unless otherwise provided by agreement added to the policy, and which contained the clause, "$3,500 total insurance permitted concurrent herewith on buildings," etc. "Other insurance permitted concurrent herewith on stock" relates to the term "total insurance," and means that the total insurance must all concur with the insurance effected by the policy, and the policy limits the insurance, the limitation taking into account the amount written in the policy; and the policy did not authorize $3,500 additional insurance, and it was forfeited by the insured taking a policy for additional insurance on the same property from another company. Senor v. Western Millers' Mut. Fire Ins. Co., 79 S. W. 687, 689, 181 Mo. 104.

CONCURRENT JURISDICTION

"Concurrent jurisdiction" between federal and state courts on rivers means the jurisdiction of two powers over one and the same place. The state of Oregon cannot under its concurrent jurisdiction under act of Congress over the Columbia river make criminal the operation of a purse net in that river in the territorial limits of the state of Washington under license from that state. Nielsen v. Oregon, 29 Sup. Ct. 383, 384, 212 U. S. 315, 53 L. Ed. 528.

The "concurrent jurisdiction" on the Mississippi, so far as said river shall form a common boundary to Iowa and any other state, given Iowa by Act March 3, 1845, c. 48, 5 Stat. 742, means that all the jurisdiction which might otherwise have been exercised by it with reference to transactions on the part of the river within its boundary shall be possessed and exercised by it with reference to like transactions on any part of the river between it and another state without regard to boundary; so that, as by Acts 33d Gen. Assem. c. 155, as amended by Acts 34th Gen. Assem. c. 117, it has done, it may prohibit fishing thereon with nets, without a license from Iowa, and in case of violation thereof, though on the Illinois side of the river, punish the same, even though the offender have a license from Illinois. State v. Moyers (Iowa) 136 N. W. 896, 897, 41 L. R. A. (N. S.) 366.

Laws 1909, c. 14, art. 7, creating county superior courts, gives them, except as to matters of probate, concurrent jurisdiction with county courts. Held, that concurrent jurisdiction within the statute means the jurisdiction of several different tribunals, each authorized to deal with the same subject-matter. Oklahoma Fire Ins. Co. v. Phillip, 111 Pac. 334, 335, 27 Okl. 234.

The word "concurrent," in its legal and generally accepted definition, means acting in conjunction, and, when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river, it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction. Ex parte Desjeiro, 152 Fed. 1004 (quoting and adopting definition in Re Mattson, 69 Fed. 535, 540).

"Concurrent" is "running together; having the same authority. Thus, we say such and such courts have concurrent jurisdictions; that is, each has the same jurisdiction." Bouv. Law Dic. "By conferring 'concurrent jurisdiction' Congress intended to declare that transactions occurring anywhere on the river between the two states might lawfully be dealt with by the courts of either according to its laws." "The existence of concurrent jurisdiction in two states over a river that is a boundary between them vests in each of such states, and its courts, except as to things permanent, and except as to maritime and commercial matters cognizable by the national government and its courts, jurisdiction, both civil and criminal, from shore to shore, of all matters of rightful state cognizance occurring upon such river in all parts thereof where it forms such common boundary." State v. Faudre, 46 S. E. 269, 273, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104 (quoting and adopting definition from Bouv. Law Dict.; Rorer, Interstate Law, 337).

Laws 1907, c. 557, regulating the sales of syrups, molasses, and glucose, and mixtures thereof, so far as it affects interstate commerce, falls within the field of "concurrent jurisdiction" of the state and federal governments, and wherein the state may enact appropriate regulations not conflicting with congressional legislation on the subject. McDermott v. State, 126 N. W. 888, 890, 143 Wis. 18, 21 Ann. Cas. 1315.

Where an adjoining state has "concurrent jurisdiction" on the waters forming their boundaries, the laws of each state regulating the common right to take fish from such waters are valid when not in conflict, and where there is a conflict the law of the state which is the most restrictive in its character must prevail. "Concurrent jurisdiction" is not joint in the sense that only legislative acts adopted by both states can be effective on boundary waters. State v. Neilson, 95 Pac. 720, 721, 51 Or. 588, 131 Am. St. Rep. 765, 16 Ann. Cas. 1113.

"Concurrent jurisdiction," properly so called, on rivers, means the jurisdiction of two powers over one and the same place. It is in this sense that the words are used in Virginia Compact 1789, § 11, declaring that the jurisdiction of the proposed state of Kentucky on the Ohio river should be concurrent

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only with the states which may possess the opposite shores of the river. Hence jurisdiction is acquired by an Indiana court by service of process on the Ohio river on the Kentucky side of the low-water mark on the Indiana shore. Wedding v. Meyler, 24 Sup. Ct. 322, 324, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 833.

CONCURRENT NEGLIGENCE

A paragraph in a petition alleging that the railroad company employed an incompetent person, well knowing him to be such, and was in that respect guilty of willful and wanton negligence, did not charge an act of "concurrent negligence," for it could not be true that the company's negligence in providing a careless and incompetent person was an act in which the latter participated. Adderson v. Southern R. Co., 177 Fed. 571, 573.

Where a person who inflicts an injury has no better opportunity to anticipate the accident nor any better means of preventing it than the person injured, and there is negligence on the part of both parties which is continuous and mutual up to the incident of accident, there is "concurring negligence" which precludes recovery. So where a traveler, when he reaches the point where he was injured by collision with a train, is in a situation to help himself, and by a vigorous use of his eyes, ears, and physical strength can extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. His negligence in such a case is said to be "concurrent" with the negligence of defendant, the negligence of which being operative at the time of the accident. Dyerson v. Union Pac. R. Co., 87 Pac. 680, 683, 684, 74 Kan. 528, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207 (citing French v. Grand Trunk Ry. Co., 58 Atl. 722, 76 Vt. 441).

CONCURRENT RESOLUTION

Though denominated a "concurrent" resolution, a resolution by the state Senate and House of Representatives that the question of nominating United States senators, etc., by direct vote of the electors be submitted at an election, and requiring the Secretary of State to certify the same to the several county clerks and give notice to the sheriffs, etc., is a bill or joint resolution within Const. art. 4, § 19, providing no bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house. Kelley v. Secretary of State, 112 N. W. 978, 979, 149 Mich. 343.

CONCURRENTLY

Payment of taxes "concurrently" means that the taxes must be paid from year to year, and one year's taxes may be paid after its termination, or two years after its termination, if it is believed that the party did not intend to abandon his possession, and paid the taxes in continuation of his possession. Hirsch v. Patton, 108 S. W. 1015, 1017, 49 Tex. Civ. App. 499.

As used in the proposition of law laid down in Lombard v. Trustees of Young Men's Library Ass'n Fund, 73 Ga. 322, that the lien of a materialman for lumber furnished on the employment of a contractor could not be foreclosed by a direct suit against the owner of the premises, without previously or "concurrently" suing the contractor to whom the lumber was furnished, is used as the equivalent of the phrase "in the same suit" so far as actions strictly at law are concerned. Buck v. Tifton Mfg. Co., 62 S. E. 107, 4 Ga. App. 695.

CONCURRING

See Concurrence.

CONCUSSION

"Concussion" is the act of shaking or agitating, especially by the shock or impulse of another body, and in surgery the shock or agitation of some organ by a fall or like cause. A person suffered "concussion" of the brain, where he sustained a fracture of the skull and remained unconscious for 17 days, during which time a portion of his skull was removed. Beave v. St. Louis Transit Co., 111 S. W. 52, 59, 212 Mo. 331 (quoting and adopting Webst. Dict.).

CONDEMN—CONDEMNATION

See Stand Condemned.
Expenses of condemnation, see Expenses.
See, also, Expropriation.

"Condemnation" is, in substance, a compulsory sale, and, so far as current taxation is concerned, may properly be treated the same as if the sale had been voluntary. Buckhout v. New York, 68 N. E. 659, 661, 176 N. Y. 363.

Under Gen. St. 1909, § 3006, subd. 4, authorizing the Kaw Valley Drainage District to condemn and cause obstructions in water courses to be removed, it may require the elevation of railroad bridges without condemnation and compensation; the term "condemn" as here used meaning to declare or pronounce a thing unlawful. Kaw Valley Drainage Dist. of Wyandotte County v. Kansas City Terminal Ry. Co., 123 Pac. 991, 994, 87 Kan. 272.

"Condemnation" for felony as a ground for divorce does not refer to conviction merely, but exists as long as the judgment is in force, and the cause is not barred by Civ. Code, § 423, subd. 3, by reason of having existed for more than five years. Davis v. Davis, 43 S. W. 168, 102 Ky. 440, 39 L. R. A. 403.

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As purchase

See Purchase; Purchaser.

Of land

"A 'condemnation' is a proceeding at law, and at law the mortgagee is the owner of the property, and even if equity does, for purposes, treat him as merely having a lien on the land." A mortgage is within the protection of a provision of a city charter requiring street commissioners, in condemning land, to ascertain the damages for which the owner or occupant of "any right or interest claimed in any ground or improvements" ought to be compensated. Mayor, etc. of Hagerstown v. Groh, 61 Atl. 467, 468, 101 Md. 560.

The words "condemn or appropriate" in the Constitution of Arkansas mean a taking of private property under the right of eminent domain and not by contract. St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627, 629.

CONDEMNATION JURY

A "condemnation jury" is a jury appointed in an eminent domain proceeding to assess damages and benefits. Such a jury is authorized to assess damages and benefits for and against different property holders for an act affecting all. Hunt v. City of Columbia, 97 S. W. 955, 122 Mo. App. 31.

CONDEMNATION MONEY

The term "condemnation money," mentioned in the conditions of a bond given under Code Civ. Proc. § 677, relating to appeal bonds in an action for the foreclosure of a mechanic's lien, means the damages which the party failing in the action is adjudged or condemned to pay; and when the Supreme Court affirmed the judgment of the lower court, it found the condemnation money against defendant, though the appeal in the Supreme Court was a trial de novo. Maloney v. Johnson-McLean Co., 100 N. W. 423, 424, 72 Neb. 340.

CONDEMNATION PROCEEDINGS

Any and all suits, see Any.

A proceeding to condemn is, in substance, a proceeding to compel a sale by the owner to the petitioner, and is justified only when the purpose for which the land is to be used is a public one. Atlanta, K. & N. R. Co. v. Southern R. Co., 131 Fed. 657, 666, 66 C. C. A. 601.

Election contest distinguished

The distinction between a condemnation suit and a proceeding to contest an election is plain. The one is to recover a judgment for the amount of the compensation and damages which the owner of private property has sustained by reason of the taking of his property for a public use, and may be said to be a case and falling within the language of the statute giving city courts concurrent jurisdiction with circuit courts in all civil cases, while the contest of an election is a proceeding instituted for the purpose of determining which of the contestants has received the greater number of votes of a particular office. Brueggemann v. Young, 70 N. E. 292, 294, 208 Ill. 181.

As special proceeding

See Special Proceeding.

As suit

See Suit; Suit of Civil Nature.

CONDENSED SKIMMED MILK

Acts 1900, p. 868, c. 532, § 138f, prohibits the manufacture or sale of condensed or preserved milk unless manufactured from pure and unadulterated milk, from which no part of the cream has been taken, or unless the proportion of milk solids therein shall be equivalent to a certain percentage of milk solids in crude milk. Section 233 provides that milk from which a part of the cream has been taken shall be deemed adulterated and unwholesome, but forbids a construction of the sections so as to prohibit the sale of pure skimmed milk when labeled and sold as such, or the addition of sugar to the manufacture of condensed milk, and sections 232 and 234 prescribe the standard for pure milk and the penalty for violating the statute. Held, that the primary purpose of section 235 was not to prevent fraud, but to prohibit the sale of articles deemed unhealthful by the Legislature, and the sale of "condensed skimmed milk," was prohibited by the statute, and the fact that such an article was unknown or not manufactured when the statute was enacted was immaterial. Reiter v. State, 71 Atl. 975, 976, 109 Md. 235.

CONDIMENT

A "condiment" is a "food" and not a "medicine." The "International stock food" is a "food or condiment" within the meaning of the Kentucky pure food law (Laws Ky. 1906, c. 48), and its sale is subject to regulation thereunder. Savage v. Scovell, 171 Fed. 566.

"Condiment," according to Webster, and as generally understood, is something "used to give relish to food and to gratify the taste; a pungent and appetizing substance; seasoning." Capers, which are pungent flower buds, when pickled in vinegar and intended for use in flavoring sauces and as a relish are a "condiment," dutiable under Act 1897, par. 241, as "pickles and sauces of all kinds," rather than as provisions. S. S. Pierce Co. v. United States, 176 Fed. 440, 441, 443, 444.

CONDITION

See Dangerous Condition; Dissimilar Condition; Dissolving Condition; Good Condition; Good Order and Condition;

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Natural Condition; Perfect Condition; Proper Condition; Same Condition; Suspensive Condition; Terms and Conditions; Terms and Conditions, Rights, and Privileges; Water Conditions.

Any dangerous condition, see Any.
Change in condition, see Change.
Sale on condition as sale, see Sale.
Similar condition, see Similar.

A "condition" is any qualification, restriction, or limitation annexed to a gift, and modifying or destroying its full enjoyment. Adams v. Johnson, 76 Atl. 174, 227 Pa. 454.

"An 'estate upon condition,' expressed in the grant itself, is where an estate is granted either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated upon performance or breach of such qualification or condition." A deed will not be construed as a grant upon condition subsequent, unless the language used by expressed terms create an "estate upon condition," or unless the intent of the grantor to create a conditional estate is manifest from a reading of the entire instrument. Thomson v. Hart, 66 S. E. 270, 272, 133 Ga. 540 (quoting and adopting definition given by Blackstone).

"A 'condition' is a future and uncertain event upon which is made to depend the existence of a juridical tie or obligation, or rather it is a kind of restriction which subordinates the existence of a juridical relation to a future and uncertain event." Barber Asphalt Paving Co. v. St. Louis Cypress Co., 46 South. 193, 197, 121 La. 152 (quoted and adopted from Dalloz Code Annoté Nouveau Code Civil, 111, p. 2, No. 27).

A "condition" in the law of realty is a qualification or restriction annexed to a conveyance, providing that if an event does or does not happen, or the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or defeated. Munro v. Syracuse, L. S. & N. R. Co., 93 N. E. 516, 518, 200 N. Y. 224, 21 Ann. Cas. 594.

The word "condition," in Act March 26, 1897, § 2, providing that the warranty of any fact or "condition" incorporated in any policy of insurance purporting to be made or assented to by the assured, which shall not materially affect the risk insured against, shall be construed as representations only in any suit at law or equity on such policy, refers to facts existing, or said or supposed to exist, at the time the policy is made. Hoover v. Mercantile Town Mut. Ins. Co., 69 S. W. 42, 44, 93 Mo. App. 111.

In a provision of an insurance policy that if, with the consent of the company, an interest thereunder shall exist in favor of a mortgagee or any person or corporation having an interest in the subject of insurance other than the interest of the insured as described therein, the "conditions hereinbefore contained" shall apply in the manner expressed in such provisions and conditions relating to such interest as shall be written upon, attached, or appended thereto, the expression "conditions hereinbefore contained" refers to the preceding conditions set out in the policy of insurance or contained on the back thereof, and such preceding conditions apply to the interest of a mortgagee or other person having an interest therein, but as modified by the provisions contained on a slip attached to the policy. Vancouver Nat. Bank v. Law Union & Crown Ins. Co., 153 Fed. 440, 445.

A judgment granting the husband, because of the wife's use of intoxicants, a limited divorce for two years, though providing that at the end of two years either party "may proceed in the action as he or she shall deem for her best interest," is not an interlocutory judgment, authorized by St. 1898, § 2883, in case of a decision leaving some condition to be performed; leaving it to the husband to ask for an absolute divorce at the end of the two years, on the record as it stood at the time of the trial, if in the meantime the parties had not been reconciled, though the wife had reformed, if such be the intent of the provision of the judgment, not being a "condition" within the meaning of the statute. Graham v. Graham, 136 N. W. 162, 163, 149 Wis. 602.

Const. art. 11, § 19, as amended in 1911 (see Laws 1911, p. 2180), authorizing any municipal corporation to establish and operate enumerated public utilities, and providing that persons or corporations may establish and operate such works under "such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof," grants to all municipalities the power to construct and operate public utilities, and to prescribe the conditions on which persons and corporations may establish and operate such works, subject to charter provisions; and an ordinance of a city empowered to regulate conduits and works for the production and distribution of gas, etc., which prohibits excavations in streets without first obtaining permission from the board of public works, is valid when applied to one engaged in laying a gas pipe in a street as a part of the distributing system of a corporation engaged in supplying gas to the inhabitants of the city; the word "condition" meaning something established as a requisite to the doing or taking effect of something else, while the word "regulations" is something distinct from the word "conditions," and implies a broader meaning in the latter word than mere regulation of the manner of use. Ex parte Russell, 126 Pac. 875, 876, 163 Cal. 668.

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Code Civ. Proc. § 1187, providing that a claim of lien by an original contractor must contain a statement of his demand, less credits, the name of the owner, the name of the person by whom he was employed, a statement of the terms, time given, and conditions of the contract, and a description of the property to be charged with the lien, does not require that a claim of lien, to be valid, should set forth that the demand was based on more than one contract, and then segregate and separately state the amount of each, though the evidence in support of the lien showed that the work was performed on separate and distinct structures under separate and distinct contracts; the word "conditions" referring only to those provisions which enter into and form a part of the contract and are essential to make it binding. Acme Lumber Co. v. Wessling, 126 Pac. 167, 170, 19 Cal. App. 406.

In an action to recover unpaid installments under a contract of employment for five years at an annual salary, payable in weekly installments, an allegation in the complaint of "performance of all the conditions" on plaintiff's part, meant only the performance of the obligations placed on him by the contract during the period sued for, or possibly up to the time suit was commenced, and not during the entire term of employment; and hence the fact that the evidence did not show performance during the entire term did not constitute a variance. Tichenor v. Bruckheimer, 81 N. Y. Supp. 653, 655, 40 Misc. Rep. 194.

Under Burns' Ann. St. 1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the "conditions" on his part, an allegation in an action on a policy "that plaintiff fully performed all the obligations required of her" was a substantial compliance with the statute. Security Accident & Sick Ben. Ass'n v. Lee, 66 N. E. 745, 746, 160 Ind. 249.

Where practically all the output of a china manufacturer was sold to the United States, special classes manufactured for European trade cannot be said to be in "condition" to supply the American trade, within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 19, providing that dutiable value shall be determined according to the "condition in which * * * merchandise is there bought and sold for exportation to the United States." United States v. Haviland & Co., 167 Fed. 414, 418.

A complaint having predicated the negligence of the master on a "defect in the condition" of the ways, works, etc., a demurrer, in that the count showed no defect in the ways, works, etc., was inapt, under the statute permitting a recovery for a "defect in the condition" of, etc. The employment of the word "condition" widens the statute beyond what would have been its scope had only the word "defect" been used. If one claiming under the statute must show a defect in the ways, the effect would be to counteract the right therein declared, and this by denying the word "condition" its proper influence. Jones v. Tennessee Coal, Iron & R. Co., 50 South. 1017, 163 Ala. 266.

As charge

The word "conditions," as used in Civ. Code, art. 1559, providing for the revocation of donations for nonfulfillment of eventual conditions, is synonymous with the word "charges"; and when a donation contains charges, it is considered as made under the condition that it may be dissolved, or revoked, if they are not executed. Voinche v. Town of Marksville, 50 South. 662, 663, 124 La. 712.

Conditional limitation and limitation distinguished

The distinction between "an estate on condition" and one "on limitation" is that in the latter the event or occurrence relied on to determine the first estate and as the beginning of another merely marks the end or limit of the first, and thus indicates the boundary between the two while in the estate on condition, such event actively defeats what might otherwise be a greater interest. Diamond v. Rotan (Tex.) 124 S. W. 196, 200.

As consideration

A will devised land "upon the condition" that the devisee pay to the testator's widow during life a certain sum, which was made a charge upon the land; but no provision was made for a forfeiture of the title, nor was a devise over made in case of default of payment of such charge. Held, that the word "condition" was used in the sense of "consideration," and that the title was not conditional, but merely incumbered with the charge as a lien which might be foreclosed. Ditchey v. Lee, 78 N. E. 972, 974, 167 Ind. 267.

As defeasance

An instrument which defeats the force or operation of some other deed or of an estate is a "defeasance"; but, if the provision is in the same deed, it is a "condition." Epperson v. Epperson, 62 S. E. 344, 345, 108 Va. 471.

As provisions

Testatrix bequeathed the income of $30,000 to her niece for life, and, after her death, to her children, if any, absolutely, but, if she died without issue, the principal to go to two brothers named, the interest only for their use and to their children, lawful issue, absolutely. The will also contained a clause bequeathing the residue to the niece, subject to the same conditions as the legacy, the interest to be used for her benefit for life,

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the principal to go to her children, lawful issue, absolutely, but, if she died unmarried, she should have power to devise it to whichever of her brothers she considered most worthy to inherit, the interest only to go to them, the principal to their children. The niece died without issue and without having exercised the power of appointment. Held, that the principal of the residue passed to the children, lawful issue, of the two brothers who took the $30,000 legacy absolutely; the word "conditions," as used in the residuary clause, being construed to mean the same as "provisions" under which the niece took the pecuniary legacy. In re Keene's Estate, 70 Atl. 706, 710, 221 Pa. 201.

The term for which the accident policy was to run was one of the "conditions and provisions," within a clause to the effect that no "condition or provision" should be waived or altered by any one, unless by written consent of an officer of the company. Wheeler v. United States Casualty Co., 59 Atl. 347, 348, 71 N. J. Law, 396.

Of person

In an action for physical pain, and for shame, humiliation, and suffering caused the plaintiff's wife from a conductor's abusive language to her, no element of the damages sued for was ignored by an instruction that the burden is upon the plaintiff to show by a preponderance of the evidence that she was injured and is suffering as alleged in the pleadings, and that "her said condition or her said injury and suffering are the direct and proximate result of the misconduct on the part of the defendant's conductor," and that if the jury should believe, by a preponderance of the evidence, that her "condition" resulted from some misconduct on the part of the conductor they should return a verdict in favor of defendant; the word "condition," as last used, in view of the other quoted phrases, comprehending every element of damage claimed in the petition, and clearly having reference to both her physical and mental condition. Carpenter v. Trinity & B. V. Ry. Co. (Tex. Civ. App.) 146 S. W. 363, 368.

Covenant distinguished

The difference between a "covenant" and a "condition" in a contract relates largely to the remedy, and, if the breach of the agreement pertains to the validity of the instrument, or is a ground for forfeiture, it is a condition, while, if the remedy for a breach is merely an action at law for damages, the agreement is a covenant. Cavanagh v. Iowa Beer Co., 113 N. W. 856, 858, 136 Iowa, 236.

An agreement in a lease to give a chattel mortgage on personalty as security for future payments of rent is a "condition," which as a mutual agreement is binding on both parties, and a breach of which will work a forfeiture of the estate, rather than a "covenant," which binds only the covenantor, and whose breach only warrants the recovery of damages. Knight v. Black, 126 Pac. 512, 514, 19 Cal. App. 518.

Plaintiff conveyed a strip of land for a railroad right of way on "condition" that the grantee "shall construct and maintain a * * * railroad to be operated by electricity for motive power, * * * and upon the failure or abandonment of said enterprise by the grantee * * * the privileges herein and the property hereby conveyed shall revert to and be fully vested in the grantors, * * * and conditioned also that the construction of such road be fully completed and such road be in operation in or before the year 1900." Held, that the clause requiring the road to be finished before or during the year 1900 was a "covenant" and not a "condition," and a failure to complete the road within that time did not operate as a forfeiture of the right of way. Krueger v. St. Louis, St. C. & W. R. Co., 84 S. W. 898, 901, 185 Mo. 227 (citing Ellis v. Kyger, 3 S. W. 23, 90 Mo. 600; O'Brien v. Wagner, 7 S. W. 19, 94 Mo. 93, 4 Am. St. Rep. 362; Morrill v. Wabash, St. L. & P. Ry. Co., 9 S. W. 657, 96 Mo. 174; Studdard v. Wells, 25 S. W. 201, 120 Mo. 25; Roberts v. Crume, 73 S. W. 662, 173 Mo. loc. cit. 581; Gratz v. Highland Scenic R. Co., 65 S. W. 223, 165 Mo. 211).

Restriction distinguished

Where a deed clearly shows the intention of the parties that on breach of a restriction the estate should be defeated and return to the grantor, the restriction is a "condition," whether the apt words to create a condition are used or not. Ball v. Milliken, 76 Atl. 789, 791, 31 R. I. 36, 37 L. R. A. (N. S.) 623, Ann. Cas. 1912B, 30.

The word "restrictions," when used in connection with the grant of an interest in real property, is the equivalent of "conditions," and either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The word "restrictions," in Pub. St. c. 113, § 7, providing for the location of street railways, subject to such restrictions as required by public interest, is the equivalent of "conditions," and therefore limitations may be imposed on the enjoyment of the right to use the streets granted for such purposes. Blodgett v. Worcester Consol. St. Ry. Co. (Mass.) 78 N. E. 222, 224 (citing Skinner v. Shephard, 130 Mass. 180; Ayling v. Kramer, 133 Mass. 12; Clapp v. Wilder, 57 N. E. 692, 176 Mass. 332, 50 L. R. A. 120).

As term

A resolution adopted by a city council pending a dispute with a street railroad company as to its franchise rights with respect to fares, etc., on certain streets, which permitted the company to continue operations from time to time "upon the same terms and

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conditions now prevailing in the city, whether due to contract agreement or not," though made when the city knew that the company was collecting extra fares on certain lines which were without the city limits when the franchises for such lines, which authorized extra fares, were granted, did not recognize the company's right to charge extra fares on such lines; the word "prevailing" having no technical meaning and as used signifying that which is common, in operation, or prevalent, while the words "terms" and "conditions" mean the propositions and limitations which comprise the agreement and govern the parties, defining their obligations, and, as applied to an ordinance giving a franchise, signifying the boundary limit or extent of the grant. City of Detroit v. Detroit United Ry., 139 N. W. 56, 59, 173 Mich. 314.

CONDITION CONCURRENT

A contract, by which a purchaser of corporate stock was, at the end of a certain time, if he was dissatisfied therewith, entitled to reconvey and redeliver the same to the corporation and receive the price paid, was, as to the provisions as to satisfaction, reconveyance, and redelivery, within a statute providing that "conditions concurrent" are those which are mutually dependent, and are to be performed at the same time. Porter v. Plymouth Gold Min. Co., 74 Pac. 938, 941, 29 Mont. 347, 101 Am. St. Rep. 569.

CONDITION IN LIFE

An instruction directing the jury to award plaintiff such damages as would fairly compensate him for the injuries sustained, if any, and that, in determining the amount, it was the jury's duty to consider his age, condition in life, physical and mental pain, and suffering, if any, etc. Held, that the words "condition in life" should be considered to refer to plaintiff's physical condition only, and that the instruction was not therefore erroneous. Vandalia Coal Co. v. Yemm, 92 N. E. 49, 53, 175 Ind. 524.

CONDITION OF PEONAGE

A person arbitrarily or forcibly held against his will, for the purpose of compelling him to render personal services in discharge of a debt, is in a "condition of peonage." Hodges v. United States, 27 Sup. Ct. 6, 15, 203 U. S. 1, 51 L. Ed. 65.

The phrase "condition of peonage" means the actual status, physical and moral, with the inevitable incidents, to which the employé, servant, or debtor was reduced under that system, when held to involuntary performance or liquidation of his obligation. A condition of peonage, within the denunciation of Act March 2, 1867, c. 187, § 1, 14 Stat. 546, is the illegal holding of a person to involuntary servitude to work out a debt or contract claimed to be due by the person so held to the person so holding. United States v. McClellan, 127 Fed. 971, 975 (quoting Peonage Cases, 123 Fed. 679).

CONDITION PRECEDENT

"A 'condition precedent' is one without the performance of which the contract, although in form executed by the parties and delivered, does not spring in life." Everson v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, 88 N. E. 658, 660, 202 Mass. 169.

A "condition precedent" in one that must happen or be performed before the estate dependent on it can arise or be enlarged. Frank v. Stratford-Hancock, 77 Pac. 134, 138, 13 Wyo. 37, 67 L. R. A. 571, 110 Am. St. Rep. 963.

"A 'condition precedent' in a contract is an act to be performed by one party before the accruing of the liability of the other party, and proof of such a condition does not vary or contradict the contract, but shows that no contract between the parties ever became effective." Cavanagh v. Iowa Beer Co., 113 N. W. 856, 858, 136 Iowa, 236.

"Conditions precedent" in a deed are those which prevent the vesting of title until the condition is complied with. Koch v. Streuter, 83 N. E. 1072, 1074, 232 Ill. 594.

Where condemnation proceedings were compromised by an agreement providing that the landowners should deed the land, and that the railroad company should within one year change the channel of a certain creek, and should, on the opening of a certain street, erect a bridge in a stipulated manner, the building of the bridge was not a "condition precedent" to the vesting of title, and failure to build it at the required time did not entitle its grantors to recover the land, but merely gave rise to a cause of action for damages. Bright v. Louisville & N. R. Co., (Tex.) 87 S. W. 780, 781.

In determining whether stipulations as to the time of performance of a contract for the sale of chattels are "conditions precedent," if it appears on a fair consideration of the contract and the circumstances that time is of the essence of the contract, stipulations thereto will be held conditions precedent. McIntyre v. Cunningham, 125 N. W. 598, 599, 86 Neb. 383.

"A 'condition precedent' calls for the performance of some act or the happening of some event after the terms of the contract have been agreed on before the contract shall take effect; that is to say, the contract is made in form, but does not become operative as a contract until some future specific act is performed or some subsequent event occurs. Hence it is said: 'A condition precedent doth get and gain the thing or estate made upon the condition by the performance of it, as a condition subsequent keeps and continues the estate by the performance of

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the condition.'" Though a policy of insurance provides that the description of the properties shall be a part of the contract and a warranty by the insured, it does not impose on plaintiff, in an action on the policy, the burden of proving the truth of such description as a prerequisite to the right to recover. Morotock Ins. Co. v. Fostoria Novelty Glass Co., 26 S. E. 850, 851, 94 Va. 361 (quoting and adopting definitions in Redman v. Ætna Ins. Co., 4 N. W. 591, 49 Wis. 431).

Where plaintiffs unconditionally accepted a special order for ice cans requiring delivery within 30 days, and plaintiffs knew that the cans were for a special use in the making of defendant's product, and of the importance to defendant of prompt delivery, and that loss would follow delay, the time of performance was a "condition precedent." Wall v. St. Joseph Artesian Ice & Cold Storage Co., 87 S. W. 574, 575, 112 Mo. App. 659.

As warranty

The terms "warranty" and "condition precedent" are used interchangeably, and in many instances a warranty is a condition precedent to the taking effect of the contract, as when the insured warrants the premium will be paid by the date of the policy. Salts v. Prudential Ins. Co., 120 S. W. 714, 717, 140 Mo. App. 142.

Condition subsequent distinguished

"Conditions precedent" and "conditions subsequent" differ, in that the former is one by the performance of which a right, estate, or thing is obtained or gained; the latter one by the performance of which a right, estate, or thing already obtained is kept and continued. Adams v. Guyandotte Valley Ry. Co., 61 S. E. 341, 344, 64 W. Va. 181.

A "condition precedent" requires performance before the estate vests. A "condition subsequent" may cause a forfeiture of a vested estate. Winn v. Tabernacle Infirmary, 69 S. E. 557, 558, 135 Ga. 380, 32 L. R. A. (N. S.) 512.

Where a condition is "precedent," the estate does not vest until the condition is fulfilled. If "subsequent," it is liable to be divested on the failure of the condition. Adams v. Johnson, 76 Atl. 174, 227 Pa. 454.

"Whether a given stipulation is to be deemed a 'condition precedent,' a 'condition subsequent,' or an 'independent agreement' is purely a question of intent; and the intention must be determined by considering, not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates." Skowhegan Water Co. v. Skowhegan Village Corp., 66 Atl. 714, 718, 102 Me. 323.

Conditions in deeds are either "precedent" or "subsequent," and, where a certain condition was to be performed after the right granted had vested in the grantee, it is a "condition subsequent." Munro v. Syracuse, L. S. & N. R. Co., 93 N. E. 516, 518, 200 N. Y. 224, 21 Ann. Cas. 594.

A "condition" is a qualification annexed to any estate whereby it is to arise, in which case it is called a "condition precedent" or is to be defeated, when it is styled a "condition subsequent." A deed in consideration of natural love and affection, whereby land is granted, bargained, sold, and released to the grantee, on condition that she shall hold and enjoy the same for life, and after her death to go to all her children, "to have and to hold all the premises heretofore mentioned unto said grantee, her heirs and assigns, forever," conveys a title in fee simple, and entitles grantee's husband to a third interest therein on the death of the grantee; the condition being but an effort to set limitations on the fee simple, and cut it down to a life estate in the grantee not within the power of the grantor to accomplish. Chavis v. Chavis, 35 S. E. 507, 508, 57 S. C. 173.

A "condition subsequent" keeps and retains the estate by the performance of the condition, while a condition precedent doth get and gain the thing or estate made upon the condition by the performance of it. Though a policy of insurance provides that the description of the property shall be a part of the contract and a warranty by the insured, it does not impose on plaintiff in an action on the policy the burden of proving the truth of such description as a prerequisite to the right to recover. Morotock Ins. Co. v. Fostoria Novelty Glass Co., 26 S. E. 850, 852, 94 Va. 361 (quoting and adopting definitions in Redman v. Ætna Ins. Co., 4 N. W. 591, 49 Wis. 431).

CONDITION SUBSEQUENT

See Right of Entry for Breach of Condition Subsequent; Sale upon Subsequent Condition.

A "condition subsequent" defeats the estate in case it does not happen or is not performed. Frank v. Stratford-Hancock, 77 Pac. 134, 138, 13 Wyo. 37, 67 L. R. A. 571, 110 Am. St. Rep. 963.

A "condition subsequent" is one to be performed or fulfilled after the vesting of the estate, and the intent of which is to defeat it. Potomac Power Co. v. Burchell, 64 S. E. 982, 985, 109 Va. 676.

"Conditions subsequent" are provisions in a deed giving the grantor, by express words or necessary implication, the right to re-enter and repossess the premises upon the violation of the condition. Koch v. Streuter, 83 N. E. 1072, 1074, 232 Ill. 594.

An "estate upon condition subsequent," is one liable to be defeated by the happening of a certain contingency, and the entry by the grantor or his heirs, who thereby regain the estate originally parted with; the estate thus being distinct from conditional

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limitation, where there is no re-entry for the grantor. Taylor v. McCowen, 99 Pac. 351, 354, 154 Cal. 798 (citing 2 Washb. Real Prop. [6th Ed.] § 1640).

A "condition subsequent" is one that operates upon an estate already created and vested, which, if not performed, renders the estate liable to be defeated at the election of the grantor, provided he re-enters within a reasonable time after default or asserts his rights in an equivalent manner. Such a condition is a qualification or restriction annexed to a conveyance, and so united with it as to qualify or restrain it, and when the grantor re-enters and takes possession of the estate upon a breach of the condition, he holds it on the same terms and in the same manner as he did previous to the grant. Paris Grocer Co. v. Burks (Tex. Civ. App.) 99 S. W. 1135, 1138 (quoting and adopting the definition in 2 Wash. Real Property, § 953).

A deed for a consideration alleged to have been nominal, conveying land to a city to be used as a burying ground, and forever kept, used, and inclosed in a decent and substantial manner, and for no other use or purpose whatsoever, in which the grantors made no record of any intention that the land should ever, under any circumstances, revert to them or their representatives, was not made on a "condition subsequent." Thornton v. Natchez, 129 Fed. 84, 86, 63 C. C. A. 526.

Where a testator devised all his real estate to his sons equally, and provided that none of the property should be sold until 10 years after his death, and that if any of his sons contracted habits of vice before the division he thereby forfeited his share, and if any of the sons died before division his share should go to the remaining heirs unless he left children, the devise vested in the sons the fee subject to divestiture or termination on any son contracting habits of vice before division, which is a "condition subsequent," defined by Civ. Code, § 1349, as where an estate is given so as to vest immediately, subject to be divested by some subsequent act or event, or on the death of any son before division; the gift over in such case being a mere executory devise, which takes effect on the happening of some contingent event in substitution for a fee previously devised. Newlove v. Mercantile Trust Co. of San Francisco, 105 Pac. 971, 973, 156 Cal. 657.

Land was conveyed to a village under agreement between the grantor and a third person whereby the latter paid the grantor one-half the value of the land on the promise of said grantor to donate to the village an equal amount by conveying the entire tract to the village for cemetery purposes. The deed recited that the land was granted in perpetuity for a cemetery, to be used for that purpose only; and the habendum provided that it should be held on the conditions expressed, and that the village should devote the land to cemetery purposes, and that it accepted the same for such purpose and covenanted to observe the condition. There was no provision for re-entry in the event of breach. Held, that the requirement that the land be used for cemetery purposes was not a "condition subsequent." Freer v. Glen Springs Sanitarium Co., 115 N. Y. Supp. 734, 736, 131 App. Div. 352.

A provision in a deed for re-entry in case of breach of conditions is evidence of intention to create "conditions subsequent." Phillips v. Gannon, 92 N. E. 616, 619, 246 Ill. 98.

A deed under which the grantees are to enter immediately into possession, and thereafter have the use of the land, unless some condition in the deed is broken, and by which the grantees, in consideration of the conveyance, covenant to furnish the grantor support and proper attendance during his life, and give him a burial and monument, and to pay a mortgage on the premises, and that he shall have the right to re-enter and take possession for a breach of any of such covenants, though providing that the performance of said covenants is made a "condition precedent to the vesting of the title," creates "conditions subsequent," and not precedent; the word "vesting" not being used in its technical sense, but the clause, in the light of the surrounding circumstances and in connection with the entire instrument, being clearly intended to mean that the title should vest at once, but that the grantees should not have an absolute indefeasible title till they had performed all the conditions of the deed. Id.

If the act required by a deed does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or, if from the nature of the act to be performed and the time required for its performance it is evident that the intention of the parties was that the estate should vest and the grantee perform the act or acts after taking possession, the condition is "subsequent." Id.

Condition precedent distinguished

See Condition Precedent.

Covenant distinguished

A provision in a deed conveying right of way to a railroad company, requiring the grantee to erect a station house thereon and to stop all passenger trains there which stopped at other stations within three miles, held, in view of other provisions, to constitute a covenant, and not a "condition subsequent." Minard v. Delaware, L. & W. R. Co., 153 Fed. 578, 579, 82 C. C. A. 586.

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Creation

"Conditions subsequent," especially when relied upon to work a forfeiture, must be created by express terms, or clear implication, and are strictly construed. A grantee's covenant to pay taxes on the land was not a condition subsequent for a breach of which the grantor could re-enter. Burgson v. Jacobson, 102 N. W. 563, 565, 124 Wis. 295 (quoting and adopting definition in 2 Washb. Real Prop. p. 7).

Though the grantees in a deed containing a condition that they should pay a certain sum to third persons were not expressly bound by the condition since they had not sealed the deed, yet, having accepted it, they were bound by an implied promise to pay the sum, for which an assumpsit would lie. Barnes v. Crockett's Adm'rs, 68 S. E. 983, 984, 111 Va. 240, 36 L. R. A. (N. S.) 464.

The fact that a deed recited that the conveyance was made pursuant to a contract whereby the grantee was to convey certain land to the grantor and erect certain buildings thereon did not create an "estate on condition subsequent," conditioned on the erection of the buildings, as such an estate can only be created by express reservation of right of re-entry. Braddy v. Elliott, 60 S. E. 507, 508, 146 N. C. 578, 16 L. R. A. (N. S.) 1121, 125 Am. St. Rep. 523.

" 'Conditions subsequent' are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted, if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt but that the grantor intended that an estate upon condition subsequent should be created—language which ex proprio vigore imports such a condition." Hawley v. Kafitz, 83 Pac. 248, 249, 148 Cal. 393, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282.

"If the condition be a subsequent one—i. e., such a one as concedes the validity of the contract, save as it has been abrogated or destroyed by breach of condition—then parol evidence is not admissible, for its manifestly varies or contradicts the terms of a written contract." Cavanagh v. Iowa Beer Co., 113 N. W. 856, 858, 136 Iowa, 236.

Running with land

"Conditions subsequent" necessarily run with the land where they are attached to the title which may be lost by failure to observe them. Where a deed contains a "condition subsequent" providing that the terms of the agreement shall be binding on the heirs, successors, and assigns of the parties thereto, the successors of the grantee are bound thereby. Munro v. Syracuse, L. S. & N. R. Co., 93 N. E. 516, 519, 200 N. Y. 224, 21 Ann. Cas. 594.

CONDITIONAL

See Unconditional.

A contract, by which a purchaser of corporate stock was at the end of a certain time, if he was dissatisfied therewith, entitled to reconvey and redeliver the same to the corporation and receive the price paid, was, as to the provisions as to satisfaction, reconveyance and redelivery, "conditional" within a statute providing that an obligation is "conditional" when the rights or duties of a party thereto depend on the occurrence of an uncertain event. Porter v. Plymouth Gold Min. Co., 74 Pac. 938, 941, 29 Mont. 347, 101 Am. St. Rep. 569.

CONDITIONAL ACCEPTANCE

A letter from a general manager of a railway company, addressed to a lumber company, contained the following: "In view of our intention of putting down 60-pound rail, we will have several miles of 45-pound rail to sell, which we can offer at $26 per ton." Subsequently the general manager verbally offered to sell to the lumber company five miles of 45-pound steel rail at $26 per ton. After this verbal offer, a letter from the general manager, addressed to the lumber company, contained the following: "My conversation with Mr. Babcock, on his recent visit to Bainbridge: This company can sell you five miles of 45-pound steel rail at $26 per ton, to be delivered as soon as the new rails, which this company has ordered, arrive, which will possibly be within the next 60 days." In reply to this, an authorized agent of the lumber company wrote the railway company as follows: "We have your esteemed favor of April 8th in regard to the 45-pound steel relayers, and accept your offer. Please consider the deal closed. In billing these, make two miles cash, and three miles to be paid for by note due a year from now; that is, April 1, 1905. Kindly deliver our first two miles at your early convenience, and the next three miles at your very latest convenience. We mean by this that we need the two miles, and do not need the three miles until early next year." Held, the acceptance was not unconditional, but, construing the whole together, embraced new terms not referred to in the offer, which do not appear to have been accepted by the railway company, and no complete contract was ever made. There was no suggestion of credit in the offer. Babcock Bros. Lumber Co. v. Georgia, F. & A. R. Co., 56 S. E. 457, 127 Ga. 329.

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CONDITIONAL BOND

See Simplex Obligatio.

A "conditional bond" does not create an indebtedness absolutely payable in the future, but is an obligation which becomes an indebtedness on the happening of a contingency. In re Chestnut St. Trust & Saving Co.'s Assigned Estate, 66 Atl. 332, 333, 217 Pa. 151, 118 Am. St. Rep. 909.

CONDITIONAL FEE

A "conditional fee" is defined as an estate whose "existence depends on the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated." Taylor v. Stephens (Ind.) 74 N. E. 12 (citing And. Law Dict. 221).

"A 'conditional fee' is one that restrains the fee to some particular heir to the exclusion of others." A will devising lands to testator's granddaughter, on condition that she pay all taxes, keep up repears, and do not incumber or sell her interest before she should arrive at the age of 40 years, and giving a remainder over in case of her death under 40, created a conditional fee. Matlock v. Lock, 38 Ind. App. 281, 73 N. E. 171, 180.

A devise to one and to the heirs of his own body is not within the rule in Shelley's Case, but creates in the devisee a conditional fee as it existed at common law before the statute de bonis, which is a part of the common law of the state, and on the birth of issue the estate becomes absolute, while on his death without issue the estate reverts to testator's heirs. A "conditional fee" is one which restricts the fee to some particular heirs, exclusive of others, and at common law is a fee simple on condition that the devisee has the heirs prescribed, and if he dies without issue the property reverts to testator's heirs. Sagers v. Sagers (Iowa) 138 N. W. 911, 43 L. R. A. (N. S.) 562.

CONDITIONAL GUARANTY

Where defendant guaranteed the collection of amounts to become due under a contract for the sale of goods, the guaranty was "conditional"; defendant not being liable until judgment was obtained and execution issued against the principal. Blanding v. Cohen, 92 N. Y. Supp. 93, 94, 101 App. Div. 442.

CONDITIONAL LIMITATION

A "conditional limitation" is an estate limited to take effect upon the happening of a contingency; an estate limited to take effect after the determination of an estate which, in the absence of a limitation over, would have been an estate upon condition. It cannot be limited after an estate upon limitation, except where the contingency which constitutes the limitation is not sure to happen and the estate is a fee upon limitation. Diamond v. Rotan (Tex.) 124 S. W. 196, 200 (quoting and adopting the definition in Tiedeman Real Prop. § 211).

The word "conditional," as used in a lease for a term of years, reciting that it is subject to the conditional limitations herein stated, and stipulating in the following paragraph that the occupation of the premises by the tenant and his family as a strictly private dwelling apartment is a specific consideration for the granting of the lease, has reference to a situation, state, or external circumstances. Schwoerer v. Connolly, 88 N. Y. Supp. 818, 820, 44 Misc. Rep. 222.

The breach of a tenant's covenant to repair is not in the nature of a "conditional limitation." Kleinstein v. Gonsky, 118 N. Y. Supp. 949, 950, 134 App. Div. 266 (citing Cramer v. Emberg, 4 N. Y. Supp. 613, 15 Daly, 205).

The distinction between "conditional limitations," "contingent remainders," and "estates upon condition subsequent" is stated to be as follows: "If an estate is limited to A. until B. return from Rome, and after B. return to C., the limitation is a contingent remainder, and good as such; but if the estate had been limited to A., which would be for life, if no words of inheritance were annexed, provided that, if B. return from Rome, the estate should go to C., the limitation, though expressly the same in effect as the first, would be, not a remainder, but a conditional limitation. In the one case, if C.'s estate comes into effect at all, it is after the prior estate had terminated by the natural expiration of the time for which it was limited, whereas in the other C.'s estate, if it took effect, came in and displaced the prior estate before its natural termination, and took its place as a substitute therefor. Then, again, though the estate of A. is a conditional one, liable to be defeated by the happening of a contingent event, it is not a case of condition at the common law, where to determine an estate for a breach of it required an entry by the grantor or his heirs, who thereby regained the estate originally parted with; but it is a case where the estate is wholly parted with by the grantor, no interest being left in him, and passes at once, upon the happening of the event, to him to whom it is limited. That contingent event, when it happens, is the limitation of the first estate granted; and the estate, instead of going back to the original grantor, goes over, eo instanti, and without any act but that of the law, to the party named in the very gift itself of the estate as the one to take it in that event." In view of Civ. Code, § 778, declaring that a remainder may be limited on a contingency, the happening of which will abridge or determine the precedent estate, and such remainder shall be deemed a conditional limitation, and section 773, providing that a fee may be limited on a contingency which must happen, if at all, within the period prescribed in the title,

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where testator bequeathed land to A. for life, and on her death to her heirs, but that, if A. should not reside on the land for her natural life, the land should become the absolute property of T., A.'s estate was not based on a condition subsequent, but was subject to a conditional limitation, so that, on her removal from the land in her lifetime, the property vested in T. at once, without entry or suit to establish title. Taylor v. McCowen, 99 Pac. 351, 353, 354, 154 Cal. 798 (quoting and adopting the distinction in 2 Washb. Real Prop. [6th Ed.] § 1640).

CONDITIONAL LINE

A "conditional line" is a line made by agreement of parties, generally without the aid of a surveyor. Martin v. Hall, 100 S. W. 343, 344, 30 Ky. Law Rep. 1110.

CONDITIONAL PARDON

An indefinite suspension of the sentence of a prisoner on condition amounts to a "conditional pardon." State v. Hunter, 100 N. W. 510, 512, 124 Iowa, 569, 104 Am. St. Rep. 361.

Const. art. 4, § 11, provides that in all criminal cases, except treason and impeachment, the Governor shall have power after a conviction to grant reprieves, commutations of punishment, and pardons, etc. Acts 32d Leg. c. 44, provides that district judges upon the written request of defendants in certain criminal cases may submit to the jury the issue as to whether or not the defendant had ever before been charged with or convicted of crime, and, if the jury finds that he has not been, such judge may suspend the sentence in case the jury convict. Such suspension is not open to review, and is for an indefinite time, depending on good behavior, and upon the violation of the good behavior provision the defendant may be brought into court, the suspension set aside, and the convict required to undergo the penalty of the original sentence. If the conditions are complied with for double the length of time of the conviction, the judge may bring the convict into court, and set aside and annul the former judgment, and discharge him from all responsibility. Held, the act confers upon the district courts the discretionary power not only to grant a "conditional pardon," which is an indefinite suspension of sentence on conditions, but also to set aside a conviction and restore the convict to all his rights, which is an essential element of the pardoning power, and it is unconstitutional as an invasion of the Governor's prerogative. Snodgrass v. State (Tex. Cr. App.) 150 S. W. 178, 179.

CONDITIONAL PROMISE

A promise to pay "as soon as possible," made after a discharge in bankruptcy, is not a "conditional promise," and as such insufficient to support an action on the original demand. Sundling v. Willey, 103 N. W. 38, 40, 19 S. D. 293, 9 Ann. Cas. 644.

Statements in letters, concerning a note given by the writer, that he would pay when he was able, that he expected a raise of salary, and that he had other indebtedness to which he felt he must give preference, do not render the promise to pay "conditional," so as to prevent it from removing the bar of limitations. Walker v. Freeman, 70 N. E. 595, 598, 209 Ill. 17.

Where, in an action on a note, plaintiff relied on a new promise to toll limitations pleaded, and the promise proved was that defendant would pay the debt as soon as she could, or as soon as she was able, an instruction that that was an absolute and unqualified promise was erroneous. Barker v. Heath, 67 Atl. 222, 224, 74 N. H. 270 (citing Butterfield v. Jacobs, 15 N. H. 140, 141).

CONDITIONAL SALE

See Sale upon Subsequent Condition.
Conditional sale to bankrupt as preference, see Preference.

Civ. Code, § 1727, defines an "agreement to sell, generally termed a 'conditional sale' as a contract by which one engages, for a price, to transfer to another the title to a certain thing." Ward Land & Stock Co. v. Mapes, 82 Pac. 426, 427, 147 Cal. 747 (citing Van Allen v. Francis, 56 Pac. 339, 123 Cal. 474).

A "conditional sale" is a sale in which the transfer of title to the buyer or his retention of it depends upon the performance of some condition. Poirier Mfg. Co. v. Kitts, 120 N. W. 558, 560, 18 N. D. 556.

A "conditional sale" is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to the failure of the buyer to comply with a condition subsequent. In re Columbus Buggy Co., 143 Fed. 859, 860, 74 C. C. A. 611.

A "conditional sale" of personal property, as understood in this state, means one in which the title is retained by the vendor, with no right in the vendee to sell the property, and in which the property is not subject to the debts of the vendee. Star Clothing Mfg. Co. v. Nordeman, 100 S. W. 93, 94, 118 Tenn. 384 (citing Houston v. Dyche, Meigs [19 Tenn.] 76, 33 Am. Dec. 130; Price v. Jones, 3 Head [40 Tenn.] 84; Holmark v. Molin, 5 Cold. [45 Tenn.] 482; Acts 1899, p. 119, c. 12, § 1; Shannon's Code Supp. p. 638; Gambling v. Read, Meigs [19 Tenn.] 281; Bradshaw v. Thomas, 7 Yerg. [15 Tenn.] 497).

"A 'conditional sale' of land is a purchase for a price paid or to be paid, to become absolute in the purchaser on the occurrence of a particular event, or it is a purchase accompanied by an agreement to resell to the grantor in a given time for a given price." Kramer v. Wilson, 90 Pac. 183, 185, 49 Or. 333.

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Where the owner of a sewing machine places it in possession of a prospective purchaser with an option to purchase at a fixed valuation, and with no agreement to rent, such transaction is not a "conditional sale," within Comp. St. 1907, c. 32, § 26, providing that an agreement for conditional sale must be in writing, and a copy filed with the county clerk. Singer Sewing Mach. Co. v. Omaha Umbrella Mfg. Co., 119 N. W. 958, 959, 83 Neb. 619.

A contract signed by the seller and purchaser of a printing press, in which it is provided that the purchaser will pay for the same in installments at fixed dates, and such payments are evidenced by promissory notes, and in which contract it is also agreed that should default be made in payment of any of the rent at the times or in the amounts, the seller has the right to retake the property, and that all money paid is to be retained, and that the title to the property sold does not pass until the entire payment has been made, is a "conditional sale," wherein the title of the property is reserved in the seller until final payment is made. Pease v. Teller Corp. 128 Pac. 981, 984, 22 Idaho, 807.

Bailment distinguished

A contract made and to be performed in Pennsylvania for the sale and delivery of showcases, by which the seller retained title until the price and all costs representing the same had been paid, was a contract of "conditional sale," and not a bailment. In re G. & K. Trunk Co., 176 Fed. 1007, 1008.

Bankrupts, at the time of the filing of the petition against them, had been for more than 30 days in possession of machinery which had been shipped to them under contracts by which they agreed to pay for the same within one year from shipment, and which provided that a retention of the property after 30 days from date of shipment should constitute a trial and acceptance. Held, that such contracts constituted "conditional sales," and not "bailments," under the law of Pennsylvania, and the property, being subject to transfer by the purchasers or to seizure and sale by their creditors under such law, passed to their trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 70a (5). In re Burt, 155 Fed. 267, 268.

Machinery was delivered to a bankrupt under a contract which provided that he should pay certain varying sums at irregular intervals as rent for the same, and that on a final small payment he should be entitled to a bill of sale. There was no provision for the return of the machinery aside from one giving the privilege of retaking it on default in making any of the payments. Held, that under the law of Pennsylvania such contract was one of "conditional sale," and not of bailment, and that the property was assets of the bankrupt estate. In re Tice, 139 Fed. 52, 54.

Under a contract called a lease, one of the parties agreed to hire from the other for a definite period a piano, and to pay as security for the contract a certain sum each month, and to return the piano at the end of the period in as good condition as reasonable use would permit; and it was agreed that upon the failure to pay any installment of rent, or upon the removal of the property from his resident, the security money should be retained as damages for the breach, and the owner should have the right to take possession of the piano without demand or notice. It was further agreed that, if the installments of rent were paid as they fell due, the party paying the same should, while the lease continued in force, have the right to purchase the piano at an agreed price, all sums paid as security or as rent to be deducted from that price. Held a "conditional sale," and not a bailment for hire. Hamilton v. Hilands, 56 S. E. 929, 931, 144 N. C. 279, 12 Ann. Cas. 876 (citing Baldwin v. Van Wagner, 10 S. E. 716, 33 W. Va. 293; Kimball v. Post, 44 Wis. 471; Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; Ott v. Sweatman, 31 Atl. 102, 166 Pa. 217; Puffer v. Lucas, 17 S. E. 174, 112 N. C. 377, 19 L. R. A. 682; Crinkley v. Egerton, 18 S. E. 669, 113 N. C. 444; Clark v. Hill, 23 S. E. 91, 117 N. C. 11, 53 Am. St. Rep. 574; Barrington v. Skinner, 23 S. E. 90, 117 N. C. 47; Manufacturing Co. v. Gray, 28 S. E. 257, 121 N. C. 168; Thomas v. Cooksey, 41 S. E. 2, 130 N. C. 148; Wilcox v. Cherry, 31 S. E. 369, 123 N. C. 79; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Cottrell v. Merchants' & Mechanics' Bank, 15 S. E. 944, 89 Ga. 508).

Defendant executed a consignment receipt for a ring, reciting that it had been consigned on memorandum by prosecutor, to be returned on demand, that the same had not been sold, and that the title thereto did not pass, that all risks were assumed by the consignee, and that agreements not expressed in the writing were not part of the contract. At the same time defendant and prosecutor signed an alleged "deposit agreement," obligating defendant to deposit with prosecutor $30 on the execution of the agreement, and certain sums on specified dates thereafter, all of which should become prosecutor's absolute property, and that, when $175 had been deposited, prosecutor would deliver to defendant for his own use one diamond ring; that, if defendant made default, prosecutor might deliver articles as near like the article to be delivered as possible, but reasonably worth the sums so deposited, and on delivery the agreement should be fulfilled. Held, that such agreements together constituted a "conditional sale" of the ring. People v. Gluck, 80 N. E. 1022, 1024, 188 N. Y. 167.

A contract between the furnisher of goods and the receiver, that the latter may sell them at such price as he chooses, and that he will account for the goods sold at

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agreed prices, and will bear the expenses of insurance, freight, storage, and handling, and will hold the merchandise unsold subject to the order from furnisher, is an agreement for bailment for sale, and not a "conditional sale," and is unaffected by the statute rendering unrecorded contracts for conditional sales voidable by creditors and purchasers. In re Columbus Buggy Co., 143 Fed. 859, 861, 74 C. C. A. 611.

To constitute a "conditional sale," within the terms of Code, § 2905, requiring the recording of any written instrument evidencing a conditional sale, there must be a delivery of possession to the purchaser, with the intention of passing immediate ownership, subject only to the reservation of title to the seller as security for the purchase money. Defendant, a sheriff, levied an attachment on property in the hands of F., and sold it. Plaintiff, claiming to have been the owner, had a written agreement with F., reciting that plaintiff agreed to buy eight teams, the property in question; that the teams were to be used by F. in railroad grading; that plaintiff should receive at each pay day one-half of what the teams earned for the month at a certain rate per team, less the cost of keeping, etc., that F. agreed to pay plaintiff one-half of the price of the teams before the completion of the grading, with interest, failing which plaintiff should receive compensation for the work done by the teams at the rate before mentioned; and that it was agreed that, in addition to the moneys paid plaintiff for the use of the teams, he should receive, on the completion of the work, one-half of the profits attributable to the use of the teams. Held, that F. was merely a bailee, with a right of purchase, which, the evidence showed, had not been exercised; and hence the attachment could not be justified under Code, § 2905, requiring the recording of conditional sales in order to affect third persons. Donnelly v. Mitchell, 93 N. W. 369, 371, 119 Iowa, 432 (citing Wright v. Barnard, 56 N. W. 424, 89 Iowa, 168; Gaar, Scott & Co. v. Nichols, 88 N. W. 382, 115 Iowa, 223; Davis v. Giddings, 46 N. W. 425, 30 Neb. 209).

Where goods were delivered to A. before he became bankrupt, under a written agreement expressly providing that the property was delivered to him as a bailee on hire and that if default in payment of any of the rents for the use and hire of the goods, wares and merchandise by the bailee were made, the bailor was authorized to repossess himself of the property, the transaction was a bailment, and not a conditional sale. In re Angeny, 151 Fed. 959, 960.

A contract providing that certain property should be held on consignment until sold by consignee with consignor's approval, that it should be invoiced to the consignee at a fixed price, and, while he could sell it at any price he saw fit, any overplus, after deducting expenses paid by him, should go to him as his compensation, and that the consignor could annul any sale and retake the property, and under which the consignee was not required to pay anything for the property, but was required merely to turn over certain of the proceeds of sales, the consignor having the right at any time to order the property returned, constituted a bailment for sale, and not a "conditional sale," within Rev. St. 1909, § 2889, making conditional sales fraudulent as to creditors, unless acknowledged and recorded. Packard Piano Co. v. Williams, 151 S. W. 211, 212, 167 Mo. App. 515.

Lease distinguished

A lease of property under an agreement that, on payment of a specified sum in installments, title shall pass to the lessee, amounts to a "conditional sale," valid as to third parties, as well as the parties to the transaction. Kidder v. Wittler-Corbin Machinery Co., 80 Pac. 301, 302, 38 Wash. 179.

A contract, though in the form of a lease, and called a lease, by which the vendor reserves title until final payment should be made, and the right of rescission in case the purchaser should fail to pay any installments of the so-called rent, is a "conditional sale." Unitype Co. v. Long, 143 Fed. 315, 317, 74 C. C. A. 453.

A contract, after reciting that the vendors had "rented" certain furniture, provided that the title should remain in the vendors until the purchase money was paid in specified installments, and on default in any payment the vendors reserved the right to take possession without legal process. There was further provision that all payments should be placed to the credit of the vendee as payments on the "lease," or any other goods for which he might owe the vendors on open account on any other "lease," and that the vendee was to have no title to the "lease" until his account should be settled in full. Held, that the contract was one of "conditional sale," entitling the vendors to the protection afforded by Code 1907, § 7342, making it a crime to remove or sell personal property to hinder or defraud any person who has a valid claim thereto, with knowledge of the existence of such claim. Steele v. State, 48 South. 673, 674, 159 Ala. 9.

The owner of land on which there were dumps of slag and smelter products entered into a contract, denominated a "lease," by which he purported to lease the land for a stated term, with the right to remove the dumps on payment of a series of notes maturing at intervals through a portion of the term. The contract provided, in effect, that removal of the dumps should proceed only in proportion as payments were made, that when all the dumps were removed the lease should terminate, and that on payment of all the notes on or before maturity the lessee should be entitled to a bill of sale of the dumps, with the right to remove the same within a speci-

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fied term. It further provided that: "It is mutually agreed that all work on the said above described slag, slag dumps and materials, and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or keep any of the agreements herein, * * * or any failure to pay immediately when due any one or more of said 100 promissory notes, * * * shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right * * * to declare each and every one and all of the said 100 promissory notes, or whatever number of the said notes may remain unpaid, * * * immediately due and payable, and * * * to collect the same, * * * and in case of forfeiture as aforesaid all work done and money expended by the said party of the first part shall inure to the party of the second part as liquidated damages, * * * and the said party * * * may thereupon * * * enter upon said premises and dispossess all persons occupying the same." Held, that such transaction was not a lease, but a "conditional sale" of the material in the dumps, which gave the owner alternative remedies for breach of the contract, and that, where he declared a forfeiture and took possession because of default in payment of notes, he could not also collect the notes maturing thereafter. Manson v. Dayton, 158 Fed. 259, 264, 82 C. C. A. 588.

A written instrument, denominated a "lease," acknowledging the recipt of $50, and providing for further payments of $10 per month, with interest, until a certain sum was paid, after which the leased personalty was to become the property of the lessee, was a "conditional sale." Pringle v. Canfield, 104 N. W. 223, 19 S. D. 506.

Mortgage distinguished

The difference between a mortgage and a conditional sale lies in the fact that a mortgage is a security for a debt, while a "conditional sale" is a deed, accompanied by an agreement to resell on specified terms. Beidelman v. Koch, 85 N. E. 977, 978, 42 Ind. App. 423.

In determining whether a conveyance absolute on its face, with a written agreement to repurchase, signed by the parties, is a mortgage or a "conditional sale," reference must be had to the inquiry whether the relation of creditor and debtor continues to exist. If it does, it is a mortgage; otherwise, a "conditional sale." Goodbar & Co. v. Bloom, 96 S. W. 657, 662, 43 Tex. Civ. App. 434 (quoting and adopting rule as laid down in Alstin's Ex'r v. Cundiff, 52 Tex. 453).

Where there is no continuing debt, the execution of a deed with a simultaneous contract to reconvey upon the payment of certain sums of money by the grantor to the grantee within a specified time, the payment of which is optional with the grantee, is a "conditional sale," and not a mortgage. Fabrique v. Cherokee, etc., Coal Co., 77 Pac. 584, 585, 69 Kan. 733 (citing 2 Kent's Commentaries [14th Ed.] p. 163, note D).

Where plaintiff deeded land to defendant, her husband's creditor, under a separate agreement for a reconveyance on the payment of the amount of the debt, interest, etc., that plaintiff was not bound to pay the amount for which the reconveyance was to be had does not show conclusively that the transaction was a "conditional sale." If an instrument does not show clearly whether a mortgage or conditional sale was intended, equity will construe it as a mortgage, rather than a "conditional sale." White v. Redenbaugh, 82 N. E. 110, 111, 41 Ind. App. 580.

Under the law of Utah a contract whereby one party sells the other personalty on condition that no title shall pass until full payment, the purchaser being given possession, the seller having the right to retake the property for default of payments, and the obligation to pay being absolute, is a "conditional sale," and not a mortgage. Studebaker Bros. Co. v. Mau, 80 Pac. 151, 153, 13 Wyo. 358, 110 Am. St. Rep. 1001.

Notes reciting that they are given to secure payment for certain described lands, and deeds reciting that the land is secured by the notes of the grantee (describing them) and that if the notes are not paid at maturity the deeds are to be null and void, constitute mortgages, and not "conditional sales." Land v. May, 84 S. W. 489, 490, 73 Ark. 415 (citing Gibson v. Martin, 38 Ark. 207; Stryker v. Hershy, 38 Ark. 264; Mitchell v. Wade, 39 Ark. 377; Hershey v. Luce, 19 S. W. 963, 20 S. W. 6, 56 Ark. 320).

A mortgage is distinguished from a "conditional sale" by the continued existence of a debt or liability between the parties, and where the conveyance is in reality intended as security, and the grantor is regarded as still liable for it, the transaction is a mortgage, whatever the language and the stipulations of the instrument; but, if no relation of debtor and creditor thereafter subsists, the transaction is a mere conditional sale. American Mortgage Co. v. Williams (Ark.) 145 S. W. 234, 238.

Where a purchaser of a piano agreed to pay $10 down and $6 a month, and executed notes representing the deferred payments and a chattel mortgage to secure the same, and thereafter the piano was delivered, there was not a contract of "conditional sale" within Rev. St. 1906, §§ 4155—2, 4155—3, defining conditional sales, and providing that the title shall remain in the vendor until the price has been paid and for deposit of a copy of the contract with certain officers. Chica-

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go Cottage Organ Co. v. Crambert, 84 N. E. 788, 789, 78 Ohio St. 149.

Where possession is given on a sale of chattels, but there is a verbal reservation of title to secure the purchase money, it is a chattel mortgage, and not a "conditional sale," in view of Rev. St. 1895, art. 3327, providing that all reservations of title to chattels as security for the purchase money thereof shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered, as required of chattel mortgages, for it clearly implies that there may have been lawful contracts which reserve the title, although not in writing, and while, without the statute, the agreement in question would have retained the title until the purchase money was paid, the effect of the statute was to pass the title and to degrade the contract from a "conditional sale" to a chattel mortgage. Crews v. Harlan, 87 S. W. 656, 659, 99 Tex. 93, 13 Ann. Cas. 863.

Intervener contracted in writing to deliver certain goods to the bankrupts prior to their bankruptcy, to be sold by them in the usual course of their business, but that the title and right of possession of all such goods and all the proceeds of sales thereof, whether in cash or in book accounts, should be vested and remain in intervener until the purchase price of the goods had been fully paid to it; that, except for the right to resell the goods in the ordinary course of business, the bankrupts should not remove any from the city in which they were doing business; and that they should keep the goods insured for intervener's benefit. Held, that the bankrupts not only held such goods for intervener, but were bound to account for and pay over the proceeds of goods sold as collected, and that the contract was therefore a "conditional sale," and not a chattel mortgage. In re E. M. Newton & Co., 153 Fed. 841, 842, 83 C. C. A. 23.

A contract binding a buyer to buy and unconditionally pay the price of a chattel, and providing that the seller shall retain title as security for the price, and on default he may take possession, is a conditional sale, and not a chattel mortgage; the term "conditional sale" applying to transactions where, by the terms of the contract, the possession of the goods is delivered to the buyer, but the property is to remain in the seller until payment of the price, though the buyer is obligated absolutely to pay the price. McDaniel v. Chiaramonte, 122 Pac. 33, 35, 61 Or. 403.

"In determining whether a conveyance, absolute on its face, with a written agreement to repurchase, signed by the parties, is a 'mortgage' or a 'conditional sale,' reference must be had to the inquiry whether the relation of creditor and debtor continues to exist. If it does, it is a mortgage; otherwise, a conditional sale." Rotan Grocery Co. v. Turner, 102 S. W. 932, 933, 46 Tex. Civ. App. 534 (quoting and adopting definition in Alstin v. Cundiff, 52 Tex. 453).

While parties competent to contract can agree upon terms that will amount to a conditional sale, where a deed is intended to secure a debt, and the relation of debtor and creditor exists between the parties, the legal inference is that a mortgage and not a "conditional sale" was intended; courts being inclined in doubtful cases to treat a transaction as a mortgage rather than a conditional sale. Tucker v. Witherbee, 113 S. W. 123, 124, 130 Ky. 269.

The purchase price of an article may be secured either by a condition in the contract, by which the title is reserved in the vendor until the price is paid, or by a chattel "mortgage" given back to the vendor by the purchaser. While the object to be accomplished by either form of security is substantially the same, the rights of the parties under the two forms of security are materially different, and it is frequently of importance to determine whether the paper constitutes a "conditional sale" or a "mortgage." Tweedie v. Clarke, 99 N. Y. Supp. 856, 858, 114 App. Div. 296.

Plaintiff, having purchased lands at judicial sale, and being unable to pay his bid, obtained the money from defendant, to whom the deed was made, and an agreement between the parties recited that the deed was made to defendant to secure payment of the money advanced by him on or before a specified date. It was agreed that defendant would convey any portion of the land on order of plaintiff, on payment to defendant of the amount paid for the land, and that, if plaintiff should fail to pay the money advanced when due, defendant should retain the land remaining unsold, and parcels of the land were sold and the purchase price paid to defendant. Held, that the transaction was not a "conditional sale" to defendant, so as to enable him to hold all the unsold land for the balance of his advances, but was in effect a mortgage. Guenther v. Wisdom (Ky.) 84 S. W. 771, 772.

Prior to the execution of an absolute deed by defendant to plaintiff, defendant owed plaintiff $1,800. The deed was drawn by plaintiff's attorney pursuant to instructions, and was submitted to plaintiff for approval before execution, reciting an absolute sale of the property for a cash consideration of $1,000. As a part of the same transaction defendant executed to plaintiff a note for $800, after which plaintiff insured the property as its own and executed a separate instrument, by which it agreed to reconvey the property to defendants on repayment of the consideration and interest, within a specified time. Held, that in view of the prin-

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ciples laid down in 3 Pom. Eq. § 1195, and Jones, Mort. §§ 258, 263, 265, 267, and cases in Texas and other states according therewith, the transaction amounted to a "conditional sale," and not a mortgage. Goodbar & Co. v. Bloom, 96 S. W. 657, 661, 43 Tex. Civ. App. 434.

Where R. deeds property to F., and by contemporaneous agreement it is provided that, on payment to F. by R. of a certain sum by a certain day, F. will reconvey the property, and time is expressly made of the essence of the contract, and it is declared that, in default of the payment on or before such time, the agreement shall be null and void, and R. does not promise or bind himself to make the payments, there is a "conditional sale," not a mortgage. Smyth v. Reed, 78 Pac. 478, 479, 28 Utah, 262.

Payment of price

The retention of title by the seller to secure the purchase money until the goods are resold by the buyer in the usual course of trade constitutes a "conditional sale." In re Priegle Paint Co., 175 Fed. 586, 587.

"Conditional sale" of personal property is a sale under an agreement between the vendor and vendee that the title in the property should remain in the vendor in the nature of a lien until the purchase money should be paid. John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422.

A sale with title reserved until the price is paid, accompanied by possession by the buyer, is a "conditional sale" with a reservation of title as security for the price, and when the price is paid the condition is extinguished. Hunter v. Crook, 47 South. 430, 431, 93 Miss. 812.

There was a "conditional sale" where defendant hired horses to plaintiff with the understanding that, if a note given for their use should be paid when due, the horses should become plaintiff's. Staunton v. Smith (Del.) 65 Atl. 593, 594, 6 Pennewill, 193.

Where a supplemental agreement attached to a note given for the price of certain live stock, recited that the stock was to be the property of the seller until the note was paid, the sale was a "conditional sale." Townsend v. Melvin (Del.) 63 Atl. 330, 331, 5 Pennewill, 495.

A contract note for a specific amount, providing for its payment in certain weekly installments and given for the price of personal property described therein, reserving the title to the property in the seller until fully paid for, and authorizing the seller, in case of default, to take possession of the property and indorse the value thereof on the note, or resell the same and indorse the proceeds on the note, and in either case to charge the balance due thereon to the maker, constituted a "conditional sale," valid not only between the parties thereto, but, in the absence of fraud as to third parties, and though not recorded, it gave the seller a right to the possession of the property on default of payment, superior to a lien of a mortgage made by the purchaser. Freed Furniture & Carpet Co. v. Sorensen, 79 Pac. 564, 566, 28 Utah, 419, 107 Am. St. Rep. 731, 3 Ann. Cas. 634.

A "conditional sale" is a sale and delivery of personal property with an express stipulation that the title is to remain in the vendor until payment of the price. If the condition of payment is not fully complied with, or is not waived, the vendor's rights become perfect and absolute, and he may follow the property into the hands of third persons, except as provided by Code 1896, § 1017, or he may recover its full value without deduction for partial payments, since such payments are forfeited by the breach. Riley v. Dillon & Pennell, 41 South. 768, 148 Ala. 283 (citing Sumner v. Woods, 67 Ala. 142, 42 Am. Rep. 104; Fields v. Williams, 8 South. 808, 90 Ala. 502; Benj. Sales [American Notes, 7th Ed.] p. 301; Davis v. Millings, 37 South. 737, 141 Ala. 380).

A contract by the United States with a shipbuilding company, whereby all parts of machinery paid for by the United States under a specified system of partial payments became thereby the sole property of the United States, is not a contract of "conditional sale," required to be recorded by Code Va. 1904, § 2462. William R. Trigg Co. v. Bucyrus Co., 51 S. E. 174, 176, 104 Va. 79.

A contract reciting that a party desired to have the use of the adverse party's building and saloon fixtures, to become the owner of the fixtures when paid for, and providing that the party could use the premises for a specified term, and should make specified monthly payments until the total payments, after deducting monthly ground rent, should equal the cost of the building, fixtures, etc., and 8 per cent. per annum interest thereon, when the party should be deemed the owner of the fixtures, thereafter paying the adverse party a specified sum monthly until the expiration of the ground lease, etc., evidenced a "conditional sale" of the fixtures. Coors v. Reagan, 96 Pac. 966, 967, 44 Colo. 126.

A "conditional sale" is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent. An agreement that the purchaser will buy and pay for merchandise, that he may sell it in the regular course of his business, but that the proceeds shall be applied as a credit or as collateral security to the debt of the vendee at the option of the vendor, and that the latter will sell and deliver the goods on condition that the title to them shall remain in him until the notes and

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accounts of the vendee are paid in cash, is a valid contract of conditional sale. In re Dunlop, 156 Fed. 545, 548, 86 C. C. A. 435.

A contract containing a clause reserving the title and ownership of a horse until full payment therefor was made was a "conditional sale," as the term is ordinarily understood, and for the purpose of the sale alone, the absolute title would not pass thereunder until the conditions subsequent thereto have been performed. There is a conflict in the authorities as to whether there can be a recovery for property sold under such condition, when, without the fault of the purchaser, the property is destroyed before the purchase price is due. On death of a stallion sold under agreement for payment from service fees, the loss fell on the vendor. Swaney v. Alstott, 111 N. W. 406, 407, 134 Iowa, 63, 8 L. R. A. (N. S.) 1032.

A contract for the sale of personal property, which expressly stipulates that title shall remain in the seller until the entire purchase money is paid, that upon final payment "then and in that case" the property "shall become the property of said purchaser," and that time is of the essence of the contract, and in case of failure to pay the purchase money the seller may take possession of the property, which shall be turned over to him peaceably and without legal process, is a contract for a "conditional sale," in which title does not pass to the purchaser until its terms are complied with, in default of which the property is subject to recovery by the seller. Page v. Urick, 72 Pac. 454, 455, 31 Wash. 601, 96 Am. St. Rep. 924.

A contract whereby one party agrees to furnish certain machinery, title to remain in him until notes for the price are paid, and providing that, if either note is not paid at maturity, then the entire debt to become due, and that it shall be lawful in such case to take possession of the machinery, but that, if the notes are paid, then title shall vest in the other party, constitutes a "conditional sale." Whitlock v. Auburn Lumber Co., 58 S. E. 909, 910, 145 N. C. 120, 12 L. R. A. (N. S.) 1214, 122 Am. St. Rep. 446.

A sale is "absolute" which has been completed, while a "conditional sale" is one which takes effect on the performance of a condition, though an absolute sale may be subject to a condition subsequent, as where there is complete change of title subject to be defeated by the nonperformance of some annexed condition; the true criterion for determining whether a sale is absolute or conditional being the intent of the parties, to be discovered from their express declarations, and, where this is not possible, from all circumstances of the case, as well as from their declarations, if any. Whitsett v. Carney (Tex.) 124 S. W. 443, 445.

Defendant executed a consignment receipt for a ring, reciting that it had been consigned on memorandum by prosecutor, to be returned on demand; that the same had not been sold, and that the title thereto did not pass; that all risks were assumed by the consignee; and that agreements not expressed in the writing were not part of the contract. At the same time defendant and prosecutor signed an alleged "deposit agreement," obligating defendant to deposit with prosecutor $30 on the execution of the agreement, and certain sums on specified dates thereafter, all of which should become prosecutor's absolute property, and that, when $175 had been deposited, prosecutor would deliver to defendant for his own use one diamond ring; that, if defendant made default, prosecutor might deliver articles as near like the article to be delivered, as possible, but reasonably worth the sums so deposited, and on delivery the agreement should be fulfilled. Held, that such agreements together constituted a "conditional sale" of the ring. People v. Gluck, 80 N. E. 1022, 1024, 188 N. Y. 167.

As sale

See Sale.

CONDITIONALLY PRIVILEGED

A defamatory publication which is "conditionally privileged" occupies a middle ground; that is, the publication is privileged, provided it was actuated by a sense of duty growing out of the action, and provided it was not malicious. When the court finds that the publication is conditionally privileged, the effect of the holding is to cast upon the plaintiff the burden of proving that malice prompted the act; not merely malice which arises by implication of law, but malice in fact, otherwise denominated "actual malice." Cranfill v. Hayden, 80 S. W. 609, 613, 97 Tex. 544.

Privileged occasions are divided into two classes, those known as "absolutely privileged" and those "conditionally privileged." Words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages in an action for slander or libel, while, on the other hand, words spoken upon an occasion only "conditionally privileged" impose such liability if spoken maliciously, or not in good faith; the difference between the two being that in the former case the freedom from liability is absolute and without condition, while in the latter case it is made to depend upon the absence of express malice. Sebree v. Thompson, 103 S. W. 374, 375, 126 Ky. 223.

A "conditionally privileged communication" is one made on an occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged, unless some additional fact is shown which alters the character of the action, so as to prevent its furnishing a legal excuse. Richardson v.

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Gunby, 127 Pac. 533, 534, 88 Kan. 47, 42 L. R. A. (N. S.) 520.

CONDONE—CONDONATION

See, also, Forgiveness.

To "condone," as applied to grounds for divorce, is to forgive. Bliss v. Bliss, 142 S. W. 1081, 1082, 161 Mo. App. 70.

"Condonation" is forgiveness for the past upon condition that the wrongs shall not be repeated, and the repetition of the offense revives the wrong condoned; and condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets. Anderson v. Anderson, 131 N. W. 907, 908, 89 Neb. 570, Ann. Cas. 1912C, 1.

"Condonation," in the law on divorce, is a conditional forgiveness of all antecedent acts of cruelty, and such acts as may have been condoned will not be revived, except by fresh acts of cruelty. Brown v. Brown, 58 S. E. 825, 129 Ga. 246.

"Condonation" has been defined to be the forgiveness, either expressed or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty, with an implied condition that the offense shall not be repeated. Davis v. Davis, 68 S. E. 594, 134 Ga. 804, 30 L. R. A. (N. S.) 73, 20 Ann. Cas. 20.

If, after an offense has been committed, and the offended party has become possessed of knowledge of the offense and of the means of proving it, the offended party elects to forego a remedy which the law affords, he or she is said to have "condoned the offense." Rogers v. Rogers, 58 Atl. 822, 824, 67 N. J. Eq. 534.

"Condonation" is the forgiveness of the offense followed in fact by a reconciliation, in which the wife is reinstated to such conjugal cohabitation as may be adapted to the circumstances of the parties. Taber v. Taber (N. J.) 66 Atl. 1082, 1084.

A promise of forgiveness for past wrongs is not sufficient to constitute "condonation." It must be followed by a restoration of the offending party to all marital rights. Anderson v. Anderson, 131 N. W. 907, 908, 89 Neb. 570, Ann. Cas. 1912C, 1.

"Condonation" in the law of divorce means the blotting out of the offense imputed, so as to restore the offending party to the same position he or she occupied before the offense was committed. Talley v. Talley, 64 Atl. 523, 524, 215 Pa. 281.

"Condonation" amounts to forgiveness on condition of subsequent proper conduct on the part of the other party, and, if the condition is not kept, the rights of the injured party to a divorce are restored. Viertel v. Viertel, 99 S. W. 759, 763, 123 Mo. App. 63.

"Condonation" by one spouse of the misconduct of the other is but forgiveness on condition of subsequent right conduct, and, where the condition is broken, the rights of the injured party are restored. Dimmitt v. Dimmitt, 150 S. W. 1107, 1111, 167 Mo. App. 94.

Civ. Code, § 115, defines "condonation" as the conditional forgiveness of a matrimonial offense constituting a cause of divorce, and section 116 requires knowledge on the part of the condoner of the facts constituting the cause of divorce. Held, that though defendant's physical condition, known to plaintiff long before she ceased to cohabit with him as his wife, was such as would ordinarily be taken as proof of unfaithfulness, yet, where she testified that she believed his representations that his condition was not so occasioned, it was not error, in an action for divorce, to find that the offense had not been condoned; there being some testimony that, after being convinced of the cause of defendant's condition, she never thereafter cohabited with him. Andros v. Andros, 82 Pac. 90, 1 Cal. App. 309.

While a decree dismissing a wife's petition for separate maintenance on the ground of her condonation of the marital wrongs complained of is conclusive against her as to her marital rights, "condonation" in its proper legal sense, referring only to marital rights as such, yet such condonation is only evidence tending to show ratification by her of a deed executed to her husband, through a third person, procured by fraud and duress; and, unless she has by such acts ratified the deed, she may sue to set it aside, unless barred by estoppel or laches. Hoag v. Hoag, 96 N. E. 49, 50, 210 Mass. 94, 36 L. R. A. (N. S.) 329.

Under Civ. Code § 102, providing that if a husband or wife desert the other, and, before expiration of the statutory period required to make the desertion ground for divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured, a finding to show cure of desertion must show not only a return, but, in connection therewith, the seeking of "condonation." Kusel v. Kusel, 81 Pac. 297, 147 Cal. 52.

Agreement to separate

An agreement by married persons to live separate and apart, unless explained, operated as a "condonation" of the offense of abandonment. Lemmert v. Lemmert, 63 Atl. 380, 382, 103 Md. 57.

Cohabitation

"Condonation of marital injury" is a voluntary pardon and the remission of a known wrong by a husband to his wife, or vice versa, which would entitle the injured party to a divorce, and the waiver of a right to maintain an action for divorce for such cause,

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subject to the condition that the misconduct will not be repeated, and in most cases condonation will be presumed from proof of cohabitation subsequent to the knowledge of the injury. Wolverton v. Wolverton, 71 N. E. 123, 126, 163 Ind. 26.

Continuous or subsequent offense

"Condonation" is "the remission by one of the named parties of an offense which he knows the other has committed against the marriage, on the condition of being continually afterward treated by the other with conjugal kindness. All condonation, especially the implied, is upon the condition, both that the offense shall not be repeated and likewise that continually afterwards the party forgiven shall treat the other with conjugal kindness, whereupon a breach of the condition revives the original right of divorce." Hence condonation does not apply where the offense is a continuing one. Hooe v. Hooe, 92 S. W. 317, 318, 122 Ky. 590, 5 L. R. A. (N. S.) 729, 13 Ann. Cas. 214 (quoting and adopting definition in 2 Bishop, Mar., Div. & Sep. §§ 269, 308).

" 'Condonation' is based on repentance, and is no defense where the subsequent conduct of the forgiven one negatives the idea of repentance; nor is it necessary, in order to overcome a 'condonation,' to produce 'clear proof of an actual fact of subsequent adultery.' Bish. on M. & D. 373. 'Condonation' is not absolute remission. Its effectiveness depends upon reformation of conduct, and may be destroyed by evidence tending 'to show the revival of the old intent, or to rebut the presumption of a change of intent, growing out of the condonation.' Bish. on M. & D. 378. Where parties between whom an adulterous intercourse has been once established are found living together under circumstances which would induce every unprejudiced mind to conclude their inclinations had not changed, the fair presumption is that the illicit intercourse is still continued." Totten v. Totten, 60 Atl. 1095, 1096 (citing Smith v. Smith [N. Y.] 4 Paige, 432, 437, 27 Am. Dec. 75).

"Condonation" is always conditional on the fact that the party forgiven will thereafter abstrain from the commission of like offenses. If they are afterwards committed, the original wrong is revived, and may be counted upon as cause for divorce. Where a husband, after having been unduly intimate with another woman, whom he brought into his home, and, after having used unseemly language toward his wife, asked and received her forgiveness, but thereafter was even more attentive to the other woman than before, and they made open confession of their love to strangers, the wife's forgiveness did not amount to condonation of the husband's offense. Craig v. Craig, 105 N. W. 446, 448, 129 Iowa, 192, 2 L. R. A. (N. S.) 669.

Knowledge of facts

"Condonation" is the forgiveness of one of the married parties of an offense which he knows the other has committed against the marriage. There can be no condonation without knowledge. Laycock v. Laycock, 98 Pac. 487, 489, 52 Or. 610.

Civ. Code, § 164, provides that, to constitute condonation which will defeat a right to a divorce, the knowledge on the part of the injured party of the facts constituting the cause of divorce, reconciliation, and remission of the offense by the injured party, and restoration of the offending party to all marital rights, are required. Where plaintiff was informed of the commission of adultery by his wife, and thereafter continued to live and cohabit with her, there was a "condonation" under this section. Bordeaux v. Bordeaux, 75 Pac. 524, 527, 30 Mont. 36.

"Condonation" is not an absolute term, applicable alike to all circumstances, and its application may vary as the different offenses alleged to have been condoned may vary. Condonation is upon the implied condition that the offense shall not be repeated, and that plaintiff thereafter shall be treated with conjugal kindness; and hence where a defendant was guilty of subsequent acts of cruelty, after other acts had been condoned, the condonation was not a bar to plaintiff's right to a divorce. Harding v. Harding, 85 Pac. 423, 424, 36 Colo. 106.

CONDUCT

See Bad Conduct; Disorderly Conduct; Improper Conduct; Inequitable Conduct; Malconduct; Regularly Conduct; Running, Conducting, or Managing; Unbecoming Conduct; Unprofessional Conduct.

Estoppel by conduct, see Estoppel in Pais.

Operates or conducts, see Operate.

Other unprofessional conduct, see Other.

Willful conduct, see Willful—Willfully.

Of action

The word "conduct," as used with reference to the "conduct" of an action, means the preparation and management of litigation. Iaquinto v. Bauer, 93 N. Y. Supp. 388, 393, 104 App. Div. 56.

Wilson's Rev. & Ann. St. Okl. 1903, § 5210, enacted when the jury for the trial of special proceedings in the district court consisted of 12 men, providing that as to a special proceeding for prohibition, etc., the trial must be by jury and "conducted in all respects in the same manner as the trial of an indictment for a misdemeanor," was intended thereby to require that in the introduction of evidence as to the degree of proof required and in the giving of instructions to the jury the rules of law applicable to a trial upon an indictment for a misdemeanor should

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apply, and not that such proceeding should be tried by a jury of 6 men, as in cases of misdemeanor. Maben v. Rosser, 103 Pac. 674, 678, 679, 24 Okl. 588.

Of business

A foreign railroad corporation operating a line of railroad in the state is a corporation "conducting a business in the state." State v. Chicago, R. I. & P. R. Co., 128 S. W. 555, 556, 95 Ark. 114.

Where a food company produces such a quantity of canned goods that the major part of them must be disposed of outside the state, a deposit of about one-tenth of its goods in warehouses outside the state and the use of the warehouse receipts as collateral to its commercial paper is a part of the "conduct of its ordinary business," within a provision in a mortgage of the goods, that the company may "conduct its ordinary business, and in so doing dispose of any of the foregoing property." Anderson v. Anderson Food Co., 57 Atl. 489, 495, 66 N. J. Eq. 209.

A receiver in bankruptcy who took possession of, advertised, and sold the property of the bankrupt, consisting of a stock of merchandise, was more than a mere custodian, and entitled to compensation accordingly under Bankr. Act July 1, 1898, § 48d, as added by Act June 25, 1910, c. 412, § 9, but where he kept the store open only during the remainder of the day on which he took possession, while a special sale then in progress was continued by the employés of the bankrupt, after which he closed the store, and sold the stock in bulk, he did not "conduct the business" of the bankrupt in such sense as to entitle him to additional compensation under subdivision "e" of said section. In re Charles Knosher & Co., 197 Fed. 136, 141, 116 C. C. A. 560.

Of officer

"The offense of 'conduct unbecoming an officer and a gentleman' is not the same offense as conspiracy to defraud, or the causing of false and fraudulent claims to be made, although to be guilty of the latter involves being guilty of the former." Carter v. McClaughry, 22 Sup. Ct. 181, 193, 183 U. S. 395, 46 L. Ed. 236.

The expression "conduct unbecoming an officer," when applied to a ground for the removal from office of a policeman, is elastic, and its meaning depends on individual conceptions of what belongs to the office of policeman, and the act of a policeman in stating, while on trial on a former charge of having failed to pay an indebtedness to a third person, that the latter was a liar, made by the policeman while the third person was testifying, was not such conduct as would justify the removal of the policeman from office. People ex rel. Dougan v. Greene, 89 N. Y. Supp. 1067, 1068, 97 App. Div. 404.

CONDUCTING TRANSPORTATION

The term "conducting transportation" is used to distinguish that class of operating expenses of a railroad company which is neither maintenance of way and structures, maintenance of equipment, nor general expenses. Southern Pac. Co. v. Bartine, 170 Fed. 725, 752.

CONDUCTOR

See Given by the Conductor.

The terms "conductor" and "man in charge of the train" should be treated as synonymous. Council v. St. Louis & S. F. R. Co., 100 S. W. 57, 59, 123 Mo. App. 432.

"The 'conductor' of a railway train is the master of the train in the same sense in which the captain of a ship at sea is master of the ship. With respect to those measures which are necessary for the safety of the persons on board the train, he wields the whole power of the railway company, except in so far as those powers have been specially committed to the engineer or to other servants. The better view, therefore, ascribes to him the status and authority of a vice principal of the railway company, so as to render it liable for his negligence resulting in injury to its subordinate servants upon the same train." Tabor v. St. Louis, I. M. & S. Ry. Co., 109 S. W. 764, 768, 210 Mo. 385, 124 Am. St. Rep. 728 (quoting and adopting definition in Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787).

The words "conductor" and "manager," used in Ky. St. §§ 795–800, requiring segregation of white and negro passengers, and requiring the conductor or manager to see that the statute is obeyed, mean the same person, except where one not designated as conductor is in charge of a train. Louisville & N. R. Co. v. Renfro's Adm'r, 135 S. W. 266, 268, 142 Ky. 590, 33 L. R. A. (N. S.) 133.

A "conductor" of a train is the superior in authority and grade in every train crew, and has charge of the train and its operations. All the other members of the crew are under his control and subject to his orders, which they must obey. He is the representative of the company, is vested with all its authority over the train and its crew, and charged with all the duties and responsibilities which the company owes to its employés. He is vice principal of the company, and it is liable for his negligence when acting in his official capacity. Alabama Great Southern R. Co. v. Baldwin, 82 S. W. 487, 488, 113 Tenn. 409, 67 L. R. A. 340, 3 Ann. Cas. 916.

The word "conductor," in Laws Mont. 1903, c. 83, making every railway corporation liable for damages sustained by an employé caused by the negligence of any train dispatcher, telegraph operator, superintendent, master mechanic, conductor, engineer, or any other employé who has superintendence of

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any stationary or hand signal, cannot be applied to the foreman of a section gang or a bridge crew, and the word cannot be applied to any other than one who manages a train. Reinke v. Northern Pac. Ry. Co., 145 Fed. 988, 990.

As laborer

See Laborer.

CONDUIT

As property, see Property.

CONFECTIONERY

So-called dragees, small round bodies with a silver coating, which are composed of sugar and starch, and are used by bakers for decorating cakes, and to some extent by confectioners, are not "sugar candy" or "confectionery," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 212, but are dutiable as articles in part of silver under Schedule C, par. 193. La Manna, Azema & Farnan v. United States, 154 Fed. 955, 956 (citing Seeberger v. Schlesinger, 14 Sup. Ct. 729, 152 U. S. 581, 587, 38 L. Ed. 560).

Sweet crackers, known as "wafers and biscuits," in which the proportion of the sweetened centers to the pastry envelopes, is large, but in which flour is used to a substantial extent, are not dutiable either directly or by similitude as "confectionery," under Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 212. United States v. Thomas Meadows & Co., 154 Fed. 1005, 83 C. C. A. 297.

The term "comfits" in paragraph 263, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, is practically synonymous with "confections," and includes boiled marrons (chestnuts) preserved in syrup. Schall & Co. v. United States, 154 Fed. 1005, 83 C. C. A. 329.

CONFER TITLE OF NOBILITY.

To "confer a title of nobility" is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people. It is not necessarily hereditary, and the objection to it arises more from the privileges supposed to be attached than to the otherwise empty title or order. Horst v. Moses, 48 Ala. 129, 142.

CONFESSION

See Express Confession; Extrajudicial Confessions; Judgment by Confession; Judicial Confession; Voluntary Confession.

As acknowledgment of guilt

"A 'confession,' in its legal sense, means an acknowledgment of guilt." Cairo, V. & C. R. Co. v. People, 80 N. E. 1065, 226 Ill. 575.

A statement freely and voluntarily made to defendant, admitting participation in the main facts essential to constitute the crime for which he is being tried, may properly be referred to by the court as a "confession." Fouse v. State, 119 N. W. 478, 479, 83 Neb. 258.

A "confession" is a voluntary statement, made by a person charged with the commission of a crime, wherein he acknowledges himself to be guilty of the offense charged. Weaver v. State, 69 S. E. 488, 490, 135 Ga. 317.

A "confession" is an acknowledgment of guilt. It is a voluntary admission or declaration by a person of his agency or participation in a crime. It is an acknowledgment of guilt, and not of facts criminating in their nature. Johnson v. People, 64 N. E. 286, 287, 197 Ill. 48 (citing 1 Greenl. Ev. § 170).

A "confession" by accused may be a naked statement that he is guilty of a crime, or it may be a full statement of the circumstances of the commission, including his part in it. State v. Brinkley, 105 Pac. 708, 55 Or. 134.

"A 'confession,' in criminal law, is the voluntary declaration, made by a person who has committed a crime or misdemeanor to another of the agency or participation he had in the same." People v. Stokes, 89 Pac. 997, 999, 5 Cal. App. 205 (quoting the definition in People v. Strong, 30 Cal. 151).

A "confession" is criminative evidence, like the facts that other witnesses testify about, and it is not proper for the court to single out a confession, except for the purposes of submitting any issue as to whether proper warning was given accused before he made the confession. Jordan v. State, 101 S. W. 247, 51 Tex. Cr. R. 145.

Admissions or declarations distinguished

A "confession" is a voluntary admission of guilt, and an admission, as applied to criminal cases, is an avowal of a fact or circumstance only tending to prove the offense charged, and not amounting to a confession. Riley v. State, 57 S. E. 1031, 1032, 1 Ga. App. 651.

A "confession" is one species of admission, namely, an admission consisting of a direct assertion by the accused of the main fact charged against him. "Admissions" are statements, assertions in words, and conduct cannot of itself be treated as an admission. Admissions are acts, and not assertions, and their use in evidence is a circumstantial one by way of inference from the conduct to the mental state beneath it, and from that to some ulterior fact. Burnett v. State, 124 N. W. 927, 928, 86 Neb. 11.

A "confession" is an acknowledgment of the criminal act or of the facts constituting the crime. Statements of facts and circumstances that do not in effect or by inference admit a crime's commission do not in general constitute a confession. Daniels v. State, 48 South. 747, 748, 57 Fla. 1.

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What are called "confessions" in civil actions, in criminal law are called "admissions." The terms are synonymous under the rule of evidence that silence, when the accused is under no restraint, and at full liberty to speak, may sometimes be regarded as a tacit admission. Merriweather v. Commonwealth, 82 S. W. 592, 596, 118 Ky. 870, 4 Ann. Cas. 1039.

A "confession" is a voluntary admission of guilt, as distinguished from an admission, which, as applied to criminal cases, is the statement by defendant of a fact pertinent to the issues and tending, in connection with proof of other facts or circumstances, to prove the guilt of accused, but which is of itself insufficient to authorize conviction. The nearer an admission approaches the completeness of a plenary confession of guilt without attaining thereto, the more likely is any reference in the charge to the subject of confession to confuse the jury and harm the defendant. Ransom v. State, 59 S. E. 101, 102, 2 Ga. App. 826.

A confession is a person's admission or declaration of his agency or participation in a crime, and is restricted to admissions of guilt. The term "confession" is restricted to acknowledgment of guilt, and is not a mere equivalent of words or statements. A statement which admits the commission of an act, but which also gives legal excuse or justification, is not a confession. Owens v. State, 48 S. E. 21, 22, 23, 120 Ga. 296 (citing People v. Parton, 49 Cal. 632, 637; 1 Greenl. Ev. § 170; Davis v. State, 39 S. E. 906, 114 Ga. 104; Simmons v. State, 42 S. E. 779, 116 Ga. 583).

A confession is a voluntary acknowledgment of a person charged with a commission of crime that he is guilty of the offense. It is a voluntary declaration by a person charged with a crime of his agency or participation in the crime. It is not equivalent to statements, declarations, or admissions of facts criminating in their nature or tending to prove guilt. It is limited in its meaning to the criminal act, and is an acknowledgment or admission of participation in it. Offers by a person arrested for forging a check to settle the matter by paying the amount of the check, or a greater sum, were not confessions, so as to authorize an instruction on the subject of confessions, in a prosecution for the crime. Michaels v. People, 70 N. E. 747, 748, 208 Ill. 603 (citing 8 Cyc. p. 562; 1 Greenl. Ev. § 170; Johnson v. People, 64 N. E. 286, 197 Ill. 48).

"A 'confession' is a voluntary admission or declaration by a person of his agency of participation in a crime." When a person only admits certain facts, from which the jury may or may not infer guilt, there is no "confession," and where in a prosecution for murder there was evidence that defendant, when informed that he had been arrested, stated that if deceased had treated his informant as he had treated defendant, informant would have wanted to kill him, it was prejudicial error to instruct that confessions are satisfactory and effectual proofs of guilt, as the evidence did not show a confession, but merely an inculpatory statement. Shelton v. State, 42 South. 30, 32, 144 Ala. 106 (citing People v. Parton, 49 Cal. 638).

"A 'confession' in a legal sense is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt can be inferred. Statements and declarations by a defendant in a criminal action, in denial of guilt, while a witness before a grand jury, are not confessions within the rule requiring them first to be shown to have been made voluntarily before they are competent evidence against him. State v. Campbell, 85 Pac. 784, 788, 73 Kan. 688, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203 (quoting and adopting definition in State v. Reinhart, 38 Pac. 822, 26 Or. 466).

A "confession" is a voluntary statement, made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act, or the share and participation which he had in it. In a prosecution for burglary, statements made by defendant to police officers with reference to his possession of certain of the stolen property before he had been charged with any offense, and without any threats or inducements on the part of the officers, were admissible as admissions. State v. Royce, 80 Pac. 268, 270, 38 Wash. 8, 111, 3 Ann. Cas. 351 (quoting and adopting 8 Cyc. p. 562).

Where accused after his arrest was questioned in the presence of the sheriff and constable and others, and admitted his implication in an affray in which he shot and wounded complainant, but claimed that he acted only in self-defense and used his revolver as a club only, the discharge being accidental, and that after complainant had knocked him off a chair into a bedroom complainant's wife joined in the assault, it was error for the court to refer to such admissions as a "confession" of guilt. People v. Cismadija, 132 N. W. 489, 491, 167 Mich. 210.

Pen. Code, § 647, subd. 4, provides that every person known to be a confidence operator, either by his own confession, or having been convicted of such offense, and having no visible means of support when found loitering around certain public places, shall be deemed a vagrant. Held, that the word "confession" as so used had reference to an admission or declaration as to the party's status as distinguished from his confession of guilt of a particular crime, and was not the equivalent of a "statement" or "declaration," and hence

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the section does not justify a conviction, or declare the offense established by the confession of the party, but only provides that his admission of the truth of one of the elements, of the offense, to wit, his calling, is sufficient to establish such element. Ex parte Hayden, 106 Pac. 893, 894, 12 Cal. App. 145.

Judicial—Extrajudicial

"Confessions" are either judicial or extrajudicial. "Judicial confessions" are those made in conformity to law before a committing magistrate or in court in the course of legal proceedings. "Extrajudicial confessions" are those which are made by a party elsewhere than before a magistrate or in court. State v. Abrams, 108 N. W. 1041, 1042, 131 Iowa, 479.

Voluntary character

A "confession" procured by a prosecuting officer, or one in official authority over the prisoner, by means of promises or threats, is involuntary per se. People v. Silvers, 92 Pac. 506, 507, 6 Cal. App. 69.

A "confession," if otherwise unobjectionable, is admissible although made while the accused was under arrest, and without his having been put on his guard not to say anything that might incriminate him. State v. Rugero, 42 South. 495, 496, 117 La. 1040.

A "confession" must be free and voluntary, and not exacted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. Sorenson v. United States, 143 Fed. 820, 823, 74 C. C. A. 468 (citing and quoting Bram v. United States, 18 Sup. Ct. 183, 168 U. S. 532, 42 L. Ed. 568; 3 Russ. Cr. [6th Ed.] 478).

CONFESSION IN OPEN COURT

The words "confession in open court," as used in Code Cr. Proc. 1895, art. 786, providing that "no person shall be convicted of perjury except on the testimony of two credible witnesses * * * or upon his own confession in open court," mean a confession made in a case pending against the person so confessing. A confession in another court as a witness in another case is not within the act. Butler v. State, 38 S. W. 46, 47, 36 Tex. Cr. R. 483.

CONFESSION OF FAITH

A "confession of faith" is the construction which a religious organization gives the Holy Book. Boyles v. Roberts, 121 S. W. 805, 818, 222 Mo. 613.

CONFESSION OF JUDGMENT

See Judgment by Confession.

"Confession of judgment," in its ordinary and proper sense, is a voluntary submission to the jurisdiction of the court. Wabaska Electric Co. v. City of Blue Springs, 122 N. W. 21, 22, 84 Neb. 577 (citing 2 Words and Phrases, p. 1420).

A "confession of judgment," as that expression is ordinarily implied, means the entry of a judgment on the admission or confession of the debtor without the formality, time, or expense involved in an ordinary proceeding. When a warrant to confess judgment is presented by an attorney, with direction or demand that judgment be confessed thereon, the acceptance of the same is, within the meaning of the warrant, an appearance at the suit of the holder, and his confession, if otherwise regular, is binding on the debtor. Cuykendall v. Doe, 105 N. W. 698, 701, 129 Iowa, 453, 3 L. R. A. (N. S.) 449, 113 Am. St. Rep. 472.

CONFESSION OF NEGLIGENCE

In an action for injuries alleged to have been sustained by plaintiff from being thrown from defendant's automobile as a result of excessive speed, the court properly excluded a question asked a witness, who had invited plaintiff to accompany the party in the automobile on the night of the accident, if such witness had not settled with defendant automobile company for injuries received by witness at the same time; the evidence not being admissible against defendant as a "confession of negligence." Routledge v. Rambler Automobile Co. (Tex.) 95 S. W. 749, 750.

CONFIDE

Intrusted or confided, see Intrust.

CONFIDENCE

A use, a trust, and a "confidence" is one and the same thing. Jones v. Jones, 123 S. W. 29, 34, 223 Mo. 424, 25 L. R. A. (N. S.) 424 (quoting and adopting 1 Perry, Trusts [5th Ed.] § 298).

As belief

In an action for malicious prosecution, the justice before whom plaintiff had been tried and acquitted testified on cross-examination that he had permitted him to go at large on his promise to appear, and on his reexamination, in answer to a question why he had not required bail, stated that he had "confidence" in plaintiff, who had agreed to appear. The word "confidence" amounted to no more than an expression of a personal belief, entertained at the time by the justice, that the plaintiff would appear at the hearing on the day fixed, without reference to any notion he might have had that the plaintiff had theretofore borne a good reputation; and as the evidence was not incompetent as tending to establish a good reputation for the plaintiff in the community, by indirectly introducing the mere personal opinion of the justice. Martin v. Corscadden, 86 Pac. 33, 36, 34 Mont. 308.

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CONFIDENCE GAME

As defined in Webster's International Dictionary, a "confidence game" is "any swindling operation in which advantage is taken of a confidence reposed by the victim in the swindler." Lace v. People, 95 Pac. 302, 304, 43 Colo. 199.

A "confidence game" is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler. People v. Talmadge, 84 N. E. 655, 656, 233 Ill. 560; Same v. Turpin, 84 N. E. 679, 680, 233 Ill. 452, 17 L. R. A. (N. S.) 276; People v. Weil, 90 N. E. 731, 735, 243 Ill. 208, 134 Am. St. Rep. 357; Hughes v. People, 79 N. E. 137, 138, 223 Ill. 417; People v. Poindexter, 90 N. E. 261, 264, 243 Ill. 68; People v. Depew, 86 N. E. 1090, 1092, 237 Ill. 574 (citing Maxwell v. People, 41 N. E. 995, 158 Ill. 248; Du Bois v. People, 65 N. E. 658, 200 Ill. 157, 93 Am. St. Rep. 183; Hughes v. People, 79 N. E. 137, 223 Ill. 417).

The "confidence game" is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler, and is very often practiced by the use of cards, dice, checks, or other means, instruments, or devices, in which the victim gets nothing, but is simply swindled out of his money by some trick or device. Juretich v. People, 79 N. E. 181, 182, 223 Ill. 484 (citing Du Bois v. People, 65 N. E. 658, 200 Ill. 157, 93 Am. St. Rep. 183; Graham v. People, 55 N. E. 179, 181 Ill. 477, 47 L. R. A. 731; Maxwell v. People, 41 N. E. 995, 158 Ill. 248).

Where defendant has, by a course of conduct, led his victim to repose confidence in him, with a view to taking advantage of such confidence and to obtain the money or property of his victim by a betrayal of such confidence, and advantage is taken of the confidence reposed by the victim in the swindler, and the swindler obtains, by reason of the betrayal of such confidence, the money or property of his victim, there is a violation of Cr. Code (Hurd's Rev. St. 1905, p. 692, c. 38) § 98, providing that "every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the 'confidence game,' shall be imprisoned," etc. Hughes v. People, 79 N. E. 137, 138, 223 Ill. 417 (citing Maxwell v. People, 41 N. E. 995, 158 Ill. 248; Morton v. People, 47 Ill. 468; Du Bois v. People, 65 N. E. 658, 200 Ill. 157, 93 Am. St. Rep. 183).

"Confidence games," as applied to the postal regulations against the fraudulent use of the mails, are those devices by which the authors of the fraudulent schemes obtain from their victims money or property without any intention of returning to them anything whatever, or anything at all equivalent in commercial value to that which is received as a result of the fraud. Rosenberger v. Harris, 136 Fed. 1001, 1004.

The devices which are commonly included within the term "confidence game" are various; but the essential ingredient therein is a swindling operation, in which advantage is taken of the confidence reposed by the victim in the swindler. Powers v. People, 123 Pac. 642, 645, 53 Colo. 43.

"Confidence game" is defined as any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler, and as a kind of swindle practiced principally in large cities upon unwary strangers; the swindler, usually under the pretence of old acquaintance, gaining the confidence of his victim, and then robbing or fleecing him at cards or betting or otherwise. From these definitions it is apparent that one of the most essential elements is that of first securing confidence of the victim. State v. Edgen, 80 S. W. 942, 946, 181 Mo. 582 (quoting and adopting the definitions in Webster's Dict. and Cent. Dict.).

In a prosecution for obtaining money by "confidence game," under Mills' Ann. St. § 1332, where the only evidence against the defendant was that she told the prosecuting witnesses that she could see gold all around them, etc., and that she was interested in certain mines, these words, however false and fraudulent, are insufficient to establish the crime. Wheeler v. People, 113 Pac. 312, 314, 49 Colo. 402, Ann. Cas. 1912A, 755.

To constitute the offense of obtaining money by "confidence game," within Mills' Ann. St. § 1332, the money or property must have been obtained or the attempt thereto made by means of some false or bogus means, token, symbol, or device, as distinguished from mere words, however false or fraudulent. Id.

Obtaining money by loans or advancements by false representations in regard to solvency, or ability or purpose to make profitable investments and return large profits, is not within Mills' Ann. St. § 1332, regarding prosecutions for obtaining money by means of a "confidence game." Id.

Where the complaining witnesses were not deceived by the defendant in reposing confidence in her, or misled by any device, scheme, or swindling operation in which advantage was taken of their confidence, the fact that contrary to their expectations promised investments were not made, or, if made, proved a failure, does not transform the transaction into a "confidence game." Id.

Rev. St. 1899, § 2213, provides that "every person who, with intent to cheat and defraud, shall obtain or attempt to obtain from any other person or persons, any money, property or valuable thing whatever, by means or by use of any trick or deception, or false and fraudulent representation or state-

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ment or pretense, or by any other means or instrument or device, commonly called the 'confidence game,' or by means or by use of any false or bogus check, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony," etc. Held, to be manifestly directed against obtaining money or property from one whose confidence has first been secured by false and fraudulent representations in connection with acts done, with intent to cheat and defraud, to provide for a class of false representations not included in some other section dealing with ordinary false representations, and to be intended to reach a class of offenders known as "confidence men," who obtain money by some trick or representation designed to deceive. State v. Wilson, 122 S. W. 701, 223 Mo. 156, 704.

The "confidence game" is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler, and the fact that the transaction is made to assume the form of a legitimate contract is not material, if in fact it is a swindling operation. People v. Depew, 86 N. E. 1090, 1092, 237 Ill. 574.

Where defendant obtained the confidence of prosecutor by representing that he would engage in a contemplated real estate business with prosecutor as his partner in another city, and by reason of the confidence so inspired induced prosecutor to pay money to M. for the purchase of certain city lots, and defendant had not intended to engage in the business at all, but falsely pretended he would do so to induce prosecutor to pay his money for the lots, which were of little or no value, defendant was guilty of obtaining money by the "confidence game," and not of a mere "breach of a civil contract." Chilson v. People, 79 N. E. 934, 936, 224 Ill. 535 (citing Maxwell v. People, 41 N. E. 995, 158 Ill. 248; Du Bois v. People, 65 N. E. 658, 200 Ill. 157, 93 Am. St. Rep. 183; Hughes v. People, 79 N. E. 137, 223 Ill. 417).

Where a person, after gaining the confidence of another by misrepresenting his name, and that he was a friend of a person who is the other's friend, and that he was in the employ of a certain company, obtained money from the other upon the representation that he had lost his own money and would return the sum borrowed on the following morning, and left a worthless watch and his I. O. U. for $30, which he never intended to pay, he was guilty of obtaining money by the "confidence game," though the transaction assumed the form of a business transaction. People v. Weil, 90 N. E. 731, 732, 734, 243 Ill. 208, 134 Am. St. Rep. 357 (quoting Maxwell v. People, 41 N. E. 995, 998, 158 Ill. 248, 256).

Larceny distinguished

Rev. St. 1899, § 2213, provides that every person who, with intent to cheat and defraud, shall obtain any money or property from another by means of any trick or false representations or pretenses or by any other means, commonly called "the confidence game" etc., shall, on conviction, be punished. Held, that such section applied to a case in which the victim consented to the parting of title and possession to the money obtained, and was not applicable where the property was obtained by a trespass, in which case the person obtaining the same with intent to deprive the true owner thereof was guilty of larceny. Prosecutor was approached by W., who showed him a lock capable of being opened without a key. Thereafter they met defendant, who pretended to be a countryman with a large sum of money, whereupon W. offered to bet dollar for dollar that he could open the lock without a key. Defendant handed W. his money, and W. took out his money, putting it with defendant's, when they turned to prosecutor and asked him how much money he had. Prosecutor took out his money, and W. pulled it out of his hand, handed him the lock, and said, "While [defendant] counts 10, you open the lock." Defendant counted 10, but the lock did not open, whereupon defendant snatched the money which W. handed to him, and, after prosecutor stated that they had robbed him, they departed. Held, that prosecutor never intended to part with the title to his money and hence the offense constituted larceny, and not obtaining money by a trick or "confidence game," prohibited by Rev. St. 1899, § 2213. State v. Copeman, 84 S. W. 942, 945, 186 Mo. 108 (citing 1 Bishop's New Crim. Law, § 585; State v. Murphy, 90 Mo. App. 548; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; State v. Vickery, 19 Tex. 326).

CONFIDENCE MAN

Pen. Code 1901, § 489, providing that any person who, with intent to cheat and defraud, shall obtain money from any other person by means of any trick or deception or false or fraudulent representation or statement of pretense, or any other means or instruments or device commonly called the "confidence game," or by means of any false or bogus check, or any other printed, written, or engraved instrument or spurious coin or metal, shall be guilty of a felony, was intended to reach the class of offenders known as "confidence men," who obtain, through some false representation, trick, or deception, the money of their victim, whose confidence has first been secured through some false representation or deception, and does not cover a case where a party obtains money by falsely pretending that he is an attorney and can obtain a divorce for the party defrauded; such offense being covered by section 481, dealing with the subject of ordinary false representations, and providing that any person who, by false or fraudulent representations or pretenses, defrauds any other per-

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son of money or property, and thereby fraudulently gets possession of money or property, is punishable as therein provided. Erickson v. State (Ariz.) 127 Pac. 754, 757.

Two or more confederates, who, by gaining the confidence of a stranger on the ground of alleged professed acquaintance with him or his friends, lure him to a place where he is afterwards fleeced at some game, or robbed of his money, or otherwise victimized, are "confidence men." People v. Simmons, 109 N. Y. Supp. 190, 193, 125 App. Div. 234.

CONFIDENCE OPERATOR

Pen. Code, § 647, subd. 4, declares every person known to be a "confidence operator," either by his own confession, or by his having been convicted of such offense, and having no visible or lawful means of support when found loitering around any steamboat landing, railroad depot, or broker's office, etc., to be a vagrant. Held, that the state's police power was sufficiently broad to warrant legislation looking toward the suppression of "confidence operators," which term implies as its fixed meaning one engaged in swindling operations, in which advantage is taken of confidence reposed by the victim in the swindler. Ex parte Hayden, 106 Pac. 893, 12 Cal. App. 145.

CONFIDENCE SCHEME

A scheme whose sole object and purpose is to trick and defraud one out of his money is a "confidence scheme." Falkenberg v. Allen, 90 Pac. 415, 417, 18 Okl. 210, 10 L. R. A. (N. S.) 494.

CONFIDENTIAL COMMUNICATION

Any confidential communication, see Any. See, also, Communications.

Defendant after being subpœnaed by the grand jury, informed the prosecuting attorney that he would like to talk to an attorney before testifying, and asked if he could not talk to the judge who had impaneled the grand jury. The prosecuting attorney took defendant to the judge's room, to whom defendant stated that he wanted advice. The judge refused to give advice, but told defendant he was not obliged to say anything before the grand jury to incriminate himself, and advised him to see an attorney; but defendant stated that he was not acquainted with any attorneys whom he trusted, whereupon the judge told him he could not advise him for his personal benefit, but that if he testified before the grand jury he should tell the truth, whatever it was, whereupon defendant, after a little delay, made a confession to the judge. Held, that such confession was a "confidential communication," and was inadmissible against defendant, on the ground of public policy. People v. Pratt, 94 N. W. 752, 754, 133 Mich. 125, 67 L. R. A. 923.

Between attorney and client

Communications made to an attorney while acting merely as a scrivener and not as an attorney are not "confidential communications" within Burns' Ann. St. 1908, § 520, providing that attorneys are not competent witnesses as to confidential communications made to them in the course of their professional business. Allen v. Bollenbacher, 97 N. E. 817, 818, 49 Ind. App. 589.

Between husband and wife

"Confidential communications" between husband and wife embrace all information coming to a husband or wife in consequence or by reason of the existence of the marriage relation. Lanham v. Lanham (Tex.) 145 S. W. 336, 337.

A letter in which the writer called the addressee his wife, and in which he subscribed himself as her loving husband, and containing no fact of a confidential nature, is admissible in evidence as against the objection that the same is a "confidential communication" between husband and wife, where a third person testified that he saw the letter delivered by mail. Caldwell v. State, 41 South. 473, 146 Ala. 141.

"Any communication" is in form of words of broader import than the expression "confidential communication." Code § 4607*l*, providing that "neither husband nor wife can be examined in any case as to any communication made by one to the other while married," was intended to protect only marital communications. Sexton v. Sexton, 105 N. W. 314, 315, 129 Iowa, 487, 2 L. R. A. (N. S.) 708.

On the issue as to whether a will was the result of an insane delusion, conceived by testator toward his wife about the time of his mother's death, testimony of the wife that, while traveling to the mother's funeral on a train, the testator sat several seats behind his wife and that every time she looked back at him he was "gazing at her" did not relate to a "confidential communication" between husband and wife. Lanham v. Lanham (Tex.) 146 S. W. 635, 637.

Question asked the wife of prosecuting witness as to a promise made by prosecuting witness in the presence of third persons was not a "confidential communication" between husband and wife, made inadmissible in evidence by Code Cr. Proc. 1895, art. 774, providing that neither husband nor wife may testify in a criminal action as to communications made by one to the other while married, with immaterial exceptions. Richards v. State, 116 S. W. 587, 55 Tex. Cr. R. 278.

In an action on a note against a husband and wife, by the wife's mother, plaintiff submitted a letter, which the husband had written to the wife, relating small items of news and small domestic matters, containing the sentence, "I will settle with

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your mother just as soon as I can get my hands on the money from the mortgage, which I hope to do next week." Held, that this was not a "confidential communication," within the inhibition of the statute, and was properly admitted. Norris v. Lee, 121 N. Y. Supp. 512, 513, 136 App. Div. 685.

Between physician and patient

Burns' Ann. St. 1901, § 505, prohibiting physicians from testifying to "confidential communications" between themselves and their patients, does not forbid the testimony of a physician to the fact of his employment by a patient. Haughton v. Ætna Life Ins. Co., 73 N. E. 592, 165 Ind. 32.

"Confidential communication," as used in Code, § 4608, providing that no practicing physician shall be allowed to disclose any confidential communication intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office, is not to be restricted to the mere verbal statements made by the patient, but must be construed to include all knowledge or information acquired by the physician through his own observation or examination. In an action for injuries, an objection to a question put to the physician who had attended plaintiff as to whether he found plaintiff conscious or unconscious at the time he attended him, and whether plaintiff talked to persons in an intelligent way, was properly sustained. Battis v. Chicago, R. I. & P. R. Co., 100 N. W. 543, 545, 124 Iowa, 623.

CONFIDENTIAL POSITION

The court stenographer of a judicial district does not hold a "confidential position," within the civil service law; the stenographer being only required to attend the terms of court, make stenographic record of all proceedings in court, preserve the minutes, supply copies to the court, attorneys, and the parties, and owing no duty of a confidential nature to the presiding justice holding trial terms away from the county of his residence. People ex rel. Weatherly v. Milliken, 130 N. Y. Supp. 1, 2, 72 Misc. Rep. 430.

Where the duties of a position are not merely clerical, and are such as especially devolve upon the head of the office, which, by reason of his numerous duties, he is compelled to delegate to others, the performance of which require skill, judgment, trust, and confidence, and involve the responsibility of the officer or the municipality which he represents, the position should be treated as "confidential." The registrar of a water bureau, who is appointed by the commissioner of public works, and whose duties are delegated to him by the commissioner, and who is given special charge of the general office, having supervision over many subordinates, who receive all the water rates paid to the city, and is required to examine vouchers for expenditures of the water bureau for maintenance and pipe extensions, and in the absence or inability of the deputy commissioner is charged by the commissioner with the entire control of the bureau, and whose duty it is to hear and adjust complaints made by users of water, and who would be liable on his bond for misappropriating funds of the city, holds a "confidential position." People ex rel. Coit v. Wheeler, 106 N. Y. Supp. 450, 453, 56 Misc. Rep. 289 (quoting and adopting Chittenden v. Wurster, 46 N. E. 857, 861, 152 N. Y. 345, 360, 37 L. R. A. 809).

The position of stock transfer tax examiner, under Tax Law (Consol. Laws 1909, c. 60) § 270, imposing a stock transfer tax, and prohibiting the sale of stamps denoting the payment of the tax except by agents of the comptroller, is not a "confidential position" within the civil service law (Consol. Laws 1909, c. 7), empowering the Civil Service Commission to make rules for the classification of offices and employments in the classified service, and the action of the commission in exempting the position from the competitive classes is unauthorized, though the examiner occupies a confidential relation to corporations, transfer agents, and stockbrokers examined to determine whether the law has been complied with. Merritt v. Kraft, 129 N. Y. Supp. 636, 641, 643, 71 Misc. Rep. 492.

A classification of positions under the civil service law (Consol. Laws 1909, c. 7), depending on whether positions are confidential, presents a question of law for the courts, and the matter is not within the discretion of the Civil Service Commission. Id.

CONFIDENTIAL RELATION

See Fiduciary Relation.

"Confidential relations" exist between parties to an exchange of property when the parties do not meet upon an equality, one having a full knowledge of the subject of traffic, and the other a slight knowledge and no ability to acquire full knowledge, and the innocent party relies on and places confidence in the representations made by the other. Liland v. Tweto, 125 N. W. 1032, 1035, 19 N. D. 551.

The term "confidential relation" is not confined to any specific association of the parties to it, and exists between client and attorney, principal and agent, principal and surety, guardian and ward, parent and child, ancestor and heir, or husband and wife. In such cases the law, to prevent undue advantage, requires the utmost good faith in all transactions between the parties. An agent and his principal are not prohibited from dealing with each other, but the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly, and honestly. Hemenway v. Abbott, 97 Pac. 190, 195, 8 Cal. App. 450.

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The terms "confidential relation" and "fiduciary relation" are frequently used interchangeably; in general the relationship is one in which, if a wrong arise, the same remedy exists on behalf of the injured party as would exist against a trustee on behalf of the cestui que trust. A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of that other person; in such case he is not allowed to derive any profit or advantage from the relation between them, except upon proof of full knowledge and consent of the other person. The relations of attorney and client, principal and agent, or guardian and ward, are familiar illustrations for fiduciary relations. The relation exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. The rule embraces both technical and fiduciary relations and those informal relations which exist wherever one man trusts in and relies in another." A son does not as a matter of law stand in a fiduciary relation to his father as to transactions between them. Dick v. Albers, 90 N. E. 683, 685, 243 Ill. 231, 134 Am. St. Rep. 369.

The term "fiduciary or confidential relation" is a very broad one. It exists, and relief is granted, in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. Stahl v. Stahl, 73 N. E. 319, 321, 214 Ill. 131, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774 (quoting and adopting Thomas v. Whitney, 57 N. E. 808, 186 Ill. 225).

The principle that, when a gift or conveyance to one standing in "confidential relations" to the donor is in question, the burden is on the donee to prove that the conveyance was the volutary act of the donor and made by him with full knowledge of its effect, applies in its strictest sense to cases of parent and child, guardian and ward, trustee and cestui que trust, or principal and agent; but its application is not confined to transactions between parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one person over another. Horner v. Bell, 62 Atl. 736, 740, 102 Md. 435.

A "confidential relation," with which a "fiduciary relation," is ordinarily synonymous, and like it is founded on trust or confidence reposed by one person in the integrity and fidelity of another, and precludes the idea of profit or advantage to the person in whom confidence is reposed from dealings with the other, is any relation existing between parties to a transaction whereby one of them is in duty bound to act with the utmost good faith for the benefit of the other. Bacon v. Soule, 126 Pac. 384, 385, 19 Cal. App. 428; Ewing v. Ewing, 126 Pac. 811, 813, 33 Okl. 414.

CONFINE—CONFINEMENT

See Close Confinement; Constantly Confined; Entirely and Continuously Confined; Solitary Confinement.

Animals

Under the night herd law, requiring an animal to be "confined" in the nighttime, the confinement must exclude the animal from the premises of the party complaining of the trespass; so that, where a railroad ran through a quarter section surrounded by a fence, but the right of way was not fenced off, an animal at large in the tract was not "confined," so as to warrant recovery for the killing the animal on the track at night. Kansas Pac. Ry. Co. v. Lands, 24 Kan. 406, 408.

It has been held that, where the owner of land adjoining a railroad turns stock into a pasture surrounded by a legal fence on all sides excepting along the right of way, which the company, in violation of its duty, leaves open, the animals are not deemed to be "running at large"; but under similar circumstances it was held that the owner had failed to "confine" his stock, a distinction being made between the two expressions, and it has been said that the words "confined" in one act and "prohibited from running at large" in another act mean substantially the same thing, but the difference has since been noted and acted upon, but decisions defining the phrase "running at large," made in railroad cases, necessarily apply whenever the statute is invoked in behalf of one whose injury has been occasioned by a failure in the performance of his own duty. Consequently, where a bull escapes from the land of the owner to that of a neighbor by reason of the failure of the latter to keep up a portion of the division fence in accordance with an agreement between them, no action for the resulting damages can be maintained under the statute (Gen. St. 1901, § 7380) forbidding owners of animals to permit them to run at large. McAfee v. Walker, 107 Pac. 637, 638, 82 Kan. 182, 27 L. R. A. (N. S.) 646 (citing Gooding v. Atchison, T. & S. F. R. Co., 4 Pac. 136, 32 Kan. 150; Kansas Pac. Ry. Co. v. Landis, 24 Kan. 406; St. Louis & S. F. Ry. Co. v. Mossman, 2 Pac. 146, 30 Kan. 336, 341; Atchison T. & S. F. R. Co. v. Riggs, 3 Pac. 305, 31 Kan. 622, 630; Railroad Co. v. Jackson, 79 Pac. 662, 70 Kan. 791; Mo. Pac. Ry.

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Co. v. Shumaker, 27 Pac. 126, 128, 46 Kan. 769, 772).

Prisoners

"Confinement" in the county jail before execution of the death penalty and "close confinement" in the penitentiary substituted therefor by Act N. D. March 9, 1903, claimed to be an ex post facto law, means only such custody as will safely secure the production of the body of the prisoner on the day ordered. Rooney v. North Dakota, 25 Sup. Ct. 264, 266, 196 U. S. 319, 49 L. Ed. 494, 3 Ann. Cas. 76.

V. S. 1610 (P. S. 1965), entitling one "confined" for contempt to a writ of habeas corpus, does not apply where the penalty imposed is merely a fine. In re Consolidated Rendering Co., 66 Atl. 790, 792, 80 Vt. 55, 11 Ann. Cas. 1069.

CONFINED TO BED

Under a life policy which provided that the insured should not be liable to a member for disability while convalescing from any disease, but that it should accept liability only for the actual time the member is necessarily and continuously "confined to bed," the insured could collect benefits if his sickness was such as would reasonably confine a person continuously to bed or substantially so confine him, though he may have been up at times to get fresh air or for other purposes. Home Protective Ass'n v. Williams, 151 S. W. 361, 151 Ky. 146.

CONFINED TO THE HOUSE

See Necessarily Confined to House.

The words "confined to the house," in a policy insuring against diseases, which provided for a weekly indemnity for the period assured should be necessarily confined to the house, when applied to one taking treatment for tuberculosis, meant confined to any part of the house, either inside or upon the porches attached to it on the outside. Dulaney v. Fidelity & Casualty Co., 66 Atl. 614, 617, 106 Md. 17.

CONFINEMENT ON THE STREETS

A sentence on conviction of violating a city ordinance, directing "confinement on the streets," means that defendant be confined at labor on the streets. Shuler v. Willis, 54 S. E. 965, 966, 126 Ga. 73.

CONFINEMENT UNDER SENTENCE

"In confinement under sentence" means in confinement under an imprisonment imposed as a punishment by force of a judicial sentence, and the imprisonment of one awaiting execution under a death sentence is not a part of the punishment; and hence the insanity of one who is in confinement awaiting execution under a capital sentence cannot be tested by a proceeding under P. L. 1906, p. 722 (Act July 5, 1906, § 13), authorizing an inquiry into the sentence of one in confinement under sentence. In re Herron, 72 Atl. 133, 134, 136, 77 N. J. Law, 315 (quoting and adopting the definition in McGinn v. State, 65 N. W. 46, 46 Neb. 427, 30 L. R. A. 450, 50 Am. St. Rep. 517).

CONFINEMENT UNTIL DISCHARGED BY DUE COURSE OF LAW

A judgment and commitment to the penitentiary, reciting that the court sentenced accused to confinement and hard labor in the state penitentiary "until discharged therefrom by due course of law," are void for uncertainty. Ex parte Howard, 83 Pac. 1032, 1033, 72 Kan. 273.

CONFIRM—CONFIRMATION

See Final Confirmation.

" 'Confirmation' implies a deliberate act intended to renew and ratify a transaction known to be voidable." Wagg v. Herbert, 92 Pac. 250, 266, 19 Okl. 525 (quoting and adopting definition in 2 Pom. Eq. Jur. § 965).

"A 'confirmation' is making firm what was before infirm." Where land which was a separate estate of a wife was sold and conveyed by her husband under a power of attorney from her, and the purchaser complied with the terms of the sale, and before the rights of third persons intervened the husband and wife joined in an instrument declaring that they "fully ratified and confirmed" the acts of the husband in the sale of the land, it was held that the latter instrument cured the defects in the deed executed by the husband, so as to vest title in the grantees. Scales v. Johnson (Tex.) 41 S. W. 828, 830.

"Confirmation of a judicial sale" of land is the judicial sanction of the court; and by confirmation the court makes the sale its own, and the purchaser is entitled to the full benefit of his contract, which is no longer executory but executed, and which will be enforced against him and for him. Ladd v. Craig, 47 South. 777, 780, 94 Miss. 659.

"Confirmation" is the approbation or assent to an estate already created, which so far as lies in the confirmer's power makes it good and valid, so that the "confirmation" does not merely create an estate. A patent from the United States government, confirming the Mexican title to certain lands in territory acquired from Mexico, and releasing that of the United States, is a "confirmation," rather than a quitclaim. Boquillas Land & Cattle Co. v. Curtis, 29 Sup. Ct. 493, 494, 213 U. S. 339, 344, 53 L. Ed. 822 (quoting and adopting the definition in Gilbert, Tenures, p. 75).

In proceedings for the partition of a decedent's real estate, the court directed the sale of the land because the same could not be divided. The administrator sold the same and executed a deed therefor. Subsequently, on the administrator reporting the sale to the

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court, it ordered that the administrator distribute the proceeds. Held, that the sale was "confirmed," giving the purchaser title. Rye v. J. M. Guffey Petroleum Co., 95 S. W. 622, 627, 42 Tex. Civ. App. 185.

"Confirmation" of a sale under mortgage foreclosure is simply the judicial sanction of the court of the sale, completing the legal transaction. It does not have the virtue of the sale itself, but is judicial evidence of the sale. It relates back to the time of sale, and supplies all defects excepting those founded in want of jurisdiction or in fraud. Though it was more than six years after the sale of land, under confirmation of the sale, the purchaser obtained a valid title, in the absence of any negligence on his part to the prejudice of innocent parties, as the purchaser obtained the equitable title on the sale, and the statute prescribing the duration of liens and judgments did not affect him. Hyde v. Heaton, 86 Pac. 664, 666, 43 Wash. 433.

"A 'confirmation' is a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or where a particular estate is increased" (quoting Coke's definition). Where a person claimed a right of way over land, and the owner of the land executed a deed ratifying, confirming, and acknowledging such right, and granting to the claimant the right to pass and repass, this was not merely a confirmation of such right as the claimant previously had, but a grant of a right, whether or not the claimant had any right theretofore. Knight v. Dyer, 57 Me. 174, 177, 99 Am. Dec. 765.

Approval synonymous

Act June 2, 1887, relating to proceedings for condemnation of a turnpike road, provides (section 6) that exceptions may be filed to the report of the jury of view within 30 days from filing of such report, and the court, after considering such exceptions, may refer the report back to the jury or may set it aside or confirm it, and if no exceptions are filed to any such report, unless appeal is taken as provided for in section 8 (and in such case the final confirmation of the proceedings shall await the result of the appeal from the assessment within 30 days from the filing thereof), then such report shall be confirmed or dismissed by the court. Section 8 provides that an appeal to the common pleas for the assessment of damages may be taken within 30 days after the approval of the report. Held, that exceptions may be filed within 30 days from the time the report is filed, and if the exceptions filed are withdrawn or dismissed and the report is not referred back to the jury or set aside, it is to be marked "confirmed nisi," which is equivalent to the approval referred to in section 8, and another 30 days is then given to allow time for an appeal to the common pleas, and if no appeal is taken within such time the report is to be finally confirmed or disapproved at the end thereof, and if an appeal is taken the final confirmation cannot take place until 30 days after the result of the appeal is remitted from the common pleas and filed in the quarter sessions, and if no exceptions are filed or appeal taken to the common pleas within the times fixed by the act, the court may of its own motion confirm or dismiss the report; the phrase "filing thereof" within the parentheses in the sixth section referring to the filing in the quarter sessions of the result of the appeal from the assessment when it is remitted from the common pleas, and the word "confirm" where it first occurs in section 6, meaning a confirmation nisi or approval to await the running of the other 30 days given by section 8, and "approval" as used in section 8 being synonymous with "confirm" in section 6. Chestnut Hill & Spring House Turnpike Road Co. v. Montgomery County, 76 Atl. 726, 727, 228 Pa. 1.

As affirm

Bankr. Act July 1, 1898, c. 541, § 57n, provides that claims shall not be proved subsequent to one year after the adjudication. "Adjudication" is defined by section 1, subsec. 2, as the date of entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when it is finally confirmed. Held, that the word "confirmed" is not synonymous with "affirmed," but includes termination of an appeal from an adjudication by dismissal, so that where an adjudication was appealed from, and the appeal dismissed, creditors were entitled to prove their claims within a year from date of such dismissal. In re Lee, 171 Fed. 266, 268.

As conveyance

"A 'confirmation' is a conveyance of an estate or right in lands to one who has the possession or some estate therein." Morrow v. Whitney, 95 U. S. 551, 554, 24 L. Ed. 456.

As ratification

"Ratification" and "confirmation" appear to be considered as almost, if not quite, synonymous. In Black's Law Dictionary, p. 995, "ratification" is defined as being the confirmation of a previous act, done either by the party himself or by another; confirmation of a voidable act. The word "confirm" is held by the same author, at page 249, to mean to ratify what has been done without authority or insufficiently. Each of these words apparently carries with it the idea of the recognition of a previous unauthorized act of an agent done, or purported to be done, for a principal who subsequently ratifies or confirms it. Capps v. Hensley, 100 Pac. 515, 517, 23 Okl. 311.

"'Confirmation' and 'ratification' imply to legal minds the knowledge of a defect in the act to be confirmed and of the right to reject or ratify it." The act of a ward after

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reaching his majority in mortgaging his real estate to reimburse his guardian for expenditures in excess of the income of the estate was not a ratification of such expenditures, where the ward acted on the guardian's advice, without knowledge of his rights, under Ky. St. 1903, § 2034, exempting his real estate from liability for such expenditures. Fidelity Trust Co. v. Butler (Ky.) 91 S. W. 676, 681.

The word "confirmation," as used in the definition of "ratification," to the effect that it is the confirmation of a previous act done, necessarily supposes a knowledge of the thing ratified. Russell v. Erie R. Co., 59 Atl. 150, 153, 70 N. J. Law, 808, 67 L. R. A. 433, 1 Ann. Cas. 672 (citing Blen v. Bear River & Auburn Water & Mining Co., 20 Cal. 603, 81 Am. Dec. 132; San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co., 44 Pac. 333, 112 Cal. 53, 33 L. R. A. 788).

CONFIRMING MY LAST WILL

Testator devised all of his property to his wife in fee. Thereafter he made a codicil, giving all his estate to his legal heirs after the death of his wife, who was to have the use of the estate if she survived him. Held, that the language of the codicil, "hereby confirming my last will made" in 1881, did not show an intention on the part of the testator to confirm such will, but only confirmed it as modified by the codicil, and the wife took an estate for life with power to dispose of any portion thereof during her lifetime, and at her decease the remainder went to testator's heirs at law. Williams v. Dearborn, 64 Atl. 851, 852, 101 Me. 506.

CONFISCATORY

To make the word "confiscatory" appropriate to statutes regulating passenger rates, it must be given the meaning of having an inevitable tendency to confiscate and not actually confiscating. Pennsylvania R. Co. v. Philadelphia County, 68 Atl. 676, 678, 220 Pa. 100, 15 L. R. A. (N. S.) 108.

"Confiscatory orders" are ordinarily, but not always, unlawful and unreasonable, and to be confiscatory an order of the railroad commission regulating rates, etc., must deprive the railroad of a fair return upon its property, and not merely reduce former rates or charges. Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission of Wisconsin, 116 N. W. 905, 912, 136 Wis. 146, 17 L. R. A. (N. S.) 821.

CONFLICT

CONFLICT IN EMBLEMS

There is no "conflict in emblems" at a primary election, within Election Law, § 57, so as to authorize determination thereof by an election officer, and summary review by the Supreme Court, where a political "party" is merely using on its primary ballots the emblem of an "independent body," which by its definition (Consol Laws 1909, c. 17, § 2, as amended by Laws 1911, c. 649) nominates by petition only, and so takes no part in primary elections. Schieffelin v. Britt, 135 N. Y. Supp. 62, 63, 150 App. Div. 568.

CONFLICT WITH GENERAL LAW

A county ordinance imposing a maximum penalty of $600 or imprisonment for seven months, or both, for one to sell intoxicating liquors in the county, it being provided the ordinance shall not apply to sales made at his regular place of business, under authority of a license issued by city or county, in effect penalizes the business of selling liquor without a license, and so is in conflict with a general law, within Const. art. 11, § 11, authorizing counties to make and enforce regulations "not in conflict with general laws," Pen. Code, § 435, making it a misdemeanor to commence or carry on without procuring the license any business for the carrying on of which a license is required by any law of the state, and section 19 prescribing as a maximum penalty for a misdemeanor, except where a different punishment is prescribed by the Code, imprisonment for six months or a fine of $500, or both. Arfsten v. Superior Court in and for Mendocino County (Cal.) 128 P. 949.

CONFLICTING EVIDENCE

A conflict in the evidence, within the rule that, where the evidence is conflicting, the question is for the jury, must be real; and, where the testimony of a witness is contradicted by all the other evidence and the physical facts there is no conflict. Zibbell v. Southern Pac. Co., 116 Pac. 513, 515, 160 Cal. 237.

CONFORM

Within a statute providing that exceptions, being examined and found conformable to the truth, should be allowed by the presiding judge, a bill of exceptions is "conformable" to the truth when, taken as a whole, it is in such form as to indicate that the excepting party has, in good faith, made an honest effort to present the exceptions truly. In re O'Connell, 53 N. E. 1001, 1003, 174 Mass. 253.

CONFORMABLY WITH THE LAWS

The treaty of May 8, 1878, between the United States and Italy, by article 17, provides that the respective consuls shall enjoy in both countries all the rights and privileges which are or hereafter may be granted to the officers of the same grade of the most favored nation. The treaty of July 27, 1853, between the Argentine Republic and the United States, by article 9, provides that, if any citizen of either country die without will in the territory of the other, the consul of

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the nation to which decedent belongs shall have the right to intervene in the administration of decedent's estate conformably with the law, for the benefit of creditors, etc. Held, that the Italian consul was entitled to letters of administration upon the estate of an Italian subject killed in this country, as against a creditor of decedent. In re Scutella's Estate, 129 N. Y. Supp. 20, 21, 145 App. Div. 156.

CONFORMED TO THE LAW

Pol. Code, § 1083, as amended in 1899, provides that only those who have "conformed to the law governing the registration of voters are qualified electors"; but the section, as it originally stood, made those qualified whose names were "enrolled on the great register." By the act amending section 1083, and providing for the use of affidavits as a register in the various precincts, sections 1094, 1095, 1096, 1097, 1103, and 1105 were also amended (pages 60–62) so as to require the one charged with the registration of voters to keep in his office a register giving the names of qualified electors the entries in which register shall be made on affidavit showing the facts required to be stated in the entry; and such person is required to preserve all affidavits used before him or his deputies in procuring registration, and to arrange the same in a book, which shall be delivered to the boards of election, and "constitute the register to be used at such election." During the absence of a deputy registration clerk, electors visited his store to be registered, and their registrations were made out by a person employed in the store, who was not a deputy, but what purported to be the affidavits of such persons were contained in the book of affidavits delivered to the board of election. Held, that such persons were qualified electors; the affidavits merely constituting an official list of voters who have been enrolled by the registration officer on the great register, and the phrase in section 1083, "conformed to the law governing registration," merely meaning those who have caused themselves to be enrolled on the authentic list. Huston v. Anderson, 78 Pac. 620, 626, 632, 145 Cal. 320.

CONFORMITY

The word "conformity," as used in Code Civ. Proc. § 540, providing that writ of attachment directed to the sheriff must require him to attach so much of defendant's property "as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in 'conformity' with the complaint," etc., is not the equivalent of "identical," but rather means "in accordance and character and in harmony or congruity." Under the above section, the basis for a writ of attachment is the affidavit therefor, which must specifically state the amount of the indebtedness, and, where a complaint in an action on notes set out the notes, and demanded judgment for the principal with interest according to their terms, and the affidavit for attachment stated the amount of the indebtedness to be the principal of the notes "besides interest," and the writ of attachment recited the amount claimed in the complaint, the writ was issued for an amount in excess of the amount imported by the affidavit, and was properly dissolved on motion. Finch v. McVean, 91 Pac. 1019, 1020, 6 Cal. App. 272 (quoting and adopting the definition in De Leonis v. Etchepare, 52 Pac. 718, 120 Cal. 407, approved in Baldwin v. Napa & Sonoma Wine Co., 70 Pac. 732, 137 Cal. 649).

CONFRONT

"Confrontation" in criminal law, as defined in Black's Law Dictionary and Anderson's Law Dictionary, is the act of setting a witness face to face with the prisoner in order that the latter may make any objection he has to the witness, or that the witness may identify the accused. The primary object of the constitutional requirement is to prevent the use of depositions or ex parte affidavits against the prisoner in place of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. The guaranty of this right does not preclude a trial of an accused who is deaf or blind, but his physical infirmity will merely lessen his capacity to utilize the right. Ralph v. State, 52 S. E. 298, 299, 124 Ga. 116, 2 L. R. A. (N. S.) 509, 4 Ann. Cas. 501 (citing Mattox v. United States, 15 Sup. Ct. 337, 156 U. S. 237, 39 L. Ed. 409; State v. Mannion, 57 Pac. 542, 19 Utah, 505, 45 L. R. A. 638, 75 Am. St. Rep. 753; Summons v. State, 5 Ohio St. 325).

" 'Confrontation' is, in its main aspects, merely another term of the test of cross-examination. It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand as a minor means of judging of the value of his testimony. But this minor advantage is not regarded as essential, i. e., it may be dispensed with when it is not feasible." Code Supp. 1907, § 245a, providing that the original shorthand notes, or any transcript thereof, duly certified, shall be admissible in evidence on any retrial, does not conflict with Const. art. 1, § 10, accord-

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ing a person the right to be confronted with a witness. State v. Brown, 132 N. W. 862, 864, 152 Iowa, 427 (quoting 2 Wigmore, Ev. § 1365).

Where depositions are taken in the presence of accused, with the right of cross-examination, he is "confronted by the witnesses" within the meaning of constitutional provisions entitling him to be so confronted. State v. Nelson, 75 Pac. 505, 507, 68 Kan. 566, 1 Ann. Cas. 468 (citing Territory v. Evans, 23 Pac. 232, 2 Idaho [Hasb.] 651, 7 L. R. A. 646).

The statute providing for the punishment of persons having short lobsters in their possession, and making possession of any lobster prima facie evidence of guilt, does not violate accused's constitutional right to "confront" the witnesses against him. State v. Sheehan, 66 Atl. 66, 67, 28 R. I. 160.

Where the witness who had given testimony on a former trial had since died, admission of the stenographer's notes of the testimony was not an infringement of the constitutional provisions that the accused "shall be confronted with the witnesses" against him. The court says "that the substance of the constitutional protection is preserved to the prisoner, in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." Toledo Traction Co. v. Cameron, 137 Fed. 48, 61, 69 C. C. A. 28.

"Confrontation" within Bills of Rights, § 10, guaranteeing to an accused person the right to be confronted with the witnesses against them, is the act by which a witness is brought in the presence of accused, so that the latter may object to him, and the former may identify accused and maintain the truth in his presence. Kemper v. State, 138 S. W. 1025, 1038, 63 Tex. Cr. R. 1.

Code Cr. Proc. § 7, giving defendant the right to be confronted with the witnesses against him "in the presence of the court," adds nothing to Const. art. 6, § 7, giving him the right to "meet the witnesses against him face to face," or Const. U. S. Amend. art. 6, giving him the right to be "confronted with the witnesses against him," which are satisfied by his having an opportunity to cross-examine the witnesses, so as to allow, under an exception to the hearsay rule, admission against him, at the trial on the indictment, of testimony given on the preliminary examination by a witness who has since left the state; and this, though the complaint before the committing magistrate alleged the offense as committed on a day different from that alleged in the indictment, the precise time being immaterial. State v. Heffernan, 123 N. W. 87, 88, 24 S. D. 1, 25 L. R. A. (N. S.) 868, 140 Am. St. Rep. 764.

CONFUSION

CONFUSION OF GOODS

"The doctrine relating to confusion of goods has no application to cattle and horses and things of a similar nature that may be readily identified." McKnight v. United States, 130 Fed. 659, 666, 65 C. C. A. 37 (citing The Idaho, 93 U. S. 575, 23 L. Ed. 978; Claflin v. Beaver, 55 Fed. 576; Carlton v. Davis, 90 Mass. [8 Allen] 94; Moore v. Bowman, 47 N. H. 494; Capron v. Porter, 43 Conn. 383; Brown v. Bacon, 63 Tex. 595; Drake, Attachm. [7th Ed.] § 199).

CONGLOMERATE

"Conglomerate" is defined as rock composed of particles of pre-existent rocks cemented together, so as to make a uniformly solid substance. City of Chicago v. McKechney, 68 N. E. 955, 975, 205 Ill. 372 (citing Cent. Dict. 1191; Webs. Int. Dict. and Stand. Dict., etc., "Conglomerate").

CONGREGATE

CONGREGATION

See Whole Congregation.

Part of congregation, see Part.

Under Kirby's Dig. § 1655, prohibiting the disturbance of a "congregation" assembled for religious worship, the disturbance of a single member of a congregation so assembled is a disturbance of the congregation. Walker v. State (Ark.) 146 S. W. 862, 864.

CONGRESS

Member of Congress, see Member.

There is no such office as "Congress" known to the law. In ordinary parlance, where a candidate is elected as representative of the people of a district of a state to Congress, he is known and designated as "congressman," or a candidate for Congress while running; but in law there is no such office as Congress, nor can an election be held to elect a candidate for the office of Congress. Allison v. State, 78 S. W. 1065, 45 Tex. Cr. R. 596.

The term "Congress," as used in an act appointing a commission to negotiate a treaty with Indians "subject to the action of the Senate," and to select a district or districts of country, "said district or districts when so selected and the selection approved by Congress" to be and remain a permanent home for the Indians to be located therein, means the lawmaking branch of the government, and the approval of both Houses was necessary to create a valid reservation of the district so selected. United States v. Crook, 179 Fed. 391, 395.

CONGRESSIONAL POSITION

Rem. & Bal. Code, § 4805, provides that candidates for "elective" offices, state, coun-

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ty, municipal, precinct, or "congressional" shall be nominated at a direct primary election. Section 4813 gives the order of arranging positions on the ballot, first congressional, next state, next preferences for United States senators; and gives a form of ballot directing a vote for first choice, and a vote for second choice for representative in Congress, and a vote for one choice only for United States senator. Section 4822 provides that, where there are four or more candidates of any political party for a state or congressional position, every voter at the primary election shall designate a first choice and a second choice for each such position. Held, that a United States senator who is elected by the Legislature does not hold an "elective" office or a "congressional position" within the meaning of the primary election law, so as to make the provision for second choice voting applicable to him. State ex rel. Duryee v. Howell, 110 Pac. 543, 544, 59 Wash. 634.

CONJOINT

As used in a bill against two defendants charging them with conjointly contriving to infringe a patent, "conjointly" means acting together, one with the knowledge and consent and aid of the other and pursuant to an agreement or understanding. Bradley v. Eccles, 133 Fed. 308, 309.

Civ. Code La. art. 1707, provides that accretion shall take place for the benefit of legatees in case a legacy is to several conjointly, and that the legacy shall be reputed to be made conjointly when it is made by one and the same disposition, without the testator having assigned the part of each co-legatee in the thing bequeathed, and article 1709 declares that except in the cases provided by such article, and by article 1708 (inapplicable), every portion of the succession remaining undisposed of shall devolve on the testator's legitimate heirs. Testator bequeathed pecuniary legacies to a number of legatees, and then bequeathed different amounts to six charitable institutions, among which was a bequest to the "Home for Insane," and then provided that the residue should be divided between the beneficiaries of the charitable bequests pro rata in proportion to the amount of the special legacies made to them. Held, that the residuary bequest was conjoint within article 1707, so that, on the failure of the legacy to the Home for Insane because of uncertainty, such legacy, together with the legatee's interest in the residue, passed to the other charitable legatees, and not to testatrix's heirs at law. Waterman v. Canal-Louisiana Bank & Trust Co., 186 Fed. 71, 73, 108 C. C. A. 183.

CONNECT—CONNECTED

Where insured warranted that he was not in any way connected with the manufacture or sale of liquors, the word "connected" must be presumed to have been used in its popular sense, so that proof that insured occasionally waited on the customers of a saloon keeper for his accommodation merely, and without consideration—insured having no financial or other interest in the saloon—did not establish a breach of warranty of a life policy. Collins v. Metropolitan Life Ins. Co., 80 Pac. 609, 610, 32 Mont. 329, 108 Am. St. Rep. 578.

Counts charging a defendant with the forgery of Chinese duplicate certificates, with the uttering of such forged certificates and with violating Rev. St. § 3169, as an officer in the revenue service by negligently and designedly permitting the commission of such offenses, may properly be joined in the same indictment under Rev. St. § 1024, since they cover "acts or transactions connected together" within the meaning of the statute. Dillard v. United States, 141 Fed. 303, 304, 72 C. C. A. 451.

With business of agency

Defendants had an office and agency in C. for lending money, conducted by an agent, and plaintiff borrowed from the agency, giving his note with an assignment of his wages, and thereafter more than paid the loan through the agency, but defendants willfully and with intent to extort money presented the assignment of wages to plaintiff's employer, causing him to be discharged. Held, that a cause of action for such wrong was "connected with the business" of defendants' agency at C., within Code, § 3500, so that the action was properly brought in the county in which the office was located. Donisthorpe v. Lutz (Iowa) 136 N. W. 233, 234.

With church

The words "connected with," in Rev. Laws, c. 36, § 54, authorizing any religious society connected with an incorporated church to convey its property to the church, subject to the same uses and trusts, mean belonging to the same denomination and professing the same creed, and having such relations with the church occupying the edifice belonging to it as existed in similar cases, according to the usages and customs of the denomination, and a conveyance by a religious society belonging to one denomination to another society of the same denomination is valid; the latter society maintaining regular worship in accordance with the doctrines of such denomination. Massachusetts Baptist Missionary Soc. v. Bowdoin Square Baptist Soc., 98 N. E. 1045, 1047, 212 Mass. 198, Ann. Cas. 1913C, 472.

With railroad

A railroad "connection," where no supplementary terms are used, means either such a union of tracks as to permit passage of cars from one road to another, or such intersection of roads as to permit the convenient interchange of freight and passengers at the point of intersection. Therefore

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the proviso in Act April 23, 1861, conferring power on railroad companies to contract for the use and lease of each other's roads, that the roads of the companies so contracting or leasing shall be directly or by means of intervening railroads connected with each other, did not limit the right of connection to roads of similar gauge. Philadelphia & E. R. Co. v. Catawissa R. Co., 53 Pa. 20, 60.

Where an employé in railroad shops on going from his work passed along a track 150 feet from a crossing used by employés for many years with the consent of the company, and then attempted to go around a train on the track, and fell and was killed by the train, he was not "connected with or employed on" the railroad within Railroad Law, § 83, prohibiting any person not connected with or employed on a railroad from walking on tracks except at crossings, and the company owed him only the duty to refrain from wantonly injuring him. McIntyre v. Long Island R. Co., 135 N. Y. Supp. 309, 310, 150 App. Div. 783.

With subject-matter of action

The phrase, "connected with the subject of the action," as used in Code Civ. Proc. N. Y. § 501, providing that a counterclaim must arise out of the transaction on which the complaint is based or be connected with the subject of the action, means connected with the facts constituting the cause of action. Van v. Madden, 116 N. Y. Supp. 1115, 1117, 132 App. Div. 535.

In an action against an agent to recover moneys alleged to have been collected by him from a customer named, a counterclaim for commissions earned on sales made to such customer and alleged to have been withheld, under a custom between the parties by which the agent was authorized to pay his own commissions, is a proper subject of counterclaim, under Code Civ. Proc. § 501, subd. 1, as "connected with the subject of the action." Benton v. Moore, 87 N. Y. Supp. 717, 718, 42 Misc. Rep. 660.

In an action for the amount of a judgment against plaintiff and defendant for negligent injury to a third person, paid by plaintiff, a counterclaim for an amount paid by defendant in settlement of actions by others growing out of the same accident does not "arise out of the transaction set forth in the complaint" as a foundation of plaintiff's claim, and is not "connected with the subject of the action," within Code Civ. Proc. § 501, authorizing a counterclaim in either of such cases. Fulton County Gas & Electric Co. v. Hudson River Telephone Co., 93 N. E. 1052, 1054, 200 N. Y. 287.

In an action to restrain defendants from interfering with plaintiff's right to occupy a logging road over defendants' land and for damages for obstructing it, damages for injuries to the land by the construction of the road is "connected with the subject-matter of the action," and may be properly interposed as a counterclaim, under Rev. Laws 1905, § 4131, providing that a counterclaim must be an existing cause of action in favor of defendant and against plaintiff and, with immaterial exceptions, must arise out of the transaction made the basis of the complaint or be connected with the subject of the action; but damages suffered by the negligent operation of plaintiff's locomotive is not connected with the subject of the action, and is not the proper subject of a counterclaim. Wild Rice Lumber Co. v. Benson, 130 N. W. 1, 2, 114 Minn. 92.

With work

Civ. Code, § 1559, provides that a contract made expressly for the benefit of a third person may be enforced by him. A contractor with a city for the construction of a tunnel agreed to protect it from "all claims and liens of any kind whatsoever, connected with said work," and authorized the city to withhold money due by him to his laborers or other workmen. Held, that a cook for the laborers engaged in the construction of the tunnel was not "connected with said work" and could not enforce the provisions of the contract as against the contractor. Clark v. Beyrle, 116 Pac. 739, 742, 160 Cal. 306.

CONNECTING BRANCH

Railroad Law, Laws 1892, p. 1405, c. 676, § 101, provides that no corporation constructing and operating a railroad under the provisions of the article shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line, or branch operated by it or under its control, to any other point thereof, or any connecting branch thereof within the limits of any incorporated city, and that not more than one fare shall be charged within the limits of any such city for passage over the main line of road and any branch or extension thereof, etc. Held that the terms "connecting branch thereof" and "main line of road and any branch or extension thereof" contemplate an original or main line which by an off-shoot and tributary line has been extended, the two constituting a single continuous and connected line of road, and not two originally separate lines not constructed with reference to one another, which have become related simply because they have been taken into a general railroad system; and hence, where a street car line did not of itself directly connect with another line upon which a passenger took passage and paid his original fare, but had to be reached by passage over a third line, the latter was not a "connecting branch" of the first line, and he was not entitled to ride on it without payment of additional fare. Bull v. New York City Ry. Co., 85 N. E. 385, 388, 192 N. Y. 361, 19 L. R. A. (N. S.) 778.

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CONNECTING CARRIER

A terminal railroad company, which receives cars of live stock from other railroad companies for transportation and delivery to another company or to stockyards, is a "connecting carrier" whose road forms a part of the line of road over which the shipment is made, within the meaning of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607), and is subject to its provisions as to interstate shipments. United States v. Northern Pac. Terminal Co., 181 Fed. 879, 880.

"Connect," as used in a railroad company's agreement to transport perishable goods by a special daily train to a certain point "there to connect with" another railroad at a certain hour, imports a complete delivery the moment such first carrier's cars reach the point of connection between the two companies, and the engine is detached from the car. Truax v. Phiiadelphia, W. & B. R. Co. (Del.) 3 Houst. 233, 240, 251.

CONNECTING LINES

Railroads, one of which crosses the other by an overhead crossing, are "connecting lines" within Rev. St. 1895, art. 4536, defining "connecting lines" to be lines which shall connect with each other by crossing each other's tracks or otherwise so as to form a continuous or connected line, and the crossing is not required to be a grade crossing. International & G. N. R. Co. v. Railroad Commission of Texas (Tex.) 86 S. W. 16, 17.

"Connected," as used in Act N. J. March 17, 1870, authorizing the United Railroads and Canal Companies of New Jersey to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company whose works shall form, with their own, "connected" lines, means lines which are connected either directly or by intervening roads. Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130, 402.

CONNECTING RAILROAD

A "connecting railroad," as used in the act of 1852, granting a railroad the right to lease connecting railroads, is one from which the cars of the other may pass uninterruptedly without the transshipment of freight or passengers. Central R. & Banking Co. v. Mayor, etc., of City of Macon, 43 Ga. 605, 646 (quoting and adopting the definition given by Act 1850, General Assembly).

CONNECTION

See Guilty Connection.

CONNECTION WITH INTERSTATE COMMERCE

Held, that a car used in such commerce only, not so equipped, though moved in a train containing a car bearing interstate traffic, was not used in "connection" therewith where they were in different parts of the train and not in position to be coupled or uncoupled. United States v. Illinois Cent. R. Co., 166 Fed. 997, 998.

Safety Appliance Act March 2, 1893, c. 196, as amended by Act Cong. April 1, 1896, c. 87, Act March 2, 1903, c. 976, declares that it shall apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles used in "connection therewith." Held that, where a car not properly equipped is moved in a train containing cars carrying interstate commerce, there is a violation of the act, notwithstanding the defective car is not immediately connected with that carrying the interstate shipment. United States v. Western & A. R. Co., 184 Fed. 336, 337.

CONNIVANCE

"Connivance" means "winking at," failing to prevent, helping by not hindering, taking no active hand, but standing by and knowingly promoting, aiding, and abetting, by not opposing or using means to prevent or protesting against; a condition where all power, authority, influence, and action to prevent the execution of a thought or purpose are intentionally withheld. Richardson v. Richardson, 114 N. Y. Supp. 912, 916.

It is not necessary that a divorce petitioner shall have made statements indicating "connivance" or consent, if his conduct indicates an intent or even a willingness that the act of adultery may take place or even culpable negligence in not preventing it; the maxim volenti non fit injuria applying. Delaney v. Delaney, 65 Atl. 217, 219, 71 N. J. Eq. 246.

A libelant, suing for divorce on the ground of adultery, who arranged with a third person that an opportunity should be afforded libelee to commit adultery, by permitting her and the co-respondent to pass an evening alone in the third person's house, is guilty of "connivance," requiring a dismissal of the suit. Noyes v. Noyes, 79 N. E. 814, 815, 194 Mass. 20, 120 Am. St. Rep. 517, 10 Ann. Cas. 818 (citing Wilson v. Wilson, 28 N. E. 167, 154 Mass. 194, 12 L. R. A. 524, 26 Am. St. Rep. 237; 2 Bish. Mar. & Div. [5th Ed.]; Morrison v. Morrison, 136 Mass. 310; Robbins v. Robbins, 5 N. E. 837, 140 Mass. 528, 54 Am. Rep. 488).

Plaintiff, suspecting her husband's fidelity, arranged with a detective to follow him on the nights when he was absent from home. On one occasion plaintiff, her sister, and certain detectives followed him in an automobile to a roadhouse, where he was found and surprised in a compromising position with another woman. Held, that plaintiff's acts were not connivance sufficient to deprive her of the right to a divorce under the rule that mere acts of watching the movements of a

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suspected spouse is insufficient to establish connivance, which means consent. Lehman v. Lehman, 79 Atl. 1060, 1061, 78 N. J. Eq. 316.

An agreement between a husband and wife, made pending a suit by her for divorce, which provides for alimony, but which is unaccompanied by any understanding that she shall have a divorce, or be unresisted at the trial, is not collusive, barring a divorce; a "collusion" to bar a divorce being a conspiracy of husband and wife to obtain a divorce by false testimony, as distinguished from "connivance," which is a corrupt consenting. Rapp v. Rapp, 145 S. W. 114, 115, 162 Mo. App. 673.

"Connivance" as a defense to divorce is not proven as an independent fact, but is usually established from a line of conduct pursued by the husband in respect to his wife's relations to the alleged paramour, and if the husband's conduct, as established by the undisputed evidence, or admitted by him, shows conclusively that he consented actively or passively to his wife's conduct, the question of connivance would be for the court. Kohlhoss v. Mobley, 62 Atl. 236, 237, 102 Md. 199, 5 Ann. Cas. 865.

An instruction, in an action for debauching plaintiff's wife defined "connivance" as the secret or indirect consent or permission of one person to the commission of an unlawful or criminal act by another. It consists of a winking at or an intentional forbearance to see a fault or other act. Woldson v. Larson, 164 Fed. 548, 552, 90 C. C. A. 422.

CONQUEST

Generally speaking, forts, cities, lands, taken from the enemy, are called "conquests"; movables taken on land, booty; on the high seas, prize. United States v. Dewey, 23 Sup. Ct. 415, 422, 188 U. S. 254, 47 L. Ed. 463; The Manila Prize Cases, 23 Sup. Ct. 415, 422, 188 U. S. 271, 47 L. Ed. 463.

CONSANGUINITY

See Lineal Consanguinity.

"Consanguinity" or kindred is the connection or relation of persons descended from the same stock or common ancestor, and is either lineal or collateral; and "lineal consanguinity" is that which subsists between persons of whom one is descended in a direct line from the other. Suman v. Harvey, 79 Atl. 197, 204, 114 Md. 241; Hettinger v. Safe Deposit & Trust Co. of Baltimore (Md.) 79 Atl. 205.

CONSCIENCE

See Courts of Conscience.

The constitutional provision that no one shall be hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own "conscience" nor for his religious professions or sentiments, provided he does not disturb the public peace nor obstruct others in their religious worship, is intended to protect all of every diversity of religious opinion in the liberty of worship and religious profession, and to prevent pains, imprisonment, or the deprivation of political rights from being imposed as a penalty for religious professions and opinions. Donahoe v. Richards, 38 Me. 379, 403, 61 Am. Dec. 256.

An injunction is a matter of grace, and not of right, and equity will never grant relief against public convenience or against "conscience" which is not the mere caprice of the individual chancellor, but is founded on the law. Johnson v. United Rys. Co. of St. Louis, 127 S. W. 63, 71, 227 Mo. 423.

"Precedents are to govern 'conscience' in chancery as well as at common law. It is not conscience naturalis et interna, but civilis et politica. It is not making the law, but declaring what it has been established to be. * * * It is not making new principles, but applying old ones to new facts or cases." Pierpont v. Fowle, 2 Woodb. & M. 23, 19 Fed. Cas. 652, 658, No. 11,152.

CONSCIENTIOUS BELIEF

"Belief in a charge implies 'conscientious belief,'" On a prosecution for murder, there was no error in refusing an instruction that the jury might "conscientiously believe" defendant guilty, yet might not believe it beyond a reasonable doubt, and that in such case they should acquit. Regan v. State, 39 South. 1002, 1004, 87 Miss. 422.

CONSCIOUS SUFFERING

Where an employé, after catching his foot on attempting to descend from a car, was dragged 180 feet in a few seconds before being instantly killed, there was "conscious suffering" within the meaning of an Employers' Liability Act allowing recovery where an employé is instantly killed or dies without "conscious suffering" as the result of the employer's negligence. Martin v. Boston & M. R. R. Co., 56 N. E. 719, 720, 175 Mass. 502, 504.

If an injured person remains conscious after the injury, even for a short time only, it is a reasonable conclusion that he lived in a state of "conscious suffering" within St. 1887, c. 270, as amended by St. 1892, c. 260, allowing recovery by a widow or next of kin, where death is not instantaneous or is preceded by conscious suffering. Knight v. Overman Wheel Co., 54 N. E. 890, 893, 174 Mass. 455, 463.

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CONSECUTIVE

Four consecutive weeks, see Four.

The fact that the county court ordered the notice of a special election under the local option law to be published for four "successive" weeks, instead of for four "consecutive" weeks, as required by Rev. St. 1899, § 3029, did not invalidate the election; the words "successive" and "consecutive" being synonymous. State v. Hitchcock, 101 S. W. 117, 124 Mo. App. 101, 118.

CONSENT

See Blanket Consent; Express Consent; Implied Consent; Mutual Consent; Qualified Consent; Without Consent; Written Consent.

"Consent" is a thinking together, an agreement of one with another to the doing of something, leaving something undone, waiving something, or permitting some act or deed or course of conduct. It need not be written, but may be spoken or acted, or may be implied. Richardson v. Richardson, 114 N. Y. Supp. 912, 916.

The word "consent" in the law of contracts means concurrence of wills. Wilkinson v. Misner, 138 S. W. 931, 935, 158 Mo. App. 551.

The word "consent" is defined to be the "voluntary allowance or acceptance of what is done or proposed to be done by another. In law intelligent concurrence in a contract or an agreement of such a nature as to bind the party consenting; agreement upon the same thing in the same sense." Clark v. North, 111 N. W. 681, 682, 683, 131 Wis. 599, 11 L. R. A. (N. S.) 764, 11 Ann. Cas. 1080 (citing Century Dict.; 2 Words and Phrases, pp. 1437, 1438).

Constitutional authority to the Legislature to provide for waiver of jury, where the "consent" of the parties is given, recognizes two kinds of consent, express and implied. Express consent where written stipulation is entered into, or oral stipulation entered of record; implied consent where a party after appearance fails to appear at the trial, or does not deny the plaintiff's claim. It was not intended by the Constitution that there should be any radical change in an established practice, but the word "consent" was used in its broadest sense. State ex rel. Clark v. Neterer, 74 Pac. 668, 670, 33 Wash. 535.

A carrier's rule that it assumed no risk for cotton placed upon its platform unless tendered for immediate shipment may be waived, and where it accepts cotton intended for shipment at some future time, the cotton will be upon its platform with the carrier's "consent," under Civ. Code 1902, § 2135, making a carrier responsible for loss by fire originating on its right of way, except for property which has been placed upon its right of way illegally or without its consent. Griffin v. Atlantic Coast Line R. Co., 72 S. E. 463, 464, 89 S. C. 547.

A paper was circulated by a railroad company among property owners to obtain their "consent" for construction of an elevated railroad in a street. An abutting owner signed it, after the words written in by him, "I am in favor of an elevated road over the middle of the street, but not on the walk." Held that, if this was a consent, it was a qualified and conditional one, which was not accepted; the company having built their structure onto the sidewalks. Shaw v. New York Elevated R. Co., 79 N. E. 984, 986, 187 N. Y. 186.

Under a valid ordinance conferring on a subway company the right to the use of streets for the construction and operation of electrical conduits, at a semiannual rent, it is immaterial whether such grant be called a mere "consent" of the city to the exercise of a franchise already conferred by the state, or whether it is called a "franchise." National Subway Co. v. St. Louis, 69 S. W. 290, 293, 169 Mo. 319.

In an action for breach of a liquor bond in permitting plaintiffs' minor son to enter and gamble in the principal's saloon, the want of "consent" of plaintiffs could be inferred from the fact that they were at the time in a distant state, and their son had been in the city where the saloon was located only a few days. Krick v. Dow (Tex.) 84 S. W. 245.

If a husband sees that his wife is about to become subject to the blandishments of a man of bad character and evil intentions, and does nothing to warn her or withhold her from such person, but permits her to be led to her ruin, his conduct in law amounts to "consent" so as to bar a divorce for adultery. Delaney v. Delaney, 65 Atl. 217, 220, 71 N. J. Eq. 246 (quoting and adopting definition in Cane v. Cane, 39 N. J. Eq. 148).

Acquiescence

"'Consent' implies something more than mere acquiescence in a state of things already in existence. It implies an agreement to that which but for the consent could not exist and which the party consenting has the right to forbid." Builders' Supply Co. v. North Augusta Elec. & Imp. Co., 51 S. E. 231, 236, 239, 71 S. C. 361 (quoting and adopting definition in Gray v. Walker, 16 S. C. 147; Geddes v. Bowden, 19 S. C. 1).

The silence of a defendant on trial for crime, or his failure to object or protest against an illegal discharge of the jury before verdict, does not constitute a "consent" to such discharge, or a "waiver" of the constitutional inhibition against a second jeopardy for the same offense. Allen v. State, 41 South. 593, 52 Fla. 1, 120 Am. St. Rep. 188.

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10 Ann. Cas. 1085 (citing State v. Richardson, 25 S. E. 220, 47 S. C. 166, 35 L. R. A. 238).

The word "consent" is sometimes treated as synonymous with "assent," "acquiescence," and "concurrence." Exemption laws should be liberally construed, and under Laws 1901, p. 365, § 269, extending the homestead exemption to a tenant in common having a homestead on the land with the consent "express or implied" of his cotenant, the cotenant's acquiescence, under such circumstances as raise a presumption of consent, is sufficient; proof of consent directly given viva voce or in writing being unnecessary. Bartle v. Bartle, 112 N. W. 471, 473, 132 Wis. 392 (citing 2 Words and Phrases, p. 1349).

Under a corporate charter providing that no loans should be made to any officer of the corporation and that the parties "consenting" to such a loan should be liable for the amount, etc., mere absence of a director from a special meeting of the board at which certain forbidden loans were made, and his absence from the next regular meeting at which the loans were ratified, cannot be construed as a "consent" to the loans. Murphy v. Penniman, 66 Atl. 282, 287, 105 Md. 452, 121 Am. St. Rep. 583.

A defendant with knowledge of relationship between examining magistrate and complaining witness who submits to a preliminary examination without objection will be held to have "consented" thereto within Cobbey's Ann. St. 1903, § 4747. Ingraham v. State, 118 N. W. 320, 321, 82 Neb. 553.

The failure of accused or his attorney to object to the discharge of the jury cannot be interpreted as a "consent to their discharge" within the meaning of the statute. People ex rel. Stabile v. Warden of City Prison of City of New York, 124 N. Y. Supp. 341, 345, 139 App. Div. 488.

Approval or confirmation

"Consent" supposes a physical power to act, a moral power of acting, and a serious determination and a free use of powers. It is an act of reason accompanied with deliberation (Bouv. Law Dict.). Though work on a highway done by the commissioner of highways is necessary, a town cannot be made liable therefor by confirmation or approval after the work is done, as that does not amount to consent, within Laws 1899, p. 108, c. 84, § 10, providing, if a highway shall be damaged or become unsafe, the commissioner of highways of the town may cause it to be immediately repaired, if consented to by the town board. People ex rel. Graham v. Studwell, 86 N. Y. Supp. 967, 969, 91 App. Div. 469.

The record of a meeting of the A. county fiscal court recited that the county judge and all the justices of the peace were present, and "came the county judge and appointed C. county road engineer for A. county, two of the magistrates, M. and S. voting to ratify said appointment and the remaining four justices of the peace not voting on said notice to ratify said appointment." Laws 1912, c. 110, § 48, required the county judge to appoint the county road engineer "by and with the consent of the fiscal court." Held, that the record did not affirmatively show that the four nonvoting justices had an opportunity to vote, so that the rule that a public official who was present and has an opportunity to vote will be taken as having consented to an affirmative vote is not applicable, the word "consent" according to Crabb's English Synonyms meaning an express sanction to the conduct of others. Morgan v. Champion, 150 S. W. 517, 518, 150 Ky. 396.

Assent distinguished

"Consent" in law means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice proposed by another. "Consent" differs from "assent," and implies some positive action and involves submission; while "assent" means mere passivity, or submission which does not include consent. People v. Dong Pok Yip, 127 Pac. 1031, 1032, 164 Cal. 143.

The synonymic discrimination between the words "assent" and "consent" is not based on the distinction between single and joint volition. "Consent" connotes individual volition, and "assent" individual judgment. In a justice's court, a suit upon an unconditional contract in writing may be tried at the first term at which time defendant is required by Civ. Code 1895, § 4134, to make his defense. If the plaintiff is present and willing to proceed to trial, the case is within the proviso of section 4135, providing that the cause may be tried at the term when the plea is filed, if the plaintiff or his attorney is present "consenting" thereto, and defendant cannot continue the case as a matter of right. Williams v. Fain & Stamps, 58 S. E. 307, 308, 309, 2 Ga. App. 136 (citing Stand. Dict., Webst. Dict., and Crabb's Eng. Synonyms).

In a prosecution against a nonresident for herding, grazing, and permitting his cattle to run at large in this state, an instruction that if the defendant's cattle were being herded or grazed or permitted to run at large in this state, and he, while in this state, participated in or assented to the same, the jury should convict him, was proper; the word "assented" being an equivalent to "consented." Beatty v. State, 95 S. W. 163, 164, 77 Ark. 247.

Consent to risk

"Consent to the risk" implies knowledge of the danger of the act to be performed and the performance of the act understandingly and without constraint. The essence of the matter is that the employé must thoroughly

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comprehend the risk, if it exceeds that ordinarily connected with such a task and freely accepted, instead of facing it reluctantly and under protest. He may be aware of the risk he encounters without assenting to it, because some coercive influence, such as fear of losing employment, controls him, and if he remains after complaining of the danger the risk is not assumed. Dean v. St. Louis Woodenware Works, 80 S. W. 292, 296, 106 Mo. App. 167.

Under Bankruptcy Act

Under Bankruptcy Act, § 23b (Act July 1, 1898, c. 541, as amended by Act Feb. 5, 1903, c. 487, § 8) which provides that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if bankruptcy proceedings had not been instituted "unless by consent of the proposed defendant," the defendants' consent need not have been given before the suit was instituted, nor need it expressly appear of record, but may be sufficiently shown by conduct necessarily implying such consent. Where in a suit by the trustee the defendants appeared and filed pleas to the merits, including not merely defensive pleas but a plea of set-off in which they affirmatively invoked the jurisdiction of the court in their own behalf and prayed for judgment against the plaintiff and proceeded to a trial upon the merits without objection to the jurisdiction of the court, they must be deemed to have consented to the prosecution of the suit in the federal court within the meaning of such section. McEldowney v. Card, 193 Fed. 475, 478.

"Consent," within said Bankruptcy Act means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of law, unless other provision is made. Where proceedings brought in a federal District Court by a trustee in bankruptcy were plenary in substance, though summary in form, defendants by answering and going to hearing, without objecting to the court's jurisdiction, consented within the Bankruptcy Act. In re Rapheal, 192 Fed. 874, 876, 113 C. C. A. 198.

Where a creditor of a bankrupt, who was also a debtor, on filing his claim, sought to set off his own indebtedness as a credit thereon, and went to trial on such issue, he thereby gave his "consent," within the meaning of the Bankruptcy Act, that the court of bankruptcy should determine the amount due from him and enter judgment therefor on the disallowance of the set-off claimed. In re White, 177 Fed. 194, 196, 101 C. C. A. 364.

CONSENT DECREE

A decree not made upon default or nil dicit, but after answer filed, issue joined, and evidence taken, is not a "consent decree." Parsons v. Stevens, 78 Atl. 347, 351, 107 Me 65.

"A 'decree by consent' is the decree of the parties put on file with the sanction and permission of the court, and in such decrees the parties, acting for themselves, may provide as to them seems best concerning the subject-matter of the litigation." Bunn v. Braswell, 51 S. E. 927, 928, 139 N. C. 135 (quoting and adopting definition in Edney v. Edney, 81 N. C. 1).

CONSENT JUDGMENT

After the lower court, on defendant's motion, struck out several items sued on, to which plaintiff excepted, and, the amount remaining being less than $300, plaintiff and defendant both entertained a view that the court had no jurisdiction of the action. A judgment of dismissal followed in the following language: "Both plaintiff and defendant having admitted in open court that the court has no jurisdiction in this action, it is therefore ordered * * * that the same be and is hereby dismissed." Held, that plaintiff did not consent to the judgment in such sense that it was deprived of the right to appeal. Placer County v. Freemen, 87 Pac. 628, 629, 149 Cal. 738.

CONSENT OF OWNER

The "consent" of an owner of a building to the making of repairs thereon necessary under the statute to create a lien in favor of those furnishing labor and materials may be inferred from his leaving the building in the possession of agents knowing that repairs are necessary and making no provision for them, but leaving them to be made by the agents without giving any notice of consent. "Consent" may be inferred for ordinary preservative repairs when it would not be inferred for alterations, remodelings, additions, or even more extensive repairs. Shaw v. Young, 32 Atl. 897, 898, 87 Me. 271.

The term "consent," as used in the Connecticut mechanics' lien statute: "When the statute uses the words by the consent of the owner of the land, it means that the person rendering the service or furnishing the materials and the owner of the land on which the building stands must be of one mind in respect to it. The words 'consent of the owner' are used in the statute as something different from an agreement with the owner; and, while it may be urged that they do not require such a meeting of the minds of the parties as would be essential to the making of a contract, there must be enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense." York v. Mathis, 68 Atl. 746, 749, 103 Me. 67 (quoting and adopting definition in Huntley v. Holt, 20 Atl. 469, 58 Conn. 445, 9 L. R. A. 111).

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Under Pub. St. c. 191, § 1, giving a lien for labor performed or material furnished for a building by virtue of an agreement with or consent of the owner, or of any person having authority from or rightfully acting for such owner, a contract to build with one holding an agreement from the owner to sell him the land on which the building was to stand on condition that he should complete it, the money being advanced for that purpose by the owner to be repaid before the land is conveyed, imports the "consent" of the owner. Borden v. Mercer, 39 N. E. 413, 163 Mass. 7, 8.

Where a tenant was required by a lease to make repairs at his own expense, a mere general consent by the owner that the tenant should make certain temporary small repairs did not constitute "consent," within the mechanic's lien law (Laws 1897, p. 514, c. 418). Garber v. Spivak, 114 N. Y. Supp. 762, 763.

A mere general consent or requirement on the part of the owner of premises that the lessee may or shall at his own expense make alterations and repairs to the premises does not constitute "consent" within the meaning of the mechanic's lien law. Ætna Elevator Co. v. Deeves, 110 N. Y. Supp. 124, 125, 125 App. Div. 842.

The "consent" by an owner to improvements on his premises within the lien law involves a power of choice and the exercise of will respecting the subject thereof, and an owner who has power to choose whether or not his property shall be improved, and who executes a lease requiring the tenant to make substantial improvements, consents to the improvements within the law. McNulty Bros. v. Offerman, 126 N. Y. Supp. 755, 763, 141 App. Div. 730.

As used in Laws 1897, p. 516, ch. 418, § 3, providing that a contractor who furnishes labor or material for the improvement of real estate with the "consent of the owner" shall have a lien, the phrase "with the consent of the owner" means that the owner's expressed consent to the particular alteration made or with his knowledge of the particular object for which they are employed, together with acquiescence in the means adopted for that purpose. Tinsley v. Smith, 101 N. Y. Supp. 382, 383, 115 App. Div. 708 (citing Hankinson v. Vantine, 46 N. E. 292, 294, 152 N. Y. 20, 29; Rice v. Culver, 64 N. E. 761, 762, 172 N. Y. 60, 65; Burkitt v. Harper, 79 N. Y. 273; Otis v. Dodd, 90 N. Y. 336; Jones v. Menke, 60 N. E. 1053, 168 N. Y. 61; Hilton & Dodge Lumber Co. v. Murray, 62 N. Y. Supp. 35, 47 App. Div. 289).

Under Rev. St. Me. c. 93, § 29, which gives a lien for labor or materials furnished in erecting, altering, or repairing a house, building, or appurtenances by virtue of a contract with or "by consent of the owner," as construed by the Supreme Judicial Court of the state, in order that the interests in real estate of any person shall be affected by reason of his statutory consent, he must be held to have set in motion a train of circumstances which necessarily, or reasonably, or ordinarily, resulted in the furnishing of labor and materials for which the lien is claimed. A mortgagee out of possession is not an "owner" within the meaning of the statute, nor can he be held to have consented to the displacement of his own lien merely because he may have knowledge of the making of the improvements. Central Trust Co. of New York v. Bodwell Water Power Co., 181 Fed. 735, 738.

Improvements on leased premises, consisting mainly in removing partitions, and in painting and plastering the larger rooms thereby made, were such as were necessary for the use of the premises which the parties contemplated when the lease was executed. Held, that though lessors must have known lessee intended to make these improvements, and in a sense consented thereto, it was not the "consent" mentioned in the mechanic's lien law (Laws 1897, p. 514, c. 418); the tenant in such case being permitted, but not required, except for his own purpose, to make the changes, and lessors not having by their lease specifically contracted for the particular improvement. Garber v. Spivak, 119 N. Y. Supp. 269, 270, 65 Misc. Rep. 37.

Where a new section of floor was laid with the intention of making it a permanent improvement to the building, as well as a convenience to the tenant, who held under a lease providing that the premises were to be used as a skating rink, and it would have been of no avail for removal by the tenant during his tenancy, and was not in fact removed by him, and the building, with the floor so repaired, continued to be used as a skating rink after he surrendered possession, and the president of the owner was present in the building the day after the repairs were commenced, and had knowledge of the proposed repairs before the old boards had all been taken up and any part of the new floor laid or the materials therefor furnished, but expressed no dissent and gave no notice that the owner would not be responsible, and, in a suit by the owner against the tenant for rent, he was given credit for a specified sum as "an allowance on floor," such facts constituted a "consent by the owner" to the laying of the new section of floor, within Rev. St. c. 93, § 29, giving a lien for labor performed or materials furnished in repairing a building "by virtue of a contract with or by consent of the owner." York v. Mathis, 68 Atl. 746, 749, 103 Me. 67.

Civ. Code 1902, § 3008, provides that any person to whom a debt is due for materials furnished and used in the erection of any building, by virtue of an agreement with "or by consent of the owner of such building," shall have a lien. Section 3011 provides that

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the owner of any such building, in process of erection, other than the party by whom or in whose behalf a contract for materials has been made, may prevent the attachment of any lien for materials not then furnished by giving notice, in writing, to the person furnishing such material that he will not be responsible therefor. A contractor purchased lumber of plaintiff to be used in defendant's house, but the only evidence that the owner knew from whom the lumber was obtained was his direction to one of plaintiff's teamsters to tell plaintiff to send him good lumber. Held, that the word "consent," as used in the statute, implies "choice," and implies an agreement which, but for the consent, could not exist, and which the party consenting has a right to forbid, and that section 3011 does not necessitate a notice that the owner of a building will not be responsible for the material used therein, unless he had given his consent, as provided by section 3008, and that a lien did not exist on defendant's property for the lumber furnished by plaintiff, as he gave no consent to have plaintiff furnish the lumber. Metz v. Critcher, 68 S. E. 627, 628, 86 S. C. 348.

"Consent," as used in statutes giving a lien for improvements made with the consent of the owner, means the unity of opinion; the accord of minds; to think alike; to be of one mind; and involves the presence of two or more persons, for without at least two persons there cannot be a unity of opinion or an accord of minds, or any thinking alike. Mere acquiescence in the erection or alteration, with knowledge, is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner, but is affirmative in its nature, and should not be implied contrary to the obvious truth, unless upon equitable principles the owner should be estopped from asserting it. Christianson v. Hughes, 122 N. W. 384, 386, 18 N. D. 282, 138 Am. St. Rep. 762 (citing Coorsen v. Ziehl, 79 N. W. 562, 103 Wis. 381; Huntly v. Holt, 20 Atl. 469, 58 Conn. 445, 9 L. R. A. 111; De Klyn v. Gould, 59 N. E. 95, 165 N. Y. 287, 80 Am. St. Rep. 719).

A hardware dealer furnished at the request of a husband material for his wife's house, and installed a furnace therein. The husband and wife when the materials were furnished and the work done resided close to the dwelling. The wife was frequently at the house when the work was in progress, and lived in it when the furnace was installed. The hardware and furnace were charged to the husband, and were necessary for the completion of the house. Held, that the property was subject to a mechanic's lien for the materials and work, under Lien Law, § 3 (Laws 1897, p. 516, c. 418). Schummer v. Clark, 95 N. Y. Supp. 836, 107 App. Div. 631.

CONSENT RULE

In order to simplify the ancient action of ejectment, the court imposed terms upon the tenant in possession upon admitting him as a defendant by requiring him to enter into a rule of court known as a "consent rule," to confess three of the four requisites for the maintenance of the action, namely, lease, entry, and ouster, which were wholly fictitious, leaving the trial to stand upon the merits of the title only. Mt. Pleasant Cemetery Co. v. Erie R. Co. (N. J.) 65 Atl. 193.

CONSEQUENCE

See Immediate Consequences; Natural Consequences; Probable Consequence.

Cause synonymous

"Cause" and "consequence" are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce or aid in producing, that result is a consequence of the event, and the event is the cause of the result. Monroe v. Hartford St. Ry. Co., 56 Atl. 498, 501, 76 Conn. 201.

CONSEQUENTIAL CONTEMPT

"Consequential contempts" are such as arise from matters not transpiring in court, but relate to a failure to comply with the orders and decrees issued by the court, and to be performed elsewhere. Appearing in court and refusing to produce the body of a child pursuant to the requirements of a writ of habeas corpus, without reasonable excuse, or willfully making an evasive or insufficient answer thereto, is a direct contempt. Smythe v. Smythe, 114 Pac. 257, 258, 28 Okl. 266 (citing Ex parte Sternes, 19 Pac. 275, 77 Cal. 156, 11 Am. St. Rep. 251).

CONSEQUENTIAL DAMAGES

Damages are either "direct" or "consequential"; the former being such as result from an act without the intervention of any intermediate controlling or self-efficient cause; the latter, such as are not produced without the concurrence of some other event attributable to the same origin or cause. Loiseau v. Arp, 114 N. W. 701, 703, 21 S. D. 566, 14 L. R. A. (N. S.) 855, 130 Am. St. Rep. 741.

"Consequential damages" are those which are not the direct and necessary consequences of the wrongful conduct of the defendant, but merely the natural results thereof. Swain v. Tennessee Copper Co., 78 S. W. 93, 95, 111 Tenn. 430.

The condemnation law in case of a taking of part of a parcel requires compensation, not only for the land actually taken, but for consequential damages to the remainder, which damages include diminution of value by the taking alone and diminution of value because of the use of land taken. In re New York, Westchester & B. Ry. Co., 130 N. Y. S. 1005, 1008, 73 Misc. Rep. 219.

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"When soil is removed from its natural position by one owner and the soil of an adjoining owner is thereby permitted to fall, such result is not a consequential damage, but a direct injury. * * * It is true that the word 'damaged' has been held to mean such damages as were recoverable at common law between individuals, but in view of the rule of the carrying away of land by its own weight is not consequential damage, but is an actual infringement and 'taking of property,' we think the same rule should apply where the land is carried away by means of water which is released in a public street by any means which would amount to an actual 'taking' and a resulting damage." And hence where land is carried away by means of water which is released, in a public street through the operations of certain railroads in constructing a tunnel under the street, the damage so occasioned is an actual infringement and "taking of property" within the Constitution, declaring that private property shall not be "damaged" for public use without just compensation. Farnandis v. Great Northern R. Co., 84 Pac. 18, 20, 21, 41 Wash. 486, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027.

"Consequential damages" are defined to be those which the cause in question naturally but indirectly produces, and those which, though directly, are not immediately, consequential upon the act or default complained of. The term "consequential damages," when applied to the ascertainment of damages for the taking of private property for a public use, is strictly applicable to the damages which are caused to the property not taken by the use of the property taken, but the term is frequently used to refer to the damages inflicted upon the residue by the mere taking itself. The statement in the minutes of the commissioners of estimate appointed to ascertain the damages for lands taken by a city to bear a bridge pier, that they considered the whole estate and, having reached the conclusion as to the loss and damage sustained by determining the value of the whole and the value of the remainders after the taking, the difference between them being the loss and damages sustained, in other words, the result arrived at by us comprehended not only our deliberate judgment of the value of the premises taken, but also the consequential damages caused by the taking, is uncertain, and the proceeding will be remitted to them to state the grounds of their decision. In re Board of Public Improvements of City of New York, 91 N. Y. Supp. 161, 163, 99 App. Div. 576 (quoting the definitions in And. Law Dict., and Bouv. Law Dict.).

CONSEQUENTIAL INJURIES

The common law allowed no damages for what we call "consequential injuries," and therefore, as no statute is necessary to exempt from such damages, a statute is not to be construed as enacted for that purpose or to serve such purpose. Leffmann v. Long Island Ry. Co., 93 N. Y. Supp. 647, 648, 47 Misc. Rep. 169.

CONSERVATOR

CONSERVATOR OF THE PEACE

"Conservators" of the peace are defined as common-law officers whose duties, as such, were to prevent and arrest for breaches of the peace in their presence. The provisions of the Constitution of Utah that certain officers "shall be servators of the peace and may hold preliminary examinations," imposes a positive duty in respect to breaches of the public peace, committed in their presence, but does not impose a positive duty in respect to holding preliminary examinations, and a statute conferring jurisdiction on other officers to act as committing magistrates, is not in conflict with the Constitution. State v. Shockley, 80 Pac. 865, 868, 29 Utah, 25, 110 Am. St. Rep. 639 (quoting and adopting 8 Cyc. p. 586).

CONSERVE THE BEST INTERESTS OF THE AGENCY

In an agreement by the proprietors of a department store to act as agents for plaintiff in the sale of patterns, fashion sheets, etc., to keep the patterns on the ground floor, to give proper attention to the sale, etc., and to endeavor at all times to "conserve the best interests of the agency," the words "conserve the best interests of the agency" must necessarily be regarded as delegating to the proprietors a discretion in determining from time to time what would constitute the best interests of the agency, and preliminary injunction would not be granted to restrain the proprietors from dealing in other patterns; it being doubtful that the contract required a construction forbidding the proprietors to sell other patterns. New Idea Pattern Co. v. Whitner, 64 Atl. 518, 519, 215 Pa. 193.

CONSIDER

"To 'consider' is to fix the mind upon with a view to careful examination; to ponder; study; meditate upon; think or reflect with care." It is in this sense that the word is used in a statute requiring that an ordinance shall be printed before it is considered. Hallock v. City of Lebanon, 64 Atl. 362, 363, 215 Pa. 1.

As adjudge

The "consideration" mentioned in rule 18 of the Department of the Interior providing for the forwarding of all applications for change of entry or settlement, to the Commissioner of the General Land Office for his consideration, is not of the character of a

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review of a decision already made by local land officers, but is in the nature of an original consideration of the subject by the General Land Office to which office the final decision belongs, and not only does the equitable title pass to the applicant upon approval by the General Land Office, but it does not pass until such approval. Clearwater Timber Co. v. Shoshone County, 155 Fed. 612, 323.

CONSIDERABLE TIME

Statement of one trading property that the mortgage thereon had a "considerable time" to run was not false; it not being due for six months. Strait v. Wilkins, 116 Pac. 685, 686, 16 Cal. App. 188.

An instruction in a personal injury case that if a city permitted a defect in a street to continue for a "considerable length of time," which rendered it unsafe and dangerous, it was liable for injuries caused thereby, was so indefinite as to offer no proper test for the guidance of the jury. Missouri Pac. R. Co. v. Dorr, 85 Pac. 533, 535, 73 Kan. 486 (quoting City of Lincoln v. Calvert, 58 N. W. 115, 39 Neb. 305).

CONSIDERATION

See Adequate Consideration; Beneficial Consideration; Contract Importing a Consideration; Due Consideration; Failure of Consideration; Fair Consideration; Good Consideration; Import a Consideration; In Consideration; On Any Consideration; Past Consideration; Present Consideration; Proper Consideration; Sufficient Consideration; Under Consideration; Valid Consideration; Valuable Consideration.

Any consideration, see Any.
As value received, see Value Received.
Element of sale, see Sale.
See, also, Forbearance.

A "consideration" for a contract may in general terms be defined to be something of value received by one party or parted with by the other by reason of the contract. Grant v. Isett, 105 Pac. 1021, 1022, 81 Kan. 246.

The "consideration" of a contract is the reason which moves the contracting parties to enter into it. This implies mutuality, and that the parties have mutually contemplated the matter of consideration; the one agreeing to pay the price or exchange the article, or forego the right, while the other for an equivalent accepts the same upon the precise terms proffered. Burgher v. Wabash R. Co., 120 S. W. 673, 674, 139 Mo. App. 62.

The "consideration" of a deed may be either a good or valuable one. Groves v. Groves, 62 N. E. 1044, 1045, 65 Ohio St. 442.

A special contract limiting the liability of a common carrier is without "consideration" if the charges and services rendered, as a rule, are the same in all respects without as with the special contract. Schaller v. Chicago & N. W. Ry. Co., 71 N. W. 1042, 1043, 97 Wis. 86.

"Consideration" of a contract for the sale of land which by force of Rev. Laws, c. 74, § 2, may be proved by parol evidence, does not mean the "price" for which the land was sold, but means the "consideration" of the promise sued on, and therefore a vendor of land cannot recover the price notwithstanding the statute of frauds, but that statute applies as much when the vendor is sued "upon a contract for the sale of lands, tenements, or hereditaments, or for any interest in or concerning them," as when the vendor is sued on such a contract. Bogigian v. Booklovers' Library, 79 N. E. 769, 770, 193 Mass. 444.

Defendant, codefendant, and two others agreed to purchase a controlling interest in a corporation and to contribute a specified sum as their part of the price. After each contributed the part allotted to him, there remained a balance which would have to be borrowed. It was mutually agreed that defendant should act for the codefendant and the two others, authorized to borrow money, which was used for the joint benefit of the parties. Defendant executed, as maker, a note for the money, and codefendant signed it as indorser. Held, that the indorsement, whether made before or after the delivery of the note to the agent of the payee, was supported by sufficient consideration, within Rev. Laws, c. 73, §§ 41, 42, defining value as a consideration. Young v. Hayes, 99 N. E. 827, 212 Mass. 525.

"Insurance" is a contract by which one party, in consideration of a price paid adequate to the risk, becomes security to the other that he may not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them. The ingredients of the contract are the consideration, the risk, and the indemnity. The "consideration" is the premium for the insurer's undertaking. Physicians' Defense Co. v. Cooper, 199 Fed. 576, 578, 118 C. C. A. 50.

Under Insurance Law (Consol. Laws 1909, c. 28) § 58, providing that insurance policies shall contain the entire contract, and that nothing shall be incorporated therein by reference without indorsement or attachment to the policy, a life policy, reciting that the consideration thereof is the application therefor, which is made a part of the contract, and of the payment in the manner specified of the premium stated, may not be defeated by false statements in the application and medical examination, not indorsed on or attached to the policy, to which was annexed a paper entitled "Copy of the ap-

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plication upon which this Policy is Issued," and in the form of questions and answers, some of which related to decedent's present and previous occupation and to his then and previous condition, health, and habits; the word "consideration" in the policy not being limited to its technical definition of some right, interest, profit, or benefit accruing to the one party or some detriment or loss given or undertaken by the other, but being used in the sense of inducing cause. Becker v. Colonial Life Ins. Co., 138 N. Y. Supp. 491, 493, 153 App. Div. 382.

Benefit to promisor, or loss to promisee

"Consideration" is a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. Roller v. McGraw, 60 S. E. 410, 413, 63 W. Va. 462; Frye v. Hubbell, 68 Atl. 325, 332, 74 N. H. 358, 17 L. R. A. (N. S.) 1197 (quoting and adopting definition in Kidder v. Blake, 45 N. H. 530, 532); Phœnix Cement Sidewalk Co. v. Russellville Water & Light Co., 140 S. W. 996, 999, 101 Ark. 22 (citing Ex parte Hodges, 24 Ark. 197; Bell v. Greenwood, 21 Ark. 249; Johnson v. Walker, 25 Ark. 196; Brinkley Car Works Mfg. Co. v. Farrell, 80 S. W. 749, 72 Ark. 354); Southern Realty Co. v. Hannon, 132 N. W. 533, 534, 89 Neb. 802.

Any prejudice suffered or agreed to be suffered by a person, other than such as he is at the time of consent bound to suffer as an inducement to the promisor, is a good consideration for a promise. Any benefit conferred or agreed to be conferred on the promisor, by any other person, to which the promisor is not entitled, is a good consideration for a promise. Snyder's Comp. Laws 1909, § 1075. Eastman Land & Investment Co. v. Long-Bell Lumber Co., 120 Pac. 276, 278, 30 Okl. 555.

A "consideration" essential to a contract is satisfied by a disadvantage to the promisee as well as by a benefit to him. Pabst Brewing Co. v. City of Milwaukee, 105 N. W. 563, 566, 126 Wis. 110 (citing 1 Pars. Cont. [9th Ed.] § 431).

The general rule as to consideration is that it must flow from both parties and both parties must receive a benefit from the contract, and the law only considers that as a benefit, in cases of purely executory contracts, which it can assure to the other party. Corbett v. Cronkhite, 87 N. E. 874, 877, 239 Ill. 9.

A "consideration" no more means that one party has profited than it does that the other party has put himself to some trouble or inconvenience or abandoned some right or assumed some burden on the faith of the promise of the other party, and it is wholly immaterial whether the party against whom the promise is sought to be enforced has received anything of value or an actual benefit to him for his promise. Underwood Typewriter Co. v. Century Realty Co., 94 S. W. 787, 788, 118 Mo. App. 197.

"Consideration" means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first. It does not matter whether the party accepting the consideration has any apparent benefit thereby or not; it is enough that he accepts it and that the party giving it does hereby undertake some burden or lose something which in contemplation of law may be of value. Where a mortgagee of property sought to be taken by a city satisfied the mortgage, and surrendered to the mortgagor the bond thereby secured, in consideration of the mortgagor giving to the mortgagee a check for a specified sum, the check was supported by a sufficient consideration whether or not the mortgagor was indebted to the mortgagee, and though at the time of the agreement the title to the premises had vested in the city. Scanlon v. Wallach, 102 N. Y. Supp. 1090, 1091, 53 Misc. Rep. 104 (quoting Poll. Cont. p. 167); Scriba v. Neely, 109 S. W. 845, 846, 130 Mo. App. 258.

"Consideration" is a benefit to the party making a promise, or to a third person at his request, or an inconvenience, loss, or injury to the promisor. The amount of the consideration, so it be appreciable, is immaterial. Strode v. St. Louis Transit Co., 95 S. W. 851, 853, 197 Mo. 616, 7 Ann. Cas. 1084 (citing Green v. Higham, 61 S. W. 798, 161 Mo. loc. cit. 337; 1 Parsons, Contracts [2d Ed.] p. 357).

A "consideration' is any benefit to the promisor, or any loss, trouble, or inconvenience to or charge upon the person to whom the promise is made. Either benefit to the promisor, or detriment to the promisee, is sufficient. A consideration emanating from some injury or inconvenience to one party, or from some benefit to the other, is a valuable consideration. Any collateral benefit received by the creditor, which is entitled to be regarded as a technical legal consideration will be held to be sufficient to support the contract. Where an insolvent judgment debtor sold exempt property and paid the proceeds to the judgment creditor in satisfaction of the judgment, there was a sufficient consideration for the release of the balance due on the judgment. Ward, Murray & Co. v. Young, 89 S. W. 456, 457, 40 Tex. Civ. App. 294 (quoting and adopting the definitions in Emerson v. Slater, 22 How. [U. S.] 43, 16 L. Ed. 365; Brantly, Contracts, 57; Conover v. Stillwell, 34 N. J. Law, 54; Brooks v. White, 2 Metc. [43 Mass.] 283, 37 Am. Dec. 95).

"The word 'consideration' is variously defined, but generally it may be said that any damage or suspension of a right or possibility of a loss occasioned to the plaintiff

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by the promise of another is a sufficient consideration for such promise and will make it binding, although no actual benefit accrues to the party promising. A surety on a note was released under Ky. St. 1903, § 2551, for a failure to sue thereon within seven years after the accrual of the cause of action. Thereafter the payee accepted a renewal note for the same sum from the same makers with the same surety as surety. Held, that the extension of time given by the payee to the makers was a sufficient consideration to support the promise of the surety to pay the new note. Steger v. Jackson (Ky.) 102 S. W. 329 (citing Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; Page on Contracts, § 274; Bouv. Law Dict., title "Consideration").

A county leased its rock-crushing machine for four months and not to exceed five months, unless by additional contract. No additional contract was made, and after the expiration of the period the county leased the machine to a third person while the machine was in the possession of the original lessee. Thereafter all three parties agreed that the original lessee might retain the machine until it completed specified work, and in consideration thereof it promised to furnish to the third person a similar machine. Held, that by the subsequent agreement the original lessee became obligated to the third person to furnish a similar machine and was liable for failure so to do; the agreement being supported by a valid "consideration," defined to be a benefit accruing to him making a promise, or a loss undergone by him to whom the promise is made. Phœnix Cement Sidewalk Co. v. Russellville Water & Light Co., 140 S. W. 996, 999, 101 Ark. 22.

Benefit to third person

There is sufficient consideration for a promise whenever the act of the promisee results in a benefit to the promisor, or at his request, to a third person, or imposes a loss or inconvenience, or obligation on the promisee at the instance of the promisor, though no advantage result to him. Utah Nat. Bank of Salt Lake City v. Nelson, 111 Pac. 907, 913, 38 Utah, 169 (quoting 2 Words and Phrases, pp. 1444–1448).

A "consideration" may consist either in some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. "It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is in a legal sense injured. The injury may consist of a compromise of a disputed claim or forbearance to exercise a legal right, the alteration in position being regarded as a detriment that forms a consideration independent of the actual value of the right forborne." The abandonment by the sole heir at law of a testator of opposition to the probate of the will at the request of the executor is a sufficient consideration for the promise of the executor to pay a named sum to a third person, though such payee had no interest in the estate under the will or otherwise. Rector, etc., St. Mark's Church v. Teed, 24 N. E. 1014, 1015, 120 N. Y. 586.

Doing what one is bound to do

Civ. Code, § 1605, providing that "any benefit conferred, or agreed to be conferred, upon the promisor by any other person to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." The converse of the above rule is equally true, that a benefit conferred to which the promisor is already lawfully entitled is not a good consideration for a promise. Hence where a wife had possession of and paid the premiums on an insurance policy on the life of her husband payable to his representatives, and delivered the policy to the husband to enable him to have it changed to a paid-up policy, there was no "consideration" for a promise of the husband, on receiving the policy, to dispose of the proceeds thereof by will in a certain manner, in the absence of anything to show that the wife had the right to the possession of the policy or was in any way bound to pay the premiums thereon, or that she paid them on the faith of any such promise. Schaadt v. Mutual Life Ins. Co. of New York, 84 Pac. 249, 251, 2 Cal. App. 715.

Under a statute defining "consideration" as any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not legally entitled, or any prejudice suffered or agreed to be suffered by such (other) person, other than such as he at the time is lawfully bound to suffer, as an inducement to the promise, a promise of part payment of wages due employés is not a good "consideration" for their agreement to extend the time for payment of the remainder. Skinner v. Garnett Gold Min. Co., 96 Fed. 735, 737.

Forbearance of promisee

There is a sufficient "consideration" for a contract, if the promisee in return for the promise does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do. Street v. Galt, 121 N. Y. Supp. 514, 516, 136 App. Div. 724.

"'Consideration' means, not so much that one party is profiting, as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first." Under this rule, refraining from the use of liquor and tobacco for a certain time at the request of another is a sufficient consideration for a promise by the latter to pay a certain sum of money. Hamer v. Sidway,

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27 N. E. 256, 257, 124 N. Y. 545, 12 L. R. A. 463, 21 Am. St. Rep. 693 (quoting definition in Pollock, Contracts, 166).

Marriage

Formal marriage articles, by which a father agrees to devise property to his son, the prospective bridegroom, equally with the other children, and under which the son subsequently marries, are supported by a sufficient "consideration" to enable the son to maintain an action for specific performance thereof. Phalen v. United States Trust Co. of New York, 78 N. E. 943, 951, 186 N. Y. 178, 7 L. R. A. (N. S.) 734, 9 Ann. Cas. 595.

Kirby's Dig. § 2684, declaring that, in every final judgment for divorce granted a husband, an order shall be made that all property be restored to either party, which either party obtained through or from the other during the marriage and in "consideration" and by reason thereof, means by the use of the word "consideration" the act of marriage, or some agreement or contract relating to the act of marriage, and by the phrase "by reason thereof" means such property as either party may have obtained from or through the other by the operation of laws regulating the property rights of husband and wife. Spurlock v. Spurlock, 96 S. W. 753, 754, 80 Ark. 37.

Held, that on divorce granted a husband he was not entitled to have restored to him property conveyed by him to the wife under a separation agreement and that conveyed to her by him in consideration of her again living with him. The Supreme Court of Kentucky in construing the word "consideration" in this act (Kirby's Dig. § 2684) held it to mean "the act of marriage, or some agreement or contract touching or relating to the act of marriage," and the expression "by reason thereof," as relating to such property as either party may have obtained from or through the other, by operation of the laws regulating the property rights of husband and wife. McNutt v. McNutt, 95 S. W. 778, 780, 78 Ark. 346 (quoting Phillips v. Phillips, 9 Bush [72 Ky.] 183; Flood v. Flood, 5 Bush [68 Ky.] 167).

Motive

"Consideration" may mean either "price" or "motive." State v. Pirkey, 118 N. W. 1042, 1045, 22 S. D. 550, 18 Ann. Cas. 192.

There is an essential difference between the "motive" which induces a party to enter into a contract and the "consideration" yielded for its support. "Motive" is not the same thing with "consideration"; it is, however, not to be doubted that there is a clear distinction between the motive that may induce to entering into a contract, and the "consideration" of the contract. Nothing is consideration that is not regarded as such by both parties. Standley v. Northwestern Mut. Life Ins. Co., 95 Ind. 254, 259.

Mutual promises

Where several persons promised to contribute to a common object of advantage to themselves, the promise of each is a good "consideration" for promise of themselves, and, after some of the promisors have performed their agreement, an action will lie on their behalf against others who have made default. People's Bank & Trust Co. v. Weidinger, 64 Atl. 180, 181, 13 N. J. Law, 433 (citing and adopting definition in Lathrop v. Knapp, 27 Wis. 214).

"A promise is a good 'consideration' for a promise, provided always that it imposes some legal liability on the person making it." A contract purporting to make one party sole selling agent for the other party, was without "consideration," where it contained no promise by the agent to do anything. Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 100 N. Y. Supp. 960, 964, 115 App. Div. 388 (quoting and adopting the definition in 9 Cyc. p. 325. Citing Chicago & G. E. R. R. Co. v. Dane, 43 N. Y. 240; Rafolovitz v. American Tobacco Co., 25 N. Y. Supp. 1036, 73 Hun, 87).

Release or settlement

A "consideration" may be something beneficial to the promisor or disadvantageous to the promisee. A release of a legal right by the promisee is a sufficient consideration to support a contract. Wm. Deering & Co. v. Veal (Ky.) 78 S. W. 886, 887 (quoting Bish. Cont. §§ 61–63).

The giving of the individual note of a partner for part of a copartnership debt is a good "consideration" for an agreement on the part of the creditor to release and discharge him from liability for the other part of the debt. Ludington v. Bell, 77 N. Y. 138, 140, 33 Am. Rep. 601.

Though the amount of a check tendered a discharged employé was admittedly due him, if the employer was unwilling to pay it unless the employé accepted it in satisfaction of his claim for damages for discharge, and it was tendered and accepted on that condition, there was a settlement of the claim for damages on a valid consideration within the meaning of Rev. St. c. 84, § 59. Fuller v. Smith, 77 Atl. 706, 708, 107 Me. 161.

When defendant, the cashier of plaintiff bank, executed a note to the bank in order to make up in part a defalcation by some unknown person, he believed that he was legally liable for at least a part of the defalcation, as did the president and vice president; but there was a controversy as to the amount defendant should pay, which was left to the vice president, who decided that defendant should pay the amount of the note, whereupon defendant, without protest, executed the note to the bank for that amount without any promise of reimbursement unless the stolen money should be recovered or the stock-

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holders voluntarily assess themselves to replace it. Defendant, as cashier, was custodian of the money stolen. Held, that the arrangement between defendant and the other officers was a compromise of any claim the bank had against the defendant, the subsequent ratification of which by the directors released defendant from any claim by the bank, and such compromise was a sufficient "consideration" for the execution of the note, even if defendant were not actually liable for the defalcation; any suspension or forbearance in good faith of a legal right being sufficient to sustain a promise. Utah Nat. Bank of Salt Lake City v. Nelson, 111 Pac. 907, 913 (citing 2 Words and Phrases, p. 1447).

As inducement to act

As used in the treaty of February 19, April 22, 1867 (15 Stat. 505), reading "and in further consideration of the destitution of said bands of Sisseton and Wahpeton Sioux," etc., the words "in consideration of" do not import a technical consideration such as is needed in a private bargain not under seal, but imports only the inducement that led Congress to make the promise. United States v. Sisseton and Wahpeton Bands of Sioux Indians, 28 Sup. Ct. 352, 355, 208 U. S. 561, 52 L. Ed. 621.

CONSIGN

The words "consign" and "consigned," employed in a commercial sense, mean "that the property was committed or intrusted to the consignee for care or sale, and do not by any express or fair implication mean the sale by one or purchase by another." B. F. Sturtevant Co. v. Cumberland Dugan & Co., 68 Atl. 351, 356, 106 Md. 587, 14 Ann. Cas. 419 (quoting and adopting definition in Sturm v. Boker, 14 Sup. Ct. 99, 150 U. S. 312, 37 L. Ed. 1093).

"To consign" means to deliver into the care and control of another; to intrust or commit. A man cannot consign a thing to another by merely saying that he consigns it, any more than he can deliver it by mere words. Ryttenberg v. Schefer, 131 Fed. 313, 321.

A delivery by a manufacturer of written consignments of goods to a selling agent who advanced to the manufacturer a part of the market value of the goods on the consignments, is a constructive delivery of the goods, and the manufacturer is estopped from asserting that he had not consigned the goods to the agent; the word "consigned," denoting delivery. James Freeman Brown Co. v. Harris, 70 S. E. 802, 803, 88 S. C. 558.

"To consign" means to transfer to a factor for sale. Wasey v. Whitcomb, 132 N. W. 572, 578, 167 Mich. 58.

CONSIGNEE

A "consignee" is one to whom a consignment of goods is made; the person to whom goods are shipped for sale. A buyer, who bought goods shipped to a third person after the goods had arrived at their place of destination, is not a consignee of the goods within a stipulation in the contract of sale that the consignee shall pay freight charges; the buyer being required to take the goods at the place of destination. American Soda Fountain Co. v. Gerrer's Bakery, 78 Pac. 115, 117, 14 Okl. 258, 2 Ann. Cas. 318.

Cr. Code, § 240, provides that whoever shall knowingly ship from one state into another any package containing intoxicating liquor, unless the package be so labled on the outside cover as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein, shall be fined and the liquor forfeited. Held, that the term "consignee" was so used in its primary legal sense to describe the person to whom the liquor was to be delivered at destination in accordance with the contract of carriage, and hence where wholesale merchants in California, after collecting enough orders from purchasers in New England to make car load shipments, labeled each package with its own name, the character and quantity of the liquor, and the name of the purchaser, and consigned the entire car to itself or to its own order with directions to the carrier to notify designated persons, the shipper was also the consignee within the statute; the names of the purchasers being regarded as surplusage, so that there was no violation of the act. United States v. Eighty-Seven Barrels, Etc., of Wine, 180 Fed. 215, 220.

CONSIGNMENT

A contract which recites that plaintiff has become defendant's agent for the sale of powder at Denver, Colo., and throughout Colorado, is a "consignment contract." King Powder Co. v. Dillon, 96 Pac. 439, 441, 42 Colo. 316.

A contract between a retail piano dealer and defendant provided that defendant, paying for pianos purchased by the dealer for himself, should consign them to the dealer for sale, and that the dealer should accept, on consignment, such pianos at prices and on conditions agreed on; that the dealer should report all sales and settle for cash sales immediately; that lien notes should be indorsed to defendant until the amount due for the instruments represented was settled, with interest; that the dealer's commission should be the amount for which instruments were sold in excess of the cost thereof, as represented by consignment receipts, reciting that the instruments should remain the property of defendant; and that the dealer should make all collections, and carry insurance to cover cost of instruments in stock, and to surrender to defendant, on 30 days' notice, unsold instruments held on consignment. Held,

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that the contract vested in defendant the title to pianos purchased from manufacturers and paid for, and was not a chattel mortgage to secure defendant; the term "consignment" indicating title in the consignor. Wasey v. Whitcomb, 132 N. W. 572, 578, 167 Mich. 58.

CONSISTENT

See Inconsistent—Inconsistency.

Under the rule of law that cities organized under section 16 of article 9 of the Constitution and the provision that they shall be "consistent with and subject to the Constitution and laws of the state," "consistent with" does not import exact conformity, but means substantial harmony with the principles of the Constitution. City of St. Louis v. De Lassus, 104 S. W. 12, 14, 205 Mo. 578 (quoting and adopting definition in Kansas City v. Bacon, 48 S. W. 860, 147 Mo. 259).

A complaint set up two causes of action: First, for a breach of contract, whereby plaintiff was entitled to an interest in certain mining options owned by defendant; and a demand and refusal that his share of the stock received on the sale of the options to a corporation be turned over to him; and second, for conversion, claiming that certain shares of said stock were set apart for him pursuant to the agreement, and subsequently converted. Held inconsistent, within the meaning of Code Civ. Proc. § 484, providing two causes of action may be joined, if growing out of the same transaction, and if "consistent." Hill v. McKane, 128 N. Y. Supp. 819, 821, 71 Misc. Rep. 581.

Spokane Commission Charter, § 125, provides that it may be amended by a majority vote on the amendments, that the provision with respect to submission of legislation to popular vote by initiative or by the council of its own motion shall apply to and include the proposal, submission, and adoption of amendments, and that the council may make further regulations to carry out the provisions of the article, not "inconsistent with" such provisions. Section 82, par. "c," provided for the filing of initiative petitions, requiring that the ordinance petitioned for be either adopted or submitted to a referendum vote within 30 days after the election is ordered unless a municipal election is to be held within 60 days. Held, that the words "consistent with," used in Const. art. 11, § 10, authorizing the amendment of the charters of first class cities so long as the amendment is consistent with the Constitution and statutes meant "not hostile to," therefore conferring power on such cities to legislate on every subject not "inconsistent with" or hostile to the statutes and Constitution, so that the provision for the submission of amendments at a special election was not in violation of Const. art. 11, § 10, providing that such amendments may be submitted at any general election. State v. Superior Court for Spokane County, 126 Pac. 920, 921, 70 Wash. 352.

CONSOLIDATE—CONSOLIDATION

Of actions

The independent and separate existence of an action may be terminated by "consolidation." Allen v. McRae, 100 N. W. 12, 13, 122 Wis. 246.

"The natural meaning and inherent force of the word 'consolidation' are perfectly plain, although it is known that in some of the authorities the word is used loosely. It has its place in proceedings in equity or in admiralty, where several libels or petitions are by authority of the court combined in one so that at the close only one decree is rendered." An order of the court directing that nine indictments against a defendant, charging the fraudulent use of the mails, shall be tried together and at the same time, is not a consolidation in the proper sense of the word. Betts v. United States, 132 Fed. 228, 234, 65 C. C. A. 452.

Actions consolidated under Code Civ. Proc. § 1894, merged into one suit, and only a single judgment should be rendered settling the entire controversy. The consolidation of actions under this statute must be distinguished from what has been known for many years as the "consolidation rule," which was first devised and established by Lord Mansfield. Under that rule, where many cases were pending between the same parties in which the same issues were involved, one case was tried, and all proceedings in the other cases were stayed until after such trial. It must also be distinguished from the old practice in equity of consolidating equity cases. Under such practice, each case was decided upon its own pleadings and evidence. The consolidation in equity cases under this practice was practically consolidating them for the purpose of trial alone. Handley v. Sprinkle, 77 Pac. 296, 298, 31 Mont. 57, 3 Ann. Cas. 531.

Of corporations

The "consolidation" of two or more railroad corporations pursuant to the laws of different states results in the formation of one corporation, which is regarded as a domestic corporation in each of the states whose laws are followed in effecting the consolidation. Smith v. Cleveland, C., C. & St. L. Ry. Co., 81 N. E. 501, 506, 170 Ind. 382.

Where a street railroad company transfers all its property and business to another company, in consideration of stock and bonds of the latter issued to the stockholders and bondholders of the former to replace its stock and bonds which were surrendered and canceled, no money being paid, such transaction, as to the creditors of the former company, should be considered a consolida-

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tion of the companies, by which the latter becomes liable for the debts of the former. Shadford v. Detroit, Y. & A. A. R., 89 N. W. 960, 963, 130 Mich. 300.

Same—Merger distinguished

While there is a distinction recognized by most authorities between a "merger" and a "consolidation" of corporations, these terms are not always used with strict accuracy. Chicago & E. I. R. Co. v. Doyle, 100 N. E. 278, 281, 256 Ill. 514.

In the construction of statutes providing that any two or more corporations, organized under the laws of the state, may consolidate and form a single corporation, some courts have noticed a distinction between "consolidation" and "merger"; the former term being used to describe the result of two corporations being combined into a new one, and the latter to describe the result where one corporation absorbs another. As corporate franchises are generally deemed unassignable without permission of the state, a merger is, after all, under our statute at least, a consolidation; for, although the old name of one may be retained and the other dropped, still the course to be pursued under the statute for one corporation to acquire the property of another is precisely the same as if an entirely new name were adopted. The result is a merging of corporate property and constituents, as where two streams flow together. At the junction they may be said to constitute a new stream, but essentially the latter takes in and is made up of all that formerly flowed in and now flows out of the two from which it gets its being. To use another figure, it is a marriage of two, in which neither is lost, but in which the two are blended into one in contemplation of law. The original corporate existence is merely a legal status. It is not a thing at all. The power that gave it its so-called existence is competent to change it into a new being, with all the rights and attributes of the old. No physical phenomenon is involved. The legislative purpose, and the practical application of it, will not stagger in execution of an imaginary difficulty in harmonizing a thing dead with a thing which is alive. We are of opinion, and hold, that the effect of the consolidation is to continue in the new corporation all the franchises, and vest in it all the property rights, subject to the terms on which it was acquired, of the two constituent corporations. Central University of Kentucky v. Walters' Ex'rs, 90 S. W. 1066, 1069, 122 Ky. 65.

There is a distinct difference between a "consolidation" and a "merger" of two companies. In a "consolidation" both go out of existence as separate corporations and a new corporation is created which takes their place and property; while in case of a "merger" one loses its identity by absorption in the other, which remains in existence and succeeds to its property and issues its own stock to the stockholders of the merged company. Lee v. Atlantic Coast Line R. Co., 150 Fed. 775, 787; Kent v. Common Council of City of Binghamton, 81 N. Y. Supp. 198, 200, 40 Misc. Rep. 1 (citing Bouv. Law Dict. 175; Webst. Inter. Dict. 914); Irvine v. New York Edison Co., 128 N. Y. Supp. 297, 299, 143 App. Div. 344.

Generally speaking, the effect of a "consolidation" of corporations, as distinguished from a union by "merger" of one company into another, is to work a dissolution of the companies consolidating and to create a new corporation out of the old ones. A railroad, which was a corporation of both Illinois and Iowa having been formed by the consolidation of two companies, one of each state, and owning a line of road therein extending to the boundary line, united with five Iowa companies to form a new company, into which they consolidated and merged "their capital stocks, corporate and other franchise rights, privileges and property, of every nature and description," as permitted by the laws of both states. It was provided that the consolidated corporation should commence as soon as the required certificate should be filed in each state, and they were so filed and the corporation took over and held and operated the properties of the several constituent companies. Held, that it became a corporation of both states, and in either, for the purposes of federal jurisdiction was a corporation of that state, and could not remove a cause brought against it in a state court therein on the ground of diversity of citizenship. Wasley v. Chicago, R. I. & P. Ry. Co., 147 Fed. 608, 614 (citing Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185; McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418; Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130; Missouri Pac. R. Co. v. Meeh, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; Winn v. Wabash Railroad Co., 118 Fed. 55).

A "consolidation" takes place when two companies are extinguished and a new one created, taking over the holdings of those companies passing out of existence. It differs from "merger," which occurs when a thing of lesser importance is absorbed by one of greater importance. Both merger and consolidation are equally productive of union. Ramsey v. Hicks, 87 N. E. 1091, 1099, 44 Ind. App. 490 (citing Adams v. Yazoo & M. V. R. Co., 24 South. 200, 317, 28 South. 956, 77 Miss. 194, 60 L. R. A. 33; McMahon v. Morrison, 16 Ind. 172, 79 Am. Dec. 418; Ferguson v. Meredith, 1 Wall. [68 U. S.] 25, 17 L. Ed. 604; St. Louis, I. M. & S. R. Co. v. Berry, 5 Sup. Ct. 529, 113 U. S. 465, 28 L. Ed. 1055; Clark & Marsh. Corp. 1042).

The Atlantic Coast Line Railroad Company incorporated in Virginia and having its principal offices in Richmond, with power given by its charter to "consolidate with it-

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self" other corporations, entered into an agreement of "consolidation and merger" with a company owning connecting lines, incorporated in other states, which agreement provided that the stock of the second company should be retired and canceled, and stock of the Coast Line Company issued in its place; that all the stock, property, and franchises of both should be merged, united, and consolidated, "so as to form a merged, united and consolidated company"; that "said merger, union, and consolidation shall be into the Atlantic Coast Line Railroad Company, which is to continue the name of the consolidated company"; and that its office should remain in Richmond. Under such agreement the stock of the second company was canceled, but stock previously issued by the Coast Line Company remained outstanding, and such company took charge of and operated all lines previously owned and operated by either company, without any change in its management or control. Held, that such agreement effected a merger, and not a consolidation, and that the Coast Line Company continued to exist as a Virginia corporation. Lee v. Atlantic Coast Line R. Co., 150 Fed. 775, 782.

CONSOLS

See English Consols.

CONSONANT STATEMENT

A consonant statement may be defined as a prior declaration of a witness whose testimony has been attacked, and whose credibility stands impeached, which the court will allow to be proved by the person to whom the declaration was made to support the witness' credibility, and which, but for such impeachment, would ordinarily be excluded as hearsay. Lyke v. Lehigh Valley R. Co., 84 Atl. 595, 598, 236 Pa. 38.

CONSORTIUM

See Loss of Consortium.

The term "consortium" means the society, companionship, conjugal affection, fellowship, and assistance of the wife. Boland v. Stanley, 115 S. W. 163, 165, 88 Ark. 562, 129 Am. St. Rep. 114.

The right of "consortium" is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together. Feneff v. New York Cent. & H. R. R. Co., 89 N. E. 436, 203 Mass. 278, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291.

In an action for alienation, the issue is whether the defendant by wrongful acts or conduct caused the separation of plaintiff and his or her spouse, since the gist of the action is not the loss of assistance, but is the loss of consortium, under which term is usually included the person, affection, assistance, and aid of the spouse. McGregor v. McGregor (Ky.) 115 S. W. 802, 803.

In its original application the term "consortium" was used to designate a right which the law recognized in a husband, growing out of the marital union, to have performance by the wife of all duties and obligations in respect to him which she took on herself when she entered into it, and as thus employed it includes the right to society, companionship, conjugal affection, and service. Marri v. Stamford St. R. Co., 78 Atl. 582, 583, 84 Conn. 9, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912B, 1120.

A husband, suing for injuries to his wife, is entitled, in addition to any outlays actually incurred, to be paid for his loss of conjugal fellowship, the society and affection, expressed in the civil law by the word "consortium." New York Transp. Co. v. Garside, 157 Fed. 521, 527, 85 C. C. A. 285.

CONSPICUOUS

Within Code 1904, § 2871, requiring that the names of the members of a limited partnership appeared "conspicuously" on the front of the place of business, means plain to the eye, and easily seen. R. S. Oglesby Co. v. Lindsey, 72 S. E. 672, 676, 112 Va. 767, Ann. Cas. 1913B, 913.

"Conspicuous" means "open to the view; catching the eye; easy to be seen; manifest; obvious to the sight; seen at a distance; exposed to the view; clearly visible; prominent and distinct." The word "conspicuous," as used in 2 Gen. St. N. J. p. 2672, § 138, authorizing railroad companies, by giving notice, to limit their responsibilities as carriers of baggage to $100 for every 100 pounds of baggage, and declaring that a general notice of the limitation of such responsibility, placed in a conspicuous place at or in the receiving office of such companies, where baggage is usually received by them for transportation, required a railroad company to post the notice in the baggage room, so that naturally under the general surrounding circumstances, it would be open to the view, obvious to the sight, and catch the eye of the passenger of ordinary care and observation, and be seen by him in the course of checking his luggage. Williams v. Central R. Co. of New Jersey, 88 N. Y. Supp. 434, 436, 93 App. Div. 582 (quoting Cent. Dict.; Wor. Dict.).

CONSPICUOUS PLACES

The act of the town clerk of a town in leaving on the counters of tradesmen notices of election on the question of the incorporation of a village and in hanging up one notice in a shop is not a compliance with Village Law, § 10, as amended by Laws 1910, c. 416, providing that the notice shall be

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posted in conspicuous places. In re Village of Lynbrook, 127 N. Y. Supp. 82, 84, 142 App. Div. 487.

CONSPIRACY

See Civil Conspiracy; Co-conspirator; Completed Criminal Conspiracy; Criminal Conspiracy; During Life of Conspiracy; Unlawful Conspiracy.
Object of conspiracy, see Object.
See, also, Combination—Combine.

A "conspiracy" is a combination between two or more persons by concerted action to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. Spaulding v. Evenson, 149 Fed. 913, 923; United States v. Biggs, 157 Fed. 264, 267 (quoting and adopting the definition in Pettibone v. United States, 13 Sup. Ct. 542, 148 U. S. 197, 37 L. Ed. 419); Murray v. Joseph, 146 Fed. 260, 261; Wong Din v. United States, 135 Fed. 702, 705, 68 C. C. A. 340 (citing and quoting Pettibone v. United States, 13 Sup. Ct. 542, 148 U. S. 197, 202, 37 L. Ed. 419); Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500, 513; Albro J. Newton Co. v. Erickson, 126 N. Y. Supp. 949, 951, 70 Misc. Rep. 291; Ballantine v. Cummings, 70 Atl. 546, 549, 220 Pa. 621; Commonwealth v. Richardson, 79 Atl. 222, 223, 229 Pa. 609; Hinkley v. Sac Oil & Pipe Line Co., 107 N. W. 629, 633, 132 Iowa, 396, 119 Am. St. Rep. 564; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 75 N. E. 877, 878, 165 Ind. 421, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; Lohse Patent Door Co. v. Fuelle, 114 S. W. 997, 1003, 215 Mo. 421, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; Charles A. Olcott Planing Mill Co. v. Same (Mo.) 114 S. W. 1013; National P. Ass'n of Steam Fitters, & Helpers v. Cumming, 63 N. E. 369, 377, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648 (dissenting op.); People v. Klaw, 106 N. Y. Supp. 341, 344, 55 Misc. Rep. 72; Standard Oil Co. v. Doyle, 82 S. W. 271, 275, 118 Ky. 662, 111 Am. St. Rep. 331; State v. Ameker, 53 S. E. 484, 487, 73 S. E. 330 (quoting and adopting definition in Commonwealth v. Waterman, 122 Mass. 43); State v. Browning, 133 N. W. 330, 335, 153 Iowa, 37; State v. Effler (Del.) 78 Atl. 411, 419; State v. Messner, 86 Pac. 636, 637, 43 Wash. 206; Territory v. Leslie, 106 Pac. 378, 379, 15 N. M. 240; Territory v. Claypool, 71 Pac. 463, 468, 11 N. M. 568 (quoting 2 Bish. New Cr. Law, § 175); Wishard v. State, 115 Pac. 796, 808, 5 Okl. Cr. 610; White v. White, 111 N. W. 1116, 1119, 132 Wis. 121; Wilson v. State, 115 Pac. 819, 823, 5 Okl. Cr. 649; Lanasa v. State, 71 Atl. 1058, 1060, 109 Md. 602; Brown v. Jacobs Pharmacy Co., 41 S. E. 553, 554, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126; Franklin Union No. 4 v. People, 77 N. E. 176, 184, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248; Garland v. State, 75 Atl. 631, 632, 112 Md. 83, 21 Ann. Cas. 28; Green v. Bennett (Tex.) 110 S. W. 108, 115; Johnson v. United States, 158 Fed. 69, 73, 85 C. C. A. 399, 14 Ann. Cas. 153; Lindsay & Co. v. Montana Federation of Labor, 97 Pac. 127, 130, 37 Mont. 264, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722; O'Malley v. Whitaker, 48 South. 545, 118 La. 906; State v. Dalton & Fay, 114 S. W. 1132, 1140, 134 Mo. App. 517; State v. Van Pelt, 49 S. E. 177, 181, 189, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495; Thomas Russell & Sons v. Stampers & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 307, 57 Misc. Rep. 96; United States v. American Naval Stores Co., 172 Fed. 455, 460; United States v. Moore, 173 Fed. 122, 125.

"Conspiracy," which is a combination between two or more persons to do a criminal or unlawful act or a lawful act by criminal or unlawful means, gives no right to a civil action. Pullen v. Headberg, 127 Pac. 954, 53 Colo. 502, 955.

A combination of two or more to do the same thing by the same means is a "conspiracy." Erdman v. Mitchell, 56 Atl. 327, 331, 207 Pa. 79, 63 L. R. A. 534, 99 Am. St. Rep. 783.

A "conspiracy" at common law is the confederation and combination of two or more to do that which is unlawful or criminal to the injury of the public or portions or classes of the community, or even to the rights of an individual. Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor 156 Fed. 809, 816 (quoting and adopting the definition in Commonwealth v. Hunt [Mass.] 4 Metc. 111, 121, 38 Am. Dec. 346; Callan v. Wilson, 8 Sup. Ct. 1301, 127 U. S. 540, 32 L. Ed. 223).

A "conspiracy" is a combination to effect an illegal object as an end or means, and a "civil conspiracy" is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259, 264, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

A consummated "conspiracy," actionable for the recovery of damages at the suit of the injured person, need not satisfy every essential of St. 1898, § 4466a; the essentials of a conspiracy at common law being sufficient. White v. White, 111 N. W. 1116, 1118, 132 Wis. 121.

A "conspiracy" includes as an element a corrupt motive. United States v. Moore, 173 Fed. 122, 132.

A common design or purpose by two or more persons is the essence of the charge of "conspiracy," and this common design must be proved, either by direct evidence or by proof of such circumstances as naturally can prove it, and sufficient in themselves to show

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existence of such common design. Brown v. Evans, 112 N. W. 1079, 149 Mich. 429.

Where two persons pursue by their acts the same object by the same means, one performing one part of the act and the other another part thereof, so as to complete it with a view to the attaining of the object which they are pursuing, there is a "conspiracy." State v. Racine Sattley Co. (Tex.) 134 S. W. 400, 403.

An instruction on trial for conspiracy that "conspiracy" is an agreement by two persons to do an unlawful act or to do a lawful act by unlawful means, and it is the agreement to do the unlawful acts that is the gist of the whole matter, and that if the defendants went to the place named and agreed to do the acts alleged they would be guilty of conspiracy, or if two or more of them went there and committed the acts alleged by virtue of an agreement so to do, then they would be guilty of conspiracy, properly described the offense. State v. Ameker, 53 S. E. 484, 487, 73 S. C. 330.

A "conspiracy" is a criminal act, and it is unnecessary to aver the means by which the conspiracy was to be carried out. Imboden v. People, 90 Pac. 608, 615, 40 Colo. 142 (citing State v. Noyes, 25 Vt. 415; State v. Stewart, 9 Atl. 559, 59 Vt. 273, 59 Am. Rep. 710).

A "conspiracy," cannot be sustained by evidence which would merely establish separate causes of action against several defendants. Thomas Russell & Sons v. Stampers' & Gold Leaf Local Union No. 22, 107 N. Y. Supp. 303, 307, 57 Misc. Rep. 96.

Collusion synonymous

"Conspiracy" is synonymous with "collusion." Levine v. Klein, 120 N. Y. Supp. 196, 198, 65 Misc. Rep. 498; Miller v. Bayer, 68 N. W. 869, 870, 94 Wis. 125.

Agreement and proof thereof

A "conspiracy" is constituted by an agreement but is the result of the agreement rather than the agreement itself, being a partnership in criminal purposes. United States v. Kissel, 31 Sup. Ct. 124, 126, 218 U. S. 601, 54 L. Ed. 1168.

The existence of a "conspiracy" may be established by proof of acts and conduct, as well as by proof of an express agreement. Stevens v. State, 68 S. E. 874, 875, 8 Ga. App. 217.

To constitute a "conspiracy" the minds of the parties must meet in a definite line of action and a particular result. State v. Crawford, 104 N. W. 295, 296, 95 Minn. 467.

The gist of "conspiracy" is planning and agreeing to commit the offense prohibited. To make out a case of conspiracy it is necessary to prove that defendants agreed, either expressly or impliedly, to commit some one or more of the things prohibited, and in consummation thereof did some overt act. Wilcox v. United States, 103 S. W. 774, 776, 7 Ind. T. 86.

Assent of minds is involved in a "conspiracy." Such assent may be, and from the secrecy of the crime usually must be, inferred by the jury from proof of facts and circumstances which taken together apparently indicate that they are merely part of some complete whole. Butt v. State, 98 S. W. 723, 725, 81 Ark. 173, 118 Am. St. Rep. 42 (citing Underhill, Cr. Ev. § 491; Chapline v. State, 95 S. W. 477, 77 Ark. 444).

While in determining whether there was a criminal "conspiracy" the question is whether there was participation in a design, it is not necessary that defendants came together and actually agreed in terms to have the design and to pursue it by common means, but a conspiracy may, and in nearly all cases must, be proved by circumstantial evidence showing a common object and acts done in pursuance of a common object. Lawrence v. State, 63 Atl. 96, 98, 103 Md. 17 (quoting and adopting definition in Wright, Cr. Consp. with Am. Cases by Carson, 212).

To establish a "conspiracy" it is not necessary to prove an unlawful agreement by direct and positive evidence; but proof that two or more persons pursued by their acts the same unlawful object is sufficient, though no actual meeting among them to concert means is proved. Bundy v. State, 130 S. W. 522, 523, 95 Ark. 460.

"It is not necessary to constitute a 'conspiracy' that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme. It is sufficient if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." The preconcerted plan to do the unlawful act must, from the nature of the case, be usually established by inferences drawn from the relation of the parties, from the acts done, and from the results achieved. Thomas v. U. S., 156 Fed. 897, 910, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720 (quoting and adopting the definitions in U. S. v. Babcock, 3 Dill. 581, 585, Fed. Cas. No. 14,487).

"A 'conspiracy' may be proved by circumstantial evidence, and this is the usual mode of proving it, since it is not often that direct evidence can be had. The acts of different persons, who are shown to have known each other or to have been in communication with each other, directed toward the accomplishment of the same object, especially if by the same means, may be satisfactory proof of a conspiracy." State v. Darling (Mo.) 97 S. W. 592, 601 (quoting Scott v. State, 30 Ala. 503).

A "conspiracy" may be proved as other facts are proved by circumstantial evidence, and parties performing disconnected overt

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acts or contributing to the same result in the consummation of the same offense may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offense. One party may allure the victim into the den, leaving it to others to effect the robbery, and all will be held equally guilty as confederates. People v. Simmons, 109 N. Y. Supp. 190, 197, 125 App. Div. 234, 241 (quoting and adopting definition in Kelley v. People, 55 N. Y. 576, 14 Am. Rep. 342).

A "conspiracy" in criminal law is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose. To constitute a "conspiracy," it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly in words or in writing state what the unlawful scheme is to be and details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons in any manner or through any contrivance passively or tacitly come to a mutual understanding to accomplish the combination and unlawful design. To violate Rev. St. U. S. § 5208, making it unlawful for any officer of any national banking association to certify any check drawn on the association unless the person drawing the check has on deposit with the association an amount equal to the amount specified in the check, a plurality of guilty agents is not necessary, and the drawer of a check and an officer of the association may enter into a conspiracy to violate the section by causing a check of the drawer to be certified by the officer when the drawer did not have a sufficient amount on deposit to pay the same. Chadwick v. United States, 141 Fed. 225, 230, 236, 72 C. C. A. 343.

The mere meeting together of a few citizens previous to the arrest of a certain person is insufficient to show a "conspiracy" by them to effect the arrest of the person arrested, in the absence of evidence showing that there was a plot on the part of the persons meeting together to have any one imprisoned or that they in any way combined with the inspector of police to procure the arrest. O'Malley v. Whitaker, 43 South. 545, 118 La. 906.

The court charged that common design is the essence of a conspiracy, and, while it is necessary to establish a conspiracy to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose, "it is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be and the detail of the plans and means by which the unlawful combination was to be effective"; but it is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. Held, that the meaning of the words quoted, in connection with the remainder of the instruction, was that no explicit or formal agreement need be proved, if it be satisfactorily proved that two or more persons came to a mutual understanding to accomplish a common and unlawful design, and was, therefore, not objectionable. People v. Sacramento Butchers' Protective Ass'n, 107 Pac. 712, 723, 12 Cal. App. 471.

Same—Parties to agreement

It is a misuse of terms to say that the vote of a majority of the members of a representative body is the result of a conspiracy; nor can the term "conspiracy" be predicated of the deliberate vote of a governing body. Lawson v. Hewel, 50 Pac. 763, 765, 118 Cal. 613, 49 L. R. A. 400.

In a prosecution of several defendants for unlawfully making threats to arrest in order to extort money, the court instructed that, where a conspiracy is once established, every act and declaration of one conspirator pursuant to the original plan and with reference to the common object is the act of all the conspirators, and that testimony was admitted as to the declarations of persons claimed to be conspirators, and the jury should reject any declarations of others not made in accused's presence, unless they found that accused conspired with the others named "or either of them," and that the statements and acts not made or done in the presence of defendant were in fact made by a person so conspiring with him, and that a "conspiracy" was a combination between two or more by concert of action to accomplish some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means, and that if accused and K. and R., or either of them, so conspired together, the jury should consider the declarations of said K. and R., or either of them, made during the existence of the conspiracy in accused's absence, as bearing on accused's guilt. Held, that the instruction was not objectionable as making defendant liable for acts, etc., of K. and R. pursuant to a conspiracy between them alone, but required that a conspiracy be found to exist between accused and K. and R., or between accused and either of them, in order to make their declarations in his absence admissible against accused. State v. Browning, 133 N. W. 330, 335, 153 Iowa, 37.

Three persons cannot be guilty of a "conspiracy" to conceal a bankrupt's property from his trustee, where the trustee himself is one of the three alleged conspirators, since, if there was no concealment from him, there was no offense committed. Johnson v. United States, 158 Fed. 69, 73, 85 C. C. A. 399, 14 Ann. Cas. 153.

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Same—Time of entering into

To constitute a "conspiracy" to do an unlawful act it is not indispensable that the evidence show the existence of the conspiracy for any definite period of time prior to the commission of the act, but the combination to do the act may have arisen on the spur of the moment. Morris v. State, 41 South. 274, 281, 146 Ala. 66 (citing Tanner v. State, 9 South. 613, 92 Ala. 1; Williams v. State, 1 South. 179, 81 Ala. 4, 60 Am. Rep. 133; Martin v. State, 8 South. 23, 89 Ala. 115, 18 Am. St. Rep. 91; Gibson v. State, 8 South. 98, 89 Ala. 121, 18 Am. St. Rep. 96; Elmore v. State, 20 South. 323, 110 Ala. 63; Evans v. State, 19 South. 535, 109 Ala. 13; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Scott v. State, 30 Ala. 503; Buford v. State, 31 South. 714, 132 Ala. 6).

As infamous crime

See Infamous Crime.

As misdemeanor

See Misdemeanor.

Overt act or execution of purpose

"At common law the crime of 'conspiracy' was complete when a corrupt agreement was made, although not followed by any overt act, and no step had been taken in furtherance of the object of the conspiracy. The statute in this state has modified the common law in this respect by requiring that to constitute the crime of 'conspiracy' there must be both a corrupt agreement and an overt act to effect the object of the agreement, except where the 'conspiracy' is to commit certain felonies specified in section 171, Pen. Code." People v. Murray, 95 N. Y. Supp. 107, 109; People v. Summerfield, 96 N. Y. Supp. 502, 505, 48 Misc. Rep. 242 (citing People v. McKane, 38 N. E. 950, 143 N. Y. 455; People v. Flack, 26 N. E. 269, 125 N. Y. 332, 11 L. R. A. 807).

To constitute a "conspiracy" there must be a corrupt agreement between two or more individuals entered into with a criminal intent to do an unlawful act, which agreement, except one to commit a felony, must be followed by the doing of such unlawful acts. People ex rel. Burnham v. Flynn, 100 N. Y. Supp. 31, 33, 114 App. Div. 578.

The gravamen of the offense of "conspiracy" is the combination, complete at common law by the combination itself without any overt act in pursuance of it. Knight & Jillson Co. v. Miller, 87 N. E. 823, 827, 172 Ind. 27, 18 Ann. Cas. 1146 (citing People v. Sheldon, 34 N. E. 785, 139 N. Y. 251, 23 L. R. A. 221, 36 Am. St. Rep. 690).

An overt act is not necessary to the completion of the offense. Where the object of a "conspiracy" is to commit a crime or do an unlawful act, the means by which it is to be accomplished are immaterial, and the indictment need not allege the means, but need only show that the purpose of the conspiracy is unlawful in stating its object. Garland v. State, 75 Atl. 631, 632, 112 Md. 83, 21 Ann. Cas. 28.

The essence of the offense consists in the unlawful agreement and combination of the parties, and therefore it is completed whenever such combination is formed, although no act be done toward carrying the main design into effect. Lanasa v. State, 71 Atl. 1058, 1060, 109 Md. 602.

No overt act is necessary to constitute a conspiracy and render the offense complete, and it is not necessary that any act shall be done or that any one shall be aggrieved or defrauded in pursuance or in consequence of the conspiracy. Act April 29, 1874, providing that any person who shall by offer or promise of money or other thing of value, or by threats or intimidation, endeavor to influence a public officer in the discharge or nonperformance of any duty pertaining to his office, shall be guilty of corrupt solicitation, applies only to an attempt to bribe, and not to a conspiracy to bribe. Commonwealth v. Richardson, 79 Atl. 222, 223, 229 Pa. 609.

A conspiracy is formed when two or more persons in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a crime or unlawful purpose. United States v. Cole, 153 Fed. 801, 803.

Every "conspiracy" to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the "conspiracy" was intended to be effected, which may be perfectly indifferent, and makes no ingredient of the crime, the offense does not consist in doing the acts by which the mischief is effected, but in conspiring with a view to effect the intended mischief. State v. Bacon, 61 Atl. 653, 655, 27 R. I. 252 (citing State v. Buchanan [Md.] 5 Har. & J. 317, 9 Am. Dec. 534).

"The essence of a 'conspiracy,' so far as it justifies a civil action for damages, is the concert or combination to defraud or to cause either injury to person or property, which actually results in damage to the person injured or defrauded." A conspiracy to do unlawful acts, which are not done, does not furnish the basis for a cause of action, for the reason that a party against whom the "conspiracy" is formed can suffer no damages therefrom, but the actionable wrong consists in the doing of the acts pursuant to the "conspiracy," and it is immaterial how such acts are manifested, or how many distinct acts are done, if injury is inflicted and damages sustained by reason thereof. In the criminal law "conspiracy" is a distinct offense; but, unless the "conspiracy" be

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made to commit a felony upon the person of another or to commit arson or burglary, the offense is not complete unless some act be done to effect the object thereof. Green v. Davies, 91 N. Y. Supp. 470, 472, 100 App. Div. 359 (quoting and adopting definition in Place v. Minister, 65 N. Y. 89).

Where by prearrangement, or on the spur of the moment, two or more persons enter on a common enterprise or adventure, and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out each is guilty whether he did any overt act or not, on the theory that one who is present, encouraging, aiding, abetting or assisting the active perpetrator in the commission of the offense is a guilty participant, and, in the eye of the law is equally guilty with the one who does the act. Jones v. State, 57 South. 31, 32, 174 Ala. 53.

The offense being complete without any overt act, and such acts being alleged and proved only as tending to show the intention of the parties or in aggravation of the unlawful combination, a combination by direct or remote concert, to do an act which would be a crime if done by one party, constitutes the offense of "conspiracy." Where the concerted action of two or more results in an increased ability to accomplish an injurious purpose, either the means or the purpose will be rendered criminal so as to amount to a criminal conspiracy, though the means or the end were not criminal if performed by a single individual. If parties are not under contract, their associates may advise them to either quit or continue a particular service or not to return thereto except upon reasonable conditions; such conduct not amounting to a criminal "conspiracy." It is unlawful to induce employés not to return to work for a former employer for the sole purpose of extorting money from the employer in order to secure the return of the employés to prevent injury to his business, and the employer could sue in tort to recover the money so paid. Rev. St. 1899, § 2152 (Ann. St. 1906, p. 1384), provides that if two or more persons agree to conspire, etc., or to commit any offense, or to falsely or maliciously indict another or procure another's arrest, to falsely or maliciously move or maintain any suit, to cheat and defraud another by criminal means, to obtain money by false pretenses, commit any act injurious to the public health or morals, or to obstruct justice or the administration of the laws, shall be guilty of a misdemeanor; and section 2153 (Ann. St. 1906, p. 1385) provides that no agreement except to commit a felony upon the person or arson or burglary shall be deemed a conspiracy unless some act be done to effect the object. Held, in view of Rev. St. 1899, § 4152 (Ann. St. 1906, p. 2251), recognizing the existence of common-law offenses by limiting the punishments therefor and the history of the adoption of the statutes on conspiracy from the New York statutes that such statutes merely affirmed the common law in part, except that section 2153 required an overt act in certain cases, and did not embrace the whole subject-matter of the offense, at common law, or repeal the common law on the subject except in so far as they are repugnant thereto. State v. Dalton, 114 S. W. 1132, 1140, 134 Mo. App. 517.

Purpose of combination

To constitute a "conspiracy" the purpose to be effected by it must be unlawful, in its nature or in the means to be employed for its accomplishment. Atchison, T. & S. F. Ry. Co. v. Brown, 102 Pac. 459, 460, 80 Kan. 312, 23 L. R. A. (N. S.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346 (quoting 2 Words and Phrases, p. 1460).

"A 'conspiracy' is a confederation to do something unlawful, either as a means or an end." State v. Bacon, 61 Atl. 653, 654, 27 R. I. 252 (citing Whart. Cr. Law [9th Ed.] § 1337; 8 Cyc. "Conspiracy"; 2 Bish. New Cr. Law, §§ 171, 175; Commonwealth v. Waterman, 122 Mass. 57; 1 Bouv. Law Dict. 408; Russ. Cr. *674; State v. Buchanan [Md.] 5 Har. & J. 317, 9 Am. Dec. 534).

A "conspiracy" is a combination of two or more persons by concerted action to accomplish some criminal or unlawful purpose. Bauer v. State, 107 Pac. 525, 526, 3 Okl. Cr. 529.

"Conspiracy" is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose by criminal or unlawful means. J. F. Parkinson v. Building Trades Council of Santa Clara County, 98 Pac. 1027, 1032, 154 Cal. 581, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165.

"Conspiracy" has been defined as "a combination or agreement formed by two or more persons to effect an unlawful end, they acting under a common purpose to accomplish that end." United States v. Richards, 149 Fed. 443, 446.

The gravamen of the offense is the combination; and a combination may amount to a "conspiracy," although its object be to do an act which, if done by an individual, would not be unlawful. Franklin Union, No. 4, v. People, 77 N. E. 176, 184, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248.

A "conspiracy" is the combining of two or more persons for the purpose of doing something unlawful, oppressive, or immoral, as a means or an end. Woodruff v. Hughes, 58 S. E. 551, 553, 2 Ga. App. 361.

The term "unlawful," used with reference to acts of conspirators, does not include every act which violates the rights of a private individual, and for which the law affords a civil remedy, but is held to include those acts which, by reason of the combina-

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tion, have a harmful effect upon society and the public; and a combination may amount to a "conspiracy," although its unaccomplished object be to do that which, if actually done by an individual, would not amount to an indictable offense, and in that sense a "conspiracy" may consist of a combination to do what is merely "unlawful." Chicago, W. & V. Coal Co. v. People, 73 N. E. 770, 775, 214 Ill. 421.

A combination to accomplish an object not criminal, by means not criminal, may become an indictable conspiracy, where the public is injuriously involved, or the result would be either injurious or oppressive to individuals. State of New Jersey v. Bienstock, 73 Atl. 530, 535, 78 N. J. Law, 256.

Whether a combination is a conspiracy depends on the quality of the acts alleged to have been committed, and where those acts are not wrongful or illegal, no agreement to commit them is a wrongful conspiracy, unless the means used to accomplish the purpose are unlawful. Green v. Bennett (Tex.) 110 S. W. 108, 115.

An indictment lies for criminal conspiracy to use the automobile of another without his consent; a "conspiracy" being a combination of persons to accomplish a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means, amounting to a civil wrong. State v. Davis, 70 S. E. 811, 812, 88 S. C. 229, 34 L. R. A. (N. S.) 295.

"An actionable 'conspiracy' exists only where there is an unwarrantable combination of two or more persons doing an unlawful thing." Where an attachment was dismissed before judgment for insufficiency of the affidavit, the attachment defendant could sell, and the deputy attachment who levied the attachment and the keeper of the property pending the attachment could buy and sell to others, the attached property, and their act in joining in so doing before the rendition of judgment for plaintiff was not an actionable "conspiracy" for which plaintiff could recover damages resulting from her consequent inability to collect her judgment out of the property. Menner v. Slater, 83 Pac. 35, 148 Cal. 284.

A civil action for "conspiracy" is not maintainable unless either the purpose intended or the means by which it was to be accomplished is shown to be unlawful; and a declaration that plaintiff's partner conspired with others to compel him to withdraw from the firm and dispose of his interests in it to him, by procuring firm creditors to attach its stock in trade and petition for its sale forthwith, states no cause of action, since the creditors had the legal right to attach and petition for sale. O'Callaghan v. Cronan, 121 Mass. 114, 115.

Where theatrical managers combine to exclude a certain individual from their respective establishments, it constitutes an unlawful "conspiracy" authorizing a commitment of one of the parties to such agreement on proof of overt acts. There are many purposes for which persons engaged in the same general line of affairs may lawfully combine; but, when the purpose of the combination is of a character to affect prejudicially the interests of others, then acts which may be within lawful bounds when done by an individual may become criminal if done in pursuance of a common agreement by a number of individuals. It is as much "conspiracy" to agree to do unlawful acts, and, tested by the character of the contemplated act, the agreement becomes even of itself the unlawful means. People ex rel. Burnham v. Flynn, 99 N. Y. Supp. 198, 199, 49 Misc. Rep. 328.

Same—Boycott

A labor organization may legally employ a boycott to further the objects of its existence, though pecuniary loss results to the boycotted, unless the means used are illegal; and hence where trade unions did not violate any legal right of another in withdrawing their patronage from him, or in agreeing to withdraw their patronage from any one patronizing him, they could not be restrained by injunction from continuing the boycott, so long as the means employed to make it effective are not illegal. Lindsay & Co. v. Montana Federation of Labor, 96 Pac. 127, 130, 37 Mont. 264, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722 (quoting and adopting definition in And. Law Dict. 234, approved in Spies v. People, 12 N. E. 865, 17 N. E. 898, 122 Ill. 1, 3 Am. St. Rep. 320).

A combination of two labor organizations to compel the manufacturer of casks and barrels to discontinue the use of a machine for hooping them, to be effected by notifying its customers and other persons not to purchase machine-hooped barrels, and by inducing the members of all labor organizations throughout the country and persons in sympathy with them not to purchase provisions or commodities which are packed in machine-hooped barrels, is an unlawful "conspiracy" to deprive the manufacturer of its right to manage its business according to its own judgment. Hopkins v. Oxley Stave Co., 83 Fed. 912, 921, 28 C. C. A. 99.

Same—Interference with employment

A conspiracy is a combination of two or more persons by some concerted action to accomplish an unlawful purpose. It is unlawful to deprive a mechanic or workman of work by force, threats, or intimidation of any kind. Erdman v. Mitchell, 56 Atl. 327, 331, 207 Pa. 79, 63 L. R. A. 534, 99 Am. St. Rep. 783.

Neither at common law nor under statutes modifying the common-law doctrine is it

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lawful for workmen to combine to injure another's business by causing his employés to leave his services by intimidation, threats, molestation, or coercion, and such a combination constitutes an indictable conspiracy. Branson v. Industrial Workers of the World, 95 Pac. 354, 360, 30 Nev. 270.

A combination or agreement to picket a manufacturing plant to interfere with the free flow of labor to an employer, to whom labor is a necessity for the carrying on of business, which, if successful, will prevent him from obtaining the means of pursuing a lawful occupation, and the sole purpose of which is to compel him to comply with the demands of an antagonistic power, is a "conspiracy" against the property rights of the employer. George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n of United States and Canada, 66 Atl. 953, 957, 72 N. J. Eq. 653.

An indictment against five carpenters, alleging that they conspired to injure the business of a lumber dealer by going to his place of business and notifying him that he could not be considered in sympathy with organized labor unless he employed union men, or while he employed nonunion men, and by publishing in a local newspaper that the dealer had been declared unfair and so listed, that no union carpenter would work any material from his shop after a certain date, that such publication was for the purpose of inducing persons who would otherwise have purchased lumber from the dealer to refrain from doing so in fear of the union carpenters' ill will, and that he would be subject to delay and inconvenience by their refusal to work material purchased from him, and that it was their intent to destroy and injure his business, charged no criminal acts or means, and hence did not charge a criminal "conspiracy." State v. Van Pelt, 49 S. E. 177, 181, 189, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495.

Where a trade union voted for a strike, and acted in concert, all the members quitting work agreeing by peaceable means to induce employés not members of the union to become such and strike, but it being expressly voted that under no circumstances should any striker endeavor, by any violence or intimidation, to influence the acts of others, there was no "conspiracy." Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 75 N. E. 877, 878. 165 Ind. 421, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829.

The constant maintenance of pickets by strikers after repeated acts of violence, the use of abusive epithets, and the creation of an unfriendly atmosphere surrounding workmen by such pickets, constitutes a conspiracy for the purpose of willfully or maliciously injuring the business of the employer, within the meaning of Rev. St. Wis. 1898, § 4466a, which makes such a conspiracy a criminal offense, and is a violation of an injunction against such conspiracy. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 Fed. 155, 181, 182.

Same—Obstruction of justice

The statute of Iowa declaring that "if any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade, health, morals or police, or to the administration of public justice, or to commit any felony, they are guilty of a conspiracy," covers practically all the subjects of conspiracy at common law; and a conspiracy to obstruct the administration of justice, or to prevent witnesses from attending a trial by escorting them outside the state and maintaining them there, while a "criminal conspiracy" at common law is also a violation of the statute. State v. Hardin, 120 N. W. 470, 471, 144 Iowa, 264, 138 Am. St. Rep. 292.

Same—Restraint of trade

" 'Conspiracy' is a combination of two or more persons to do (a) something that is unlawful, oppressive or immoral; or (b) something that is not unlawful, oppressive or immoral by unlawful, oppressive or immoral means; (c) something that is unlawful, oppressive or immoral by unlawful, oppressive, or immoral means." A combination of mercantile dealers to compel another dealing in similar goods to sell at prices fixed by it, or upon his refusal so to do to prevent those of whom its members are purchasing customers from selling goods to him, is upon general legal principles contrary to public policy and void. Brown v. Jacobs Pharmacy Co., 41 S. E. 553, 554, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126 (quoting and adopting definitions in 1 Eddy, Combinations, §§ 171, 340).

A combination to destroy competition between dealers in a commodity is a "conspiracy" in law whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and giving effect to the purpose of the latter, whether of extortion or mischief. Total suppression of trade in the commodity is not necessary in order to render the combination one in restraint of trade. Where an association of retail druggists in a certain city and wholesale druggists formed a combination to maintain a maximum schedule of prices, and in pursuance of the plan refused to sell to plaintiff, a retailer who had refused to join the combination, and coerced and intimidated vendors of like commodities by means of threats to blacklist and boycott such vendors if they sold to plaintiff, whereby such vendors were deterred from selling to plaintiff, the parties to the combination

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were liable to plaintiff for resulting damages to his business. Klingel's Pharmacy v. Sharp & Dohme, 64 Atl. 1029, 1030, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184.

A combination to injure or destroy the trade, business, or occupation of another by threatening or producing injury to the trade, business, or occupation of those who have business relations with him is an unlawful "conspiracy," regardless of the name by which it is known, and may be restrained by injunction. Lohse Patent Door Co. v. Fuelle, 114 S. W. 997, 215 Mo. 421, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; Charles A. Olcott Planing Mill Co. v. Same (Mo.) 114 S. W. 1013.

Under anti-trust law of 1903 (Laws 1903, c. 94), defining a "trust" as a combination of capital by two or more persons to create restrictions in trade or the free pursuit of any business, and defining a "conspiracy" in restraint of trade as an agreement between two or more persons to refuse to buy from or sell to any other person any article of merchandise, a petition, which alleges that a manufacturer of farm implements and vehicles entered into a contract with a dealer therein whereby the manufacturer agreed to give the dealer the exclusive sale of its product, and whereby the dealer agreed not to buy or sell any other makes of like goods, and that the manufacturer and dealer carried the contract into execution to the injury of the people, charges a violation. State v. Racine Sattley Co. (Tex.) 134 S. W. 400, 402.

A "conspiracy," within the anti-trust act of 1903 (Laws 1903, c. 94), prohibiting conspiracies in restraint of trade, is a combination between two or more persons to do an unlawful act or to do a lawful thing in an unlawful manner. State v. Racine Sattley Co. (Tex.) 134 S. W. 400, 402.

A contract for the manufacture and sale of souvenir albums according to a schedule and order of arrangement of views of a city, which stipulates that the buyer shall have the exclusive control and resale of the albums in the city, is a "conspiracy," within the anti-trust law of 1903 (Laws 1903, p. 119, c. 94), and neither party can invoke the aid of the courts in enforcing it. Gust Feist Co. v. Albertype Co. (Tex.) 109 S. W. 1139, 1140.

Under the Anti-Trust Laws (Acts 28th Leg. c. 94), where plaintiff and defendant grain dealers made an agreement whereby plaintiff agreed not to buy grain from the growers thereof or from curbstone brokers or other persons not regularly engaged in the grain business, held, that the contract was void as contravening the statute against a "conspiracy in restraint of trade." Star Mill & Elevator Co. v. Ft. Worth Grain & Elevator Co. (Tex.) 146 S. W. 604.

Concurrence or combination of two or more persons or corporations must appear in order to constitute a "conspiracy" at common law, and under Anti-Trust Law (Acts 1903, p. 268, c. 140) §§ 1, 3, a salesman of an oil company, who, upon being directed to procure the countermand of orders given by a former customer to a competitor, agreed to and did give to the customer 100 gallons of oil to countermand the order to the competitor, thereby violated the anti-trust law, making it an offense for any person, as agent, etc., to knowingly carry out any of the purposes of a conspiracy against trade. Standard Oil Co. v. State, 100 S. W. 705, 716, 117 Tenn. 618, 10 L. R. A. (N. S.) 1015.

Cr. Code (Hurd's Rev. St. 1903, c. 38) § 46, declaring that if two or more persons conspire together to do any illegal act injurious to the public trade, they shall be guilty of "conspiracy," is not repealed by Anti-Trust Act 1891, § 1 (Hurd's Rev. St. 1903, c. 38, § 269a), declaring that, if any corporation shall become a member of a pool, trust, or combination to fix the price of any commodity, it shall be deemed guilty of conspiracy. Neither does such act abrogate the common law on the subject of conspiracies to regulate and fix prices. Chicago, W. & V. Coal Co. v. People, 73 N. E. 770, 777, 214 Ill. 421.

When the ingredients constituting the "criminal conspiracy" at common law and the ingredients constituting the "conspiracy to defraud" under anti-trust acts are examined, it is apparent that the offenses are not identical. The latter is doing business while a member of an illegal cominbation, while the former is a conspiracy to do an unlawful act, or a conspiracy to do a lawful act in an unlawful manner. The remedies against the common-law conspiracy were indictment for the criminal conspiracy and an action on the case for damages by an aggrieved party, or quo warranto by the state against an offending corporation. Hammond Packing Co. v. State, 100 S. W. 407, 410, 81 Ark. 519, 126 Am. St. Rep. 1047 (citing Eddy, Combinations, §§ 335, 363, 371; Beach, Monopolies, §§ 77–87).

Same—Sherman anti-trust law

The word "conspiracy," as used in the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, §§ 1, 2) has substantially the same meaning as the word "contract." United States v. Kissel, 173 Fed. 823, 827.

To warrant a conviction on an indictment charging a number of defendants with a "conspiracy" among themselves and with others in violation of a federal anti-trust act, it must be found that at least two of them were parties to such a conspiracy. United States v. American Naval Stores Co., 172 Fed. 455, 460.

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"Unlike combination, 'conspiracy' is a term of art. In the anti-trust law, it is to be interpreted independently of the preceding words. United States v. Debs, 64 Fed. 747. The elements of a 'conspiracy' are that it must depend on the concerted action of two or more persons to accomplish an unlawful purpose by any means or a lawful result by unlawful means." United States v. MacAndrews & Forbes Co., 149 Fed. 823, 831 (citing Pettibone v. United States, 13 Sup. Ct. 542, 148 U. S. 197, 37 L. Ed. 419).

Sherman Anti-Trust Law (Act July 2, 1890, c. 647) § 3, declares that every contract, combination, and form of trust or otherwise, and conspiracy in restraint of trade or commerce, in any territory of the United States, or in restraint of trade or commerce between any such territory and another, etc., are declared illegal, and that every person who shall make any such contract or engage in any such "combination or conspiracy" shall be deemed guilty of a misdemeanor. Held, that the words "combination or conspiracy," as so used, were synonymous, and hence an indictment alleging that defendants entered into a "combination or conspiracy" in restraint of trade was not duplicitous, as alleging two distinct offenses. Tribolet v. United States, 95 Pac. 85, 87, 11 Ariz. 436, 16 L. R. A. (N. S.) 223.

Congress, by Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, having employed the words "conspiracy" and "conspire" without words of limitation in creating offenses affecting interstate commerce, did not provide, as in the general conspiracy statute (Rev. St. § 5440), that overt acts shall be necessary to complete the offense; and hence counts in an indictment for conspiracy to monopolize interstate trade and commerce in violation of the anti-trust law were not demurrable for failure to allege overt acts since the unlawful agreement, and not the overt acts, constitutes the crime of conspiracy at common law. United States v. Patten, 187 Fed. 664, 666.

Same—To commit felony

A "conspiracy to commit a felony" is a step toward the consummation, but it is only a misdemeanor. Under Cr. Code Prac. §§ 262–265, providing that, if the proof show the defendant to be guilty of a higher degree of the offense than is charged in the indictment, the jury shall find him guilty of the degree charged in the indictment, a defendant, indicted for conspiracy to defraud, that offense being a misdemeanor, was properly convicted of the offense of conspiracy to defraud, where the facts alleged show that the acts done pursuant to the conspiracy amounted to a felony. Wait v. Commonwealth (Ky.) 69 S. W. 697, 699 (quoting and adopting 1 Bish. New Cr. Law, § 812).

A complaint which charges that defendants "entered into collusion with defendant K. to cause a criminal operation to be performed upon the body of plaintiff, and have the said K. perform an abortion upon her body," clearly charged defendants with entering into an unlawful combination to injure plaintiff by performing upon her an abortion. "Collusion" is synonymous with "conspiracy." Miller v. Bayer, 68 N. W. 869, 870, 94 Wis. 125 (citing Stand. Dict.).

Though, under Code, § 4759, punishing one attempting to produce the miscarriage of any pregnant woman, a female on whom an abortion is attempted cannot be an accessory or accomplice, she may, under section 5059, declaring that where two or more conspire to commit a felony they were guilty of "conspiracy," conspire with others to perform the act. State v. Crofford, 110 N. W. 921, 922, 133 Iowa, 478.

An indictment charging two or more persons with conspiracy to procure the commitment of adultery by a married woman, and that in the execution of such purpose they did attempt to procure, and did procure, certain men to the grand inquest unknown, to commit such crime, and that the men attempted so to do, sufficiently charges the crime of "conspiracy." State v. Reiners, 76 Atl. 330, 80 N. J. Law, 196.

Under Code, § 5059, providing that if two or more persons conspire to do an illegal act injurious to the public morals, or to commit any felony, and section 5093, defining a felony as a public offense which may be punished by imprisonment in the penitentiary, there may be a "conspiracy" to commit adultery. State v. Clemenson, 99 N. W. 139, 123 Iowa, 524.

"A 'conspiracy,' as the word indicates, is an unlawful agreement, and the members of the conspiracy are entitled to but scant protection under the law of necessity while they are carrying out their unlawful engagements." Where two or more combine to kill another, and, in pursuance of the conspiracy, seek him out and kill him, or provoke an assault and then take his life, neither of the conspirators can rely upon the plea of self-defense; but if, though a person was killed pursuant to a conspiracy, and while it existed, no one of the conspirators sought him out for the purpose of killing him, or provoked the difficulty resulting in his death, or first attacked him, then any one of them could avail himself of the plea of self-defense. Gambrell v. Commonwealth, 113 S. W. 476, 479, 130 Ky. 513.

Same—To defraud

A "conspiracy to defraud" on the part of two or more persons means a common purpose supported by a concerted action to defraud, that each has the intent to do it, that it is common to each of them, and that each understands that the other has that purpose. Ballantine v. Cummings, 70 Atl. 546, 549, 220 Pa. 621.

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At common law it was a crime to conspire to cheat or defraud, even without the use of false tokens, and under Code, § 5059, declaring that if two or more persons conspire to injure the person, business, property, or rights of the property of another, or to commit any felony, they are guilty of "conspiracy," and shall be imprisoned, etc., a conspiracy to injure the property rights of another is punishable, though the overt acts were committed in another state. State v. Loser, 104 N. W. 337, 338, 132 Iowa, 419.

Same—To defraud or commit offense against United States

The federal statute which makes it a misdemeanor to "conspire either to commit any offense against the United States, or to defraud the United States," must be construed as standing alone, and covers all conspiracies to commit an act which is made a criminal offense by the laws of the United States. United States v. Thomas, 145 Fed. 74, 80.

To constitute a "conspiracy" to defraud the United States, within Rev. St. § 5440, the object of the combination must be to accomplish, by concerted action, a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. United States v. Keitel, 157 Fed. 396, 403 (citing Pettibone v. United States, 13 Sup. Ct. 542, 148 U. S. 197, 37 L. Ed. 419).

A conspiracy to defraud the United States by corruptly administering an act of Congress, contrary to the true intent and policy thereof, constitutes an indictable offense under Rev. St. § 5440, prohibiting a "conspiracy to defraud the United States" in any manner or for any purpose. United States v. Moore, 173 Fed. 122, 125, 128.

The term "defraud," as used in Rev. St. § 5440, prohibiting a conspiracy to defraud the United States in any manner or for any purpose, should not be construed as limited to frauds respecting property rights, but includes the deprivation of any right by deception or artifice; the act being intended to secure the wholesome administration of the laws and affairs of the United States in the interests of the government. Id.

Where a conspiracy is formed to defraud the United States in any manner, in violation of Rev. St. § 5440, the offense is complete when the conspiracy is formed, and the conspirators are subject to prosecution whenever one or more of them has done any act in the furtherance of the unlawful scheme devised and agreed on; it being, therefore, sufficient that the conspiracy, when formed, was attended with corrupt motives and was for a corrupt purpose. Id.

The elements of a "criminal conspiracy" under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), are: (1) An object to be accomplished which must be either the commission of an offense against the United States or to defraud the United States; (2) a plan or scheme embodying means to accomplish the object; (3) an agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means; and (4) an overt act by one or more of the conspirators to effect the object of the conspiracy. United States v. Munday, 186 Fed. 375, 377.

Under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), it is sufficient that it be the conspirator's purpose to commit a willful fraud on the law, or some statutory requirement pertinent to be observed, in view of the present controlling conditions; and it is not necessary that there should be a "conspiracy" to do an act that is an offense or crime by some statute of the general government, or to deprive the United States of its property or some property right. United States v. Raley, 173 Fed. 159, 162.

To bring a case within Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), the conspirator must himself do the act or authorize it to be done, and a mere failure on his part to prevent another from doing it is not sufficient. United States v. McClarty, 191 Fed. 518, 520.

An indictment charging the president of a national bank with conspiring with others to commit an offense against the United States by making a false entry in the books of the bank showing its balance in the hands of its reserve bank to be larger that it was in fact, with intent to deceive any agent who might thereafter be appointed by the Comptroller of the Currency to examine the affairs of the bank, does not state an offense under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), where the overt act charged to have been committed by defendant consisted in his concealing from the bookkeeper, who actually made the alleged false entries, but who is not charged with being a party to the conspiracy, the issuance of certain drafts which should have been credited to the account of said reserve bank. Id.

To constitute the offense of "conspiracy to defraud the United States," it is not essential that the conspiracy should have been to commit an act in violation of a criminal statute. The statute is not limited in its application to conspiracies to deprive the United States of money or property, but should be broadly construed to protect the government in its rights, privileges, operations, and functions against all fraudulent operations. An indictment averring the facts, sufficiently showing that defendants conspired to deceive inspectors of

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the United States in the exercise of their official functions by fraudulently inducing them to approve life preservers which did not in fact comply with the requirements of the federal law, and that they committed overt acts pursuant to such conspiracy, is good. United States v. Stone, 135 Fed. 392, 397, 398.

A "conspiracy" to violate Rev. St. § 5209, by causing false entries to be made in the books of a national bank by an officer or agent thereof, for the purpose of defrauding the bank or others or deceiving an agent appointed to examine the affairs of the bank, is one to commit an offense against the United States, within the meaning of section 5440. Scott v. United States, 130 Fed. 429, 432, 64 C. C. A. 631.

The fraud contemplated by the statute for the punishment of "conspiracy to defraud" the United States, may be against the rights of the government, as well as against its property. The government is not defrauded by publishing its agricultural statistics to individuals before official publication, there being no law requiring secrecy; but the government is defrauded by a conspiracy to cause the publication of incorrect monthly agricultural reports. Haas v. Henkel, 166 Fed. 622, 626.

Assuming that the common law as it existed in Maryland when the District of Columbia was ceded exists in the District, and that it makes misconduct in office a criminal offense, it is not an offense against the United States as a distinct sovereign in such sense that an indictment will lie under Rev. St. § 5440, for "conspiracy" to commit such offense in the District, especially against a person who is not a resident thereof. United States v. Haas, 167 Fed. 211, 213.

In Rev. St. § 5451, which makes it a criminal offense to give or offer bribes, etc., to induce any officer of, or person acting for or on behalf of, the United States in any official function to do or omit to do any act in violation of his lawful duty, the phrase "lawful duty" is not restricted to a duty imposed by statute, but is broad enough to cover a duty imposed by a lawful superior; and an indictment charging a conspiracy to induce an assistant statistician in the Department of Agriculture to furnish to the accused advance news of crop conditions, and to cause to be published false reports as to such conditions in violation of the rules of the department, to aid defendants in market speculations, by promising such employé a percentage of the profits of such speculations, charges a "conspiracy to commit an offense against the United States" under Rev. St. § 5440. United States v. Haas. 163 Fed. 908, 909.

A "conspiracy" to induce entrymen who have made application under Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348, to agree to convey after patent, is not one to defraud the United States "in any manner or for any purpose," within the meaning of Rev. St. U. S. § 5440. United States v. Biggs, 29 Sup. Ct. 181, 185, 211 U. S. 507, 53 L. Ed. 305; Same v. Freeman, 29 Sup. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; Same v. Sullenberger, 29 Sup. Ct. 186, 211 U. S. 522, 53 L. Ed. 311; United States v. Biggs, 157 Fed. 264.

An indictment which charges that defendants conspired to hire persons to make entry and purchase of public lands of the United States under the coal land act, with money furnished by defendants, such lands to be conveyed by the entrymen to a corporation, for the purpose of enabling the corporation to acquire a larger quantity of such lands than it could lawfully purchase under the act, does not charge a "conspiracy to defraud the United States" within Rev. St. § 5440, where it is not averred that such entrymen were not legally qualified to make the purchases they did, nor that they severally acquired more land than the acreage limited by the act. United States v. Keitel, 157 Fed. 396, 401.

Under the coal land statute (Rev. St. § 2350), which expressly provides that only one entry of coal lands shall be allowed to the same person or association of persons, and that no association of persons, any member of which shall have taken the benefit of the statute, either as an individual or as a member of any other association, shall enter or hold any other lands under its provisions, any agreement, the purpose of which is to evade such provisions and to secure indirectly lands which could not be secured directly thereunder, constitutes a "conspiracy to defraud the United States," within the meaning of Rev. St. § 5440. United States v. Lonabaugh, 158 Fed. 314, 315.

In order to establish a "conspiracy" to commit an offense against the United States in violation of 1 Rev. St. Supp. (2d Ed.) p. 264, c. 8, there must not only be an agreement or combination to commit a crime or unlawful purpose, but also an overt act apart from the conspiracy, done to carry into effect the object of the original combination. United States v. Cole, 153 Fed. 801, 803; United States v. Brace, 149 Fed. 869, 874, 877; United States v. Black, 160 Fed. 431, 434, 87 C. C. A. 383; Hyde v. United States, 32 Sup. Ct. 793, 794, 225 U. S. 347, 56 L. Ed. 1114.

An indictment under section 5440, Rev. St., for "conspiracy to defraud the United States" by means of a false invoice, is sufficient which sets forth such a conspiracy, notwithstanding that it does not set forth

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the consummation of the fraud nor include an allegation that the fraud could have been accomplished, if not detected. United States v. Stamatopoulos, 164 Fed. 524, 525.

CONSPIRACY AGAINST TRADE

Where neither party to the contract was engaged in buying or selling automobiles or any other article of merchandise, a contract whereby plaintiff gave defendant the exclusive right to sell certain machines and supplies in a designated locality for a given length of time is not in violation of Rev. Civ. St. 1911, art. 7798, defining as "conspiracies against trade" agreements or understandings whereby any two or more persons engaged in buying or selling any article of merchandise refuse to buy or sell from any other persons, or threaten to or boycott any other persons. Nickels v. Prewitt Auto Co. (Tex.) 149 S. W. 1094, 1095.

CONSPIRE

One "conspires" where he enters into "a combination or agreement formed by two or more persons to effect an unlawful end, they acting under a common purpose to accomplish that end." United States v. Richards, 149 Fed. 443, 446.

Evidence. in an action to recover money lost in gambling, considered, and held to warrant a finding by the jury that defendants had "conspired" to obtain plaintiff's money under the guise of a game of poker. Bynum v. Brady, 100 S. W. 66, 67, 82 Ark. 603.

CONSTABLE

A "constable," as a police officer, stands on the same footing as a sheriff; and where he has a warrant to make an arrest the law invests him with the power to do all that is necessary to make such arrest. State v. Franklin (S. C.) 60 S. E. 955.

A "constable" is a public officer, who is required by law to give bond conditioned on the faithful performance of his official duties. McCain v. Bonner, 51 S. E. 36, 37, 122 Ga. 842 (citing Jefferson v. Hartley, 9 S. E. 174, 81 Ga. 716).

Under Rev. St. §§ 6694, 6699, making it the duty of a constable to apprehend and bring to justice all felons and disturbers and violators of the criminal law of the state, and to suppress all riots coming to his knowledge, and generally keep the peace and to pursue after and arrest fugitives from justice in any county in the state. A "constable" is by virtue of his office a conservator of the peace, and whenever he has knowledge or specific information that a felony has been committed at a particular locality within his jurisdiction, it is clearly his duty to take prompt measures for the arrest and apprehension of the perpetrators of such crime. Somerset Bank v. Edmund, 81 N. E. 641, 643, 76 Ohio St. 396, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726.

CONSTANT

CONSTANT FLOW

A right to use water for irrigation being limited in time and volume to the extent of the needs of the person in whose favor the right is established for the purpose named, a decree, allowing a "constant flow" of one inch per acre, only entitled the owner to a constant flow of that amount when required to irrigate the land to which it was to be applied. Wolff v. Pomponia, 120 Pac. 142, 144, 52 Colo. 109.

CONSTANT POTENTIAL

The term "constant potential," in the specification of a patent for a regulated system for electric circuits, indicates that, whatever might be the fluctuations of current or variations in the rate of flow, the voltage or pressure or potential is constant. Electric Storage B. Co. v. Gould Storage B. Co., 158 Fed. 610, 616, 85 C. C. A. 432.

CONSTANT PRESSURE ENGINE

A "constant pressure engine" is one in which the cylinder pressure remains the same during the outward travel of the piston while the volume of flame increases. The pressure is applied continuously. This mode of operation is also called "slow combustion" and "nonexplosion." Columbia Motor Car Co. v. C. A. Duerr & Co., 184 Fed. 893, 904, 107 C. C. A. 215.

CONSTANT VOLUME ENGINE

A "constant volume engine" operates in a different manner from a constant pressure engine. The volume during ignition theoretically remains constant; the pressure increases. The action is spasmodic and is kept in motion by a series of explosions. Columbia Motor Car Co. v. C. A. Duerr & Co., 184 Fed. 893, 904, 107 C. C. A. 215.

CONSTANT WATCH

The words "constant watch," as used in a rider attached to an insurance policy: "Steam pump, with sufficient hose to cover building. Constant watch"—constitute a representation, and not a warranty, under Rev. St. Me. c. 49, § 20, providing that statements of description in a policy of insurance are representations, and that a change in the property insured, or in its use or condition, or a breach of any of the terms of a policy by the insured, does not affect the policy, unless they materially increase the risk, and the temporary absence of a watchman without knowledge of the insured will not prevent a recovery. King Brick Mfg. Co. v. Phœnix Ins. Co., 41 N. E. 277, 279, 164 Mass. 291, 292, 293, 294.

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CONSTANTLY CONFINED

It cannot be said that an assured is not "confined constantly" to the house during an illness characterized by recurring periods of severity, though he may occasionally step into his yard, or visit his physician, or make other short trips; he being at all times unable to resume the ordinary duties or pleasures of life. Breil v. Claus Groth Plattdutschen Vereen, 120 N. W. 905, 84 Neb. 155, 23 L. R. A. (N. S.) 359, 18 Ann. Cas. 1110.

CONSTANTLY RECURRING

See Continuing Nuisance.

By a "constantly recurring grievance" is not meant a constant or unceasing nuisance or injury, but a nuisance which occurs so often, and is so necessarily an incident of the use of property complained of, that it can be fairly said to be continuous, though not constant or unceasing. Central of Georgia R. Co. v. Americus Constr. Co., 65 S. E. 855, 858, 133 Ga. 392 (quoting Wood's L. Nuis. § 772; Farley v. Gate City Gaslight Co., 31 S. E. 193, 105 Ga. 328, 337, 338, 29 Cyc. p. 1222 et seq.).

CONSTITUENTS

Under a claim in a patent reading "as a new article of manufacture, a compound of the crystallizable blood pressure raising constituents of the suprarenal glands substantially free from noncrystallizable constituents thereof, which is soluble in water, and which when in a water solution is practically inert to the oxygen of the air," etc., the word "constituent" includes those elements of a gland from which it is separated. Parke-Davis & Co. v. H. K. Mulford Co., 189 Fed. 95, 110 (quoting and adopting the definition in Enc. Brit. [11th Ed.] sub. tit. Chemistry).

CONSTITUTED BY THE ACT

In Code Cr. Proc. § 444, providing that, on a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by the act and warranted by the evidence, "constituted by the act" means that the assault must form a component part of the act, of the wound indisputably fatal. People v. Schiavi, 89 N. Y. Supp. 564, 568, 96 App. Div. 479.

CONSTITUTION

See Controversy Arising Under Federal Constitution; Controversy Concerning Construction of Constitution; Founded on Constitution; Written Constitution.

The word "constitution" signifies something constituted, and is generally used to designate the written evidence of something which can have only a legal existence. Clark v. Brown (Tex.) 108 S. W. 421, 437.

As law

See Law.

Of association or corporation

A "constitution" adopted by a voluntary association constitutes a contract between its members which the courts will enforce. Kalbitzer v. Goodhue, 44 S. E. 264, 266, 52 W. Va. 435.

"Charters" are not created by the act of the corporation or association, but are granted by the sovereign power of the state. A "constitution" of a voluntary association or a corporation is nothing more than a by-law under an inappropriate name. A provision in the "constitution" of a beneficial association, providing that any member in arrears for four weeks' dues shall not draw any benefit until one month from the date of paying the deficiency, was a mere by-law of the association, and void for unreasonableness. Burns v. Manhattan Brass Mut. Aid Soc., 92 N. Y. Supp. 846, 847, 102 App. Div. 467 (quoting and adopting definition in Supreme Lodge, Knights of Pythias, v. Knight, 20 N. E. 479, 117 Ind. 489, 3 L. R. A. 409).

Of state or United States

"The 'constitution' is the supreme and paramount law." Rice v. Palmer, 96 S. W. 396, 398, 78 Ark. 432 (quoting and adopting definition in Collier v. Frierson, 24 Ala. 108).

"A 'constitution' is a Magna Charta of the people's rights, the fundamental law of the land, intended, not for short periods of time, but for all time." Henry v. State, 39 South. 856, 893, 88 Miss. 843.

The "constitution" of the United States is the supreme law of the land, and the judges in every state are bound thereby, anything in the constitution or laws of their own state to the contrary notwithstanding. Atkinson v. Woodmansee, 74 Pac. 640, 641, 68 Kan. 71, 64 L. R. A. 325.

A "constitution" is the written instrument by which the fundamental powers of the government are established and limited, and by which those powers are distributed among the several departments for their exercise for the benefit of the body politic. Frantz v. Autry, 91 Pac. 193, 202, 18 Okl. 561; Walck v. Murray, 91 Pac. 238, 239, 18 Okl. 712; McCollister v. Same, 91 Pac. 239; 18 Okl. 710; Board of Com'rs of Greer County v. Constitutional Delegate Convention of Oklahoma Territory, 91 P. 239, 18 Okl. 707; Haines v. Murray, 91 Pac. 240, 18 Okl. 711.

The "constitution" is the paramount law, to which all other laws must yield, and is the measure of the rights and powers of the legislative department. Merwin v. Fussell, 124 S. W. 1021, 1022, 93 Ark. 336.

A "constitution," for the most part, may be construed as a great compact or agree-

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ment, entered into by all the people of the state, for and on behalf of themselves and those who shall come after them, until such time as it is abolished, changed, or modified. State v. Harden, 58 S. E. 715–718, 62 W. Va. 313.

In American constitutional law, the word "constitution" is used in a restrictive sense, as implying the instrument agreed on by the people of the Union or any one of the states as the absolute rule of action and decision for all departments and officers of the government in respect to all of the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be altogether void. Cline v. State, 36 S. W. 1099, 1107, 36 Tex. Cr. R. 320, 61 Am. St. Rep. 850 (quoting and adopting Cooley Const. Lim. p. 5).

A "constitution" is the paramount law of a state, designed to separate the powers of government, defining their extent and limiting their exercise by the several departments, as well as to secure and protect private rights, and no other instrument is of equal significance. It has been properly defined to be a legislative act of the people themselves in their sovereign capacity. Every positive delegation of power therein to one officer or department implies a negation of its exercise by any other officer, department, or person. Ex parte Corliss, 114 N. W. 962, 969, 16 N. D. 470.

The term "constitution" is difficult to define. "It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of laws, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made. It is but the form and framework of the political government, and necessarily based upon the preexisting condition of laws, rights, habits, and modes of thought. There is nothing primitive in it. It is all derived from a known source. It presupposes an organized society, laws, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachment of tyranny." State ex rel. Dillon v. Braxton County Court, 55 S. E. 382, 384, 60 W. Va. 339.

The "constitution" is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general, and as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. While the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. That which is implied is as much a part of the "constitution" as that which is expressed. State of South Carolina v. United States, 26 Sup. Ct. 110, 111, 199 U. S. 437, 50 L. Ed. 261, 4 Ann. Cas. 737.

A petition under the initiative amendment to the Constitution adopted in 1908, and the initiative and referendum act (Acts 1909, p. 554), to amend Const. art. 4, § 11 (Ann. St. 1906, p. 180), fixing the senatorial districts until changed as provided by the Constitution, by creating senatorial districts which shall continue until the federal census of 1920, when the districts shall by a law enacted by the people, or by the Legislature, be adjusted on the basis of that census, is a petition for a legislative enactment of a temporary character, and not a petition for a constitutional amendment; a "constitution" being a fundamental law as distinguished from a temporary act, and implying an instrument of a permanent nature. State ex rel. Halliburton v. Roach, 130 S. W. 689, 694, 230 Mo. 408, 139 Am. St. Rep. 639.

CONSTITUTIONAL CONVENTION

A "constitutional convention" is created by the direct action of the people, and in the discharge of its duties, powers, and obligations it performs a most important act of popular sovereignty. It is vested with the power and charged with the duty of forming a constitution and state government, and in the performance of such duty it exercises legislative functions. It has plenary power, subject to the limitations and restrictions that the constitution shall be republican in form and that it shall not be repugnant to the constitution of the United States and the principles of the Declaration of Independence, etc. Frantz v. Autry, 91 Pac. 193, 202, 18 Okl. 561.

"A 'constitutional convention' is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its functions are not to execute or interpret laws, but to make them. 'That the consent of the general body of electors may be necessary to give effect to the ordinances of the convention no more changes their legislative character than the requirement of the Governor's consent does the nature of the action of the senate and assembly' (quoting proceedings of New York Constitutional Convention 1894, pp. 79, 80). A state convention is really nothing but a law made directly by the people voting at the polls on a draft submitted to them. People

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of a state, when they so vote, act as a primary and constituent assembly, just as if they were all summoned to meet in one place like the folkmotes of our Teutonic forefathers; it is only their numbers that prevent them from so meeting at one place and oblige the vote to be taken in a variety of polling places. Hence the enactment of a constitution is an exercise of direct popular sovereignty, to which we find few parallels in modern Europe, though it was familiar enough to the republic of antiquity, and has lasted until now in some of the cantons of Switzerland." Smith v. State ex rel. Hepburn, 113 Pac. 932, 935, 28 Okl. 235 (quoting 1 Bryce, Am. Com. 436).

CONSTITUTIONAL HOMESTEAD

A "constitutional homestead" can only be obtained in a regular proceeding instituted in the court of ordinary after due notice to creditors, and the order of the ordinary approving the setting apart of the homestead is a judgment of a court of competent jurisdiction and cannot be collaterally attacked. While in such a proceeding the court may allow an amendment even after judgment approving the homestead, there is no provision of law for amending a claim of exemption asserted by filing a schedule of property for exemption under Civ. Code 1895, § 2866 et seq., authorizing the setting apart of what is commonly known as a "short or pony homestead." Stinson v. Hirsch Bros. & Co., 53 S. E. 1011, 1012, 125 Ga. 149.

CONSTITUTIONAL LAW

See Unconstitutional.

CONSTITUTIONAL LIBERTY

"'Constitutional liberty' means the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. The restrictions upon conduct which may be imposed in the exercise of police power include everything that may be necessary in the interest of the public health, the public safety, or the public morals, and they include nothing more." O'Keeffe v. Somerville, 76 N. E. 457, 459, 190 Mass. 110, 112 Am. St. Rep. 316, 5 Ann. Cas. 684.

CONSTITUTIONAL OFFICER

The county judge is a "constitutional officer." Rush v. Denhardt, 127 S. W. 785, 786, 138 Ky. 238, Ann. Cas. 1912A, 1199.

CONSTITUTIONAL RIGHT

A "constitutional right" differs from a right conferred by the common law or by statute only in the fact that it is guarded from any attack or interference by the Legislature, or any other governmental agent, and is not entitled by its nature to protection by injunction to a greater extent than any other right. Menge v. Morris & E. R. Co., 67 Atl. 1028, 1030, 73 N. J. Eq. 177.

CONSTRUCT—CONSTRUCTION

See Duty to Construct; Further Construction; New Construction; Original Construction; Properly Constructed.

Construction of instruments, see Construe—Construction.

See, also, Reconstruct—Reconstruction.

The term "construction," with reference to a building, means the putting together of the materials used therein. Scharff v. Southern Illinois Const. Co., 92 S. W. 126, 130, 115 Mo. App. 157.

Claims growing out of a delay caused by the federal government, as well as those arising from a change in specifications, were included in a release of all claims "for or by reason of or on account of the 'construction' of a battleship 'under contract." United States v. Wm. Cramp & Sons, Ship & Engine Bldg. Co., 27 Sup. Ct. 676, 678, 206 U. S. 118, 51 L. Ed. 983.

The word "construction" in an ordinance under San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), and previous charter provisions, authorizing the acquisition, construction, or completion of public utilities, means the original construction of the utilities proposed to completion. Platt v. City and County of San Francisco, 110 Pac. 304, 309, 158 Cal. 74.

The word "construction," in Rev. Codes, § 2315, subd. 1, authorizing municipalities to issue bonds for the "construction" and maintenance of waterworks, does not limit the power given by section 2238, subd. 36, empowering municipalities to acquire, by purchase or otherwise, waterworks or plants and illuminating plants, and to supply the municipality and the inhabitants thereof with water and light; and the very fact that a municipality is authorized to provide for the "construction" and maintenance of necessary waterworks implies authority to purchase works already constructed and to make the same all, or a part of, a general system of waterworks, and a municipality may issue bonds for the purpose of waterworks already constructed. Ostrander v. City of Salmon, 117 Pac. 692, 695, 20 Idaho, 153.

The phrase "the immediate doing of the work of construction," in a policy indemnifying a telephone company against damages to any person not employed by assured from the operation of the telephone plant, and stipulating that the policy shall not cover losses from liability for injuries suffered otherwise than during the immediate doing of the work of construction, includes an accident resulting in the death of a person not employed by the telephone company while employés are

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trimming a tree while putting up a line. Camden & Atlantic Tel. Co. v. United States Casualty Co., 75 Atl. 1077, 227 Pa. 242.

As enlargement

Laws 1883, p. 261, § 38, as amended by Laws 1885, p. 324, provides that persons owning or constructing a ditch across any highway shall keep the highway open for safe travel by constructing bridges over such ditch, to be thereafter maintained by the county, and that all bridges which shall be of greater length than 20 feet shall be constructed and maintained by the owners of the ditch. Held, that by the "construction" of a ditch provided for in the statute is meant not only the original construction, but also any enlargement, and where the necessity for the building of a bridge in excess of 20 feet was created by the enlargement of a canal after the passage of the statute, the canal company was liable for its construction and maintenance, even though the ditch was first built before the passage of the statute and the road crossing it was built after the original construction. People v. Farmers' High Line Canal & Reservoir Co., 123 Pac. 645, 647, 52 Colo. 626.

As extension

As used in Code 1907, § 1421, authorizing elections to decide the bond issues for constructing sewers, etc., but that no second election should be held within a certain time, the word "construction" would include "extension"; so that, there having been an issue voted for the "construction" of a sewer, there could not be another issue for its "extension" within the time limited. City of Graymount v. Stott, 49 South. 683, 684, 160 Ala. 570.

The term "construction of waterworks," on ballots used at an election for the submission to the qualified electors of a city of the question of incurring indebtedness for the construction of public utilities under Const. art. 10, § 27, is sufficiently comprehensive to include such work as re-equipping and making extensions of an existing waterworks system, and the voters are sufficiently informed to render an election valid. State ex rel. Edwards v. Millar, 96 Pac. 747, 751, 21 Okl. 448, 598.

As maintenance or repair

The authority conferred by Rev. St. 1895, art. 877, as amended by Acts First Called Sess. 28th Leg. 1903, c. 4, and Acts 26th Leg. c. 149, § 4, to "construct" bridges for public purposes, embraces the repair and maintenance of such structure. Bell County v. Lightfoot, 138 S. W. 381, 382, 104 Tex. 346.

Rev. Laws, c. 104, § 1, authorizing certain cities, for the prevention of fire, to regulate the inspection, materials, construction, alteration, and use of buildings, does not authorize an ordinance prohibiting reshingling of a roof, since the section does not comprehend repairs; the word "construction" being used to mean the erection of a new building or an addition to an old one, the word "alteration," to denote a change or substitution in a particular of one part of a building for a building different in that particular, the word "use" indicating the purpose for which the building may be occupied, and the word "materials" being a word of general signification, and necessarily ancillary to the other more definite terms employed in the statute. Commonwealth v. Hayden, 97 N. E. 783, 784, 211 Mass. 296.

Providing a barge with a cover to protect her cargo from the wet and the heat, to fit her for a particular business, is so slight a change as to constitute "repairs," and not "construction." The O. H. Vessels, 177 Fed. 589, 590 (citing The Iris, 100 Fed. 104, 40 C. C. A. 301; The Ella, 84 Fed. 471), affirmed 183 Fed. 561, 562, 106 C. C. A. 107.

A large part of plaintiff's factory having been destroyed, it was engaged in rebuilding the same, and, in connection therewith, was rebuilding an acid chamber, required to be lined with lead. In the course of this work, one of plaintiff's employés, while engaged in unrolling the lead, fell from a scaffold and received injuries for which he recovered damages from plaintiff. Held, that such work was not "ordinary repairs," but "construction, demolition, or extraordinary repairs," within the exception of an employer's liability policy excepting injuries to persons occurring in the construction, demolition, or in making extraordinary repairs to structures, buildings, or plants. Home Mixture Guano Co. v. Ocean Accident & Guarantee Corporation, Limited, of London, England, 176 Fed. 600, 603.

The phrase "purchasing or constructing," as used in Const. art. 10, § 12a, and Laws 1903, p. 93, authorizing certain cities with the assent of two-thirds of the voters thereof, voting at an election for the purpose, to become indebted in a larger amount than specified in Const. art. 10, § 12, not exceeding an additional 5 per cent. of the value of the taxable property, for the purpose of "purchasing or constructing" waterworks or electric light plants, to be owned exclusively by the city so purchasing or constructing the same, do not give cities the power to issue bonds for the purpose of maintaining and operating waterworks or electric light plants, for the power to maintain and operate waterworks and electric light plants is not necessarily incident to or implied in the power to purchase or construct waterworks or electric light plants, for the word "maintain" does not mean to provide or construct, but to keep up and preserve, and the word "operate" means to put into or continue in operation or activity. State ex rel. City of Chillicothe v. Wilder, 98 S. W. 465, 467, 200 Mo. 97.

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Completion synonymous

In an action on a bond for the performance of a contract which provided for the construction of two steamers within a fixed period, according to certain plans, and that on failure to do so the United States might complete the same, the declaration alleged the steamers were not completed, that the contractor abandoned the contract, that a new contract was thereupon made, and they were completed thereunder. Held, that a demurrer to the declaration, for the reason that the new contract was for the construction and completion of said steamers, whereas under the original contract it should have been for their completion only, would not lie, the words "construction" and "completion" having substantially the same meaning. United States v. Perth Amboy Shipbuilding & Engineering Co., 137 Fed. 685, 686.

Establishment synonymous

Although the term "establishment" of a drainage ditch means the action of the board of supervisors in ordering it, and "construction" means the actual work, these terms are so interchangeable that, in the absence of evidence showing greater damage at one point than another, they may be used as synonymous in instructions in a proceeding to assess damages for the taking of land for a drainage ditch. Larson v. Webster County, 130 N. W. 165, 167, 150 Iowa, 344.

Erect synonymous

Where a statute authorized a city to issue bonds to erect an electric light plant, the use of the word "construct," instead of "erect," in city ordinances providing for the issuance of bonds was immaterial; the word "erect" meaning "to construct." State ex rel. City of Chillicothe v. Gordon, 135 S. W. 929, 931, 233 Mo. 383.

The word "construction," referring to building, is synonymous with "erection." Butz v. Murch Bros. Const. Co., 97 S. W. 895, 897, 199 Mo. 279.

Furnishing materials

Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278, provides that any person entering into a formal contract with the United States to construct any public building, "shall execute a penal bond with good and sufficient sureties, with the additional obligations that such contractor shall promptly make payments to all persons supplying him labor and materials, in the prosecution of the work, provided for in such contract," and that one who has so supplied labor and materials may bring suit on the bond for his own benefit. In a suit brought against the sureties on such a bond, when the contractor had died insolvent while the work was only partially executed and the sureties had completed the contract, held, that a contract to "furnish all necessary labor and materials" required in the construction of a government building, which also provides for work to be done, and prescribes when and how it shall be done, and in which the government agrees to pay for the construction of the building, and not merely for labor and materials, is a contract for the "construction" of a building, within the meaning of the statute. United States v. Murdock, 59 Atl. 60, 62, 99 Me. 258.

Incidental authority under right to construct works

Act Cong. July 24, 1866, 14 Stat. 221, authorizing any telegraph company to construct, maintain, and operate its lines over any portion of the public domain, and over and along any military or post road of the United States, confers an interstate franchise, but does not confer on telegraph companies the right to exercise the power of eminent domain to condemn right of way over private property. Western Union Tel. Co. v. Pennsylvania R. Co., 120 Fed. 362, 372.

"An authority to one party to 'construct' a levee on behalf of a second party could scarcely be held in any case to include authority to the first party to condemn the land on which the levee was to be constructed." Act April 9, 1862 (St. 1862, pp. 152, 153, 158, c. 158) §§ 4, 7, 17, provided in substance, that the levee board of the city of Sacramento might construct that portion of levees required by the plans adopted at a joint meeting of the city board and state board of swamp land commissioners, and that in case the state board was unable, from lack of funds, to let out the constructing of the levee, the city levee commissioners could construct so much of the levee as was necessary for the protection of the city, or could advance the funds necessary therefor to the state board. Authority to condemn lands without the city for levee purposes was given by St. 1861, p. 355, c. 352, to the state board, and a petition to the district court by the state board was required. Held, that the city board of levee commissioners had no authority to condemn land for a levee which lay outside of the city; such authority being in the state board alone. McCarty v. Southern Pac. Co., 82 Pac. 615, 619, 148 Cal. 211.

The title of an ordinance granting the right to "construct, maintain, and operate" an electric light and power plant "gives to the grantee the right to use the streets and public grounds for that purpose, and it would occur to any one that such was the object of the ordinance, for the granting of the right to construct and operate a light and power plant in fact conveys no other right than the right to use the streets and public grounds. Unless the grantee desires the use of the streets and public grounds, a franchise is not necessary; but it will be difficult, if not almost impossible, to construct and operate such a plant without the use of the streets and public grounds, and the right

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to do the former suggests the latter as a necessary incident thereto." Bartlesville Electric Light & Power Co. v. Bartlesville Interurban Ry. Co., 109 Pac. 228, 230, 26 Okl. 453, 29 L. R. A. (N. S.) 77.

Of railroad

As used in an ordinance requiring an electric railway company to deposit a certain sum, to be forfeited in case of default of the construction of the road within a prescribed time (section 14), and requiring the company to fully construct the railway and equip the same with cars and to commence the operation of the road within a certain time (section 15), the word "construction" means "the performance of all that is required in section 15, viz., the actual building of the road, putting down rails, ties, planking, grading, paving, etc., including the erection of poles, stringing of wires, and the actual equipment of the road by cars and motors as stipulated in the ordinance." Springwells Tp. v. Detroit, P. & N. Ry. Co., 103 N. W. 700, 701, 140 Mich. 277 (quoting and approving definition in Whiting v. Village of New Baltimore, 86 N. W. 403, 127 Mich. 66).

Burns' Ann. St. 1901, § 5152, provides that a railroad company, before proceeding with the construction of a part of its road into or through any county named in its articles of association, shall make a map and profile of the route intended to be adopted by such company and file it in the office of the clerk of such county. The word "construction," as used in this statute, has no technical meaning, but it refers to the labor put forth to fit and adapt a certain selected route to the running of cars. "Construction" means building, and does not include buying the ground on which to build and construct the road. Buying the ground may be an essential prerequisite to construction, but it is not a part of it; and therefore, under the statute quoted above, it is not necessary to file the map and profile of the route before proceeding to condemn the lands, such filing being a part of the construction of the road. Southern Indiana Ry. Co. v. Indianapolis & L. Ry. Co., 81 N. E. 65, 69, 168 Ind. 360, 13 L. R. A. (N. S.) 197 (citing Missouri River, etc., R. Co. v. Shepard, 9 Kan. 647).

The expression "profits used in construction" of a railroad was held to include all money expended in permanent betterments. "If a railroad company should make a second track when they had but a single track before, this would be a betterment or permanent improvement, and, if paid out of the earnings, would be fairly characterized as 'profits used in construction.'" State ex rel. Edwards v. Millar, 96 Pac. 747, 750, 21 Okl. 448 (quoting and adopting definition in Grant v. Hartford & N. H. R. Co., 93 U. S. 225, 23 L. Ed. 878).

Of streets and roads

As used in the statute giving a board of public works exclusive control of the construction, improvement, repair, and cleaning of streets, "construction" is a broad term, authorizing the making of new streets. "Improvement" permits new work on streets already constructed, and "repair" relates to the restoration of an existing condition. The four terms govern the whole subject, from the making of a new street to its final and ordinary maintenance. In re Board of Public Works of City of Watertown, 39 N. E. 387, 388, 144 N. Y. 440.

"'Construct' means to build; 'reconstruct' means to rebuild, to build over again; and a street is not reconstructed by being resurfaced either in whole or in part." Where, after a street which had been paved with asphalt at the expense of abutting owners had fallen into disrepair, the city passed an ordinance directing that it be reconstructed with asphalt pavement in accordance with the ordinance, in so far as it related to resurfacing streets with asphalt paving, so that the entire improvement consisted merely of relaying a new three-inch asphalt surface on the original macadam base, without disturbing the same, the work did not constitute a reconstruction of the street, but was a mere repair thereof, for which the city was solely responsible. City of Covington v. Bullock, 103 S. W. 276, 278, 126 Ky. 236.

Code 1906, § 331, authorizing the issuance of bonds by a county for "constructing public roads," gives the power to issue such bonds, regardless of the method adopted for working the roads. Weston v. Hancock County, 54 South. 307, 309, 98 Miss. 800.

CONSTRUCTED

A street is not "constructed," within the law authorizing the original construction of a street at the cost of abutting owners, until its construction is prescribed by the city authorities. Sparks v. Barber Asphalt Pav. Co., 112 S. W. 830, 129 Ky. 769.

Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107, authorizing cities of the fourth class to cause streets "to be graded, constructed, reconstructed, paved," etc., authorizes a city of the class to issue special tax bills to pay for the cost of curbing, especially in view of the provision in the section authorizing the issuance of tax bills for special assessments for "paving, macadamizing, and curbing"; for the terms "constructed" and "paved" refer to the entire pavement of the street, and include curbing, which is a necessary part thereof. City of Excelsior Springs v. Ettenson, 96 S. W. 701, 705, 120 Mo. App. 215.

Within Kirby's Dig. § 6681, providing that, when a railroad company has constructed a railroad across a highway, the

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company shall construct a crossing or build a bridge, for failure to do which within a certain time after notice it is, by sections 6682 and 6684, subject to penalty, the railroad is "constructed," though it is not completed, when its track is laid at the crossing and trains are there running. St. Louis, I. M. & S. R. Co. v. State, to use of Boone County, 114 S. W. 703, 704, 88 Ark. 338.

Wright Act, § 12, authorizes an irrigation district to acquire by purchase canals and works, "including canals and works constructed and being constructed" by private owners, etc. Held, that the words "constructed and being constructed" indicated an intention to authorize irrigation districts to negotiate for water systems in advance of their total completion. Stowell v. Rialto Irr. Dist., 100 Pac. 248, 251, 155 Cal. 215.

Act Cong. Aug. 30, 1890, c. 837, provides that all patents for lands thereafter taken up under any of the land laws of the United States on entries or claims validated by the act, west of the one hundreth meridian, should reserve a right of way for ditches or canals, "constructed" by authority of the United States. Held, that the word "constructed," as so used, did not limit the reservation to a right of way for ditches already constructed, but extended as well to those "to be constructed" by the government in furtherance of its irrigation scheme for the reformation of arid lands. Green v. Willhite, 160 Fed. 755, 757; the word "constructed," as so used, has a general reference and application to ditches or canals constructed by the authority of the United States, without reference to the time of such construction. Green v. Wilhite, 93 Pac. 971, 972, 14 Idaho, 238.

CONSTRUCTED, RUN, AND OPERATED

A deed of a railroad right of way conveyed to the grantee, its successors and assigns, all the land contained within 100 feet in width on each side of the track or roadway, measuring from the center of any portion of the lot of land thereinafter described through which the railway may be "constructed, run, and operated," to have and to hold for railroad purposes forever, and for no other, in fee simple. Held, that the words "constructed, run, and operated," were limited by what preceded them, so that the deed should be construed to convey only a right of way through the particular part of the land actually touched by the grantee's main line as originally laid out. American Spinning Co. v. Southern Ry. Co., 62 S. E. 787, 788, 81 S. C. 482.

CONSTRUCTED WORKS

Laws 1907, c. 49, § 53, provides that, in case of seepage water from any constructed works, the owner of the works shall have first right to the use thereof on filing an application to the territorial engineer as in the case of an original appropriation, but if the owner shall not file such application within a year after the completion of the works, or the appearance on the surface of such seepage water, any party desiring to use the same shall make an application to the territorial engineer as in the case of unappropriated water, and shall pay the owner of the works a reasonable charge for storage and carriage of the water, provided the appearance of such seepage water can be traced beyond a reasonable doubt to the storage and carriage of water in such works. Held, that the term "constructed works" as so used referred to constructed reservoirs and ditches, not including a dynamited artesian well, and that the section had no application to seepage or spring water arising on the land of a proprietor from an unknown source. Vanderwork v. Hewes, 110 Pac. 567, 569, 15 N. M. 439.

CONSTRUCTION COMPANY

A corporation engaged in the construction under contract of piers and abutments made of concrete for railroad bridges, including the work of clearing the foundations, and in some instances building cofferdams and driving piling for the work, is a "construction company," and not a "manufacturer," which, is one engaged in the manufacture for sale of articles of commerce, within Bankr. Act July 1, 1898, c. 541, § 4b (U. S. Comp. St. 1901, p. 3423), and is not subject to proceedings in involuntary bankruptcy. In re T. E. Hill Co., 148 Fed. 832, 834, 78 C. C. A. 522.

The word "construction," as used in the title of "An act to incorporate a power and construction company," suggests building, erecting, and manufacturing; and the word "power" is used in connection with it, and the words together do not give any clear indication of a business necessarily requiring a special franchise, so that a special franchise granted in the body of the act to occupy the streets, is unconstitutional. Economic Power & Construction Co. v. City of Buffalo, 88 N. E. 389, 394, 195 N. Y. 286.

CONSTRUCTION WORK

Civ. Code, § 3060, providing that debts of at least $50 contracted for the benefit of ships are liens, construed in connection with Code Civ. Proc. § 813, giving a lien for materials and services furnished for the construction of vessels, contemplates an existing completed vessel, and refers only to such debts as are contracted for the benefit of a completed vessel, and section 813 gives a lien for construction work, regardless of the amount. Jensen v. Dorr, 116 Pac. 553, 555, 159 Cal. 742.

Everything originally done in making a vessel complete and ready for use as an instrument of commerce or navigation is con-

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struction work, and a structure becomes a ship within the maritime law only when construction work has been fully completed. Id.

CONSTRUCTIVE

CONSTRUCTIVE ALLOWANCE

The words "constructive allowance" in the Tariff Act, providing that there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits, would seem to imply an allowance for leakage which may be presumed or implied, or which would exist in contemplation of law, rather than an allowance for an actual leakage established by affirmative proof, and there can be no allowance made for leakage of wine while in transit to this country. United States v. A. D. Shaw & Co., 144 Fed. 329, 331, 75 C. C. A. 291.

On an importation of wine in casks having a wantage in excess of normal, the collector assessed duty without allowance for the excess, on the ground that it was due to leakage and was within the terms of paragraph 296, Schedule H, § 1, c. 11, Tariff Act July 24, 1897, forbidding "constructive or other allowance for breakage, leakage, or damage on wines." Held, that this was in violation of section 8, art. 1, Const. U. S., prescribing that "all duties * * * shall be uniform throughout the United States." Alexander D. Shaw & Co. v. United States, 141 Fed. 469, 470.

CONSTRUCTIVE CONTEMPT

A "constructive contempt" is one committed beyond the presence of the court. Frowley v. Superior Court of Modoc County, 110 Pac. 817, 818, 158 Cal. 220.

Contempts are divided into two classes "criminal contempts" and "constructive or consequential contempts," the latter of which arises from matters not transpiring in court, but relating to a failure to comply with the orders and decrees issued by the court and to be performed elsewhere. Smythe v. Smythe, 114 Pac. 257, 258, 28 Okl. 266.

A "constructive contempt" is one offered elsewhere than in the presence of the court, and which tends to degrade or weaken its authority, or in some manner to impede the due administration of justice. Ex parte Clark, 106 S. W. 990, 997, 208 Mo. 121, 15 L. R. A. (N. S.) 389.

"Constructive contempts" are such as are committed outside of the view and presence of the court or judge at chambers. They may consist of a publication in a newspaper of general circulation in the place where the court was being held of such articles in reference to a cause pending as are circulated to interfere with the administration of justice. People ex rel. Attorney General v. News-Times Pub. Co., 84 Pac. 912, 956, 35 Colo. 253.

To constitute "constructive contempt" of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or bring the court or judge, or the administration of justice, into disrespect. Saal v. South Brooklyn Ry. Co., 106 N. Y. Supp. 996, 1000, 122 App. Div. 364 (quoting and adopting the definition in In re Dill, 5 Pac. 39, 32 Kan. 668, 49 Am. Rep. 505).

CONSTRUCTIVE CONTRACT

See Contracts Implied by Law.

"Constructive contracts," or "contracts implied by law," are obligations imposed or created by law without the assent of the party bound, and sometimes even notwithstanding his actual dissent, on the ground that they are dictated by reason and justice. They are fictions of law adopted to enforce legal duties. Harty Bros. v. Polakow, 86 N. E. 1085, 1086, 237 Ill. 559 (citing Keener, Quasi Cont. p. 5; Bish. Cont. § 205; Hertzog v. Hertzog, 29 Pa. 465; 9 Cyc. p. 242; Lillard v. Wilson, 77 S. W. 74, 178 Mo. 145; Railway Co. v. Gaffney, 61 N. E. 152, 65 Ohio St. 104).

"A 'constructive contract' is where duty defines it, instead of the contract defining the duty to be performed. Constructive contracts are fictions of law adopted to enforce the legal duties by actions of contract where no proper contract exists, express or implied." Plaintiff, defendant, and another were the sole owners of corporate stock. Certain negotiations conducted by defendant, who was acting for the other two owners of the stock, as well as for himself, resulted in a sale of the whole stock of the corporation, to be paid for in the stock of another corporation. In this negotiation defendant simply stipulated for a cash payment of a large sum of money to himself as a part of the consideration for his own stock, and paid no part thereof to his associates. He was liable to his associates severally under the doctrine of constructive contract. Graham v. Cummings, 57 Atl. 943, 949, 208 Pa. 516 (citing Hertzog v. Hertzog, 29 Pa. [5 Casey] 465).

"The term 'implied contract' has also been applied to a class of obligations which are imposed or created by law, without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contractu. These obligations, however, are not contract obligations at all, in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy. They are described by the term 'quasi' or 'constructive' contracts." Leonard v. State, 120 S. W. 183, 187, 56 Tex. Cr. R. 307 (quoting 9 Cyc. p. 243).

Where there was no agreement between plaintiff and defendant that defendant was to return money advanced on the purchase price

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of real property if the negotiations failed, or at all, yet where equity and good conscience required him to do so, the law implied a promise on his part, and the obligation created or implied is termed a quasi contract, a contract implied by law, or a "constructive contract." Schaeffer v. Miller, 109 Pac. 970, 972, 41 Mont. 417, 137 Am. St. Rep. 746.

CONSTRUCTIVE CONVERSION

"A 'constructive conversion' takes place, when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself." A broker's employé, who became lawfully possessed of certificates of stock to be transferred on the company's books, converted them, if he delivered them to the brokers as his own property. Kilmer v. Hutton, 116 N. Y. Supp. 127, 135, 131 App. Div. 625.

"A 'constructive conversion' takes place where a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself"; so that, where an agent intrusted with his principal's property parted with it in a way or for a purpose not authorized, he was liable for a conversion, although there was no wrongful intent on his part. Laverty v. Snethen, 68 N. Y. 522, 524, 23 Am. Rep. 184.

CONSTRUCTIVE DELIVERY

"A delivery which will discharge the carrier may be constructive and not actual. To constitute a 'constructive delivery,' the carrier must, if practicable, give notice to the consignee of the arrival, and when this has been done, and the goods are discharged in the usual and proper place, and reasonable opportunity offered to the consignee to remove them, the liability of the common carrier as such terminates." Becker v. Pennsylvania R. Co., 96 N. Y. Supp. 1, 5, 109 App. Div. 230 (quoting Tarbell v. Royal Exchange Shipping Co., 17 N. E. 721, 724, 110 N. Y. 170, 180).

Where goods are ordered, and no specific instruction given for shipment, a delivery to the usual carrier for the purchaser is a "constructive delivery" to the purchaser, and the goods become the property of the purchaser, subject only to the right of stoppage in transitu. Bloom's Son Co. v. Haas, 108 S. W. 1078, 1079, 130 Mo. App. 122.

Where there are no specific instructions as to shipment, a delivery by the seller to the usual carrier for the buyer, with proper directions, is a "constructive delivery" to the buyer and the goods immediately become his property, subject only to the right of stoppage in transitu. Lewis v. Imhof, 122 S. W. 329, 331, 138 Mo. App. 370.

The "constructive delivery" sufficient to constitute a delivery, essential to make a gift causa mortis, must completely terminate the donor's custody and control of the property given and must place it wholly under the power of the donee and enable him, without further act of the donor, to reduce it to manual possession. Scott v. Union & Planters' Bank & Trust Co., 130 S. W. 757, 761, 123 Tenn. 258.

Where goods were given to a railroad company for delivery to a consignee at a place where the company had no facilities for unloading cars or storing goods, and the company provided no facilities to the consignee for unloading cars except the consignee's own siding, the detaching of cars from trains and placing them on a side storage track between stations, where the consignee could not obtain access to them, for purposes of unloading, followed by notice to the consignee of their arrival, was not "constructive delivery," so as to put the consignee in default and entitle the carrier to demurrage. Carrizzo v. New York, S. & W. R. Co., 123 N. Y. Supp. 173, 176, 66 Misc. Rep. 243.

A "constructive delivery" of goods by a carrier to a buyer can be effected only by an agreement between the carrier or middleman and the buyer, whereby the former agrees to hold the goods for the latter for some purpose other than that of carriage to and delivery at their original destination; and, in the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold in its original capacity, and the carrier cannot constitute itself the buyer's agent for the custody of the goods, nor can the buyer, without the carrier's consent, make it his agent for custody. State v. Intoxicating Liquors, 72 Atl. 331, 333, 104 Me. 463, 23 L. R. A. (N. S.) 942.

To establish a "constructive delivery" by a ship of goods deposited on the wharf, it is necessary for the carrier to show that he separated the goods from the general bulk of the cargo, designated them, and gave due notice to the consignees of the time and place of their deposit and a reasonable time for their removal. The Titania, 131 Fed. 229, 230, 65 C. C. A. 215.

Civ. Code Ga. 1895, § 3567, relating to gifts, declares that any act which indicates a renunciation of dominion by the donor, and transfer of dominion to the donee, is a "constructive delivery." Philpot v. Temple Banking Co., 60 S. E. 480, 483, 3 Ga. App. 742.

Where a broker, empowered to negotiate a sale of real estate, but not to execute a contract of sale, procured a purchaser, prepared a contract in duplicate, which the purchaser signed, and sent the duplicates to the owner, with the request to sign both contracts and return one for the purchaser, and the owner signed both, kept one, retained the money accompanying it, and returned the other contract to the broker, the contract of sale was executed and "delivered" within the principle established as to a grant, by Civ. Code, § 1059, providing that

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a grant shall be deemed constructively delivered where the instrument is delivered for the benefit of the grantee. Carr v. Howell, 97 Pac. 885, 889, 154 Cal. 372.

CONSTRUCTIVE DESERTION

To entitle a wife to divorce for "constructive desertion," in that she was compelled to leave her husband because of his conduct, his conduct must be the degree of cruelty necessary to support a decree a mensa et thoro. Thomas v. Thomas (N. J.) 74 Atl. 125, 126.

CONSTRUCTIVE EVICTION

Of lessee

A "constructive eviction" is an obstruction to the beneficial enjoyment of leased premises by the landlord, but intent of the landlord to compel the tenant to vacate is not essential; it being sufficient that his acts tend to compel vacation. Berlinger v. Macdonald, 133 N. Y. Supp. 522, 524, 149 App. Div. 5.

A "constructive eviction" exists where the physical expulsion of the tenant is not effected, but the acts of the landlord so interfere with the beneficial enjoyment of the premises as to necessitate an abandonment thereof. Jackson v. Paterno, 108 N. Y. Supp. 1073, 1076, 58 Misc. Rep. 201.

A "constructive eviction" exists where a lessor does some act, or omits to perform some obligation, imposed upon him by the lease, as the result of which the lessee's possession and beneficial enjoyment of the premises are interfered with, and is more than a mere trespass, and not dependent upon an actual entry of the leased premises by the lessor. Dolph v. Barry, 148 S. W. 196, 198, 165 Mo. App. 659.

The relation of landlord and tenant can be terminated by a "constructive eviction," consisting of conduct compelling the tenant to abandon the premises. Phœnix Land & Improvement Co. v. Seidel, 115 S. W. 1070, 135 Mo. App. 185.

Evictions are of two kinds: "Actual eviction," by the landlord or through a title paramount, by which the tenant is actually deprived of the use of a material part of the premises; and "constructive eviction," where the landlord, by acts of omission or commission, deprives the tenant of the beneficial enjoyment of the premises, the character of the enjoyment to which he is entitled depending upon the nature of the building and the purpose for which it was let. Lawrence v. Katcher, 117 N. Y. Supp. 876, 879.

A "constructive eviction" is something done by a landlord or his agents which deprives the tenant of the full benefit and enjoyment of the leased premises; and such acts of the landlord or his agent, accompanied by an abandonment of the premises by the tenant with reasonable promptitude, are a virtual expulsion of the tenant, precluding a recovery for rent thereafter. Fox v. Murdock, 109 N. Y. Supp. 108, 109, 58 Misc. Rep. 207.

A "constructive eviction" is, properly speaking, no eviction at all in the sense originally attached to that word; that is, as signifying an actual ouster from lands and tenements, either by a stranger to the lease gaining possession on title superior to the landlord's or by an expulsion at the hands of the landlord himself. To constitute an eviction by construction of law, the wrongful conduct of the landlord must be sufficient to render the premises untenantable for the purpose for which the tenant leased them, or at least seriously interfere with their profitable use. When a constructive eviction is asserted because of breaches of covenants by the lessor, the magnitude of the breach and the extent of the injury done to the lessee in the way of destroying his use of the leasehold are decisive of whether or not an eviction occurred. Delmar Investment Co. v. Blumenfeld, 94 S. W. 823, 826, 118 Mo. App. 308.

Real Property Law, § 227, providing that, where any building which is leased or occupied is destroyed, or so injured by the elements, or any other cause, as to be uninhabitable and unfit for occupancy, the lessee may, if the destruction or injury occurred without his fault, surrender the possession without liability for subsequent rent, gives relief only where the building itself is injured, or, by reason of other conditions, the tenant's enjoyment of the leased premises is interfered with, and so unbearable stench from rats, which have died in the walls of an apartment, does not, under this law, constitute a "constructive eviction." Barnard Realty Co. v. Bonwit, 135 N. Y. Supp. 700, 702, 76 Misc. Rep. 464.

"To constitute a 'constructive eviction' there must be an intentional and injurious interference by the landlord, which deprives the tenant of the beneficial enjoyment of the demised premises. Such eviction cannot be predicated of acts or misconduct, however wrongful or distressing, unless committed, encouraged, or connived at with the landlord. He is not responsible for the conduct of other tenants acting within their rights in their own apartments." A rule subjoined to leases of an apartment house declared: "Practicing on any musical instruments not allowed." The lease also provided: "In case of violation of any of the covenants of the lease or any rule of the building by the lessee, * * * the lease shall at the option of the lessor immediately be annulled, * * * and the lessor may re-enter without notice," etc. The provision is not a covenant on the part of the landlord that such option will be

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exercised for the benefit of one tenant when the rule of the house is violated by another tenant, and his failure to do so is not an eviction of the tenant complaining. Sefton v. Juilliard, 91 N. Y. Supp. 348, 349, 46 Misc. Rep. 68 (quoting and adopting definition in Seaboard Realty Co. v. Fuller, 67 N. Y. Supp. 146, 33 Misc. Rep. 109).

The refusal of a landlord to repair a bursted waterpipe, as required by the lease, is not a "constructive eviction." Baldwin v. Cohen, 116 N. Y. Supp. 510, 511, 132 App. Div. 87.

In order to constitute "constructive eviction" based on defective plumbing, it must be shown not only that the plumbing was defective, but that its condition rendered the premises untenantable, and that the landlord with knowledge of these facts violated an agreement to keep the premises in repair. Huggins v. Jasper, 114 S. W. 545, 546, 134 Mo. App. 1.

CONSTRUCTIVE FORCE

"Constructive force" is a putting in fear. Long v. State, 12 Ga. 293, 315.

As related to the commission of robbery, "actual force" is applied to the body, while "constructive force" is by threatening words or gestures, and operates on the mind. Tones v. State, 88 S. W. 217, 220, 48 Tex. Cr. R. 363, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455.

CONSTRUCTIVE FRAUD

A "constructive fraud" is an act which the law declares to be fraudulent without inquiring into its motive. Frost v. Latham & Co., 181 Fed. 866, 868.

"Constructive fraud," as distinguished from "actual fraud," is inferred from illegal or improper acts that result in loss or injury to others; for example, that kind of fraud which might be inferred from an overvaluation of property purchased for a corporation by dummy directors. Hobgood v. Ehlen, 53 S. E. 857, 859, 141 N. C. 344.

"By 'constructive frauds' are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done malo animo." Where a clerk in the office of the Commissioner of the Five Civilized Tribes in Muskogee, Ind. T., appointed by the Commissioner, acting for and on behalf of the Secretary of the Interior, who kept the Creek roll in his office, took the roll from the office with the intent to make a copy thereof, the taking was fraudulent within the meaning of Rev. St. U. S. § 5408, providing a punishment for any officer having the custody of any record filed in his office, or deposited with him, or in his custody, who fraudulently takes it away or destroys it. Martin v. United States, 104 S. W. 678, 684, 7 Ind. T. 451.

"Constructive fraud" does not necessarily negative integrity of purpose, and may be an act which the law declares fraudulent without inquiry into its motives, and is such fraud as the law infers from the relationship of the parties or the circumstances surrounding them, regardless of any actual dishonesty of purpose. Curtis v. Armagast (Iowa) 138 N. W. 873, 878.

Where the petition in a suit to set aside certain conveyances in trust charges actual fraud, and the proof not only tends to show actual fraud, but shows a fiduciary relationship, sometimes denominated "constructive fraud," evidence of the fiduciary relationship of the parties is admissible under the general allegation of fraud. Bleyer v. Bleyer, 117 S. W. 709, 715, 219 Mo. 99.

A bill of sale intended as an absolute transfer of title, but made with a secret agreement that the grantee, after selling enough goods to pay the grantor's indebtedness to him, should turn back to the grantor the remainder, or their proceeds, presents a case of "constructive fraud," sometimes called "legal fraud." Walklin v. Horswill, 123 N. W. 668, 672, 24 S. D. 191.

CONSTRUCTIVE HOMICIDE

A stenographer appointed by a board of coroners and entitled to receive an amount per folio for all transcripts made for the use of the district attorney's office, on being directed to make transcripts for all "homicide cases," could recover the statutory compensation for the transcripts furnished in all cases of death, whether from negligence or otherwise; but, on the stenographer including in his claim compensation for transcripts in cases of "constructive homicide," it was wrongfully assumed that he had no right to recover for cases of such description. Strassner v. City of New York, 39 N. Y. Supp. 669, 670, 6 App. Div. 370.

CONSTRUCTIVE KNOWLEDGE

"Constructive knowledge" of the precise injury liable to befall an employé in case of his inattention to a warning means that knowledge that he necessarily would have acquired in the exercise of ordinary care for his own safety. Ft. Worth & R. G. R. Co. v. Robinson, 84 S. W. 410, 412, 37 Tex. Civ. App. 465.

An allegation, in a complaint in an action for injuries to an employé, of knowledge of the employer, embraces not merely actual knowledge, but also "constructive knowledge," which is that knowledge chargeable to

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the employer from an opportunity, by the exercise of ordinary care, to know. Zeller, McClellan & Co. v. Vinardi, 85 N. E. 378, 380, 42 Ind. App. 232.

CONSTRUCTIVE MALICE

See Implied Malice.

"Constructive malice" is an inference or conclusion of law as to malice from the facts found by the jury. State v. Di Guglielmo (Del.) 55 Atl. 350, 351, 4 Pennewill, 336; State v. Mills (Del.) 69 Atl. 841, 842, 6 Pennewill, 497.

CONSTRUCTIVE MORTGAGE

A deed absolute on its face may be shown by parol to be a mortgage to secure future advances and the performance of a contract, though the mortgagor did not at the time have title to the land, and though title was in the name of a third person under an agreement with him for convenience. Stitt v. Rat Portage Lumber Co., 104 N. W. 561, 564, 96 Minn. 27.

A deed absolute in form, but given merely for purposes of security, is in equity a "constructive mortgage." Wilson v. Rehm, 117 Ill. App. 473, 477.

Since, under Rev. St. c. 84, §§ 17–21, the court has full equity powers, it can treat a conveyance or reservation in a conveyance absolute in terms, as made solely for security for some obligation, if it finds such to be the fact from extrinsic evidence. Plaintiff reserved in terms an absolute life estate out of a farm conveyed by her to defendant. One consideration for the conveyance was a bond of the defendant to support plaintiff on the farm, and that the reservation was made solely as security for the performance of the bond. Held, that defendant was entitled to retain possession of the farm until a breach of his bond, and, no such breach being shown, plaintiff is not yet entitled to possession. Hurd v. Chase, 62 Atl. 660, 661, 100 Me. 561.

In determining whether an instrument in the form of a deed is or is not a mortgage, the principal test to be applied is whether the relation of the parties towards each other of debtor or creditor continued after the execution of the deed. The test is the existence or nonexistence of a debt, and equity looks behind the form to the fact. If the transaction was intended as a loan, if there remains a debt for which the conveyance is only a security, and the collection of which may be enforced independent of the security, equity will hold it a mortgage, no matter whether the transaction is evidenced by one or two instruments. Plummer v. Ilse, 82 Pac. 1009, 1010, 41 Wash. 5, 2 L. R. A. (N. S.) 627, 11 Am. St. Rep. 997.

CONSTRUCTIVE NEGLIGENCE

The term "constructive negligence" is not properly applicable to the failure of a banker to look to the interests of his depositor, to see that the signature of the payee of a check presented to the bank for payment is genuine. Jordan Marsh Co. v. National Shawmut Bank, 87 N. E. 740, 742, 201 Mass. 397, 22 L. R. A. (N. S.) 250.

CONSTRUCTIVE NOTICE

See, also, Legal Notice.

"Constructive notice" is notice imputed by law. Parker v. Maslin, 116 Pac. 227, 228, 85 Kan. 130.

"Constructive notice" is a legal presumption not to be controverted. Missouri, K. & T. Ry. Co. of Texas v. Wood (Tex.) 152 S. W. 487, 491.

"Constructive notice" is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. Reed v. Munn, 148 Fed. 737, 756, 80 C. C. A. 215 (quoting and adopting the definition in United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 67 C. C. A. 1).

"Constructive notice" is a knowledge of such facts that the party possessing such knowledge is conclusively presumed to know other things besides the facts which have been proved to have come to his knowledge. Powers v. Perry, 106 Pac. 595, 596, 12 Cal. App. 77.

"Constructive notice," it is said, is the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from a duty to know imposed by the law, or from his knowing something which ought to have put him upon further inquiry, or from his willfully abstaining from inquiry to avoid notice." State v. Omaha Nat. Bank, 93 N. W. 319, 330, 66 Neb. 857.

"Constructive notice" is a legal inference from established facts, and like other legal presumptions does not admit of dispute. "It is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being contradicted." Cooper v. Flesner, 103 Pac. 1016, 1020, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29 (quoting Story, Eq. Jur. § 399).

A person chargeable with "constructive notice" is as much bound thereby as if the notice were actual. D. P. Haynes & Bro. v. W. O. Gray & Co., 41 South. 615, 148 Ala. 663.

"Constructive notice" is defined by Rev. Codes, § 5117, as notice imputed by law to a person not having actual notice. A mortgagee in a mortgage executed by a grantee in a deed, absolute on its face but intended as a mortgage, cannot be defeated, where he relied on the record title and the grantee's

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apparent ownership, and had no actual notice or knowledge that the deed was other than what it purported to be, in view of section 4730, providing that, when a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees having actual notice, unless an instrument of defeasance, duly executed and acknowledged, is recorded. Patnode v. Deschenes, 106 N. W. 573, 576, 15 N. D. 100.

Actual notice distinguished

"Constructive notice" is that which is imputed by law, while "actual notice" is that which consists in express information of a fact; and a notice is deemed actual when the party sought to be affected by it knows of the existence of the particular fact in question or is conscious of having means of knowing it. Parker v. Maslin, 116 Pac. 227, 228, 85 Kan. 130.

As notice from circumstances

The existence of a hole in a sidewalk, covered by a board so as to be invisible, for 24 hours, is not "constructive notice" to the borough in which it is located, which has no actual notice of the hole; and hence the borough is not liable for injuries to a person who stepped on the board and was thrown into the hole by the turning of the board. Yeager v. Berwick Borough, 67 Atl. 347, 348, 218 Pa. 265.

"By 'constructive notice' is meant such notice as the law imputes from the circumstances of the case." "After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence." Todd v. Lacy, 61 N. Y. 506, 509.

Whether a defect in a sidewalk has existed a sufficient length of time and under such circumstances that the city is deemed to have had notice thereof is a question of fact, and not one of law; and the court cannot charge that the existence of the defect for a certain time is of itself to be deemed "constructive notice." Hendershott v. City of Grand Rapids, 105 N. W. 140, 141, 142 Mich. 140.

In an action against a city for injuries sustained on account of a defective sidewalk, the court instructed: "It is not necessary that the defendant city should have had actual notice of the unsafe and dangerous condition of the sidewalk (if you find that the sidewalk was unsafe); if you find that such condition of said sidewalk existed a sufficient length of time before the injury to have enabled the defendant city, or its officers and agents, by the exercise of ordinary care and diligence, to have known of the existence thereof and remedy the same, then the law implies a notice to the defendant city of the existence of the condition." The statement in the instruction that the "law implies a notice" is equivalent to a statement that the city had "constructive notice." Robison v. White City, 94 Pac. 141, 142, 77 Kan. 293.

"Constructive notice" is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell. A purchaser of the property of a lumber company is not charged with the knowledge of the wrongful character, as against the federal government, of certain conveyances of standing timber, which might have been gained by a searching investigation of the books and papers turned over by the lumber company as evidence of its titles, where there were no circumstances disclosed which cast suspicion upon those titles. United States v. Detroit Timber & Lumber Co., 26 Sup. Ct. 282, 286, 200 U. S. 321, 50 L. Ed. 499 (quoting and adopting definition in Townsend v. Little, 3 Sup. Ct. 357, 109 U. S. 504, 27 L. Ed. 1012).

To constitute "constructive notice" that a possession begun by consent is adverse, there must be some visible change in the nature of the occupancy calculated to notify the owner that the land is in the possession of a hostile claimant. Lancey v. Parks, 66 Atl. 311, 313, 102 Me. 135.

"Constructive notice" is defined in Civ. Code, § 4666, as notice imputed by law. A certificate of acknowledgment of a mortgage by husband and wife is not rendered insufficient to charge a subsequent purchaser with notice by reason of the fact that in the statement that the parties "severally acknowleged ——— he ——— executed the same," the blanks before and after the word "he" were not filled so as to make the word "they." Trerise v. Bottego, 79 Pac. 1057, 1058, 32 Mont. 244, 108 Am. St. Rep. 521.

As notice of facts putting on inquiry

"Constructive notice" is knowledge of such facts and circumstances as would put a reasonably prudent man on such inquiry as, being made, would have led to actual knowledge of the fact in question. Moore v. Dunn, 41 S. W. 530, 531, 16 Tex. Civ. App. 371.

Rev. Code 1899, § 5118, defines "constructive notice" as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man on inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have 'constructive notice' of the fact itself." One purchasing real estate, who had

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been told by a number that another person had bought the land or claimed some sort of an estate in it, had at least constructive notice of the other person's claim. "Constructive notice," where it exists, is the equivalent of actual notice. Hunter v. Coe, 97 N. W. 869, 871, 12 N. D. 505.

"Constructive notice" is expressly defined by Wilson's Rev. & Ann. St. 1903, §§ 12, 13, to be notice imputed by law to a person not having actual notice. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, has in legal effect a notice which imputes knowledge, because he is shown to be conscious of having means of knowledge, though he does not use them, but remains voluntarily ignorant of the fact, or is grossly negligent in following up the inquiry which the known facts suggest; it does not include either positive knowledge or information so direct as to necessarily carry conviction to the mind of the person notified, and does not apply to that class of notice which depends upon legal presumption, but is substantial evidence from which the jury may infer notice. Cooper v. Flesner, 103 Pac. 1016, 1020, 24 Okl. 47, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29 (citing and adopting Wade, Notice, §§ 3, 4, 5, 8).

"The law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence would have apprised him. This is called 'constructive notice' and has the same effect as actual notice." The word "trustee," written on the face of a certificate of stock after the name of the person to whom the certificate was issued, is sufficient to put a purchaser of the stock on inquiry as to the nature of the holder's ownership. Johnson v. Amberson (Ala.) 37 South. 273, 274 (quoting and adopting the definition in Cook, Stock, Stockh. & Corp. Law [2d Ed.] § 325, p. 359).

Rev. Codes 1905, § 6702, providing that "constructive notice" is notice imputed by law to a person not having actual notice, and section 6703, providing that every person who has actual notice of sufficient circumstances to put a prudent man upon inquiry, and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself, since the enactment of the negotiable instruments law, have no application to actions upon negotiable instruments in the hands of indorsees before maturity, if they ever had such application, being superseded by section 6358, defining notice in such case as actual knowledge of infirmity or defects or knowledge of such facts as to amount to bad faith. American Nat. Bank v. Lundy, 129 N. W. 99, 102, 21 N. D. 167.

Rev. Civ. Code, § 2035, provides that an inferior lienor may redeem the property, as the owner might, from the superior lien, and be subrogated to all benefits of the superior lien; section 2451 defines "constructive notice" as notice imputed by law to one not having actual notice; and section 2452 provides that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. A second mortgagee paid the first mortgagee the amount due him, but no assignment or indorsement was made on the papers delivered, and no assignment of the mortgage taken, and thereafter the second mortgage was foreclosed by advertisement and plaintiff purchased. Before purchasing he made inquiries of the first mortgagee, who stated that his mortgage had been paid and satisfied; but plaintiff did not inquire who had paid it. Held, that plaintiff had "constructive notice" of the rights of the second mortgagee under his redemption. Malmberg v. Peterson, 108 N. W. 339, 340, 20 S. D. 587.

Where a party seeking to avoid or excuse a delay, on which a plea of laches is predicated, possessed information or knowledge of extraneous facts and circumstances which, though not directly tending to show the existence of a prior conflicting right, were sufficient to put him, as a prudent person on inquiry, he was then charged with "constructive notice" of all that he might have learned on an inquiry prosecuted with reasonable diligence. Miller v. Ash, 105 Pac. 600, 605, 156 Cal. 544.

Record

The recording of a trust deed of personal property, which furnishes a stranger with the means of identifying the property, gives the "constructive notice." Williamson v. Payne, 49 S. E. 660, 662, 103 Va. 551.

"The registration of a deed is 'constructive notice' only to those who subsequently have acquired from the grantor in such deed some interest or right in the property." Runge v. Gilbough (Tex. Civ. App.) 87 S. W. 832, 836.

"Constructive notice" cannot be imputed from a recording of a document which the statute does not recognize as an instrument that should be recorded. Instruments to impart constructive notice must be recorded in their true character. Benedict v. T. L. V. Land & Cattle Co., 92 N. W. 210, 212, 66 Neb. 236.

"In regard to the extent to which a purchaser is bound by 'constructive notice,' and what a purchaser by a subsequent deed is bound to know, the rule is that the law imputes to such purchaser a knowledge of all the facts relating to said land, appearing at the time of his purchase, upon the muni-

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ments of title which it was necessary for him to inspect in order to ascertain the sufficiency of such title. * * * What would be 'constructive notice' in such cases may be said to be a knowledge by the purchaser of some facts which would put him upon inquiry, and require him to examine other matters that would generally unfold the true title." A decree in partition, severing the interests of cotenants and establishing in one of them a right of way over the land allotted the other, was "constructive notice" of such easement to a purchaser of the servient estate, though the deeds thereto from the cotenant and his grantees made no mention thereof. Dickinson v. Crowell, 94 N. W. 495, 496, 120 Iowa, 254 (quoting and adopting statement in 3 Washb. Real Prop. [5th Ed.] pp. 347, 348).

To corporation

A corporation should be held to have "constructive" notice of only such facts as have been brought to the actual notice or attention of some one of its officers or agents, or of such facts only as have been constructively brought to the notice or attention of some one of its officers or agents by the actual notice of such other facts as would naturally put the officer or agent upon inquiry. Iowa Nat. Bank of Ottumwa v. Sherman & Bratager, 97 N. W. 12, 15, 17 S. D. 396, 106 Am. St. Rep. 778.

CONSTRUCTIVE OUSTER

Though entry under a deed from a part of tenants in common was not an actual ouster of the others, in the sense that notice was brought home to them of the adverse holding, it was what may be called a "constructive ouster," which the law recognizes as sufficient to put the cotenants on notice and to start the running of the statute of limitations. Armijo v. Neher, 72 Pac. 12, 13, 11 N. M. 645.

CONSTRUCTIVE POSSESSION

"Constructive possession" is that which exists in contemplation of law without actual enjoyment or occupation. Lieberman, Loveman & O'Brien v. Clark, 85 S. W. 258, 263, 114 Tenn. 117, 69 L. R. A. 732 (citing Newcome v. Crews, 32 S. W. 947, 98 Ky. 339; Brown v. Volkening, 64 N. Y. 80; Foust v. Territory, 58 Pac. 728, 8 Okl. 541; Mitchell v. Bridgers, 18 S. E. 91, 113 N. C. 63; Graham v. Houston, 15 N. C. 232; Sullivan v. Sullivan, 66 N. Y. 37; McColman v. Wilkes, 3 Strob. [S. C.] 465, 51 Am. Dec. 637; Jeffrey v. Owen, 41 N. J. Law, 260); Lofstad v. Murasky, 91 Pac. 1008, 1009, 152 Cal. 64.

" 'Constructive possession' is that which exists in contemplation of law without actual personal occupation." Brown v. Volkening, 64 N. Y. 76, 80.

"Constructive possession" of land is that possession which the law presumes the owner has, in the absence of evidence of exclusive possession in another. Inhabitants of Millinocket v. Mullen, 78 Atl. 1120, 1121, 108 Me. 29.

In a controversy between adjoining landowners as to an intervening strip of land, an instruction that one cannot be in "constructive possession" and another in "actual possession" of the same piece of land at the same time was proper. Crouch v. Colbert, 84 S. W. 992, 111 Mo. App. 93.

A tenant, who went into possession of a sixth of a league of land under an agreement that, in consideration of his protection of the interest of the landlord for 5 years, the landlord would convey to him 25 acres thereof, remained in possession of the whole tract for 5 years, erected improvements on and inclosed 5 acres of the tract, to which he became entitled to a deed under the contract, and for 5 years or more thereafter lived on the same tract in the same condition, continuing during the whole time to be the lessee of the remainder of the one-sixth league, though he never demanded or received a deed as stipulated. *Held* insufficient to show "constructive possession" of the landlord for 10 years, so as to give him title by adverse possession of that portion of the one-sixth league not included in the 25 acres agreed to be conveyed to the tenant. William Carlyle & Co. v. Pruett, 84 S. W. 372, 375, 37 Tex. Civ. App. 384.

Actual possession distinguished

See Actual Possession.

Partial actual possession

The term "constructive possession" necessarily implies partial actual possession. Where a landowner conveys standing trees and a right of entry, retaining the remaining interest in the land, neither the grantor nor the grantee has actual constructive possession of the trees until the grantee actually engages in the work of felling the trees. King v. Davis, 137 Fed. 222, 246 (citing 3 Va. Law Reg. 765).

As possession

See Possession.

Possession of part under deed

"Constructive possession" of lands arises where a person having paper title to a tract of land is in actual possession of only a part. In such case the law construes the possession to extend to the boundary of the tract. Downing v. Anderson, 55 S. E. 184, 186, 126 Ga. 373; Harriss v. Howard, 55 S. E. 59, 60, 126 Ga. 325; Smith v. Donalson, 73 S. E. 577, 578, 137 Ga. 465.

"Adjacent owners may be in 'constructive possession' of the same land being included in the boundaries of each tract. In such cases no prescription can arise in favor of either, but the rights of the parties will be determined according to the superiority

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of the one title or the other aside from such prescription." Harriss v. Howard, 55 S. E. 59, 60, 126 Ga. 325 (citing Grimes v. Ragland, 28 Ga. 123, 127).

The doctrine of "constructive possession" of lands, by the cultivation of a part accompanied by a claim of the whole tract under color of title, does not apply to large tracts of land not purchased for actual cultivation, nor where one maintains a few acres of land in an uncultivated township, for the purpose of thereby claiming title to the entire township by the extension of his actual possession under his color of title. Lawrence v. Alabama State Land Co., 41 South. 612, 613, 144 Ala. 524 (citing Jackson ex dem. Gilliland v. Woodruff [N. Y.] 1 Cow. 276, 13 Am. Dec. 525).

Title or right of actual possession

"Constructive possession" is the possession which follows the legal title. Vanderveer Crossings v. Rapalje, 117 N. Y. Supp. 485, 486, 487, 133 App. Div. 203; Same v. Palmer, 117 N. Y. Supp. 488, 133 App. Div. 926.

One who dredges a tidal creek many years after the disappearance of a millpond, and puts the soil on the margin to reclaim it, the land formerly under water being capable of actual possession, acquires neither "actual" nor "constructive" possession. Id.

"In a general way it may be said that 'constructive possession' is that which exists in contemplation of law without actual personal occupancy of the property, such a possession as in contemplation of law proceeds from the vesting of the paramount title or follows in the wake of the legal title, or, as more exactly defined, 'constructive possession,' or 'possession in law' as it is sometimes called, is that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate 'actual possession' of such property, but no actual possession." Lofstad v. Murasky, 91 Pac. 1008, 1009, 152 Cal. 64.

"Constructive possession," or "possession in law," as applied to the remedy for the quieting of title to land, is that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate actual possession. When one has a legal estate in fee in land, he has the constructive possession, unless the actual possession is in some one else. Constructive possession is founded on the existence of title in some form, and it is a legal impossibility for a constructive possession under the statute of uses to vest in one under a deed from another having no legal estate to convey. Southern Ry. Co. v. Hall, 41 South. 135, 136, 145 Ala. 224 (citing Smith v. Gordon, 34 South. 838, 136 Ala. 498).

"'Constructive possession' follows the legal title, the rightful owner being deemed in possession until he is ousted and disseised. Possession follows the title, in the absence of actual possession adverse to it. The phrase is also sometimes used to denote that legal fiction which extends actual possession of a part of a tract of land to the whole when the possession is held under color of title describing the whole tract." Birmingham Securities Co. v. Southern University, 55 South. 240, 173 Ala. 116 (citing 2 Words and Phrases).

"Constructive possession" of necessity depends on ownership as its basis, and "constructive possession" can never be in one except the owner. In trover for conversion of a chattel, rendered such by severance from the freehold, a possession which is merely transitory, for the purpose of making the trespass or severing a part of the freehold, does not defeat recovery by the owner of the freehold who has either actual or constructive possession of the land. Aldrich Min. Co. v. Pearce, 52 South. 911, 913, 169 Ala. 161, Ann. Cas. 1912B, 288.

Under Code 1896, § 809, authorizing a suit to quiet title by a person in peaceable possession, whether "actual or constructive," one having a legal estate in fee in the land has the "constructive" possession, unless there is an actual possession in some one else. George E. Wood Lumber Co. v. Williams, 47 South. 202, 203, 157 Ala. 73.

Code 1896, § 809, provides that one in peaceable possession of land, either actual or constructive, claiming ownership, and whose title is disputed, may maintain a suit in equity to settle the same. *Held*, that the "constructive possession" which exists in the holder of title is sufficient possession. Kyle v. Alabama State Land Co., 41 South. 174, 175, 147 Ala. 698.

A "constructive possession" of a tract follows the title till such possession of the rightful owner has been invaded by an actual occupancy of part of the tract; so actual occupation by another of a contiguous tract owned by him does not oust the constructive possession of the owner of the first tract, though both tracts are described in the deed to the owner of the second tract. Hardie v. Investment Guaranty & Trust Co., 98 S. W. 701, 81 Ark. 141.

"Constructive possession," within Code Civ. Proc. § 2245, providing that petitioner in forcible entry and detainer must prove actual possession at the time of the entry, or be in constructive possession at the time of a forcible holding out, includes a case where petitioner has the absolute fee or absolute right of possession by some grant, so that he would be entitled to the actual possession, but for the forcible holding out. Town of Oyster Bay v. Jacob, 96 N. Y. Supp. 620, 625, 109 App. Div. 613 (citing Lowman v. Sprague, 26 N. Y. Supp. 568, 73 Hun, 408).

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Of burglars' tools

"Constructive possession" of burglars' tools, in violation of Rev. Laws, c. 208, § 41, would be proved by evidence that the implements were held by one for himself and as agent for another; "that they were jointly bought and owned, but kept by one only, or procured and held by one by mutual agreement, or at the request of another; or that they were deposited in some place mutually agreed on, to which either could resort at pleasure." Commonwealth v. Conlin, 74 N. E. 351, 188 Mass. 265 (quoting and adopting definition in Com. v. Tivnon, 8 Gray [74 Mass.] 375, 69 Am. Dec. 248, and citing Com. v. Day, 138 Mass. 186).

CONSTRUCTIVE PRESENCE

A "constructive presence" at the commission of an offense, so as to make one an accessory, is such as would enable him to take part in aiding the escape of the perpetrator, or giving him information of approaching danger, if necessary. Able v. Commonwealth, 68 Ky. (5 Bush) 698, 703.

CONSTRUCTIVE SEIZURE

"A 'constructive seizure' is accomplished by the actual reduction by the officer of the property intended to be seized to his own control. He must have brought such property so far under his subjection that he could exercise control over it, and must exercise or assume to exercise dominion by virtue of his writ. He must do some act by which he could be successfully prosecuted as a trespasser, if it were not for the protection offered him by the writ. * * * In general, it may be said that it [the levy] must be such a custody as to enable an officer to maintain and assert his control over property, and so that it cannot probably be withdrawn or taken by another without his knowing it." A sheriff's delivery to judgment debtors of a copy of the execution and notice of sale, and his posting the notice of sale and making a return not showing that he went upon or saw the property, or that he constituted the judgment debtor's or any other person's agent to keep possession, is not "constructive seizure." Cupples v. Level, 103 Pac. 430, 432, 54 Wash. 299, 23 L. R. A. (N. S.) 519 (quoting and adopting the definition in Jones v. Howard, 27 S. E. 765, 767, 99 Ga. 451, 59 Am. St. Rep. 231, 235).

CONSTRUCTIVE SERVICE

"Constructive service" of process is a substituted service, and is made by leaving a copy of the process at defendant's residence, when he is absent, or by posting or publishing notice of the pendency of the suit, and mailing a copy of the notice posted or published to defendant, if his post office address is known. Nelson v. Chicago, B. & Q. R. Co., 80 N. E. 109, 111, 225 Ill. 197, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133.

CONSTRUCTIVE TOTAL LOSS

A "constructive total loss" is one upon the happening of which the insured may abandon the subject-matter of the insurance. Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co., 133 Fed. 642, 643, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

Under the American rule relating to marine insurance, a "constructive total loss" with right of abandonment to the insurers exists where the damage is in excess of one-half of the insured value of the vessel or thing insured; but the right of abandonment, which must be exercised promptly in case of a disaster, does not depend on the certainty, but upon the high probability, of such loss. Royal Exch. Assur. v. Graham & Morton Transp. Co., 166 Fed. 32, 34, 92 C. C. A. 66.

The words "constructive total loss," in a marine policy stipulating that there shall be no abandonment of the barge insured as for a constructive total loss unless the cost of the necessary repairs required by the disaster, exclusive of the cost of rescuing the barge and taking her to the dock, etc., be equivalent to 75 per cent. of the agreed value, mean, when applied to damages by a storm, one of the perils insured against, to be such a loss as that the repairs made necessary thereby, exclusive of rescuing the vessel and taking her to the dock. will be equivalent to 75 per cent. of her value. Searles v. Western Assur. Co., 40 South. 866, 869, 88 Miss. 260, 117 Am. St. Rep. 741.

CONSTRUCTIVE TRESPASS

A mere claim of dominion, an intention intimated to interfere with acts under pretense of right or authority, amounts to a "constructive trespass." Lowe v. Ozmun, 86 Pac. 729, 732, 3 Cal. App. 387 (quoting and adopting definition from Dodge v. Meyer, 61 Cal. 420).

CONSTRUCTIVE TRUST

See, also, Implied Trust; Involuntary Trust.

A "constructive trust" is one created by operation of law, arising independent of contract. Eisenberg v. Goldsmith, 113 Pac. 1127, 1131, 42 Mont. 563.

1 Perry on Trusts, p. 168, defines a "constructive trust" as a trust arising from some equitable principle, independent of the existence of any fraud; as where an estate has been purchased and the consideration money paid, but the deed is not taken, equity will raise a trust by construction for the purchaser. Safford v. Barber, 70 Atl. 371, 375, 74 N. J. Eq. 352.

Trusts are classified into " 'direct or express trusts' (that is, those springing from agreement of the parties) and into 'constructive or implied trusts' (that is, those created by the rules and principles of equity). Un-

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der this latter class fall all of those trusts known distinctively as implied or constructive, as well as those called resultant; in short, all those that do not spring from the agreement of the parties. * * * A 'constructive trust' is one not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice." Newman v. Newman, 55 S. E. 377, 379, 60 W. Va. 371, 7 L. R. A. (N. S.) 370.

Where a purchaser at a judicial sale purchased for another, who was in possession and owned an interest, a trust was created in favor of such other person. Parker v. Catron, 85 S. W. 740, 741, 120 Ky. 145, 117 Am. St. Rep. 575 (quoting and adopting the definition in Pomeroy's Eq. § 1044).

Intention of parties

"Constructive trusts" generally have their roots in actual or legal fraud, and generally arise in cases where there is no intention to create a trust. Alexander v. Spaulding, 66 N. E. 694, 696, 160 Ind. 176.

"Constructive trusts" include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. Orth v. Orth, 42 N. E. 277, 282, 145 Ind. 184, 32 L. R. A. 298, 57 Am. St. Rep. 185 (citing 2 Pom. Eq. Jur. § 1044; Perry, Trusts, § 166; Pillow v. Brown, 26 Ark. 240; Hollinshead v. Simms, 51 Cal. 158; McLane v. Johnson, 43 Vt. 48; Collins v. Collins, 6 Lans. [N. Y.] 368; Griffith v. Godey, 5 Sup. Ct. 383, 113 U. S. 89, 28 L. Ed. 934; Lewin, Trusts, 180, note 1; Mescall v. Tully, 91 Ind. 96; Wright v. Moody, 18 N. E. 608, 116 Ind. 175; Parker v. Catron, 85 S. W. 740, 741, 120 Ky. 145, 117 Am. St. Rep. 575; Scribner v. Meade, 85 Pac. 477, 479, 10 Ariz. 143).

A "constructive trust" is an implied trust, raised in equity on behalf of one imposed on by another to work out justice, and in spite of the intention of one of the parties, and it always involves the element of fraud or a breach of some moral or legal duty on the part of the one charged with the trust; and hence is not enforceable against a stranger, or one not connected with the fraud, or who was under no legal duty or obligation to the complaining party. Wright v. Yates, 130 S. W. 1111, 1112, 140 Ky. 283.

" 'Constructive trusts' are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such relation, and often directly contrary to the intention of the one holding the legal title." Under Horner's Ann. St. 1901, § 2976 (Burns' Ann. St. 1901, § 3398), providing that the provisions of section 2974 (3396) that, when a conveyance for a valuable consideration is made to one person and the consideration is paid by another, no trust shall result in favor of the latter, shall not extend to a case where it appears that by agreement, and without fraudulent intent, the person to whom the conveyance was made was to hold the land or an interest in it in trust for the party paying the purchase money or some part of it, a trust is created where plaintiffs and defendant agreed to purchase land, the former to furnish a third of the purchase money and have title to a third interest vested in them, the latter to furnish the balance of the purchase money and have the remaining interest vested in him, and when it was time to take title plaintiffs borrowed their third of the purchase money of defendant, and deed of their interest as well as of his was made to him as security for repayment by them of the money borrowed of him, he to deed their interest to them on his being repaid, either by them directly, or by rentals from the land. Holliday v. Perry, 78 N. E. 877, 879, 880, 38 Ind. App. 588 (quoting and adopting definition in Pom. Eq. Jur. § 155).

"Constructive trusts" are raised by equity to work out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of one holding the legal title; and where one obtains the legal title by fraud, or by violation of confidence, or in any other unconscientious manner, so that he cannot equitably retain the property really belonging to another, equity impresses the property with a constructive trust in favor of the one who is in good conscience entitled to it. Teich v. San Jose Safe Deposit Bank of Savings, 97 Pac. 167, 169, 8 Cal. App. 397 (citing 1 Pom. Eq. Jur. § 155).

Resulting trust distinguished

Implied trusts are of two species; one denominated a "resulting trust," and the other a "constructive trust." In the first class are those trusts which attach to a legal estate acquired by consent of the parties, not in violation of any fiduciary duty or trust relation, for the common benefit of both trustee and cestui que trust. This trust arises out of, and is declared in favor of, the intent of the parties creating it. Its inception is in good faith and in furtherance of fair and honest dealing. The other species of implied trusts, which is called a "constructive trust," is one imposed by a court of equity for the purpose of enforcing an equitable right as against the fraudulent intent of the trustee ex maleficio. This latter class of implied trusts have their origin in the bad faith of the trustee and are imposed by a court of conscience to defeat

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his wrongful ends. Hanson v. Hanson, 111 N. W. 368, 372, 78 Neb. 584.

"Resulting or presumptive trusts," says Bouvier, are those which are implied or presumed from the supposed intention of the parties and the nature of the transaction; "constructive trusts" are such as are raised independently of any such intention and which are forced on the conscience of the trustee by equitable construction and operation of law. Bunel v. Nester, 101 S. W. 69, 77, 203 Mo. 429.

Where a husband uses the coercive power he possesses over his wife to procure her to convey to him her real estate without consideration, the trust raised thereby in equity for the protection of the wife, is not a "resulting trust," as defined in Burns' Ann. St. 1901, § 3396, but a "constructive trust," which will be enforced against him. Huffman v. Huffman, 35 Ind. App. 643, 73 N. E. 1096, 1097.

Wrongful acquisition of property

A "constructive trust" is one that arises where a person clothed with some fiduciary character by fraud or otherwise gains something for himself. Stahl v. Stahl, 73 N. E. 319, 320, 214 Ill. 131, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774.

"The element essential to create a 'constructive trust' is that fraud, either actual or constructive, must have intervened. Such trusts are raised by courts of chancery only in cases where it becomes necessary to prevent a failure of justice, and in most cases where there is no intention or agreement of the parties to create such a relation." Yuster v. Keefe, 90 N. E. 920, 922, 46 Ind. App. 460.

When a trustee or person clothed with a fiduciary character takes advantage of the relation and acquires the title or use of trust property, or makes a profit or advantage to himself out of the trust and confidence, a "constructive trust" is impressed on the property, profits, or proceeds in his hands in favor of the original beneficiary. Home Inv. Co. v. Strange (Tex.) 152 S. W. 510, 512.

One who obtains the legal title to property by fraud or by violating a fiduciary relation, or by any other unconscientious means, holds it under a "constructive trust" for the person in good conscience entitled thereto. Norris v. Kendall, 93 N. E. 1087, 1088, 48 Ind. App. 304 (citing 2 Words and Phrases, p. 1476).

A "constructive trust" is a creature of equity, and takes form whenever title is obtained by fraud, actual or constructive; in such cases equity acting on the substance, regarding that as done which should have been done. Sanguinetti v. Rossen, 107 Pac. 560, 562, 12 Cal. App. 623.

"Constructive trusts" are such as are raised by equity in respect to property which has been acquired by fraud, or where, although acquired without fraud, it is against equity that it should be retained by him who holds the legal title. Walker v. Bruce, 97 Pac. 250, 252, 44 Colo. 109.

"A well-settled and even common form of trusts ex maleficio occurs whenever a person acquires the legal title to land by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like—and, having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a 'constructive trust,' and will compel him to fulfill the trust by conveying according to his engagement." Ammonette v. Black, 83 S. W. 910, 73 Ark. 310 (quoting 2 Pom. Eq. 1055).

A "constructive trust" arises where there is no express or implied, written or verbal, declaration of trust, and when one party occupying a fiduciary position, or having placed himself in such a position in relation to another that good faith requires him to act for the other, and not for himself, fraudulently acquires title to the property in himself in place of the cestui que trust. Butts v. Cooper, 44 South. 616, 619, 152 Ala. 375.

If an owner of an undivided one-half of a tract of land conveys the same by quitclaim deed to his co-owner, who thus obtains the legal title by virtue of confidential relations between them, and under such circumstances that he ought not, according to the rules of equity and good conscience, as administered in chancery, to hold the benefits, out of such circumstances or relations a court of equity will raise a "trust by construction," fasten it upon the conscience of the offending party, and convert him into a trustee of the legal title. Koefoed v. Thompson, 102 N. W. 268, 270, 73 Neb. 128.

Whenever one person acquires from another the title to real estate by a fraud, actual or constructive, practiced upon that other, a "constructive trust" is created which a court of equity will fasten upon the title in his hands. Where a husband's separate deed to his wife of property occupied by them as their homestead, in consideration of her promise to hold the same for another after her death, did not increase the wife's estate in the property on her surviving her husband, she did not hold the same under a constructive trust, under Civ. Code, § 2224, creating a constructive trust in property "acquired by fraud." Loomis v. Loomis, 82 Pac. 679, 680, 148 Cal. 149, 1 L. R. A. (N. S.) 312 (quoting Hayne v. Hermann, 32 Pac. 171, 97 Cal. 259).

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"Constructive trusts" have no element of fraud in them, but the court merely uses the machinery of a trust for the purpose of affording redress in cases of fraud and in working out the equity of the complainant. The party guilty of the fraud is said in such cases to be a trustee ex maleficio, and will be decreed to hold the legal title for the use and benefit of the injured party, and to convey the same, when necessary for his protection, as when one has acquired the legal title to his property by unfair means. Avery v. Stewart, 48 S. E. 775, 778, 136 N. S. 426, 68 L. R. A. 776.

"A 'constructive trust' arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it, as, for example, when money has been acquired through breach of trust, or violation of a fiduciary duty, and the like." York v. Farmers' Bank of Garden City, 79 S. W. 968, 971, 105 Mo. App. 127 (quoting and adopting definition in Clark v. First Nat. Bank of Harrisonville, 57 Mo. App. loc. cit. 286).

"Constructive trusts" arise as a result of frauds committed by one party on another, and such a trust arises when, along with other things, a person clothed with some fiduciary character, by fraud or other wrongful conduct, gains some advantage himself. Where one was induced by fraud to contribute to the price of real estate, the title to which became vested in another, who was cognizant of the fraud and received the benefit of the payment, such owner and the property are chargeable with a constructive trust in favor of the person defrauded to the extent of the amount paid by him. Cunningham v. Pettigrew, 169 Fed. 335, 340, 94 C. C. A. 457.

Where plaintiff and defendant were partners in the purchase and sale of certain land for their joint benefit, and defendant improperly purchased the lot in controversy, which was within the partnership agreement, in his own name and with his own funds over the protest of plaintiff, who furnished money for a part of the expense and agreed to pay his share of the purchase price, the trust imposed upon defendant is of the class known as "constructive trusts." Koyer v. Willmon, 90 Pac. 135, 136, 150 Cal. 785.

" 'Constructive trusts' are often termed trusts in invitum, and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly constructive. * * * All instances of 'constructive trusts' properly so called may refer to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source." Scribner v. Meade, 85 Pac. 477, 479, 10 Ariz. 143 (quoting and adopting the definition in 2 Pom. Eq. Jur. § 1044).

"A 'constructive trust' arises whenever another's property has been wrongfully appropriated and converted into a different form. If the person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name, or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title, or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, in these and all similar cases equity impresses a 'constructive trust' upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except in those of a bona fide purchaser for value and without notice." Chaves v. Myer, 85 Pac. 233, 236, 13 N. M. 368, 6 L. R. A. (N. S.) 793 (quoting and adopting definition from 2 Pom. Eq. Jur. § 1051); Harmon v. Harmon (S. C.) 71 S. E. 815, 816 (quoting and adopting definition 3 Pom. Eq. Jur. [3d Ed.] § 1051).

CONSTRUE—CONSTRUCTION

See Contemporaneous Construction; Strict Construction.

Placing a "construction" upon an instrument means to ascertain the meaning of the signs or words made upon it, and their relation to the facts of the case. Laclede Const. Co. v. T. J. Moss Tie Co., 84 S. W. 76, 88, 185 Mo. 25 (citing Stephen's Dig. Ev., art. 91, p. 146; Carter v. Foster, 47 S. W. 6, 145 Mo. 392).

The "construction of a will" is the ascertainment of the fact of intention from competent evidence, and not the application of technical rules as legal tests. Frost v. Wingate, 64 Atl. 19, 20, 73 N. H. 535.

"By 'construction' of a will we may understand the ascertainment of the meaning and force of the words thereof and the effect in law of the disposition made therein." This meaning is given to the word "construction" as used in 3 Rev. Stat. N. Y. (5th Ed.) p. 153, pt. 2, c. 6, tit. 1, § 93, providing that "the provisions of this title shall not be construed to affect the construction of any such will." Obecny v. Goetz, 102 N. Y. Supp. 232, 234, 116 App. Div. 807 (citing Cutting v. Cutting, 86 N. Y. 522, 535).

In the absence of anything to indicate a contrary intention, it must be assumed that the framers of the Constitution and members of the Legislature, in speaking of municipal townships, used the word "township" in the ordinary popular sense of the term according to the context and approved usage of the language of Rev. Codes, § 8070, expressly providing for such construction. State ex rel.

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Gillet v. Cronin, 109 Pac. 144, 145, 41 Mont. 293 (citing 8 Words and Phrases, p. 7032).

" 'Construction' is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter, of the text." United States v. Farenholt, 27 Sup. Ct. 629, 631, 206 U. S. 226, 51 L. Ed. 1036 (adopting quotation from Lieber, 56).

In a suit to set aside a decree of divorce because obtained through fraud, the petition alleged that substituted service was had only because of willfully false affidavits, and that, if the statute prohibiting petition to review judgments of divorce applied to this case, it was unconstitutional because working a deprivation of property without due process of law. Held, that the Supreme Court had jurisdiction of an appeal from an order sustaining a demurrer to the petition because it has exclusive jurisdiction in cases involving the "construction" of the Constitutions of the United States and the state, which term signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances, and, the petition having in good faith alleged that the statute worked a deprivation of property without due process of law, the question of its constitutionality is presented, even though the appeal might be disposed of on other grounds. Dorrance v. Dorrance, 148 S. W. 94, 97, 242 Mo. 625.

As interpretation

"While there seems to be a technical distinction between the terms 'interpretation' and 'construction,' the latter being perhaps the more comprehensive, they are so alike in their practical results and are used so interchangeably as to have become almost synonymous." Russell v. Ayer, 27 S. E. 133, 140, 120 N. C. 180, 37 L. R. A. 246.

Every question of the character referred to in Act March 2, 1907, c. 2564, 34 Stat. 1246, authorizing a writ of error by the government from the federal Supreme Court, to review certain judgments in criminal cases, need not be decided by the Supreme Court when the decision of one question disposes of the case. "Interpretation" is included in the term "construction," as used in such act. The action of the court below as to the mere construction of an indictment is not open to review on the writ of error authorized by such act. United States v. Biggs, 29 Sup. Ct. 181, 185, 211 U. S. 507, 53 L. Ed. 305; Same v. Freeman, 29 Sup. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; Same v. Sullenberger, 29 Sup. Ct. 186, 211 U. S. 522, 53 L. Ed. 311.

In usage the "interpretation" and "construction" of a statute are usually understood as being the same, even though they may have a technical distinction; interpretation as well as construction of a statute consisting of an abstract distinction between the two terms. It is comprehended by Act Cong. March 2, 1907, authorizing a writ of error on behalf of the government from the federal Supreme Court, quashing an indictment, when based upon the "construction" of the statute upon which the indictment is founded. United States v. Keitel, 29 Sup. Ct. 123, 127, 211 U. S. 370, 53 L. Ed. 230.

"Construction" of a city ordinance is an effort, by applying certain rules, to ascertain the intention of the parties, when it is not clearly disclosed by their own forms of expression. City of St. Louis v. Chicago House Wrecking Co., 200 Fed. 239, 241, 118 C. C. A. 425.

As mean

The expressions "shall be construed" and "shall be deemed" have been used time out of mind in statutes to import the same as "shall mean." Dilworth v. Schuykill Imp. Land Co. of Philadelphia, 69 Atl. 47, 48, 219 Pa. 527.

CONSUL

Rev. St. U. S. § 1674, in force in 1880 when a deed executed in London, England, was acknowledged before the United States "vice and deputy consul general," provided for "vice" and "deputy" consuls. Section 1750 (page 1196) conferred on every "consular officer" the "authority and powers of a notary public." Revisal 1905, § 1024, validates acknowledgments before "vice consuls and vice consuls general." Held, in view of the above, Code, § 1245 (4), which authorized such acknowledgments before "any ambassador, minister, consul or commercial agent of the United States," included any "consul," whether consul, consul general, or vice consul or deputy consul. Powers v. Baker, 68 S. E. 203, 152 N. C. 718.

By Texas Act Dec. 18, 1837, the Republic of Texas adopted the United States consular system for the government of the "consular agents" of the Republic, and section 2 required the Secretary of State to furnish "said consuls" with such instructions as might be necessary for the regulation of commercial intercourse, etc. Held, that the words, "consuls" and "consular agents" were used interchangeably, and that a deed to land in Texas, certified to by a consular agent in Louisiana, was not objectionable, when offered in evidence, because the certificate was not by the consul. Houston Oil Co. of Texas v. Kimball (Tex.) 114 S. W. 662, 668.

CONSULAR OFFICER

As notary public, see Notary Public.

A "consular officer," as defined by the Consular Regulations, § 409, "is by the law of nations and by statute the provisional conservator of the property within his dis-

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trict belonging to his countrymen deceased therein. He has no right, as a 'consular officer,' apart from the provisions of treaty, local law, or usage, to administer on the estate or in that character to aid any other person in so administering it, without judicial authorization. His duties are restricted to guarding and collecting the effects, and to transmitting them to the United States, or to aid others in so guarding, collecting, and transmitting them, to be disposed of pursuant to the law of the decedent's state. 7 Op. Atty. Gen. 274. It is, however, 'generally conceded that a 'consular officer' may intervene by way of observing the proceedings, and that he may be present on the making of the inventory.'" Rocca v. Thompson, 32 Sup. Ct. 207, 209, 223 U. S. 317, 328, 56 L. Ed. 453.

CONSULT

"To 'consult' is defined as to apply to for direction or information; to ask the advice of—as to consult a lawyer; to discuss something together; to deliberate." Hewey v. Metropolitan Life Ins. Co., 62 Atl. 600, 602, 100 Me. 523.

CONSULT OR CONSULTATION WITH PHYSICIAN

"'Consulting' a physician, and being 'under the care of' a physician, not only in the technical use of the terms, but to the common mind, may mean very different things. A man may consult a physician without being under his care at all." Hewey v. Metropolitan Life Ins. Co., 62 Atl. 600, 602, 100 Me. 523.

A person does not "consult" a physician and is not "treated" for an "ailment," within the meaning of a question in an insurance application, by merely stating to a physician that he has a headache and receiving medicine therefor, without asking or receiving any professional advice. Modern Woodmen of America v. Miles (Ind.) 97 N. E. 1009.

In an application for life insurance, the insured stated that he had not consulted a physician within a certain time. The evidence was that a physician, who was his friend, made at intervals examinations of insured to ascertain the condition of his health, and that this was done, not at the instance of the insured, but on the physician's own initiative, without charge, and for the sole purpose of rendering a friendly service, and the court holds that it would be a misuse of words, as they are ordinarily understood, and especially as they were employed in this application, to say that in so submitting himself to those examinations the insured "consulted a physician" or was attended by him. Mutual Reserve Life Ins. Co. v. Dobler, 137 Fed. 550, 556, 70 C. C. A. 134.

In an action on an insurance policy, the insurer defended on the ground that a warranty in the application that the insured had not consulted a physician for a certain length of time before his application was untrue. An instruction, requested by the defendant, was that if the insured talked with a doctor with regard to his health, and if the doctor gave the insured certain medicine for some ailment, the verdict should be for the defendant. Before giving the instruction the court changed the words "talked with" to "consulted." Held, that this change was not improper, for "consulted," as used in this connection, means the same as "talked with," "consulted" meaning to apply for direction and information, while to "talk with" a physician and get medicine from him amounts to the same thing. Winn v. Modern Woodmen of America, 137 S. W. 292, 295, 157 Mo. App. 1.

Merely calling in the office of a doctor for some medicine to relieve a temporary indisposition, or simply for an examination to ascertain if there is any ailment or complaint about the person, and for nothing more, is not a "consultation by a physician," within the meaning of a question in an application for an insurance policy as to whether the applicant had within a certain time "consulted a physician." Scofield's Adm'x v. Metropolitan Life Ins. Co., 64 Atl. 1107, 1109, 79 Vt. 161, 8 Ann. Cas. 1152.

The attendance of a physician at the time of a normal case of confinement is not a "consultation with a physician," within the meaning of a statement by an applicant for life insurance that within the last seven years she had not consulted any physician in regard to a personal ailment. Rasicot v. Royal Neighbors of America, 108 Pac. 1048, 1053, 18 Idaho, 85, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

Where a benefit certificate is issued on applicant's warranty that she had not consulted a physician, a call made by a physician at the instance of applicant's husband is a "consultation" within the meaning of the warranty, if she accepts his services and receives aid from him. Beard v. Royal Neighbors of America, 99 Pac. 83, 86, 53 Or. 102, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199.

That applicant for reinstatement of life insurance had been treated by a physician for what was regarded as a common temporary inflammation of the throat did not constitute "consultation" of a physician within a statement in the application that he had not consulted a physician since a certain time, though it subsequently appeared that applicant had tubercular laryngitis. Cole v. Mutual Life Ins. Co. of New York, 56 South. 645, 647, 129 La. 704, Ann. Cas. 1913B, 748.

CONSUME—CONSUMPTION

See Business Consumption; Loan for Consumption.

The power given by law to a devisee to use the principal means the "power to con-

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sume," and the power to consume real estate necessarily includes the power to convey. Kennedy v. Pittsburg & L. E. R. Co., 65 Atl. 1102, 1103, 216 Pa. 575.

Act March 3, 1897, c. 389, § 17, 29 Stat. 691, amending Rev. St. U. S. § 2797, provided that sea stores and the legitimate equipment of vessels in the foreign trade, delayed in port for any cause, may be transferred in the port from one vessel to another of the same owner by payment of duties, but duties must be paid on such stores or equipment landed for consumption. Held, that the word "consumed" should not be construed to mean only such articles as are eaten, since candles, kerosene, and coal, used to light the vessel, are as much consumed in the course of a voyage as is the food eaten. United States v. Hawley & Letzerich, 160 Fed. 734, 735.

Table ware and commissary supplies furnished to a subcontractor and materials furnished workmen in railway construction work in part payment for their labor are not "consumed" within a statute giving a lien to a materialman for material delivered to a subcontractor who performs any part of the work in grading any railroad company's roadway, etc. S. B. Luttrell & Co. v. Knoxville L. & J. R. Co., 105 S. W. 565, 572, 119 Tenn. 492.

CONSUMABLE ARTICLES

Under the rule that a limitation over on the death of one to whom chattels are bequeathed, to be held and enjoyed by her during life, is valid, except as to such articles the use of which means their "consumption," corn, wheat, shock fodder, sheaf oats, chickens, and fat hogs are classed as property "consumed in its use"; while a deposit in bank, sheep, horses, cows and calves, a threshing outfit, gristmill, blacksmith tools, and farming implements are not. Davison's Adm'r v. Davison's Adm'x, 149 S. W. 982, 983, 149 Ky. 571.

CONSUMER

See Large Consumer; Separate Consumer.

Water was supplied to three tenement houses, occupied by three families, but owned by one person, through a single pipe. The minimum charge for water was 60 cents per month, and "each consumer" was required by the regulations to be supplied by a separate pipe. Held, that a minimum charge of $1.80 per month was proper; each householder using water and occupying a separate house, either as tenant or owner, being a "consumer." Thompson v. City of Goldsboro, 65 S. E. 901, 902, 151 N. C. 189.

CONSUMMATE

See Curtesy Consummate.

A landowner contracted with a corporation for a lease of land for the purpose of mining and an option to purchase, the first payment of $15,000 to be made September 1, 1907, deed to be made on first payment, and provided that the lessee should pay rent on the buildings and royalties on the iron mined. Before the first payment became due a new contract was entered into, because a prospective purchaser of stock in the corporation objected to the amount of the first payment provided by the lease, and the new contract made the first payment $4,250, deed to be made on this payment, and further provided that the corporation might retain possession of all parts of the premises as it now occupies, and pursue its business of mining for ores "during and until this contract is finally 'consummated' as contemplated on the first day of September, 1907." After the execution of the contract, mining operations were continued as before, but no payment was made and no deed executed, but the owner received royalties thereafter until the mine was closed down for the lack of funds, and a chattel mortgage given on the mining machinery. Held, that the second contract would be construed a lease with option to purchase, though standing alone it was a contract for the sale of land, since by using the word "consummate," which means to complete, and making time of the essence of the contract, it was obvious that that was the intention. Powell v. Plank, 125 S. W. 836, 838, 141 Mo. App. 406.

CONSUMMATED SALE

Where the contract between the purchaser and seller of real estate contained a provision fixing the compensation of the agent who procured the purchaser, and also fixing the period of payment of such compensation as the time of the consummation of the sale, held, in an action by the agent to recover his commissions, that the "consummation of the sale" contemplated by the parties was the passing of the title, and that the agent's compensation under the contract was contingent upon that. Morse v. Conley, (N. J.) 85 Atl. 196, 197.

A "consummated sale," within the requirements of the rule permitting recovery of commission by a broker for a consummated sale, is not necessarily a sale consummated by the delivery of deeds of conveyance, but such a contract as will be enforced by the courts, if enforcement be demanded. Ormsby v. Graham, 98 N. W. 724, 729, 123 Iowa, 202.

CONSUMPTION

"Consumption" is the most common and most fatal of all diseases. It is a disease of the lungs, caused by a germ breathed into the lungs, or which gets into the body with food. The germ comes only from some other person or animal that has the disease. Therefore a refusal to perform a marriage

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agreement on the ground that the one refusing is afflicted with consumption is justified. Grover v. Zook, 87 Pac. 638, 640, 44 Wash. 489, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192 (citing Sanders v. Coleman, 34 S. E. 621, 97 Va. 690, 47 L. R. A. 581).

CONTACT

Where, in an action for injuries to a traveler in a collision with a team, the complaint alleged that the team struck plaintiff, and the answer denied it, but admitted that plaintiff came into collision with the team, and the evidence was conflicting, and two witnesses testified that the team was practically at a standstill when plaintiff collided with it, an instruction that it was admitted that defendant was driving along the highway and came in "contact" with plaintiff was misleading. The word "contact" might be considered by the jury as synonymous with collision. Coors v. Brock, 96 Pac. 963, 964, 44 Colo. 80.

CONTACT WITH POISON

"Contact with poison," or with poisonous substances, in the ordinary sense, means contact with corporeal matter, with that which is substance, as distinguished from that which cannot be seen nor handled. Farner v. Massachusetts Mut. Accident Ass'n, 67 Atl. 927, 928, 219 Pa. 71, 123 Am. St. Rep. 621.

Death from blood poisoning caused by the sting of an insect is not the result of "poison in any form or manner" or of "contact with poisonous substances," within the meaning of an accident policy. Omberg v. United States Mut. Acc. Ass'n, 40 S. W. 909, 911, 101 Ky. 303, 72 Am. St. Rep. 413.

Where an embalmer accidentally punctured the palm of his hand with the point of an embalming needle while embalming a dead body, and blood poison set in, resulting in death a few weeks later, the death was not from "contact with poisonous substances" within an accident policy exempting insurer from liability for injuries arising from "contact with poisonous substances." Simpkins v. Hawkeye Commercial Men's Ass'n, 126 N. W. 192, 194, 148 Iowa, 543.

CONTAGIOUS DISEASE

While a well-defined difference in the meanings of the words "contagious" and "infectious" is observed by lexicographers and scientists, an instruction, in an action for damage to a shipment of hogs through their wrongful exposure to cholera, where some witnesses say that cholera is "contagious," others "infectious," and others that it is both, but it is admitted that the disease is transmissible, it is immaterial whether the word "infectious" or the word "contagious" was used to describe the form of transmissibility. Council v. St. Louis & S. F. R. Co., 100 S. W. 57, 61, 123 Mo. App. 432.

"There is doubtless a technical distinction between the two [terms 'contagious' and 'infectious'] in the fact that a contagious disease, is communicable by contact, or by bodily exhalation, while an infectious disease presupposes a cause acting by hidden influence, like the miasma of prison ships or marshes, etc., or through the pollution of water or the atmosphere, or from the various ejections from animals. The word 'contagious,' however, is often used in a similar sense of pestilential or poisonous and not strictly confined to influences emanating directly from the body." Grayson v. Lynch, 16 Sup. Ct. 1064, 1068, 163 U. S. 477, 41 L. Ed. 230.

CONTAIN

A book having no lithographic prints, except one on the front cover, held not to be within the provision for "books * * * 'containing' illuminated lithographic prints," in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188. E. P. Dutton & Co. v. United States, 154 Fed. 214, 215.

CONTAINED IN

The words "contained in," as used in a fire policy insuring against loss of horses contained in a frame barn, cannot be construed to cover a horse which was kept in a pasture one-eighth of a mile from the barn for two months before the loss of the horse by being struck by lightning while in the pasture, whether the words be construed as "kept in" or not. Thorp v. Ætna Ins. Co., 72 Atl. 690, 75 N. H. 251.

CONTAINING BY ESTIMATE

Where land sold was described by metes and bounds, the words "containing by estimate" a certain number of acres were equivalent to the words "more or less." Mayer & Schmidt v. Wooten, 102 S. W. 423–427, 46 Tex. Civ. App. 327.

CONTAINING CHAMBER

The phrase "containing chamber," as used in the books, is simply a convenient expression for the limits or boundaries of a grant of mineral in or under land, with the right to remove the same. Moore v. Indian Camp Coal Co., 80 N. E. 6, 8, 75 Ohio St. 493.

CONTEMPLATE—CONTEMPLATION

Testator directed: "I confer upon my executors power * * * to make sale * * * of my real estate, not only for the purpose of paying my debts, but to enable them to make the division into those parts as hereinbefore provided, it being contemplated by me that they will sell my real estate, though not with undue haste." Held,

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that one of the meanings of the word "contemplate" is to "consider deliberately," and appearing at the other end of his will, after the other expressions authorizing the executors to sell his real estate, it may well be taken that it was his deliberate purpose that his real estate should be sold by them. Boyce v. Kelso Home, 68 Atl. 550, 552, 107 Md. 190.

The word "contemplates," as used in a memorandum of agreement reciting that the agreement "contemplates" that the capital for a certain business should be furnished by a certain person, indicated rather an expectation or intention than a promise or undertaking. Read v. Fox, 104 N. Y. Supp. 251, 253, 119 App. Div. 366.

In an action on a promissory note claimed to have been executed by defendant to plaintiff's assignor for margins advanced, and commissions for purchasing cotton on margins without actual delivery, the plea alleged that it was not contemplated or intended by either of the parties to the transaction that the actual cotton would be delivered, but that it was contemplated and intended by all such parties that at the time of delivery differences would be settled by paying or receiving the difference between the price when sold and the price at the time of delivery. Held, that the plea sufficiently alleged that the parties mutually intended that the transaction should be adjusted by the payment of differences only, so as to make the contracts unlawful; the word "contemplation," as used in the plea, signifying "purpose" or "intention." Birmingham Trust & Savings Co. v. Currey (Ala.) 57 South. 962, 964.

Rev. St. § 2979, provides that any owner or importer of merchandise on which the duties have not been paid on giving satisfactory security and obtaining a permit may re-export the same without the payment of duty under inspection of the proper officers. Held, that since such section contemplates, not only that the goods be deposited on ship within the time limited after their removal, but also requires that the shipment shall be under the continued inspection of the customs officers, and Act Cong. June 10, 1890, c. 410, § 9, makes it a crime for any owner or importer to make or attempt to make any entry of goods without payment of duty, and one "contemplates" a crime who means to deposit, conceal, or withdraw goods removed from a warehouse for exportation and to introduce them unconditionally into the country effecting a surreptitious entry by which the duties would become due instanter, an indictment charging a conspiracy to effect such result sufficiently charged a crime. United States v. Ehrgott, 182 Fed. 267, 273.

CONTEMPLATED SUICIDE

The term "contemplate" in Rev. St. Mo. 1889, § 5855, providing that suicide shall be no defense to an action on a life policy unless the insured "contemplated suicide" at the time of his application, is equivalent to "intended" or "had resolved"; and it is not sufficient to show that the insured, at the time of his application, had considered the subject of suicide, without any definite purpose to commit suicide. Ætna Life Ins. Co. v. Florida, 69 Fed. 932, 934, 935, 16 C. C. A. 618, 30 L. R. A. 87.

CONTEMPLATION OF DEATH

The statute taxing transfers of property made "in contemplation of death" includes gifts inter vivos, as well as gifts causa mortis. In re Palmer's Estate, 102 N. Y. Supp. 236, 240, 117 App. Div. 360.

The words "in contemplation of death," as used in Laws 1903, p. 66, c. 44, § 1, subd. 3, imposing a tax on transfers by deed or gift "made in contemplation of death of the grantor or donor, or intended to take effect in possession or enjoyment at or after such death," refer to an expectation of death arising from such a bodily or mental condition as prompts one to dispose of his property to those entitled, and includes gifts inter vivos as well as gifts causa mortis. State v. Pabst, 121 N. W. 351, 359, 139 Wis. 561.

As used in a statute imposing a tax on transfers made "in contemplation of death," the quoted words do not refer to that general expectancy which every mortal entertains, but rather to the apprehension which arises from some existing condition of body or some impending peril. An antenuptial agreement for the payment of a certain sum to the wife in lieu of dower was in contemplation of death, though not intended to take effect until after the husband's death. In re Baker's Estate, 82 N. Y. Supp. 390, 391, 83 App. Div. 530 (citing Matter of Spaulding's Estate, 63 N. Y. Supp. 694, 49 App. Div. 541; Matter of Seaman's Estate, 41 N. E. 401, 147 N. Y. 69, 77; Matter of Mahlstedt's Estate, 73 N. Y. Supp. 818, 67 App. Div. 176, 178).

CONTEMPLATION OF INSOLVENCY

To "contemplate" insolvency, within the meaning of the corporation act of 1896 (P. L. 1896, p. 298, § 64), providing that any sale, conveyance, assignment, or transfer of property by a corporation in contemplation of insolvency shall be void as against creditors, is to have in mind something more than a mere possibility of insolvency on a contingency which does not in fact happen. If a corporation or its officers regard a suspension of its ordinary business for want of funds, as is likely to happen in the event of its not being able to borrow money with which to meet its current expenses, and it is in fact able to borrow it, and secures the money and goes on with its business, it cannot be said to contemplate insolvency. Re-

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ginn Music Box Co. v. F. G. Otto & Sons, 56 Atl. 715, 717, 65 N. J. Eq. 582.

A creditor attacking a payment by a debtor to another creditor as made in contemplation of insolvency and with a design to prefer the creditor, showed that the debtor was worth about $5,000 less than his liabilities, but he had a large credit by reason of the confidence of the people in his integrity. The payment attacked was a payment of $1,500 on a debt of $3,250 made to preserve his credit and save his business. Shortly thereafter the debtor lost his mind, while if he had been able to manage his business, he would have succeeded in continuing in business. Held not to show that the payment was made "in contemplation of insolvency" and with a "design to prefer a creditor" within Ky. St. § 1910. Cecil v. Citizens' Nat. Bank of Danville, 141 S. W. 416, 418, 145 Ky. 842.

A payment by an insolvent debtor in the usual course of his business to maintain his credit, preserve his estate, and carry on his business, without any intent to prefer one creditor to another, is not a payment "in contemplation of insolvency," and with a design to prefer a creditor, within Ky. St. § 1910. Union Trust & Savings Co. of Maysville v. Taylor, 129 S. W. 828, 830, 139 Ky. 283.

CONTEMPORANEOUS

The term "contemporaneous" does not necessarily always refer to any single or ultimate fact, however important to any precise or definite time. Fraley v. Fraley, 64 S. E. 381, 383, 150 N. C. 501.

The res gestæ rule authorizes the admission of such circumstances and declarations as are contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character. The term "contemporaneous," however, in such sense does not mean coincidence, but requires that the circumstance or declaration be substantially at the same time as the main fact, so that it will appear that the evidence offered has not the ear-marks of a device or afterthought, or a narrative of a transaction which is really and substantially past. Bessierre v. Alabama City, G. '& A. Ry. Co. (Ala.) 60 South. 82, 86.

Declarations springing out of a transaction, though not exactly coincident in point of time, are considered as "contemporaneous," so as to be admissible as part of the res gestæ. Price v. State, 98 Pac. 447, 451, 1 Okl. Cr. 358.

By "contemporaneous" forgeries, evidence of which is admissible to illustrate purpose and intent, it is not meant that they must occur at the same time as that in question; they may have been months before or months after the forgery on trial. If they serve to illustrate, or show system, or make apparent the intent with which the act in question was committed, they are germane and admissible. Taylor v. State, 81 S. W. 933, 935, 47 Tex. Cr. R. 101.

The word "contemporaneous," as used in Revisal 1905, § 3749, providing that if any carrier shall collect from any person a greater compensation for transportation of property than it receives from any other for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances, it shall be liable to a fine of a specified sum, means a period of time through which shipments of freight are made by one shipper at one rate, and by other shippers at another rate. Hilton Lumber Co. v. Atlantic Coast Line R. Co., 53 S. E. 823, 829, 141 N. C. 171, 6 L. R. A. (N. S.) 225.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, which prohibits a carrier from charging to one shipper a greater or less compensation for a service than is charged to another for a like and "contemporaneous service," services rendered to a complaining and a favored shipper are "contemporaneous" as long as the discriminating rates remain in force, and for the purpose of comparison they need not be rendered on the same day, nor during the same week or month. Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 181 Fed. 403, 411.

What lapse of time is embraced in the word "contemporaneous," as apply to res gestæ declarations, is often a question of difficulty. Perfect coexistence of time between the declaration and the main act is not, of course, required. It is enough that the two are substantially contemporaneous. They need not be literally so. The declaration must, however, be so approximate in point of time as to grow out of, elucidate, and explain the character and quality of the main act, and must be so closely connected with it as virtually to constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the earmarks of a device or afterthought, nor be merely a narrative of a transaction which is really and substantially past. A motorman's statement that it was due to his carelessness that plaintiff got hurt, made after the injury was complete and the plaintiff had been removed from where he had fallen and was sitting on the car, and with the obvious purpose of showing that he was guilty of no intentional wrong, was no part of the res gestæ and was inadmissible. Little Rock Traction & Electric Co. v. Nelson, 52 S. W. 7, 9, 66 Ark. 501 (quoting and adopting definition in Alabama Great Southern R. Co. v. Hawk, 72 Ala. 112).

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Where a condition contained in a life insurance policy issued by the Supreme Lodge Knights of Pythias to one of its members provided that "the contract evidenced hereby shall not begin until 12 o'clock noon of the day of the date hereof, and then the Supreme Lodge Knights of Pythias, hereinafter called the society, will not be liable unless the said member has actually paid the membership fee and made the first monthly payment required while said member is in good health," and the policy was dated November 1, 1907, and delivered to the insured on November 2, 1907, and the first monthly premium was due and paid on the 20th day of November, 1907, by the insured, held that, relatively to delivering the policy and paying the premium as above stated, both acts were "contemporaneous," within the meaning of the contract in this case, and the policy of insurance became of binding force on the society on the 20th day of November, 1907, so far, at least, as this clause of the contract is concerned, and not before. Where in such a case the agent of the society knew the insured was not in good health after the time the application for insurance was received, but before the policy was delivered to the insured, and the agent delivered the policy and received the first monthly payments from the insured with the same knowledge, the society will not be heard to set up as a defense to a suit on the policy that the insured was not in good health at the time of taking out the insurance on his life, but will be held to have waived the conditions in the policy to the effect that the insurer "will not be liable unless said member has actually paid the membership fee and made the first monthly payment required while said member is in good health." Supreme Lodge K. P. v. Few, 76 S. E. 91, 92, 138 Ga. 778.

CONTEMPORANEOUS CONSTRUCTION

"Contemporaneous construction" is a rule of interpretation, but is not an absolute one. It does not preclude an inquiry by the court as to the original correctness of such construction. A custom of a department of the government, however long continued by successive officers, must yield to the positive language of the statute. If there be any ambiguity or doubt, then such a practice, begun early and continued long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. Houghton v. Payne, 24 Sup. Ct. 590, 593, 194 U. S. 88, 48 L. Ed. 888 (citing United States v. Graham, 3 Sup. Ct. 582, 110 U. S. 219, 28 L. Ed. 126; Edwards v. Darby, 12 Wheat. [25 U. S.] 206, 6 L. Ed. 603; United States v. Temple, 105 U. S. 97, 26 L. Ed. 967; Swift & C. & B. Co. v. United States, 105 U. S. 691, 26 L. Ed. 1108; Ruggles v. Illinois, 2 Sup. Ct. 832, 108 U. S. 526, 27 L. Ed. 812).

The literal meaning of "contemporaneous" is living or existing at the time. As applied to the question of the effect of legislative construction of the statutes, the principal of construction cannot be held to require perfect or literal coincidence in point of time; the lapse of time weakening the force or influence of the effect of an enactment as a practical and "contemporaneous" construction. Burke v. Snively, 70 N. E. 327, 334, 208 Ill. 328.

CONTEMPT

See Civil Contempt; Consequential Contempt; Constructive Contempt; Continuing Contempt; Criminal Contempt; Direct Contempt; Independent Contempt; Indirect Contempt; Judicial Contempt; Quasi Criminal Contempt.

Expenses caused by contempt, see Expenses.

Power to punish as judicial power, see Judicial Power.

See, also, Misbehavior.

A "contempt" is a willful disregard or disobedience. Saal v. South Brooklyn Ry. Co., 106 N. Y. Supp. 996, 1000, 122 App. Div. 364 (quoting and adopting definition in Bouv. Dict.).

A "contempt of court" is disobedience to the court, by acting in opposition to the authority, justice, and dignity thereof. Rooker v. Bruce, 85 N. E. 351, 353, 171 Ind. 86.

"'Contempts' logically arrange and divide themselves into four classes, viz., direct and indirect, civil and criminal." Ex parte Clark, 106 S. W. 990, 996, 208 Mo. 121, 15 L. R. A. (N. S.) 389.

"Contempts" are either civil or criminal, and "criminal contempt" consists of conduct on the part of one which amounts to an obstruction of justice, tending to bring the court into disrepute. Gordon v. Commonwealth, 133 S. W. 206, 208, 141 Ky. 461.

"'Contempt of court' involves two ideas—diregard of the power of the court and disregard of its authority. Disregard of power, in that lawful orders have not been obeyed, and disregard of authority, in that its jurisdiction to declare the law and ascertain and adjudicate the rights of the parties is hindered, prevented, or at set at naught. Such conduct is an offense against the court as an organ of public justice, and may be rightfully punished on summary conviction, whether the act complained of be punishable as a crime on indictment or not." In re Fellerman, 149 Fed. 244, 247.

It is a "contempt" openly to insult or resist the powers of the court or persons of the judges, or to do acts which may lead to the disregard of their authority, and from their nature to require a summary in-

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terposition to preserve order in the court and to maintain dignity of the judges. McCarthy v. Hugo, 73 Atl. 778, 779, 82 Conn. 262, 135 Am. St. Rep. 270, 17 Ann. Cas. 219.

Anything done or said in or out of the presence of the court, which impedes or obstructs it in the decision of a pending cause, or in the execution, by authorized means, of its judgments, may be punished as a "contempt." Fellman v. Mercantile Fire & Marine Ins. Co., 41 South. 49, 51, 116 La. 723.

Rem. & Bal. Code, § 2372, subds. 1, 3, defining "contempt" as disorderly, contemptuous, or insolent behavior committed during the sitting of the court in its immediate view, and directly tending to interrupt its proceedings, and as a breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of a court, are but declaratory of the common law. State v. Buddress, 114 Pac. 879, 880, 63 Wash. 26.

The elements essential to a civil prosecution for "contempt of court" are an offense within Code Civ. Proc. § 14, defining contempts punishable civilly, or, under the common law, the operation of that offense to impair, prejudice, or defeat the rights or remedies of the adversary, the further operation of that offense to cause actual loss or injury to the adversary who is without statutory remedy to recoup his damages. Dollard v. Koronsky, 118 N. Y. Supp. 922, 925, 64 Misc. Rep. 611.

For one, on contempt proceedings for saying out of court that the judge was corrupt, to state, in answer to a question of the court, that he had given publicity to the statement he had heard that the court was corrupt, does not constitute a "contempt" in the presence of the court. Ex parte Davies, 84 S. W. 633, 635, 73 Ark. 358.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1169) §§ 299, 300, which provides that offenses committed in the Circuit Courts, which were abolished, may be prosecuted and punished in the District Courts, the District Court has jurisdiction to punish for "contempt" committed in the Circuit Court under proceedings for punishment brought in the Circuit Court before it was abolished. In re Steiner, 195 Fed. 299, 301.

Under Ballinger's Ann. Codes & St. § 5807 providing that, if any loss or injury to a party in an action prejudicial to his rights therein have been caused by the "contempt," the court may give judgment that the party aggrieved recover of the defendant a sum sufficient to indemnify him, it is not necessary that the contempt be a criminal contempt for which a fine could be adjudged, as provided in other terms of the chapter; there being a distinction between a civil and a quasi criminal contempt, and both may exist at the same time, or only one. State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 107 Pac. 196, 197, 55 Wash. 1.

Any disorderly conduct calculated to interrupt the proceedings of the court, any disrespect or insolent behavior toward the judge presiding, any breach of order, decency, or decorum, either by parties connected with the tribunal, or by strangers present, or by any assault made in view of the court, is punishable as "contempt of court." "Every writing, letter, or publication which has for its object to divert the course of justice is 'contempt of court.' * * * Every insult offered to a judge in the exercise of his duties is a 'contempt of court.'" People ex rel. Attorney General v. News-Times Pub. Co., 84 Pac. 912, 946, 35 Colo. 253.

"Contempt" of court is a despising of the authority, justice, or dignity of the court. He is guilty of such contempt whose conduct is such as tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigations. Any conduct which is calculated to interfere with the proceedings, by assaulting litigants or witnesses within the precincts of the court, or preventing or hindering, or endeavoring to prevent or hinder, them in their access to the court or otherwise, is a contempt. The power of the court in the matter of contempt cannot be defined within any limits, and the primary question in all cases of alleged contempt is whether there has or has not been an interference with the due administration of justice. For one to change the locks on the door of the courtroom, during adjournment of the court, and thereafter refuse to allow the judge of the court and his officers, and the parties to the suit on hearing before him, to enter the courtroom, is a contempt. Dahnke v. People, 48 N. E. 137, 139, 168 Ill. 102, 39 L. R. A. 197 (citing Oswald, Contempt, pp. 3, 4, 27, 70).

Words written or spoken at a place other than where the court is held, and not so near thereto as to interfere with the proceeding of the court, do not render the author liable. Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for "contempt." Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95, 98.

Neither the taking of a deposition to be used in a federal court in another state, in pursuance of a conspiracy to impose upon the court, nor the filing and publication of such deposition, is a misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice, punishable as a "contempt" under Rev. St. § 725; but to constitute such contempt the deposition must have been used or offered in

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evidence. Doniphan v. Lehman, 179 Fed. 173, 174.

Abuse of process

Where witnesses were brought by the United States to testify in a criminal proceeding from another state, and duly subpœnaed, and after the termination of the proceeding they were served with civil process by the acquitted defendant in an action for malicious prosecution growing out of their testimony, such act constituted a "contempt" of court, within Rev. St. § 725, limiting the jurisdiction of the federal courts to punish a misdemeanor committed in the presence of the court or so near as to obstruct the administration of justice, though the service was not in the courtroom nor in its immediate vicinity; the court's power being construed to extend as far as necessary to the protection of the witness. United States v. Zavelo, 177 Fed. 536, 538.

By attorney

Where an attorney for defendant in a criminal prosecution used insulting language with reference to the opposing counsel, and persistently resorted to frivolous methods for the purpose of interrupting the trial, and conducted the defense in a contemptuous manner, and when called upon to show cause why he should not be punished for contempt made no excuse, but assumed a defiant attitude as to the judge, he was guilty of "contempt," authorizing punishment therefor. State ex rel. Cary v. District Court of Hennepin County, 125 N. W. 1020, 1021, 110 Minn. 446.

An attorney is guilty of no wrongful act in advising his client of his legal rights and remedies, and hence is not guilty of "contempt" for advising his client to file a petition in bankruptcy or in actually filing the petition, though the client was undergoing examination in supplementary proceedings, and had been enjoined from disposing of or transferring any property. In re Kepecs, 123 N. Y. Supp. 872, 874.

A false statement by the attorney for defendant in supplementary proceedings in the City Court that he would deposit the amount of the judgment in the Municipal Court if granted an adjournment to enable him to apply for a vacation of the judgment, made to defeat and prejudice plaintiff's rights, though reprehensible, is not punishable as "contempt," under Judiciary Law (Consol. Laws, c. 30) § 753, subd. 3, authorizing punishment for disobedience to a lawful mandate, unlawful interference with proceedings, and in other cases where contempt proceedings have been usually practiced, in a court of record to enforce civil remedy or to protect the rights of the parties. Franzone v. Tumminelli, 123 N. Y. Supp. 455, 457, 67 Misc. Rep. 549.

By bankrupt

A bankrupt, who on his examination before the referee willfully swears falsely, or falsely denies knowledge of matters, refuses "to be examined according to law," and is guilty of "contempt," under Bankr. Act. July 1, 1898, c. 541, § 41a (4), 30 Stat. 556; In re Gitkin, 164 Fed. 71, 73.

The subsequent concealment of property of a bankrupt in his possession on his adjudication, by one who had no lien upon it or debatable claim to it, is a violation of the injunction against the interference with the bankrupt's property embodied by the settled law of the land in the adjudication, and is punishable as "contempt of court" under Rev. St. § 725. Clay v. Waters, 178 Fed. 385, 389, 101 C. C. A. 645, 21 Ann. Cas. 897.

By sheriff

An undersheriff, advising or directing a witness upon whom he had served a subpœna duces tecum to disobey it, and hide or destroy the books, and not produce them, is not punishable as for a "contempt" of court, within Code Cr. Proc. § 619, making disobedience to a subpœna punishable as a criminal contempt, especially where the witness, regardless of what the undersheriff said, obeyed the subpœna and produced the books. People ex rel. Drake v. Andrews, 118 N. Y. Supp. 37, 38, 134 App. Div. 32.

By witness

In supplementary proceedings, a subpœna requiring a witness to appear was personally served. The witness disobeyed. An order to show cause why she should not be punished for contempt was personally served on her. On the return of the order she appeared by attorney, and was fined $10 and ordered to obey the subpœna on a new day fixed. The order was served on the attorney only. Held, that the failure of the witness to appear at the time fixed in the order was a "contempt," authorizing the court to punish for contempt, though she knew nothing of the order requiring her to appear as a witness, and was not informed thereof by the attorney, who it was claimed had no authority to appear for her, and who was also insolvent. Ex parte Depue, 95 N. Y. Supp. 1017, 1020, 108 App. Div. 58.

Code Civ. Proc. § 966, providing that, when it shall appear to the satisfaction of a justice of the peace that a person refuses or neglects to attend as a witness, he shall issue a warrant for the arrest of the delinquent for the purpose of compelling his attendance and punishing his disobedience, and section 967, providing that when a person so arrested is brought before the justice, and no valid excuse is shown, the justice may impose a fine not exceeding $5, do not apply to the taking of depositions before a justice of the peace, but sections 356, etc., providing that disobedience of a subpœna, or a refusal to

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be sworn or to answer as a witness, or to subscribe a deposition, may be punished as a contempt, control, and the power of a justice of the peace to punish for a refusal to be sworn or answer a question is not limited to the imposition of a fine of $5. The refusal to answer such improper questions as would constitute an abuse of process is not a "contempt," and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court. In re Button, 120 N. W. 203, 204, 83 Neb. 636, 23 L. R. A. (N. S.) 1173; In re Hammond, Id.

As crime

See Crime.

False affidavit

Preparing, verifying, and securing the presentation of a false affidavit, intended to influence the action of a court, constitutes an obstruction to the administration of justice, punishable as a "criminal contempt," under Rev. St. § 725, now Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163) § 268. In re Steiner, 195 Fed. 299, 302.

Interference with officer

Mills' Ann. Code, § 321, provides that "the following acts or omissions shall be deemed contempt: * * * Third. Disobedience to any lawful writ, order, rule, or process issued by the court, or judge at chambers." A decree adjudging priority of right to use of water for irrigation being a decree in rem, and containing no order to any one to do or refrain from doing any act, and the water commissioner appointed by the Governor, and, to a certain extent, under the control and direction of the irrigation division engineers and the state engineer, not being an officer of the court, though charged as a part of his official duties with distribution of water for irrigation as it may be decreed, interference with him in the discharge of such official duties is not a "contempt of court" under such section. Roberson v. People ex rel. Soule, 90 Pac. 79, 80, 40 Colo. 119.

Interference with process

Under Code Civ. Proc. § 2170, making any unlawful interference with the process or proceedings of a court a "contempt," where defendant in replevin refused to receive a copy of papers, and threatened the officer with violence if he took possession of the property, and while the officer was absent seeking assistance secreted the property, he was guilty of a "contempt," though he had not been served with summons, and though the order indorsed by plaintiff on the affidavit was not strictly within the definition of "process." State ex rel. Bruce v. District Court, 83 Pac. 641, 642, 33 Mont. 359.

Misconduct as to jury

All willful attempts, of whatever nature, seeking to improperly influence jurors in the impartial discharge of their duties, whether it be by conversations or discussions, or attempts to bribe, constitute "contempts." To be in contempt of court in such a matter, it is not necessary that the party accomplish his purpose. It is sufficient if he makes the attempt, for he thereby violates the instruction of the court, and the law of the state in relation thereto. Emery v. State, 111 N. W. 374, 375, 78 Neb. 547, 9 L. R. A. (N. S.) 1124.

A jury while deliberating on their verdict is an appendage of the court, and one attempting to influence a juror at such time is guilty of "contempt," under Code Civ. Proc. § 1209, declaring that disorderly behavior toward the judge while holding court, and any other unlawful interference with the proceedings of the court, shall be contempt. In re Creely, 97 Pac. 766, 768, 8 Cal. App. 713.

Pen. Code, §§ 190, 193, declare that a person who offers a bribe to a juror, who may be called to hear and determine any question or controversy, with intent to influence his vote or decision, is guilty of a felony. Held, that such provisions include offers made to members of a jury panel, and are not limited to offers made to jurors sworn in a particular case, so that an attempt to corrupt members of a jury panel constituted a "contempt," without reference to whether they had been drawn to try the case with reference to which it was sought to influence them. State ex rel. Webb v. District Court, 95 Pac. 593, 595, 37 Mont. 191, 15 Ann. Cas. 743.

Misconduct as to grand jury

Though a grand jury is an adjunct of the court, it is not such part thereof as, under the statute authorizing summary punishment for a "contempt in the immediate presence of the court," permits the judge to summarily punish offenders for any act before the grand jury, without proceeding on affidavit and citing the offender to show cause why he should not be punished. Ex parte Hedden, 90 Pac. 737, 743, 744, 29 Nev. 352, 13 Ann. Cas. 1173.

As misdemeanor

See Misdemeanor.

Newspaper criticism of court

Rev. St. § 725, provides that the federal courts shall have power to punish "contempts" by fine and imprisonment, provided that such power shall not extend to any case except misbehavior in the presence of or so near the court as to obstruct the administration of justice, the misbehavior of officers of the court and the disobedience or resistance of any such officer, party, juror, witness, or other person to any lawful writ, process, order, decree, or command of the court. Held, that the jurisdiction prescribed by such act was exclusive, and deprived the court of power to punish a newspaper publisher for

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contempt, consisting of an editorial in his paper criticising the official conduct and integrity of the court. Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95, 97.

Perjury

The fact that perjury is a substantive crime, and punishable as such, does not prevent it from also constituting a "contempt," punishable under Rev. St. § 725, now Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163) § 268. In re Steiner, 195 Fed. 299, 302.

Pleading

Failure to file an answer in a case at law within the time allowed by order of court is not a "contempt of court." Rooker v. Bruce, 85 N. E. 351, 353, 171 Ind. 86 (citing 9 Cyc. p. 6).

As specific criminal offense

See Specific Criminal Offense.

Violation of order

A "contempt" for refusal to pay pursuant to an order is not committed in the immediate view of the court within Code Civ. Proc. § 1211, authorizing summary punishment for such contempt. In re Northern, 121 Pac. 1010, 1011, 18 Cal. App. 52.

One against whom supplementary proceedings were instituted was ordered not to dispose of his property, except exempted property, until further orders. When the order was served, he had been employed by a company for two months, and after the service of the order received from it his share in the profits from certain transactions occurring prior to the granting of the order, and transferred money to his wife under a prior assignment to her of everything which he received until her indebtedness was paid. Held, that the transfer of the money was a violation of the injunction order, constituting a "contempt." In re Black, 123 N. Y. Supp. 371, 373, 138 App. Div. 562.

Mandamus was issued directing a trial judge forthwith to secure the services of another judge to hear all proceedings in a certain action or show cause before the Supreme Court why he should not do so. On the return day he appeared and made return of his reasons for not obeying the writ, and the opinion denying the petitioner's application for mandamus was filed. Before remittitur had been filed in the superior court, the judge made an order that certain motions pending in the cause be set for hearing before him, and announced that he would hear and determine the same. Held, to constitute a technical "contempt." Noel v. Smith, 83 Pac. 167, 168, 2 Cal. App. 158.

"Contempts" are divided into two classes: "Criminal contempts," which are committed in the immediate view and presence of the court; and "constructive or consequential contempts," which arise from matters not transpiring in court, but relate to a failure to comply with the orders and decrees issued by the court, and to be performed elsewhere. Appearing in court and refusing to produce the body of a child pursuant to the requirements of a writ of habeas corpus, without reasonable excuse, or willfully making an evasive or insufficient answer thereto, is a contempt committed in the presence of the court. Smythe v. Smythe, 114 Pac. 257, 258, 28 Okl. 266.

Under Rev. Code Civ. Proc. §§ 7309, 7318, 7319, declaring that willful disobedience of any lawful order of court shall be contempt, and providing that, when the contempt consists in the omission to perform an act which is in the power of the person to perform, he may be imprisoned, etc., inability to obey an order is a good defense to a charge of contempt for its violation, unless the person charged voluntarily and contumaciously brought the disability on himself, and one paying out in good faith money received from the court under the belief that she had a perfect right to do so is not guilty of "contempt" for violating a subsequent order requiring her to repay the money into court on her being unable to comply therewith by poverty and inability to borrow money. State ex rel. McLean v. District Court, 97 Pac. 841, 842, 37 Mont. 485, 15 Ann. Cas. 941.

Violation of injunction

The willful violation of an injunction by a party to the cause is a "contempt of court," constituting a specific criminal offense. Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105, 106, 63 C. C. A. 607.

A labor union, which ordered a strike, and which, through its officers and members, engaged in picketing and intimidating and threatening nonunion employés, assaulting some and frightening others, was properly adjudged guilty of "contempt" in violating an injunction restraining it from interfering with the business of their employers and from intimidating other employés from doing their work or accepting employment, etc. Franklin Union, No. 4, v. People, 77 N. E. 176, 181, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248.

Of legislative committee

Where a special committee of the state senate, appointed to investigate the administration of the departments of a city and county, and to report thereon with recommendations, learned through its investigations of transactions between the city and county and a newspaper corporation, and learned that the president of the newspaper corporation was a minority stockholder of another corporation which had profitably dealt with the city and county, and that such a person was the leader of the party politically dominant, an order requiring him to produce the books of the newspaper corporation, and questions as to what he had paid for the stock in the other corporation or whether he had received

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the same as a gift, were improper, and the refusal to produce the books and to answer the questions did not amount to "contempt," within Code Civ. Proc. § 856, requiring that the questions to be answered shall be pertinent. In re Barnes, 97 N. E. 508, 512, 204 N. Y. 108.

CONTEMPT PROCEEDING

" 'Contempt proceedings' are quasi criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in the case of a charge of a criminal offense." Hutton v. Superior Court of City and County of San Francisco, 81 Pac. 409, 410, 147 Cal. 156.

A "contempt proceeding" is sui generis. It is distinctly criminal in its nature. In a proceeding for criminal contempt in violating a strike injunction respondent is entitled to the benefit of the presumption of innocence. Garrigan v. United States, 163 Fed. 16, 21, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295.

A "contempt proceeding" is sui generis. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil, as well as criminal, actions, and also independently of any civil or criminal action. Bessette v. W. B. Conkey Co., 24 Sup. Ct. 665, 666, 194 U. S. 324, 48 L. Ed. 997. A contempt proceeding, unless used as a coercive remedy to compel the performance of an act to which a suitor is entitled, is a special criminal proceeding, distinct from the cause in which it may arise, and the reversal of an order in such cause does not affect proceedings for contempt in disobeying it while in force. State v. Nathans, 27 S. E. 52, 55, 49 S. C. 199 (quoting and adopting Rap. Contempt).

The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be partially remediable or not, and the same rules prevail which govern in the trial of indictments, the defendant being entitled to the benefit of any reasonable doubt. Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105, 106, 63 C. C. A. 607.

"Proceedings for contempt are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees made to enforce the rights, and administer the remedies to which the court has found them to be entitled." The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect and enforce. The defendant in a suit in equity was adjudged to pay a fine, and to be committed until he paid it, for "contempt of court" in violating a preliminary injunction. He sued out a writ of error, and died before a hearing in the appellate court. Held, that the contempt proceedings were civil and not criminal and did not abate by his death. Wasserman v. United States, 161 Fed. 722, 723, 88 C. C. A. 582 (quoting and adopting statement in Re Nevitt, 117 Fed. 448, 458, 54 C. C. A. 632).

A proceeding against members of labor unions to punish them for "contempt" for prosecuting a criminal conspiracy to violate an injunction granted by the court in a civil suit, restraining them from interfering with the business or employés of the complainant therein, is a "criminal proceeding" within the meaning of a statute providing that no discovery or evidence obtained from a party or witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court of the United States in any "criminal proceeding." Hammond Lumber Co. v. Sailors' Union of the Pacific, 167 Fed. 809, 821.

A prosecution for "contempt" is not a "criminal proceeding," so as to relieve one discharged in such a proceeding from liability to be again tried or punished for the same act, under Const. art. 1, § 12, providing that no person once acquitted shall be again tried for the same offense. Gibson v. Hutchinson, 126 N. W. 790, 148 Iowa, 139, Ann. Cas. 1912B, 1007.

In a proceeding for "contempt of court," the state need not be made a party; the contempt not being a crime, except when made so by statute, in which case the procedure must be that ordinarily followed for the punishment of crime. McDougall v. Sheridan, 128 Pac. 954, 963, 23 Idaho, 191.

As civil action, etc.

See Civil Action—Suit—Case—Etc.

As criminal case

See Criminal Case or Cause.

As criminal prosecution

See Criminal Prosecution.

Defenses

It is no defense to proceedings for "contempt" in making and presenting false affidavits and in disobeying an order requiring delivery of property that respondents ultimately succeeded in the suits in which the contempt was committed. In re Steiner, 195 Fed. 299, 301.

Process

Code Civ. Proc. § 856, providing that, where a person duly subpœnaed refuses without reasonable cause to be examined or answer questions or to produce books, the judge of any court may, by warrant, commit the of-

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fender to jail, when considered alone or in connection with Judiciary Law, §§ 750, 751, providing that one charged with contempt not committed in the presence of the court must have notice, requires notice to one charged with contempt not committed in the presence of the court, and one charged with contempt for failing to answer questions put to him by an investigating committee of the Legislature is entitled to notice of proceedings to punish him for contempt, and hence the statute does not violate the due process clause of the Constitution. In re Barnes, 97 N. E. 508, 512, 204 N. Y. 108.

Proceedings for "contempt of court" may be begun by warrant of attachment as well as by rule to show cause. In re Steiner, 195 Fed. 299, 302.

Judgment

" 'Contempt of court' is 'a specific criminal offense,' and the fine imposed is a judgment in a criminal case. The adjudication is a conviction, and the commitment in consequence thereof is execution." In re Clark, 103 S. W. 1105, 1107, 126 Mo. App. 391 (quoting and adopting the definition in Church, Habeas Corpus, § 308).

"Contempt of court" is a specific criminal offense, and the charge and the findings and judgment of the court thereon are to be strictly construed in favor of the accused. Reymert v. Smith, 90 Pac. 470, 471, 5 Cal. App. 380.

Punishment

Power to punish as judicial power, see Judicial Power.

Under 2 Ballinger's Ann. Codes & St. § 5799, authorizing the punishment for contempt by fine or imprisonment, or both, and declaring that the fine shall not exceed $300, nor the imprisonment 6 months, and, when the contempt does not consist of disorderly behavior toward the court or conduct interrupting the course of a trial, it must appear that a party's rights are prejudiced before the contempt can be punished otherwise than by a fine not exceeding $100, a person adjudged guilty of "contempt" in violating an order restraining him from obstructing a public highway cannot be punished by a fine of $100 and 30 days' imprisonment, in the absence of a showing that the rights of a party were prejudiced by the act constituting the contempt. State ex rel. v. Rielly, 82 Pac. 287, 288, 40 Wash. 217.

CONTEMPTUOUS

Kirby's Dig. § 1655, provides that if any person shall maliciously or contemptuously disturb or disquiet any congregation assembled in any church for religious worship, etc., he shall, on conviction, be fined, etc. Held, that the words "malicious and contemptuous" refer to the manner of disturbance, and not to the intent with which the disturbance was effected. Walker v. State (Ark.) 146 S. W. 862, 864.

CONTENTION

As used in a restriction limiting the recovery of plaintiff, if the jury believed the contention of defendant, it was held that the meaning of the word "contention" was not clear, but probably meant the testimony on behalf of the defendant. Peterson v. Christianson, 56 Atl. 288, 290, 68 N. J. Law, 392.

"There is a difference between the 'contention,' using the word in its legal sense, of a party and the argument by which such 'contention' is supported. It may be difficult sometimes to draw the line of distinction between the two, but we think it can be clearly drawn here. The court could not so mix and mingle the contentions of the party with the inferences and deductions of such party drawn from the evidence as to present such contentions to the jury in the form of an argument, for this is but to repeat to the jury the argument of the party, instead of what the party contends the facts of his case are." Smith v. Hazlehurst, 50 S. E. 917, 919, 122 Ga. 786.

CONTENTS

See Will and Its Contents.

Of building

A policy on "dwelling and addition" and "contents of dwelling" does not cover contents of the addition. Tate v. Jasper County Farmers' Mut. Ins. Co., 113 S. W. 659, 660, 133 Mo. App. 584.

Where a fire policy insured certain barns and "contents of barn buildings," and tools and machinery kept in barns insured by the policy were removed to a barn subsequently erected and not covered by the policy, the policy did not cover a loss of the tools by fire while in the new barn, unless the insurer was estopped to insist on the provisions of the policy. Wilson v. Farmers' Mut. Fire Ins. Co., 121 N. W. 284, 286, 156 Mich. 545.

Of instrument in writing

The word "contents," used in Code Civ. Proc. § 3146, providing that in conformity with previous provisions evidence may be given of the contents of a writing, includes all the substantial parts of the instrument sought to be proven by secondary evidence. Capell v. Fagan, 77 Pac. 55, 56, 30 Mont. 507, 2 Ann. Cas. 37.

A suit by an assignee of a mortgage to quiet title, brought after receiving a certificate of purchase on foreclosure sale, is not one to recover the "contents of a chose in action" within the meaning of the federal judiciary act (Act March 3, 1875, § 1, c. 137, 18 Stat. 470), and the fact that the assignor of the mortgage could not have sued there-

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on in the federal court does not deprive it of jurisdiction therein. Hobe-Peters Land Co. v. Farr, 170 Fed. 644, 646.

The "contents" of a contract, as used in section 629, Rev. St., providing for jurisdiction in suits "to recover the contents of a chose in action," are the rights created by it which a party may enforce in a suit on the contract. Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 120, 66 C. C. A. 179 (quoting and adopting definition in Corbin v. Black Hawk County, 105 U. S. 659, 665, 26 L. Ed. 1136).

A suit to recover the "contents" of a promissory note or other chose in action within Act Cong. Aug. 13, 1888, providing that no federal court shall have cognizance of any suit to recover the "contents" of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, unless such suit might have been prosecuted in such court to recover the said "contents," if no assignments had been made, is a suit to recover the amount due on such note, or the amount claimed to be due upon an account, personal contract, or other chose in action. A suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill. Kolze v. Hoadley, 26 Sup. Ct. 220, 222, 200 U. S. 76, 50 L. Ed. 377 (citing Sere v. Pitot, 6 Cranch, 332, 3 L. Ed. 240; Deshler v. Dodge, 16 How. 622, 14 L. Ed. 1084, 1088; Bushnell v. Kennedy, 9 Wall. 387, 19 L. Ed. 736; Shoecraft v. Bloxham, 8 Sup. Ct. 686, 124 U. S. 730, 31 L. Ed. 574).

CONTEST

Of action or other proceeding

Where an appeal was taken from a probate order directing payment of the residue of an estate to relator, and an order was in turn reversed on a further appeal to the Supreme Court, after which the appeal was voluntarily dismissed, the proceeding was "contested," within Comp. Laws 1897, § 681, providing, in all contested cases in the probate or circuit court, such court may award costs to either party in its discretion, etc. Universalist General Convention v. Van Buren Circuit Judge, 104 N. W. 384, 141 Mich. 64.

Const. art. 14, § 1, provides that all county officers shall be paid salaries to be fixed by the Legislature. Section 2 provides for fees to be collected by the sheriff and an accounting therefor, and that, in addition to the salary of the sheriff, he shall be entitled to receive from the party for whom the services are rendered in "civil cases" such fees as may be prescribed by law. By section 3, the salaries of county officers are to be fixed by law within stated maximum limits. Rev. St. 1899, § 1112, fixed the salaries of sheriffs, and by section 1113 declared that the sheriff in addition to his salary might receive from the party for whom the service is rendered in civil cases certain stated fees. By section 1232, county officers receiving money for any county were required to pay the same into the county treasury. Laws 1901, c. 79, § 1, provided for an inspection of horses about to be transported or driven out of the state. Section 3 made the sheriff of each county an inspector and required that he keep a record of inspections and file certain reports. Section 8 provided for a fee of 15 cents per head on all horses inspected, in full compensation for all inspection. Held, in an action by a sheriff to recover inspection fees paid into the county treasury pending a judicial determination, that the word "case" was to be construed as synonymous with a "contested question" before a court of justice; that the term "civil cases," as used in the Constitution, was in contradistinction to criminal cases, and was to be broadly construed as inclusive of all cases not criminal, and that it was used as meaning a legal proceeding of some nature for the protection of a private right or the redress of a private wrong; and that the services of the sheriff as inspector were not rendered in civil cases, and hence that he was not entitled to the fees collected. Messenger v. Board of Com'rs of Converse County, 117 Pac. 126, 130, 19 Wyo. 309.

Of claim to public land

Under Pol. Code, § 3414, providing that when a contest arises concerning the approval of a survey or location of public lands, and when either party demands a trial in the courts, the surveyor general must make an order referring the contest, a "contest" arises when two persons make separate applications to purchase the same state land, which is still open to location, and it is not necessary that the contestant file a statement of the specific grounds of contest with the surveyor general. Miller v. Engle, 85 Pac. 159, 160, 3 Cal. App. 325.

Of election

As civil case, see Civil Action—Case—Suit—Etc.
As suit, see Suit; Suit in Equity.
Condemnation suit distinguished, see Condemnation Proceeding.

An "election contest" is a special statutory proceeding designed to contest the right of a person, declared elected, to enter upon and hold office. Maddux v. Walthall, 74 Pac. 1026, 1027, 141 Cal. 412.

An "election contest" is a controversy between two contending candidates for the same office; the unsuccessful candidate contesting against the candidate to whom the election board have issued a certificate. It is an adversary proceeding. Toncray v. Budge (Idaho) 95 Pac. 26, 32.

"The proceeding for 'contesting an election' is, strictly speaking, neither an action at law nor a suit in equity. It is a summary

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proceeding of a political character, and it is not only the privilege, but the duty, of the court on its own motion to look into the record and determine whether it is authorized by the statute." Griffith v. Bonawitz, 103 N. W. 327, 328, 73 Neb. 622 (quoting and adopting definition in Thomas v. Franklin, 60 N. W. 568, 42 Neb. 310).

A "contest" is not in any sense a criminal proceeding, but a controversy between two private individuals as to the right to exercise the functions and enjoy the emoluments of an office. Maloney v. Collier (Tenn.) 83 S. W. 667, 672 (citing Boring v. Griffith, 1 Heisk. [48 Tenn.] 456; Moore v. Sharp, 38 S. W. 411, 98 Tenn. 65).

A "contest" of a local option election is a suit in which the validity of the election, or the correct ascertainment of the result thereof, is the subject-matter of litigation in a court having jurisdiction to hear and determine such issues. Clary v. Hurst (Tex.) 138 S. W. 566, 571, answering question certified from Clarey v. Same (Tex.) 136 S. W. 840.

Where the qualified electors of a town had an opportunity to vote at an election, and the majority voted at the polling place fixed by the council of the town, while a minority cast their ballots at an unauthorized place fixed by the mayor, and the inspectors of election were eligible, the election was subject to "contest" within Code 1907, § 1168, authorizing election contests. Mizell v. State ex rel. Gresham, 55 South. 884, 885, 173 Ala. 434.

Of will

A "contest" of a will implies a trial and final judgment; such a hearing as will amount to an adjudication of the validity of a will. Institution of a suit and its voluntary dismissal without a trial is not a contest. Wait v. Westfall, 68 N. E. 271, 272, 161 Ind. 648.

In determining whether proceedings by a legatee amounted to a contest within a provision forfeiting bequests to any legatee who should "contest" the will, the meaning of the word as used by testator, in view of his purposes, is the controlling consideration. In re Hite's Estate, 101 Pac. 443, 445, 155 Cal. 436, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993.

The mere filing of a caveat did not constitute a "contest" of a will within a provision directing that any of the legatees contesting or attempting to contest the will should lost their legacies. In re McCahan's Estate, 70 Atl. 711, 714, 221 Pa. 188.

Where testator provided for forfeiture of legacies if any legatee should contest the will, the word "contest" was not used in its technical sense, but meant "to make a subject of dispute, to call in question, to dispute, to litigate, oppose, challenge, resist," and hence it included proceedings by certain legatees who were heirs of testator's first wife to withdraw certain real estate willed to testator's widow on the theory that it belonged to them as heirs of their mother, and that testator had acquired title thereto by forgery of a deed. Moran v. Moran, 123 N. W. 202, 206, 144 Iowa, 451, 30 L. R. A. (N. S.) 898.

Under section 20 of the wills act, providing for formal and regular proceedings, a "contest of a will" has always been considered as a formal proceeding by a civil action, in which the issues are defined by formal pleadings, and the rules of evidence, for and against the issues, established by repeated rulings. Wright v. Young (Kan.) 89 Pac. 695, 696.

CONTESTED ELECTION

See Contest; Election Contest.
As cause, see Cause (In Practice).

CONTIGUOUS

The word "contiguous," in Pierce's Code, § 7122, is not to be given the restricted meaning of "next to" or "touching," but includes lands, not bordering upon the river nor forming its banks, but subject to damage by its overflow, which are as much entitled to protection from damage caused by overflow as is the land next to, and forming the bank of, the river. State ex rel. Grays Harbor Boom Co. v. Superior Court for Chehalis County, 106 Pac. 481, 483, 57 Wash. 71.

The word "contiguous," in an ordinance providing that where an excavation goes below ten feet, if the other party permits entrance, the excavator must preserve any adjoining or contiguous structure, contemplates nearness of a structure, but with intervening space, and any wall or structure is contiguous which is near enough to be disturbed by the excavation. Baxter v. York Realty Co., 112 N. Y. Supp. 455, 456, 128 App. Div. 79.

A tract of land wholly surrounded by the waters of the ocean may properly be said to be "contiguous" to the beach or ocean front; the words "beach or ocean front" not excluding land always covered by the sea. P. L. 1909, c. 13, providing for the erection of piers below the low-water mark, is applicable to such a tract. A city holding a qualified fee in lands is the owner thereof within P. L. 1909, p. 27, authorizing cities bordering on the Atlantic Ocean owning lands "contiguous" to the beach or ocean front to improve the same for public use and recreation, and to issue bonds therefor. A tract of land is "contiguous" to the beach or ocean front within P. L. 1909, p. 27, authorizng cities bordering on the Atlantic Ocean owning lands contiguous to the beach or ocean front to improve the same for public use and recreation, and issue bonds therefor, although the land intended to be used lies wholly below low-water mark. Bew v. Ventnor City, 80 Atl. 28, 29, 81 N. J. Law, 207.

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One who furnishes under a running account with the common owner of a group of exposition buildings materials for use in the illuminating equipment thereof is entitled to a lien on such buildings, where they are maintained for a common purpose, though they are not all situated on "contiguous" lots, and though the claimant is not able to show what portions were used in a particular building. Lehmer v. Horton, 93 N. W. 964, 67 Neb. 574, 2 Ann. Cas. 683.

"Contiguous property," within the meaning of the term as used in a statute authorizing cities to make "local improvements by special assessment, or by special taxation, or both, of contiguous property," includes a railway in the street which is being improved. Kuehner v. City of Freeport, 32 N. E. 372, 376, 143 Ill. 92, 17 L. R. A. 774.

Const. art. 4, § 31, authorized the levy of special assessments for drains on property benefited, and Const. art. 9, § 9, authorized the General Assembly to vest municipal authorities with power to make local improvements by special assessment, such tax to be uniform as to persons and property within the jurisdiction of the body imposing the same. Levee Act, § 55, as amended in 1885, authorized the assessment of the property of any public or corporate road or railroad for local improvements whenever the proposed improvement benefited any of such roads, so that the property of such road would be improved by the construction of the ditch, drain, or levy, and provided that the commissioners should apportion to the corporation for a corporate road or railroad such portion of the cost as to private individuals, etc. In 1909, section 55 was amended, so as to include streets and alleys of municipal corporations, and a new section was added providing that the act should be liberally construed. Held that, where the construction of certain drains operated to improve parts of certain streets on which a street railway was operated, the railroad was "contiguous property" within Const. art. 9, § 9, and was subject to assessment. Spring Creek Drainage Dist. v. Elgin, J. & E. R. Co., 94 N. E. 529, 539, 249 Ill. 260.

Abutting, adjacent, or adjoining

"Contiguous" means near to, but not touching, not being synonymous with "adjoining." Northern Pacific Ry. Co. v. Douglas County, 130 N. W. 246, 248, 145 Wis. 288.

"Contiguous" is defined to be adjacent; in actual close contact; touching; near. The word "contiguous" is a relative term, and, when employed in reference to a building, evidently means in close proximity to the same. Arkell v. Commerce Ins. Co., 69 N. Y. 191, 193, 25 Am. Rep. 168.

"What is 'contiguous' must be fitted to touch entirely on one side. * * * Lands are adjacent to a house or town; fields are adjoined to each other; houses contiguous to each other." Baxter v. Realty Co., 112 N. Y. Supp. 455, 456, 128 App. Div. 79 (quoting from Crabb's Eng. Synonyms).

The word "contiguous," as used in the statute and an ordinance authorizing the assessment of contiguous property for the payment of a street improvement, means "in actual or close contact," "touching," "adjacent," or "near," and only such lots as abut on the street can be assessed. Langlois v. Cameron, 66 N. E. 332, 334, 201 Ill. 301.

That which is "adjacent" may be separated by some intervening object, that which is "adjoining" must touch in some part, while that which is "contiguous" must touch entirely on one side. "Contiguous," in an ordinance providing that where an excavation goes below ten feet, if the other party permits entrance, the excavator must preserve any adjoining or contiguous structure, contemplates the nearness of a structure, but with intervening space, and any wall or structure is contiguous which is near enough to be disturbed by the excavation. Baxter v. York Realty Co., 112 N. Y. Supp. 455, 456, 128 App. Div. 79 (quoting and adopting definition in Crabb, Eng. Synonyms).

Land cornering

Neither two tracts which merely corner on each other, nor two tracts with a strip 50 feet wide included merely for the purpose of connecting them, constitute "contiguous" territory, within Hurd's Rev. St. 1905, c. 24, § 182, authorizing the incorporation into a village of contiguous territory. Wild v. People ex rel. Stephens, 81 N. E. 707, 708, 227 Ill. 556.

"Contiguous" is defined by Webster to mean "in actual contact; touching; also adjacent; near; neighboring; adjoining." He defines "contiguous angles" as such angles as have one leg common to both angles. The word "contiguous," in the statute defining "tract," as applied to land, when used in the revenue law, as any contiguous quantity of land in possession of, owned by, or recorded as the property of the same claimant, means land which touches on the sides; and two quarters of the same section, which only touch at the corner, do not constitute, for the purpose of taxation, one tract or parcel of land. Griffin v. Denison Land Co., 119 N. W. 1041, 1043, 18 N. D. 246.

Where several claims are held in common, the annual assessment work for all may be done on one of the claims or on adjacent patented land or even on public land, provided the claims are "contiguous" and the work is for the benefit of all of them, and tends to develop them all, and facilitate the extraction of ore therefrom. Mining claims which touch each other only at a common corner are not "contiguous" within the rule authorizing the performance of assessment work for several contiguous claims on any

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one of them. Anvil Hydraulic & Drainage Co. v. Code, 182 Fed. 205, 206, 105 C. C. A. 45.

Separation as affecting

"Contiguous property," as used in decisions holding that only such damages as result to the land described in a petition can be recovered in the absence of a cross-petition, necessarily means property in some way distinguishable from the lot or tract, a part of which is sought to be taken, and includes land separated from that sought to be taken merely by dividing lines designated on plats. Metropolitan West Side El. R. Co. v. Johnson, 42 N. E. 871, 872, 159 Ill. 434.

Hurd's Rev. St. 1909, c. 30, relating to the registration of land titles provides (section 55) that any number of contiguous pieces of land in the same county and owned by the same person and in the same right, or any number of pieces of property in the same county having the same chain of title and belonging to the same person, may be included in one application. Held, that the ordinary meaning of "contiguous" being "in actual contact" or "touching" a number of lots separated from each other, two lots being the largest number in actual contact, and some of them being separated by two blocks, are not contiguous within the act. Culver v. Waters, 93 N. E. 747, 748, 248 Ill. 163.

CONTIGUOUS TERRITORY

Neither two tracts which merely corner on each other, nor two tracts with a strip 50 feet wide, included merely for the purpose of connecting them, constitute "contiguous territory," within the statute authorizing the incorporation into a village of contiguous territory. Wild v. People ex rel. Stephens, 81 N. E. 707, 227 Ill. 556.

"Contiguous" means "in actual contact; touching; also adjacent; near; neighboring; adjoining." Queens County was the most contiguous territory to Richmond to which it could be joined to form a senate district under a constitutional provision that every senate district shall at all times consist of contiguous territory. Payne v. O'Brien, 101 N. Y. Supp. 367, 370, 51 Misc. Rep. 397 (quoting and adopting definition in Webst. Dict.; citing Board of Sup'rs of Houghton County v. Blacker, 52 N. W. 951, 92 Mich. 638, 16 L. R. A. 432).

The ordinary and plain meaning of the words "contiguous territory" is not territory near by, in the neighborhood or locality of, but territory touching, adjoining, and connected, as distinguished from territory separated by other territory. Const. 1894, art. 3, § 4, declaring that senate districts shall consist of contiguous territory, does not apply to the county of Richmond, which is an island and not contiguous to any other county. In re Sherill, 81 N. E. 124, 131, 188 N. Y. 185, 117 Am. St. Rep. 841.

"'Contiguous territory' is not territory near by, in the neighborhood or locality of, but territory touching, adjoining, and connected, as distinguished from territory separated by other territory." The constitutional provision that senate districts shall consist of contiguous territory does not apply to the county of Richmond, which is an island, and not "contiguous" to any other county. Such county, not containing a population sufficient to entitle it to a senator, should be joined to a county bounded by the Atlantic Ocean or Hudson river, so as to comply with the constitutional provision that the senate districts shall be in as compact a form as possible. In re Sherill, 81 N. E. 124, 131, 188 N. Y. 185, 117 Am. St. Rep. 841.

CONTINGENCY

See Unavoidable Contingency.

A "contingency" is some future event which may or may not occur, and the termination of a trust estate depending on the death of the beneficiary depends on a certainty and not a contingency. Devin v. McCoy, 93 N. E. 1013, 1014, 48 Ind. App. 379.

In Rev. St. 1899, § 4375, requiring that the petition in partition set forth the names and titles of every person who, upon any contingency, may be entitled to any beneficial interest in the premises, the legislature used the word "contingency" to cover every kind of estate that was known to the law, but not in the sense that all persons who, by any future possibility might have an interest in the land, should be made parties defendant. Where a minor heir had no interest in a devise of premises sought to be partitioned, the fact that he was entitled, within a specified time, unexpired, to contest the will, did not make him a necessary party to the suit. Robertson v. Brown, 86 S. W. 187, 190, 187 Mo. 452, 106 Am. St. Rep. 485.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607, forbids railroads from confining cattle longer than 28 hours without unloading, unless prevented by storm or other accidental or other unavoidable unanticipated causes, provided that on the written request of the owner the time may be extended to 36 hours; it being the intent of the act to prohibit continuous confinement for more than 28 hours except "upon the contingencies hereinbefore stated." Held, that the "contingencies hereinbefore stated" included both the case where the carrier was prevented from unloading by storm or other accidental or unavoidable causes and the contingency of the owner having filed a written request extending the time of confinement to 36 hours. United States v. Pere Marquette R. Co., 171 Fed. 586, 588.

Under Rev. St. c. 86, § 55, cl. 4, providing that no trustee shall be charged by reason of any money or other thing due from him

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to the principal defendant unless, at the time of service of the writ upon him, it is due absolutely and not on any contingency, where labor was performed under a contract, and there remained only to fix its amount and value, the fact that payment was to be made on an estimate and certificate of an engineer does not constitute a "contingency." Ware v. Gowen, 65 Me. 534, 535.

Negotiable Instruments Act (Code Supp. 1907, § 3060–a1) declares that an instrument to be negotiable must be payable on demand or at a fixed or determinable future time, and section 3060–a4 declares an instrument to be payable at a determinable future time when expressed to be payable on or before a fixed or determinable future time specified therein, or on or before a fixed period after the occurrence of a specified event which is certain to happen, but that an instrument payable upon a "contingency" is not negotiable, and that the happening of the event does not cure the defect. Notes dated April 23, 1904, due December 1, 1905, and December 1, 1907, provided that "it is agreed that if crop on Secs. 25 and 26, Twp. 145–48, is below 8 bushels per acre (for 1905 as to one and 1907 as to the other) this note shall be extended one year." Held, that a "determinable future time" as used in clause 2 of section 3060–a4 meant a time that could be certainly determined after the execution of the note, and that the "contingency" which would render a note nonnegotiable meant an event which might or might not happen, a contingency in law meaning an uncertain future event, and that under such language and in view of the other provisions of the section the notes were negotiable. State Bank of Halstad v. Bilstad (Iowa) 136 N. W. 204, 207.

Authorizing additional highway tax

A "contingency" has the element of uncertainty and doubt, and is defined as an event which is possible, but which may or may not occur. It is in the nature of a casualty, accident, or chance, and results from an agency the operation of which is uncertain. It is dependent on a possibility and on causes which are undetermined or unknown. Under the road and bridge act, providing for a greater levy in view of some contingency, a certificate of the commissioners that a contingency existed, in that many bridges in the township were becoming unsafe and would have to be repaired and rebuilt, did not show the existence of a "contingency" within the meaning of the statute. People ex rel. Bahde v. Toledo, St. L. & W. R. Co., 83 N. E. 118, 119, 231 Ill. 125 (citing Webst. Dict; Stand. Dict.; 9 Cyc. p. 72).

A "contingency," within Hurd's Rev. St. 1909, c. 121, § 14, authorizing additional taxes for highways, is some unusual or extraordinary event, not happening in the ordinary course of events; and a certificate of commissioners of highways, levying an additional tax, must state that the tax is to meet a "contingency," and what the contingency is; and a certificate that the additional tax is needed, in view of the contingency that impassable roads need to be improved, and bridges repaired, and culverts constructed, does not show a contingency, and the additional tax is void. People ex rel. O'Connell v. Atchison, T. & S. F. Ry. Co., 96 N. E. 877, 252 Ill. 407.

No levy may be made to complete payment for the erection of a new bridge across a new drainage channel of a river, for building of such a bridge is not a "contingency." People ex rel. Vaughn v. Chicago, B. & Q. R. Co., 96 N. E. 866, 252 Ill. 377.

A certificate that an additional levy is needed for the purpose of "building and repairing bridges" or for "building new bridges" or "for opening new roads" does not state a "contingency." People ex rel. George v. Wabash R. Co., 94 N. E. 137, 138, 248 Ill. 540.

The certificate must state what the contingency is, which must be in the nature of a casualty; and a certificate for an additional tax to build a bridge swept away by a freshet shows such a "contingency." People ex rel. Cline v. Wabash R. Co., 96 N. E. 861, 252 Ill. 316; Same v. Illinois Cent. R. Co., 96 N. E. 862, 252 Ill. 376.

A contingency must be shown to exist, and the certificate of the commissioners of highways must state that the tax is required to meet the contingency, and must state what the "contingency" is, which must be some unusual or extraordinary event in the nature of a casualty. People ex rel. Williamson v. Chicago, B. & Q. R. Co., 97 N. E. 245, 246, 253 Ill. 100.

A certificate that in view of the contingency that recent and unusual storms and rains in the town have so washed away the roads and bridges thereof that a specific tax on each $100 will be an insufficient sum to repair the roads and bridges, does not show a "contingency," within the meaning of the section, and an additional tax is illegal. People ex rel. Mooneyham v. Cairo, V. & C. Ry. Co., 93 N. E. 405, 406, 247 Ill. 360.

A certificate which recites that in the opinion of the commissioners an additional tax levy is necessary "in view of the contingency that it is necessary, on account of their destruction, to rebuild immediately nine bridges," does not show the existence of a contingency, since the "contingency" contemplated is something that does not occur regularly in the ordinary course of events. People ex rel. Lee v. Kankakee & S. W. R. Co., 86 N. E. 742, 744, 237 Ill. 362.

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CONTINGENT

"Contingent" implies the idea of futurity and refers to something that may or may not happen. A bet by parties not aware of the fact, involving the question whether or not a third person had a lease on designated real estate, is a betting on a "contingency," within Betting and Gaming Law (1 Rev. St. [1st Ed.] p. 662, pt. 1, c. 20, tit. 8, §§ 8, 9), declaring that bets depending on any chance or unknown or contingent event shall be unlawful. Thomson v. Hayes, 111 N. Y. Supp. 495, 497, 59 Misc. Rep. 425 (quoting and adopting definition in Webst. Dict.).

CONTINGENT CLAIM

"A 'contingent claim' is where the liability depends upon some future event which may or may not happen, and therefore makes it now wholly uncertain whether there will ever be a liability." Grand Lodge I. O. O. F. v. Troutman, 103 Pac. 94, 98, 80 Kan. 441; Converse v. Elward, 103 Pac. 140, 142, 80 Kan. 558 (quoting Sargent's Adm'r v. Kimball's Adm'r., 37 Vt. 320; Stevens v. Stevens, 72 S. W. 542, 172 Mo. 36; Jorgenson v. Larson, 88 N. W. 439, 85 Minn. 534; Davis v. Davis, 119 N. W. 334, 137 Wis. 640).

It is a claim which may never accrue, but the mere fact that an accounting is necessary to determine the amount due does not make the claim "contingent." Davis v. Davis, 119 N. W. 334, 337, 137 Wis. 640.

Future installments of rent, which may hereafter become due and remain unpaid, do not constitute a "contingent claim" against the estate under section 922 of Court and Practice Act 1905. Bowler v. Emery, 70 Atl. 7, 9, 29 R. I. 310.

The result of claims against national banks to collect a first assessment was a "contingency" upon which depended the right to order a second assessment, because if, under the first assessment, sufficient money was obtained to discharge the obligations of the corporation in receivership, there was no reason for making the second assessment; otherwise, it was the duty of the court to make a second assessment. Converse v. Elward, 103 Pac. 140, 142, 80 Kan. 558 (quoting and adopting Sargent's Adm'r v. Kimball's Adm'r, 37 Vt. 320).

Where plaintiff and another entered into a contract to establish and maintain a private charity, and the other party agreed to and did execute a deed purporting to convey a large tract of land to trustees for that purpose, and plaintiff agreed to and did pay off an equitable lien upon the land, and agreed to and did pay for the erection of buildings thereon, and after the death of the other party his heirs brought action to set aside the deed, alleging that it was void, making plaintiff a party defendant, who filed a cross-petition for the money paid for the betterment of the estate, and prayed that it be adjudged a lien upon the land, his cause of action to have his contribution adjudged a lien on the land was "contingent" on the validity of the other party's deed, and upon the bringing of the action to avoid the deed became absolute. Grand Lodge, I. O. O. F., v. Troutman, 103 Pac. 94, 98, 99, 80 Kan. 441.

Under a covenant of warranty in a conveyance that defendant would warrant and defend the premises against lawful claims and demands of all persons, the vendee, in the undisputed enjoyment of his purchase and without any breach of the covenants of his vendor, does not have a "contingent claim" provable in bankruptcy against the vendor, because of the possibility that some unknown claimant may at some time interpose a superior title by means of which he may be deprived of the property purchased. Reed v. Pierce, 36 Me. 455, 463, 58 Am. Dec. 761.

CONTINGENT DEBT OR LIABILITY

As liability, see Liability.

CONTINGENT ESTATE

Real Property Law (Laws 1896, p. 564, c. 547) § 27, declares that a "contingent estate" arises where the person to whom or the event on which it is limited to take effect remains uncertain. Schell v. Carpenter, 100 N. Y. Supp. 554, 555, 50 Misc. Rep. 400.

A future estate is "contingent," when the person to whom, or the event upon which, it is limited to take effect remains uncertain. Ward v. Ward, 131 Fed. 946, 950; In re Ryder, 89 N. Y. Supp. 460, 462, 43 Misc. Rep. 476; In re Perry, 96 N. Y. Supp. 879, 884, 48 Misc. Rep. 285.

Strictly speaking the word "contingent," as "applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present right exists, and that whether a right ever will exist depends on a future uncertain event." Taylor v. Stephens (Ind.) 74 N. E. 12 (citing Anderson's Law Dict. 245.)

The rule for determining whether an estate bestowed by a will is vested or contingent is that, where the time of division or payment is of the substance of the gift, the legacy is "contingent"; when time is mentioned only as a qualifying clause of the payment or division, then the legacy is vested; or, in other words, legacies payable after the death of the testator are either vested or contingent, and when the testator annexes time to the payment only the legacy will be vested, but if of the gift itself it will be contingent. Johnson v. Terry, 36 South. 775, 776, 139 Ala. 614.

A "contingent estate" depends for its effect upon an event which may or may not happen; as an estate limited to a person not in esse or not yet born. A testator de-

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vised and bequeathed his residuary estate to trustees, to hold and manage the same during the lives of the two surviving children of the testator who should be the youngest at the time of his death, and for so much longer as permissible under the laws of the state. The trustees were directed to set apart a sufficient sum to produce a certain amount of income to be paid to the widow during her life, and to pay the income from the remainder in equal parts to the four children of the testator named, or to their issue or devisees in case of their death, subject as to a part thereof to certain charges to pay off liens on the property. At the termination of the trust the corpus of the estate was to be divided equally between the four children, or the devisees, legatees, assignees, or legal heirs of any deceased. Held, that each of the four children took at once a vested estate in one-fourth part of the testator's residuary estate, having immediate right to dispose of the same by deed or will, and to enjoy a part of the income subject to no contingency; possession of the corpus alone being deferred. Title Guaranty & Trust Co. v. Ward, 164 Fed. 459, 468 (citing 1 Bouv. Law Dict.; Crabb, Real Prop.).

A future estate may be either "vested" or "contingent"; "vested" when there is a person in being who would have an immediate right to the possession of the property on the determination of the intermediate or precedent estate, and "contingent" when the person to whom or the event on which it is limited to take effect remains uncertain. The fact that there may be a defeasance of the estate in remainder, so far as the person in whom it is vested is concerned, does not make the estate on that account a "contingent" one. Testator gave to his widow the use of the residue of his estate for life or until her remarriage, on the happening of either of which events he gave such residue to his children equally, the children of any child, who at that time might be deceased, to take the share the parent would have taken. Held, that the will created a vested, and not a contingent, remainder in testator's children. Genunge v. Murphy, 112 N. Y. Supp. 310, 311, 59 Misc. Rep. 381 (quoting and adopting the definition in 2 Washburn on Real Property, p. 553, and Real Property Law [Laws 1896, p. 564, c. 547] § 30).

Where testatrix devised rents to her father during his life, and after his death to four persons and the survivor of them, at the death of whom the property was to be sold and the proceeds divided equally among the children of the four devisees and testatrix's half brothers and sisters surviving at that time, it was held that there was no trust, but the estate attempted to be devised to the children of the four devisees, and the half-brothers and half-sisters was a "future estate," within St. 1898, § 2060, providing that disposition of rents and profits of land to accrue and be received subsequent to the execution of the instrument creating the disposition shall be governed by the rules established in the chapter (95) relating to future estates in land, and, as the persons to whom the estate was limited remained uncertain, it was a "contingent future estate" under the express provisions of section 2037. In re Adelman's Will, 119 N. W. 929, 930, 138 Wis. 120.

Where the intention of the testatrix appears to have been to vest in interest a share in each child, and merely to postpone the possession of the principal, though the share is described as "contingent, expectant, or presumptive," such words will be considered as referring merely to the physical possession, and not to the vesting of the legal title in interest. Hayden v. Sugden, 96 N. Y. Supp. 681, 690, 48 Misc. Rep. 108.

A lease giving the lessee an option to purchase during the term is dependent as to its duration on the contingency of the lessee's exercising his option to purchase, and if he does so during a rent period he is liable for rent for the expired portion of that period, under Rev. Laws, c. 129, § 8, providing that, when land is held by lease of a person having an estate determinable "on a contingency," and such estate determines during a rent period, the landlord may recover a part of the rent proportional to the expired part of the last rent period. Withington v. Nichols, 73 N. E. 855, 856, 187 Mass. 575.

CONTINGENT EVENT

A bet by parties, not aware of the fact, involving the question whether a third person has a lease on designated real estate, refers to an event unknown to the bettors, and constitutes "gambling" within Const. art. 1, § 9, forbidding pool selling, book making, or any other kind of gambling, and within Betting and Gaming Law, §§ 8, 9, declaring that bets depending on any chance, "or unknown or contingent event," shall be unlawful, etc.; the word "unknown" referring to that which was unknown to the parties to a wager, the word "contingent" showing that the event referred to applies equally to existing or nonexisting events, the word "event" meaning that in which an action, operation, or series of operations terminates and having reference to something that has taken place, the words "unknown event" meaning a past circumstance unknown to the parties, and the words "contingent event" referring to one that hereafter may or may not occur. Thomson v. Hayes, 111 N. Y. Supp. 495, 497, 59 Misc. Rep. 425.

CONTINGENT EXPENSE

"'Contingent expenses' are such as are possible or liable, but not certain, to occur." An item of $10,000 to apply on a contract for a garbage crematory was not a "con-

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tingent expense." Mander v. Coleman, 95 N. Y. Supp. 696, 700, 109 App. Div. 454 (citing Webst. Dict.).

CONTINGENT FUND

Under statutes authorizing school districts to create and maintain a schoolhouse fund and a teachers' fund, a warrant drawn against the "contingent fund" in payment of a debt for the construction and equipment of a schoolhouse must be regarded as drawn against the schoolhouse fund. School Dist. No. 3, Carbon County, v. Western Tube Co., 80 Pac. 155, 165, 13 Wyo. 304.

CONTINGENT INTEREST

See Remainder and Contingent Interest.

A "contingent interest" is one in which there is no present fixed right of either present or future enjoyment but in which a fixed right will arise in the future under certain specified contingencies. Nelson v. Nelson, 72 N. E. 482, 483.

CONTINGENT LEGACY

Where the event is uncertain, a legacy is "contingent," though the time is fixed. Moore v. Matthews, 61 Atl. 743, 745, 70 N. J. Eq. 373 (citing Beatty's Adm'r v. Montgomery's Ex'x, 21 N. J. Eq. 324).

A "contingent legacy" is a legacy made dependent upon some uncertain event, or it is a legacy which has not vested. A testator devised and bequeathed his residuary estate to trustees, to hold and manage the same during the lives of the two surviving children of the testator who should be the youngest at the time of his death, and for so much longer as permissible under the laws of the state. The trustees were directed to set apart a sufficient sum to produce a certain amount of income to be paid to the widow during her life, and to pay the income from the remainder in equal parts to the four children of the testator named, or to their issue or devisees in case of their death, subject as to a part thereof to certain charges to pay off liens on the property. At the termination of the trust the corpus of the estate was to be divided equally between the four children or the devisees, legatees, assignees, or legal heirs of any deceased. Held, that each of the four children took at once a vested estate in one-fourth part of the testator's residuary estate, having immediate right to dispose of the same by deed or will, and to enjoy a part of the income, subject to no contingency; possession of the corpus alone being deferred. Title Guarantee & Trust Co. v. Ward, 164 Fed. 459, 468 (citing 1 Bouv. Law Dict.; 1 Rop. Leg. 506; Williams, Ex'rs).

CONTINGENT LIABILITY

See, also, Contingency.

The liability incurred by a corporation transferring a note to it and guaranteeing payment thereof at maturity or at any time thereafter, waiving demand, notice of nonpayment, and protest, is not a "contingent liability," but is an absolute liability created at the date of the making of the guaranty, for a "contingent liability" is dependent on the happening of the event which creates the liability, while the right to enforce an absolute liability may be contingent on the happening of an event. First Nat. Bank of Redlands v. Consolidated Lumber Co., 116 Pac. 680, 681, 16 Cal. App. 267.

Under Business Corporation Law, § 6, providing that stockholders of a full liability corporation shall be severally and individually liable for the corporate debts, and Stock Corporation Law, § 55, providing that no stockholder shall be personally liable for any corporate debt not payable within two years from the time it is contracted, the liability of a corporation as an assignee of a lease stipulating for the rent payable quarterly in advance is a "contingent liability," which only ripens into a debt as the rent falls due, and therefore is not a debt within the meaning of the statutes. Sanford v. Rhoads, 99 N. Y. Supp. 407, 408, 113 App. Div. 782 (citing Garrison v. Howe, 17 N. Y. 458; Gold v. Clyne, 31 N. E. 980, 134 N. Y. 262, 17 L. R. A. 767; Whitney Arms Co. v. Barlow, 68 N. Y. 34).

CONTINGENT REMAINDER

"A 'contingent remainder' is one limited to take effect * * * upon a dubious and uncertain event." Brownback v. Keister, 77 N. E. 75, 77, 220 Ill. 544 (quoting and adopting definition in 2 Bl. Comm. 168, and citing Thompson v. Adams, 69 N. E. 1, 205 Ill. 552).

"A 'contingent remainder' is one limited to take effect either to a dubious or uncertain person or upon a dubious and uncertain event." Thompson v. Adams, 69 N. E. 1, 3, 205 Ill. 552 (quoting definition in 2 Bl. Comm. 168, and citing Haward v. Peavey, 21 N. E. 503, 128 Ill. 430, 15 Am. St. Rep. 120); Northern Trust Co. v. Wheaton, 94 N. E. 980, 983. 249 Ill. 606, 34 L. R. A. (N. S.) 1150 (citing Haward v. Peavey, 21 N. E. 503, 128 Ill. 430, 15 Am. St. Rep. 120; City of Peoria v. Darst, 101 Ill. 609; Smith v. West, 103 Ill. 332; Brechbeller v. Wilson, 81 N. E. 1094, 228 Ill. 502); Golladay v. Knock, 85 N. E. 649-651, 235 Ill. 412, 126 Am. St. Rep. 224; Walker v. Alverson, 68 S. E. 966, 87 S. C. 55, 30 L. R. A. (N. S.) 115.

A "contingent remainder" is one limited to take effect either to an uncertain person or on an uncertain event. Carter v. Carter, 85 N. E. 292-294, 234 Ill. 507; Pingrey v. Rulon, 92 N. E. 592, 246 Ill. 109.

A "contingent remainder" is one limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular

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estate, in which case the remainder can never take effect. Richardson v. Richardson, 68 S. E. 217, 152 N. C. 705.

A remainder is "contingent" if the event on which it is to take effect is contingent, or if at the time of creating the estate the person who is to take is not ascertained. Sullivan v. Garesche, 129 S. W. 949, 951, 229 Mo. 496.

It does not follow that every remainder which is subject to a contingency or a condition is therefore a "contingent remainder"; if the condition be precedent the remainder is contingent. Walker v. Alverson, 68 S. E. 966, 968, 87 S. C. 55, 30 L. R. A. (N. S.) 115.

A "contingent remainder" is not an estate, and is merely a chance of having one; but it is a right in property which the remainderman could release to the life tenant. Ortmayer v. Elcock, 80 N. E. 339, 340, 225 Ill. 342 (citing Williams v. Esten, 53 N. E. 562, 179 Ill. 267).

The estate is "contingent" if the contingency or condition is precedent and vested, subject to be divested by the happening of the condition subsequent, if the contingency or condition is subsequent. Golladay v. Knock, 85 N. E. 649, 650, 651, 235 Ill. 412, 126 Am. St. Rep. 224.

At common law "contingent remainders" were interests or possibilities rather than estates, but finally were assigned in equity and could be released at law to an owner in possession, or transferred to strangers under the doctrine of estoppel. Shindler v. Robinson, 135 N. Y. Supp. 1056, 1060, 150 App. Div. 875.

"The remainder is said to be 'contingent' where the right of the remainderman to succeed to the possession and enjoyment of the estate depends upon some contingency which may never arise, or where the person who shall be entitled to succeed to such possession and enjoyment at the termination of the life tenancy is not and may never be ascertained, or is not in being." Archer v. Jacobs, 101 N. W. 195, 197, 125 Iowa, 467.

A "contingent remainder" must vest during the continuance of a particular estate, and if that estate comes to an end before the event upon the happening of which the contingent remainder is to take effect occurs, the remainder is defeated; and this is so whether the preceding estate reaches its natural termination, or is brought to a premature end by merger, forfeiture, or otherwise. When the estate for life and the next vested estate in remainder or reversion meet in the same person, notwithstanding intervening contingent remainders, the particular estate will merge in the reversion or remainder, and the contingent remainders will be destroyed. A qualification of this rule exists where the creation of the particular estate and the remainder and reversion occur at the same time and by the same instrument. Bond v. Moore, 86 N. E. 386, 392, 236 Ill. 576, 19 L. R. A. (N. S.) 540 (citing 2 Bl. Comm. 168, 171; Gray, Perpetuities, § 10; Madison v. Larmon, 48 N. E. 556, 170 Ill. 65, 62 Am. St. Rep. 356; Fearne, Rem. §§ 316–324; 3 Prest. Conv. [3d Ed.] 399; 2 Washb. Real Prop. [6th Ed.] 553, pars. 1597, 1598; Williams, Real Prop. 233).

Washburn on Real Property defines a "contingent remainder" in the following language: "A 'contingent remainder' is one whose vesting or taking effect in interest is by the terms of its creation made to depend upon some contingency which may never happen at all, or may not happen within a requisite prescribed time, by reason whereof its capacity of vesting or taking effect in interest may be forever defeated; or, in the language of another, it is one 'which is limited to a person who is not ascertained at the time of the limitation, or which is referred for its vesting or taking effect in interest to an event which may not happen till after the determination of the particular estate,' or upon the happening of some uncertain and doubtful event, or where the person to whom it is limited is not ascertained or yet in being. Until the contingency has happened the remainder is rather a possibility in its character than an estate, although it has become a familiar quality of an estate, to understand and apply which involves much nice learning. It is always an executory interest from its very nature." 2 Washb. Real Prop. (6th Ed.) § 1555. The same author in the succeeding section (1556) gives many illustrations of the rule above announced, and among them are the following: "Suppose an estate be limited to A. for life, remainder to the oldest son of B., who then has no son. The contingency in that case is that of a son being born to B. If he has a son, the moment he is born the remainder becomes vested in him and ceases to be contingent. If the uncertain event fails to happen at all, the remainder fails for want of a person to take it when the particular estate determines, and the estate reverts at once to the grantor. So, where there was a devise to a wife for life, and at her death to be divided to and among such of testator's children as should then be living, share and share alike, it was held a contingent remainder. If one of these died in her lifetime, his share was lost, although he left a child. The latter took nothing. Another instance would be that of an estate to A. for life, and, if B. outlived him, then to B. in fee. There is here no contingency about the person who is to take, but the contingency is in the event of his outliving A.; for, if he die before A., though all along ready to take the remainder if it falls in, the remainder as such goes to no one. If A. die first, the remainder not only becomes vested in interest, but at once in possession. Another and familiar illustra-

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tion would be where this estate was limited to A. for life, remainder to B. after the death of A. and H. Here B. is a known person in esse, ready at all times to take the remainder. It is certain that A. will die, and that H. will also. The contingency is in the doubt whether H. will die before A. If he does, the grant is thereupon converted into a simple limitation of an estate to A. for life, with a remainder to B., and is a vested one. But, if A. dies first, B.'s remainder is wholly gone, because he can only take it when A. and H. are both dead; and by the death of A. before H. the particular estate in A. determines before B. can take, and consequently his remainder fails, and the estate reverts to the grantor. And to these may be added for further illustration a conveyance in trust for the grantor for life, and after his death to A. when and provided he attains the age of 21 years. The interest of A. was held to be a contingent remainder until he arrived at that age." Other equally eminent authors define a "contingent remainder" as follows: "Where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event." 2 Black Com. 169. Mr. Bingham, in his able work on Descents, at page 125, thus defines it: "A 'single contingent remainder' is that part of an estate in fee bestowed conditionally upon one of two or more persons which one is not certain, the rest of which is bestowed definitely upon some other person or persons named. The part not thus definitely disposed of to some particular person or persons is provided to go to some other person or persons of two or more named, which of the two or more is left uncertain, and is to be fixed and made certain by succeeding events. The remainder itself is certain but the person who is to have it is uncertain until it is determined by the events named." Dickerson v. Dickerson, 110 S. W. 700, 702, 703, 211 Mo. 483.

Uncertainty of time of enjoyment

An estate in remainder is not rendered "contingent" by uncertainty of time of enjoyment. The right and capacity of the remaindermen to take possession of the estate if the possession were to become vacant, and the certainty that the event on which the vacancy depends must happen at some time, and not the certainty that it will happen in the lifetime of the remaindermen, determine whether or not the estate is vested or contingent. Nelson v. Nelson (Ind.) 72 N. E. 482, 483 (citing Hoover v. Hoover, 19 N. E. 468, 116 Ind. 498; Bruce v. Bissell, 22 N. E. 4, 119 Ind. 525, 12 Am. St. Rep. 436; Corey v. Springer, 37 N. E. 322, 138 Ind. 506).

An "estate in remainder" is not rendered contingent by the uncertainty of the time of enjoyment. The right and capacity of the remainderman to take possession of the estate if the possession were to become vacant, and the certainty that the event on which the vacancy depends must happen at some time, and not the certainty that it will happen in the lifetime of the remainderman, determine whether or not the estate is vested or contingent. Hoover v. Hoover, 19 N. E. 468, 469, 116 Ind. 498; Corey v. Springer, 37 N. E. 322, 138 Ind. 506.

Conditional limitations distinguished

The distinction between "conditional limitations," "contingent remainders," and "estates upon condition subsequent" is stated to be as follows: "If an estate is limited to A. until B. return from Rome, and after B. return to C., the limitation is a 'contingent remainder,' and good as such. But if the estate had been limited to A., which would be for life if no words of inheritance were annexed, provided that, if B. return from Rome, the estate should go to C., the limitation, though expressly the same in effect as the first, would be, not a remainder, but a 'conditional limitation.' In the one case, if C.'s estate comes into effect at all, it is after the prior estate had terminated by the natural expiration of the time for which it was limited, whereas in the other C.'s estate, if it took effect, came in and displaced the prior estate before its natural termination, and took its place as a substitute therefor. Then, again, though the estate of A. is a conditional one, liable to be defeated by the happening of a contingent event, it is not a case of condition at the common law, where to determine an estate for a breach of it required an entry by the grantor or his heirs, who thereby regained the estate originally parted with; but it is a case where the estate is wholly parted with by the grantor, no interest being left in him, and passes at once, upon the happening of the event, to him to whom it is limited. That contingent event, when it happens, is the limitation of the first estate granted; and the estate, instead of going back to the orignal grantor, goes over, eo instante, and without any act but that of the law, to the party named in the very gift itself of the estate as the one to take it in that event." In view of Civ. Code, § 778, declaring that a remainder may be limited on a contingency, the happening of which will abridge or determine the precedent estate, and such remainder shall be deemed a conditional limitation, and section 773, providing that a fee may be limited on a contingency which must happen, if at all, within the period described in the title, where testator bequeathed land to A. for life, and on her death to her heirs, but that, if A. should not reside on the land for her natural life, the land should become the absolute property of T., A.'s estate was not based on a condition subsequent, but was subject to a conditional limitation, so that on her removal from the land in her lifetime the property vested in T. at once, without entry or suit to establish title. Taylor v. McCowen (Cal.) 99 Pac. 353, 354

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(quoting and adopting the distinction in 2 Washburn, Real Property [6th Ed.] § 1640).

As interest in land

See Interest (In Property).

As property

See Property.

Particular grants and devises construed

A devise to one for life, remainder to his heirs, creates a valid contingent remainder; the enjoyment depending on a contingency which must necessarily happen by lapse of time. Westcott v. Meeker, 122 N. W. 964, 968, 144 Iowa, 311, 29 L. R. A. (N. S.) 947.

A devise of the residue remaining in the hands of the trustees among such of testator's children as may survive his wife creates a "contingent remainder." Northern Trust Co. v. Wheaton, 94 N. E. 980, 983, 249 Ill. 606, 34 L. R. A. (N. S.) 1150 (citing Haward v. Peavey, 21 N. E. 503, 128 Ill. 430, 15 Am. St. Rep. 120; City of Peoria v. Darst, 101 Ill. 609; Smith v. West, 103 Ill. 332; Brechbeller v. Wilson, 81 N. E. 1094, 228 Ill. 502).

Testator devised certain land, with the timber in controversy, to his daughter for life, and provided that after the daughter's death the land should go to the daughter's children and the children of such as were dead. Held, that the children of a deceased daughter of the life tenant had only a "contingent remainder" in such land. Latham v. Roanoke R. & Lumber Co., 51 S. E. 780, 139 N. C. 9, 111 Am. St. Rep. 764.

Where testator executed his will in 1867 and died in 1870, and gave a portion of the residue of his estate to his niece for life, and on her death to her children living at her decease, it created a remainder in the children of the niece "contingent" on their surviving her. In re Long's Estate, 73 Atl. 981, 982, 225 Pa. 39; Appeal of Murphy, Id.

A "contingent remainder" is one which is limited to a person not in being, or not ascertained; or, if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. Where testator devised property to his wife to hold until his two children became of age, then to be divided "in equal shares between my wife and my two children, share and share alike," the children took vested remainders, and, on their deaths before attaining majority, their interests passed to their heirs at law. Roberts v. Herron, 58 S. E. 968, 78 S. C. 115 (quoting and adopting Faber v. Police, 10 Rich. [10 S. C.] 376, 387).

Where land is conveyed for life, with the remainder to the grantee's children, in consideration of his supporting grantors for life, the interests of the remaindermen are dependent on the grantee fulfilling the contract, and, where he fails to do so, the interests of the remaindermen are defeated by the grantors electing to declare a forfeiture, followed by re-entry and possession and a conveyance to a purchaser in good faith and for value. Lowe v. Stepp, 116 S. W. 293, 294, 132 Ky. 75.

Not only at common law, but under the laws of Tennessee and Texas, under a will giving property to F., the wife of G., for her use as long as she remained the wife of G., and the children she might have by G., said property to go to the children of G. on the death of F. or her ceasing to be his wife, there was a "contingent remainder" as regards the children of F. by G. till a child was born to them, whereupon it immediately became a vested remainder in that child and all other children that might afterwards be born to them; said remainder opening and letting in each successive child as it was born, and the interest of any child dying before F. descending to the child's heirs. Greenlaw v. Dillon (Tex.) 108 S. W. 705, 708.

Testator's will provided that the widow should have the sole use of all the property during her life, save in case of her remarriage, when the estate was to be divided between her and her children, or the survivors of them, their heirs, and legal representatives, and on her death unmarried it was to be divided between the children, or the survivors of them, etc. The remainders were "contingent." Thompson v. Adams, 69 N. E. 1, 3, 205 Ill. 552 (quoting and adopting definition in 2 Bl. Comm. 168, and citing Haward v. Peavey, 21 N. E. 503, 128 Ill. 430, 15 Am. St. Rep. 120).

A will provided that the trustees should pay out sums necessary for the widow's support and minor children's nurture, etc., that at her death the trust estate should cease, and that the residue should be equally divided among such of testator's four children as might survive his wife, the issue of children dying before such issue taking the parent's share. Testator's son, plaintiff's husband, and his issue died before the widow. Held, that testator's children's estate was a "contingent remainder," not vesting until the widow's life estate expired, and that then the property passed to the children then living or deceased children's issue; and hence plaintiff could not claim the share that would have passed to her husband or his issue, had one of them survived the widow. Brechbeller v. Wilson, 81 N. E. 1094, 1095, 228 Ill. 502.

Testator devised real estate in trust for the benefit of his son and wife and their children then living. He required the income to be used to pay an annuity to testator's wife for life, to pay the expenses of the trust, and bequeathed the residue in equal shares to his son and certain other named grandchildren, declaring that, if the son's wife be divorced or remarry, she should not receive any por-

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tion of the rentals, which should then be divided among the grandchildren named, and if any such grandchildren should die leaving children the share of such deceased child should be paid to his or her descendants, and in default of descendants be distributed among the grandchildren after the death of testator's wife and son; that after the death of testator's wife, his son, and the death or marriage of the son's wife, and when the named grandchildren arrived at age, the trust should terminate, and the lands described should vest in fee in such grandchildren and their descendants. Held, that the remainder to the grandchildren was a "contingent" one, being limited to dubious and uncertain persons. Brownback v. Keister, 77 N. E. 75–77, 220 Ill. 544.

Vested remainder distinguished

"The distinction between a 'vested' and 'contingent' remainder in a case like the present one is well defined. The former is one that is so limited to a person in being and ascertained that it is capable of taking effect in possession or enjoyment on a certain determination of the particular estate, without requiring the concurrence of any collateral contingency. The uncertainty as to the remainderman ever enjoying the estate which is limited to him by way of remainder will not render such remainder a contingent one, providing he has by such limitation a present absolute right to have the estate the instant the prior estate shall determine; but the absence of such present absolute right renders the estate a contingent remainder." A will left a life estate in certain property to R., the remainder to her son A., or A.'s surviving lawful issue, if any, but, if A. died without lawful issue, then the remainder was to go to testator's three sons, C., B., and W., in equal shares, or to their lawful issue, respectively. R. survived B., who had survived A.; but both A. and B. died without lawful issue. Held, that the remainder to A. did not vest because of the gift over, neither did the remainder to B. vest because of the gift over to his issue, in case R. survived him, and also because of its liability to be defeated by A. surviving R. Hence, B.'s interest being a "contingent remainder," his will conveyed no interest in the property in question. Voorhees v. Singer, 68 Atl. 217, 218, 73 N. J. Eq. 532.

A "contingent remainder" is one limited to take effect either to an uncertain person, or on an uncertain event, while a "vested remainder" is a present interest which passes to a party to be enjoyed in the future, so that the estate is immediately fixed in a determinate person after a particular estate terminates. Pingrey v. Rulon, 92 N. E. 592, 595, 246 Ill. 109.

A remainder is "vested" where there is a right of present enjoyment or a fixed right to a future enjoyment in a determinate person after the particular estate terminates. If there is uncertainty either as to the person who is to receive or in the gift itself to the remainderman, the remainder is "contingent." Northern Trust Co. v. Wheaton, 94 N. E. 980, 983, 249 Ill. 606, 34 L. R. A. (N. S.) 1150.

That an estate is to take effect after the termination of an intervening estate will not prevent both estates from being vested at the same moment; it being the present capacity of taking effect, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited determines, that distinguishes a "vested" from a "contingent" remainder. Hackney v. Tucker (Ky.) 121 S. W. 417.

"If the gift is immediate, though its enjoyment be postponed, it is 'vested'; but if it is future, and is dependent on some dubious circumstances through which it may be defeated, then it is 'contingent.'" And the rule is recognized that "the law leans towards the vesting of remainders." The uncertainty which characterizes a "contingent" as distinguished from a "vested" remainder is uncertainty as to the person or the event, and not as to the time of enjoyment. If futurity is annexed to the substance of the gift, the vesting is suspended; but if it appears to relate to time of payment only, the legacy vests instanter, and words directing division or distributing between two or more objects at a future time are equivalent to a direction to pay. Plaintiff took a vested remainder where by the terms of a will the wife received the entire property during her natural lifetime, after first disposing of sufficient to pay all of the testator's debts. The second item provided that, at the death of the wife, "all the property devised or bequeathed to her as aforesaid, or so much thereof as may then remain unexpended, I give and bequeath to my four sons (of whom plaintiff was one), to be divided equally among them and to their heirs and assigns forever." Jonas v. Weires, 111 N. W. 454, 134 Iowa, 47.

To constitute a "vested remainder," there must be some known person in being who, by the instrument, is to take and enjoy the estate upon the expiration of the particular estate, and whose right to do so cannot be defeated by any contingency, while a "contingent remainder" is contingent if it depends upon the happening of a contingent event, which may not happen until the particular estate has terminated; the existence of a contingency, irrespective of the duration of the remainder, being the criterion. In re Washburn's Estate, 106 Pac. 415, 417, 11 Cal. App. 735.

The terms "vested estates" and "contingent estates," used in section 2037, St. Wis. 1898, have far different significations than the common-law terms "vested remainders" and "contingent remainders." A "vested re-

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mainder" at the common law is one where there is "some person in esse, known and ascertained, who by the will or deed creating the estate is to take and enjoy the same upon expiration of the existing particular estate, and whose right to such remainder no contingency can defeat." A "vested" estate or remainder in the statutory sense is one where there is a person in esse, "who, should the particular estate now cease, would eo instante et ipso facto have an immediate right to the possession," though whether he would ever take in fact might depend upon an uncertain event rendering the interest a "contingent remainder," strictly so called, by the common-law rule. While a vested remainder by the rules of the common law is not subject to be divested at all, not so a "vested estate" in the statutory sense. That may be divested upon condition subsequent, in whatever way or manner the creator thereof, in creating the same, may provide or authorize. While at common law an estate in remainder cannot be at the same time both vested and contingent, there is that seeming contradiction as to remainders under section 2037, St. 1898. A person may be so conditioned that he would immediately take in remainder, should the precedent estate presently cease, yet may not be so entitled at any future time. The element of certainty, by force of the statute, gives to the remainder the character of a vested estate for the purpose of the subject covered by the statutes. The element of uncertainty gives to the remainder, by the same means, the character of a "contingent estate" for the same purpose. Whether an estate in remainder created by will is or is not vested in the common-law sense is controlled by the character of the estate actually created, as evidenced by the testamentary intention, not by any law, common or statute. When there is a devise to one, remainder over direct to others, nothing appearing in the will to the contrary, the legal presumption is that the testator intended to create "vested estates in remainder" in a common-law sense; that is, estates indefeasible, descendible, and alienable. When an estate is by will carved out of a fee, and the remainder is directed to be divided between the members of a class of persons after the expiration of such particular estate, the presumption of a testamentary intention that the estates in remainder shall vest upon the death of the testator is displaced by a presumption, nothing appearing in the will to the contrary, that the testator purposed to create "contingent remainders" in a common-law sense. In re Moran's Will, 96 N. W. 367, 369, 370, 118 Wis. 177.

"It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder 'contingent.' The present capacity of taking effect in possession, if the possession were to become vacant distinguishes a vested from a 'contingent remainder,' and not the certainty that the possession will ever become vacant while the remainder continues." In re Kountz's Estate, 62 Atl. 1103, 1105, 213 Pa. 390, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427 (citing and quoting definition from 4 Kent's Comm. § 203, note a, in Doe ex dem. Poor v. Considine, 6 Wall. [73 U. S.] 458, 476, 18 L. Ed. 869).

The chief difference between a "vested remainder" and one that is "contingent" is that the latter may be destroyed by determination of the particular estate or the happening of the contingency (and even this cannot be where, as here, the life estate is held by trustees), while a vested remainder would simply be accelerated; and, unless the contingency is one which affects the capacity to take, a "contingent remainder" or other contingent interest is transmissible, even though not, in the technical sense, vested, and hence it will pass, in case of death before the happening of the event upon which it is dependent, to the heirs or devisees of the remainderman so dying. In re Brooke's Estate, 63 Atl. 411, 412, 214 Pa. 46 (citing Gray, Perpetuities, § 118; Bassett v. Hawk, 11 Atl. 802, 118 Pa. 94; Appeal of Chess, 87 Pa. 362, 30 Am. Rep. 361).

A remainder is "vested" when there is a person in being who would have an immediate right to the possession of the property on the determination of the intermediate or precedent estate; "contingent" when the person to whom, or the event on which, it is limited to take effect, remains uncertain. That there may be a defeasance so far as the person in whom it is vested is concerned does not make the estate on that account a contingent one. A "vested remainder" may be alienated by any form known to the law which does not require a formal livery of seisin or passing of actual possession, with the same restrictions as are applicable to other estates. Real Property Law (Laws N. Y. 1896, p. 564, c. 547) § 30, declares a future estate to be vested when there is a person in being who would have an immediate right to the possession of the property on the determination of the intermediate or precedent estate, and contingent while the person to whom or the event on which it is limited to take effect remains uncertain. Testator gave to his widow the use of the residue of his estate for life or until her marriage, on the happening of either of which events he gave such residue to his children equally, the children of any child, who at that time might be deceased, to take the share the parent would have taken. Held, that the will created a vested, and not a contingent, remainder in testator's children. Genunge v. Murphy, 112 N. Y. Supp. 310, 311, 59 Misc. Rep. 381 (quoting and adopting definitions in 2 Washb. Real Prop. p. 553, and Real Property Law [Laws 1896, p. 564, c. 547] § 30, and citing Reeves, Real Prop. 730, 731,

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Lawrence v. Bayard [N. Y.] 7 Paige, 70, and Grout v. Townsend [N. Y.] 2 Denio, 336).

Vested and contingent remainders are distinguishable, in that in the first there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate on expiration of the particular estate, and whose right to such remainder no contingency can defeat; while a "contingent remainder" depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all. A will, after providing for testator's widow during her life, directed that his property be placed in the hands of trustees, and that on the death of the widow the residue of the estate should be disposed of according to several clauses, specifying persons and institutions to whom payment should be made, and the respective amounts thereof. Held, that such clauses created "contingent" and not "vested" remainders. Giddings v. Gillingham, 81 Atl. 951, 953, 108 Me. 512.

A remainder is "vested" where there is a present capacity to convey an absolute title to the remainder, and, where the remainder is limited to a person not ascertained by the terms of the instrument, the remainder is "contingent." Under a clause of a conveyance in trust providing that, ten years after the youngest of the children had reached majority, the trustee should make a final settlement with each of said children, paying over to each of them living, and to the heirs at law of such as may have died, their respective shares, whereupon the trust should cease, and the title to the real estate not disposed of should vest in fee simple in the children living and in the heirs of children who had died, the estate taken by the children living and the heirs of those deceased was a "contingent remainder," and the legal title was in the trustee until the time for the termination of the trust. Buxton v. Kroeger, 117 S. W. 1147, 1151, 219 Mo. 224.

A "contingent remainder" is limited by the instrument creating it either to a person not yet ascertained or not in being, or so as to depend on an event which may never happen. It is an estate which is not ready to come into possession at any moment when the prior estate may end, but, if the estate is at any time ready to come into possession provided the prior estate ends, then the estate is vested, so that whenever the person who is to succeed to the estate in remainder is in being and is ascertained, and the event which by express limitation will terminate the precedent estate is certain to happen, the remainder is vested; the uncertainty which distinguishes the contingent from the vested remainder being not the uncertainty whether the remainderman will live to enjoy the estate, but whether he will ever have the right to such enjoyment. Carter v. Carter, 85 N. E. 292, 294, 234 Ill. 507.

Where the preceding estate created by deed is limited, so as to determine on an event which must happen, and the remainder is so limited to a person in being, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, the remainder is "vested"; but, where the preceding estate is limited, so as to determine only on an event which is uncertain and may never happen, or where the remainder is limited to a person not in being, or not ascertained, or when it is limited, so as to require the concurrence of some uncertain event, independent of the determination of the preceding estate and the duration of the estate limited in remainder, to give it a capacity of taking effect, the remainder is "contingent." Hall v. Wright, 120 Pac. 429, 431, 17 Cal. App. 502.

The second clause of a will provided: "I give, devise, and bequeath all the property of which I may die seised and possessed * * * to my beloved wife for her natural life, the remainder thereof to my sons hereinafter named in proportions, for the time and upon the conditions hereinafter expressed." The fourth clause provided that, upon the termination of the wife's life estate, "I give and devise unto my son M. all those certain lots. * * * If my son M. should precede in death his wife and leave him no lawful issue surviving, and should such death of my son M. occur before the property herein devised and bequeathed to him vests in him, then, all the interests herein devised and bequeathed to said M. shall pass to and vest in" his wife absolutely. Other provisions showed that testator clearly understood the legal significance of words of present devise unqualified by other language. Civ. Code, § 694, provides that a future interest is vested when there is a person in being who would have a right to immediate possession upon the ceasing of the precedent interest. Section 695 provided that a future interest is contingent while the person in whom or the event upon which it is limited to take effect remains uncertain; and section 1341 provides that devises and bequests are presumed to vest at testator's death. Held, that son M. took a "vested remainder" in the estate devised to him immediately upon testator's death. In re De Vries' Estate, 119 Pac. 109, 111, 17 Cal. App. 184.

The use of the word "vested" in a finding that a party was the owner of an estate in remainder in a lot that was vested in children of a life tenant by virtue of a certain deed which was to one for life, remainder to the heirs of her body, and "will upon the death of said E. M. (the life tenant) take the interest and estate in fee in said lot 4 that would, under said deed, * * * go to those of the above-named children of Mrs. E.

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M. who shall survive her," was not a holding that the interest in remainder of such children was a "vested" one, so as to be inconsistent with the view that the remainder is "contingent," implied from the language of another finding; the context making it apparent that the words "vested in" are not used in the comparative sense as distinguishing a vested from a contingent estate, but rather as the equivalent of "acquired by." Los Angeles County v. Winans, 109 Pac. 650, 653, 13 Cal. App. 257.

The test whether a remainder is "vested" or "contingent," by inquiring whether the owner, being sui juris, could, by uniting with the owner of the particular estate, convey a fee-simple title, is inapplicable to a "vested remainder," which is subject to a divesting contingency, or which is given to a class some of whom are not in esse. Walker v. Alverson, 68 S. E. 966, 968, 87 S. C. 55, 30 L. R. A. (N. S.) 115.

The uncertainty of the right to the enjoyment of a remainder, as distinguished from the uncertainty of the enjoyment of the estate in the future, distinguishes a "vested" from a "contingent" remainder, so that the fact that the estate is to take effect after the termination of an intervening estate will not prevent both estates from vesting at the same moment. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a "vested remainder" from a "contingent remainder." Where testator bequeathed to his wife for life the house in which he resided, and at her death to be divided between testator's heirs per stirpes, the heirs took a vested estate in the remainder at testator's death, and their interest was therefore descendible in case of the death of any of them during the continuance of the life estate. Weil v. King (Ky.) 104 S. W. 380, 382.

The distinction between vested and contingent remainders is clearly stated in the case of Faber v. Police, 10 S. C. (10 Rich.) 376, as follows: "According to the elementary writers, a 'vested remainder' is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend on the happening of any future event, but whose enjoyment and possession is postponed to some future time. A 'contingent remainder,' on the other hand, is one which is limited to a person not in being or not ascertained, or, if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. So that the most marked distinction between the two kinds of remainders is that in one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period, but is dependent upon the happening of some future contingency. As it has been well expressed, 'it is not the uncertainty of the estate in the future, but the uncertainty of the right to such enjoyment, which marks the difference between a contingent and a vested remainder.'" A trust deed granted a fee to the trustee for the benefit of the grantor for life, and provided that after her death the trustee should convey the property to certain named children and grandchildren, or, if any of them died before conveyance, leaving children, such children should take the share of their parents. The parties named took a vested, and not a contingent, remainder. Woodley v. Calhoun, 48 S. E. 272, 273, 69 S. C. 285.

"'The true criterion of a "vested remainder" is the existence in an ascertained person of a present, fixed right of future enjoyment of the estate, limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate.' 24 Am. & Eng. Enc. of Law (2d Ed.) 389. Mr. Washburn, in his work on Real Property, says: 'The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect.' A 'vested remainder' is one 'when there is an immediate right of present enjoyment, or a fixed right of future enjoyment.' 4 Kent, Comm. 194. 'That a remainder cannot be vested unless there be some certain person or persons in being in whom it can be regarded as vested is a proposition as to which, upon principle, it would seem that there could be little doubt, and that such is the law is recognized by the most authoritative writers and by numerous decisions.' 1 Tiffany's Modern Law of Real Prop. 120." Testator devised real estate to his wife for life, with remainder to J., adding that, on the latter dying before distribution of the property, his issue, if he left any, otherwise his heirs, should receive his share. Held, that J. took a "vested remainder," so that he and the life tenant could give a perfect title. Callison v. Morris, 98 N. W. 780, 781, 123 Iowa, 297.

An estate is "vested" when there is an immediate right of present enjoyment or a present fixed right of future enjoyment. It

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is not the uncertainty of ever taking effect in possession that makes a remainder "contingent," for to this extent every remainder is and must be liable. The present capacity of taking effect in possession, if the possession were to become vacant before the estate limited in remainder determines, distinguishes a vested from a contingent remainder. Where a testator devised land to his wife during her lifetime, and upon her death to his children in equal shares, but with a provision that if any of the children should die before the wife, leaving no children, the share devised to them was thereby devised to the survivors of the children the children took vested and not contingent remainders, which might be defeated by their death before the death of the wife, or what is generally called a "defeasible fee." Roach v. Dance (Ky.) 80 S. W. 1097, 1098 (citing Kent's Comm. § 202; 2 Minor's Institutes, p. 388).

"A 'vested remainder' is an estate to take effect after another estate for years, for life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who is in esse and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency." A testator devised real estate to his daughter for life, remainder to her children, if any, surviving her, otherwise to testator's brothers and sisters, and, in case any one or more or all of them should be dead at the time of his death, the share of such deceased brother or sister should go to and be equally divided among his or her children, share and share alike. At the time of the suit for the partition, testator's daughter, though married, was 50 years of age, and had never had any children. It was held that the remainder to testator's brothers and sisters was not a vested remainder, but a contingent one, and hence no partition could be had during the daughter's life. Ruddell v. Wren, 70 N. E. 751, 753, 208 Ill. 508.

A testator, who died in March, 1901, by his will bequeathed his residuary estate in trust, the income to be paid to his wife during her life, with remainder to his children living at the time of her death, and the lawful issue of any deceased child or children; such issue taking the share only their parent would have taken if living. Held, that the remainder so created was not "vested," not being limited to "persons in esse and ascertained," but was "contingent," being limited to persons who could not be ascertained until the death of the wife, and that such bequests were not subject to the legacy tax imposed by War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464; the wife being still living at the time of the taking effect of the amendment by Act June 27, 1902, c. 1160, § 8, 32 Stat. 406, exempting from the tax "any contingent beneficial interest not absolutely vested in possession or enjoyment" prior to July 1, 1902. Land Title & Trust Co. v. McCoach, 129 Fed. 901, 904, 64 C. C. A. 333.

"A 'vested remainder' is an estate to take effect after another estate for years, for life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who was in esse and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency." A remainder limited upon an estate tail is held to be vested, though it must be uncertain whether it will ever take place. Where a testator limits the interest of one son in the latter proportionate part of the realty to an estate for life, remainder to any surviving child of the life tenant, and in default thereof to such tenant's brothers and sisters, and all of them are living at testator's death, but the life tenant is childless, the brothers and sisters take a "vested," and not a "contingent," remainder, notwithstanding the liability to a defeat of their interests by subsequent issue born to the life tenant. Boatman v. Boatman (Ill.) 65 N. E. 81, 83 (quoting and adopting 4 Kent, Comm. [13th Ed.] 228).

Not only at common law, but under the laws of Tennessee and Texas, under a will giving property to F., the wife of G., for her use as long as she remained the wife of G., and the children she might have by G., said property to go to the children of G. on the death of F. or her ceasing to be his wife, there was a "contingent remainder" as regards the children of F. by G. till a child was born to them, whereupon it immediately became a "vested remainder" in that child and all other children that might afterwards be born to them; said remainder opening and letting in each successive child as it was born, and the interest of any child dying before F. descending to the child's heirs. Greenlaw v. Dillon (Tex.) 108 S. W. 705, 708.

CONTINGENTLY

The word "contingently," in Code Civ. Proc. § 2662, providing that a person entitled absolutely or contingently to administration may present a petition praying for letters to himself or to such other persons having a prior right, when considered in connection with sections 2660, 2661, prescribing the persons entitled to letters of administration, and fixing their priorities, etc., means a person to whom at the time the petition is filed letters would issue, if persons entitled thereto in priority did not take, and a nonresident alien is not entitled to file a petition and secure the appointment of his resident attorney; he not being contingently entitled to letters himself.

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In re Ferrigan's Estate, 87 N. Y. Supp. 16, 17, 92 App. Div. 376.

CONTINUANCE

Of action

Under Revisal 1905, § 2773, prescribing among the fees to be charged by clerks of the superior court for official services rendered in the course of pending actions, "Continuance, 30 cents," the continuance must be such as is made by the judge on motion, and as must be recorded in the minutes by the clerk, and not such continuance of the trial of an action as is brought about by the inability to reach the cause for trial owing to a crowded docket and lack of time. Luther v. Southern R. Co., 69 S. E. 762, 763, 154 N. C. 103.

Of injury

An instruction that, "if the jury find for the plaintiff in determining the damages, they may consider the bodily suffering and mental anguish endured by plaintiff since said injury in consequence thereof, the character and extent of said injury, and its 'continuance,' together with loss of time, if any," does not authorize damages for permanent injury. Moore v. Missouri Pac. Ry. Co., 116 S. W. 440, 441, 136 Mo. App. 210.

Of partnership

Bankr. Act July 1, 1898, c. 541, § 5, subd. "a," 30 Stat. 548, authorizes adjudication of a partnership during the continuance of the partnership business, or after its dissolution and before final settlement. Held, that the "continuance of a partnership" within such section meant its actual status as a firm, as distinguished from a status created by estoppel against a partner, and that it was therefore essential that the partnership should exist as such, or that its affairs should be still unsettled at the time of the filing of a petition, in order to subject it to adjudication. In re Pinson & Co., 180 Fed. 787, 789.

CONTINUANCE IN OFFICE

Const. art. 6, § 25, declaring that the compensation of judges of the superior and circuit courts in Cook county shall not be changed during their "continuance in office," refers to the term of office, and not to the individual, so that Laws 1901, p. 207, providing that judges of the circuit and superior courts of Cook county hereafter to be elected shall receive $10,000 per year, instead of $7,000, does not entitle a judge, elected after the passage of the act to complete the unexpired term of a judge elected before the passage of the act, to receive a salary of $10,000. Foreman v. People ex rel. McEwen, 71 N. E. 35, 37, 209 Ill. 567.

CONTINUANDO

"Continuando" is an averment of the continuance of a nuisance until the finding of the indictment, and to authorize the abatement of a nuisance upon judgment, in case of a conviction therefor, it was essential that the information contain a "continuando," though it is otherwise where punishment only is sought. State v. Murray, 140 S. W. 899-902, 237 Mo. 158.

CONTINUATION

A suit in equity, dependent upon a former suit of which the federal court had jurisdiction, may be maintained in that court, without diversity of citizenship or a federal question, (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit. Such suit is but the "continuation of the original suit," to the end that more complete justice may be accomplished thereby. Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 612, 73 C. C. A. 260.

A proceeding under Rev. St. 1895, c. 17, tit. 30, art. 1375, authorizing a new trial for good cause shown, upon defendant's application, where judgment was rendered against him on service by publication without appearance, is not an "original suit," but a "continuation of the former suit." Hence the order vacating the original judgment is an interlocutory order, from which no appeal lies. Wolf v. Sahm, 120 S. W. 1114, 1117, 55 Tex. Civ. App. 564.

CONTINUE

See May Continue in Session.
See, also, Continuance.

An order of a city council that the sewer on B. street be "continued" to W. street is sufficiently definite as to the termini of the sewer; one end being the point where the sewer then existing on B. street ended and the other being W. street. Googin v. City of Lewiston, 68 Atl. 694, 697, 103 Me. 119.

As to actions or proceedings

Webster defines the word "continue" to mean to keep up or maintain a particular condition, course, or series of actions; to unite; to connect; to protract or extend in duration; to carry onward; to extend; to prolong; to draw out at length. The word "continue," as used in Code Civ. Proc. § 26, providing that a special proceeding may be continued from time to time, before one or more judges of the court, means to keep up, extend in duration, or prolong. Bridges v. Koppelman, 117 N. Y. Supp. 306, 312, 63 Misc. Rep. 27.

The term "continued," as used in Code Civ. Proc. § 26, means the taking of the next step in the proceeding toward an ultimate determination thereof, and did not authorize a judge who had not granted an order for the examination of the debtor in supplementary proceedings in the First department to alter the order before service, so as to require the debtor's appearance at a date later than that

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designated in the order. Ward v. Stoddard, 128 N. Y. Supp. 846, 849, 144 App. Div. 143.

As to residence

Code Civ. Proc. § 1763, subd. 3, provides that an action for separation may be brought where the parties, having been married without the state, have become residents of the state and have continued to be residents thereof at least one year, and plaintiff is such a resident when the action is commenced. Held, that the words "and have continued to be residents thereof at least one year" contemplate a residence continuing to the time of the separation, the word "continue" meaning "to protract or extend in duration; to persevere or persist in; to cease not." And where a husband and wife, married in a foreign country, became residents of New York, living there for many years, and then went to another state, where a cause of action for separation arose in the wife's favor, and she, upon her husband's excluding her from their home, returned to New York, acquiring an independent and separate domicile there, she could not sue her husband for a separation in New York, though she obtained personal service of process upon him there. Elwell v. Elwell, 128 N. Y. Supp. 495, 498, 70 Misc. Rep. 61.

CONTINUE IN SERVICE

Where a supernumerary surgeon's mate of the Virginia line accepted an appointment as surgeon's mate of the regiment of guards January 9, 1790, as authorized by resolution of the Continental Congress of that date, and such regiment was discharged before the end of the war because its term of enlistment had expired, he did not "continue in service until the end of the war," within the meaning of Resolutions Cong. Oct. 21, 1780, and March 22, 1783. Williams v. United States, 14 Sup. Ct. 1188, 1189, 154 U. S. 648, 25 L. Ed. 309.

CONTINUE TO CARRY ON BUSINESS

Where, on the dissolution of a law and collection firm, defendant formed a new partnership, circulars sent out to the customers of the old firm, stating that the new firm would "continue to carry on the business" of the old firm, did not amount to a statement that defendants were the successors of the old firm. Holbrook v. Nesbitt, 39 N. E. 794, 795, 163 Mass. 120.

CONTINUED CHANGE OF POSSESSION

See Actual and Continued Change of Possession.

It is not the design of the statute requiring sales to be followed by an actual and continued change of possession "to give such extension of meaning to this phrase, 'continued change of possession,' as to require, upon penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them. * * * The 'continued change of possession,' then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrines of the court holding the general principles transcribed into the statute. The delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back; not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time to give general advertisement of the status of the property and the claim to it by the vendee." Reynolds v. Beck, 83 S. W. 292, 295, 108 Mo. App. 188 (quoting and adopting definition in Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; citing Gould v. Huntley, 15 Pac. 25, 73 Cal. 401; Carpenter v. Clark, 2 Nev. 243).

CONTINUED DESERTION

See, also, Desertion.

A "continued desertion" for the space of three years, within the divorce law, is a desertion for three years consecutively. Distinct and separate intervals cannot be combined together to make out the period. Gaillard v. Gaillard, 23 Miss. 152, 153.

CONTINUED OF COURSE

"The declaration that the process, etc., shall be 'continued of course' means simply continued without any special order, and was obviously designed to prevent that failure of right which in many cases might otherwise result from the absence of a judge." McDowell v. United States, 16 Sup. Ct. 111, 112, 159 U. S. 596, 600, 40 L. Ed. 271.

CONTINUED ON THE TABLE

A motion of the city council that the matter of a reassessment be "continued on the table" until the next regular meeting, while expressed in inappropriate language, should be construed in accordance with the intention of the council to effect a continuance of the business, and should not be construed as operating to lay the matter on the table, and deprive the council of jurisdiction thereof. Duniway v. Portland, 81 Pac. 945, 950, 47 Or. 103.

CONTINUED POSSESSION

The words "continued possession," as used in Laws 1850–51, p. 403, providing for the organization of gravel road companies, were

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not intended to confer on such companies perpetual corporate rights and franchises, but conferred corporate rights and the capacity of succession on the incorporators only for the period limited in the charter or fixed by the general statutes then in force at a term of 20 years. State v. Louisiana, B. G. & A. Gravel Road Co., 92 S. W. 153, 163, 116 Mo. App. 175.

CONTINUED SUCCESSION

The term "continued succession" means only a capacity of succession for a period limited in the charter of the corporation or a period fixed by general statutes. State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co., 86 S. W. 170, 174, 187 Mo. 439.

"Continued succession," as employed in Laws 1850–51, p. 403, and Laws 1870–71, p. 227, providing for the incorporation of gravel road companies, did not confer on such companies perpetual succession, but only the right of "continued succession" for the charter or statutory period. State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo.) 92 S. W. 152, 163, 164.

CONTINUING BODY

The board of fire commissioners of the city of Elmira, being composed of the mayor of the city and two others, and on the expiration of the term of office the mayor, under Laws 1894, p. 1457, c. 615, appointing the successors, and the terms of office expiring at different times, it is a "continuing body"; and a writ of mandamus, running against the board, to reinstate relator, is effective to accomplish that result, whether the board is composed of the same persons who passed the resolution resulting in his dismissal or not. People ex rel. Lazarus v. Coleman, 91 N. Y. Supp. 432, 433, 99 App. Div. 88.

CONTINUING CONTEMPT

A failure or refusal to comply with an order of court requiring the payment of alimony and attorney's fees is a "continuing contempt," and the court may enter a judgment that the party so refusing be imprisoned until he shall comply. In such case the time of imprisonment is not within the limitation of the statute relative to a single act of contempt, that the duration of imprisonment must not exceed 20 days. Gray v. Gray, 56 S. E. 438, 127 Ga. 345 (citing Tindall v. Nisbet, 39 S. E. 450, 113 Ga. 1114 (4), 1135, 55 L. R. A. 225).

CONTINUING CONTRACT

The term "continuing contract," in a finding by the trial court in proceedings in bankruptcy, that a contract between a wife and her husband for the return of money brought by her into the community at the time of the marriage was a continuing contract, was not objectionable for indefiniteness. In re Myer, 89 Pac. 246, 247, 14 N. M. 45.

CONTINUING COVENANT

Where, prior to the organization of a water company to furnish water to a town, its promoters made a contract to furnish the town with water for a specified period at specified rates, all of the covenants in a contract which were of a continuing nature ran with the waterworks, and were binding on a new corporation subsequently formed, to which the works were transferred, though some of them did not expressly purport to bind the original corporation's assigns. Mayor, etc., of Town of Boonton v. Boonton Water Co., 61 Atl. 390, 69 N. J. Eq. 23.

A covenant to build within a given time is not a "continuing covenant." A covenant to pay rent by installments, to keep the premises in repair, to keep them insured, to pay the taxes, to properly cultivate the land, and many others that indicate or necessarily imply the doing of the stipulated acts successively, or as often as occasion may require, are continuing covenants; but the covenant to repair or insure on or before a time certain, or forthwith to pay a gross sum as rent for the term, or not to assign the lease, and others of a like character, are not continuing covenants. McGlynn v. Moore, 25 Cal. 384, 395.

When a thing is spoken of as "continuing from year to year," the primary meaning is not that it continues forever; and so a lease providing for a monthly rental for a term terminating in 1901, with the privilege of renewal at the same rate and terms each year thereafter from year to year, does not give the lessee right to a perpetual renewal. Tischner v. Rutledge, 77 Pac. 388, 389, 35 Wash. 285.

A covenant of seisin, implied from the use of the statutory words "grant, bargain and sell," in a deed, as provided by Rev. St. 1899, § 907, is a "continuing covenant of indemnity" running with the land, so that an action for breach thereof only accrues from the dates of eviction because of a paramount title. Leet v. Gratz, 101 S. W. 696, 699, 124 Mo. App. 394.

A "continuing crime" is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may occupy. Armour Packing Co. v. United States, 153 Fed. 1, 5, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400 (citing Whart. Cr. Pl. & Prac. [9th Ed.] §§ 473, 474; People v. Sullivan, 33 Pac. 701, 702, 704, 9 Utah, 195).

A railroad company, delivering a freight car containing fireworks, and having knowledge of its contents, and its liability to explode from concussion, negligently placed the car at a place in its yards where it would be subjected to impact from other cars. As a result of concussion a fire broke out in the car after an explosion of part of its con-

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tents, and, a fire alarm being turned in, plaintiff's intestate, the chief engineer of the fire department, approached the burning car to extinguish the fire, and received a serious injury from a further explosion. Held, that the danger was not a "continuing one" within the rule that an owner of premises is not liable to one coming thereon without invitation for injury resulting from the usual condition of the premises, and the fact that there was a succession of explosions while the fire was burning did not create a condition of continuous danger, so as to bring intestate within such rule. Houston Belt & Terminal Ry. Co. v. O'Leary (Tex.) 136 S. W. 601, 603.

CONTINUING GUARANTY

A "continuing guaranty" is one that is not limited in time or to a particular transaction or to specific transactions, but is operative until revoked. Merchants' Nat. Bank v. Cole, 93 N. E. 465, 466, 88 Ohio St. 50, Ann. Cas. 1912A, 773.

A "continuing guaranty" is defined to be a guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied. White Sewing Mach. Co. v. Courtney, 75 Pac. 296, 297, 141 Cal. 674.

An instrument reciting that the assignor agreed to pay a company "for any amount of flour delivered to B. * * * to any amount to $500" was a "continuing guaranty," and did not contemplate merely a single transaction. Grob & Co. v. Gross, 84 Atl. 1064, 1065, 83 N. J. Law, 430.

Plaintiff wrote defendant, stating that a third person wished to buy some goods from plaintiff, and asking defendant to guaranty payment for "any goods he might purchase." Defendant refused, and plaintiff in reply stated that the intending purchaser had told it that defendant would guaranty payment, and to hold the goods until it received the guaranty. Later defendant wrote, stating that he had decided to help the purchaser, and would guaranty the payment of goods he might buy, not exceeding $300. Held not a "continuing guaranty." Callender, McAuslan & Troup Co. v. Flint, 72 N. E. 345, 187 Mass. 104.

An agreement by a bank to honor checks of a firm drawn on it and accompanying drafts on an individual so long as another bank will protect the drafts, entered into to extend credit to the firm, is a "continuing guaranty," unlimited as to time or amount, so long as the latter bank acts on it, and it is binding on the former bank when acted on by the latter, and the former may terminate the guaranty at any time before it has been acted on. First Nat. Bank of Ft. Wayne, Ind., v. Union Stockyards Bank of Buffalo, 123 N. Y. Supp. 655, 656, 138 App. Div. 918.

The following guaranty: "We, the undersigned, do guarantee you to trust Bodner, Berkman & Co., three hundred (300) dollars worth of material to be credited to them at the rate of ten or fifteen days terms for a term of five months from date" — is a "continuing guaranty," and extends to all moneys due for materials purchased within five months; the amount of the credit only being limited to $300. Paskusz v. Bodner, 67 Atl. 1040, 75 N. J. Law, 447 (citing Rindge v. Judson, 24 N. Y. 64; Columbia Electrical Supply Co. v. Kemmet, 50 Atl. 663, 67 N. J. Law, 18; Hatch v. Hobbs, 12 Gray [78 Mass.] 447; Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545; Taussig v. Reid, 32 N. E. 918, 145 Ill. 488, 36 Am. St. Rep. 504; Clark v. Burdett, 2 N. Y. Super. Ct. 217; Bent v. Hartshorn, 1 Metc. [42 Mass.] 24).

CONTINUING INJUNCTION

An order denying a motion to dissolve a preliminary injunction is not one "continuing" the injunction, within the meaning of Act March 3, 1891, c. 517, § 7, 26 Stat. 828, and is not appealable thereunder. Pioneer Lace Mfg. Co. v. Dodd, 181 Fed. 688, 690, 104 C. C. A. 586.

CONTINUING INJURY

Permanent injury distinguished, see Permanent Injury.

CONTINUING NUISANCE

A band stand in the street is a "continuing nuisance," where, so long as it remains and is used for the purpose of its construction, it will interfere with merchants in their business, and hence injunction will lie against it after its completion. Atterbury v. West, 122 S. W. 1106, 139 Mo. App. 180.

By "continuing nuisance" or "constantly recurring grievance" or "permanent injury" is meant a nuisance which occurs so often, and is so necessarily an incident of the use of property complained of, that it can be fairly said to be continuous, although not constant or unceasing. Central of Georgia R. Co. v. Americus Const. Co., 65 S. E. 855, 858, 133 Ga. 392.

If leaving timber and brush on plaintiff's land, which had been cut, constituted a nuisance, because of the danger of forest fires, it was not a "continuing nuisance," the continuance of which could be restrained by injunction. Litchfield v. Bond, 93 N. Y. Supp. 1016, 1021, 105 App. Div. 229.

Every continuance of a "continuing nuisance," as distinguished from a permanent nuisance, is a new nuisance, for which a new action lies, though an action for the original nuisance is barred by limitations, and an action lies for every continuance for the damages accruing within the period of limitations. A nuisance which may be abated by law is a continuing nuisance, for which suc-

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cessive actions for damages occasioned by it may be maintained from time to time as they are inflicted. Uvalde Electric Light Co. v. Parsons (Tex.) 138 S. W. 163, 164.

CONTINUING OFFENSE

A continuing crime is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may occupy. Armour Packing Co. v. United States, 153 Fed. 1, 5, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400 (citing Whart. Cr. Pl. & Prac. [9th Ed.] §§ 473, 474; People v. Sullivan, 33 Pac. 701, 702, 704, 9 Utah, 195).

Under Ky. St. 1903, § 4224, requiring an annual license tax for selling oil by retail of $5 for each wagon used therefor, and section 4201, providing that any person, engaging in business from which a license is required before procuring the license and paying the tax, shall be guilty of a misdemeanor, the offense of operating a wagon without a license is a "continuing offense," and a conviction for retaining oil from a wagon is a bar to another prosecution for retailing from the same wagon during the same license year. Commonwealth v. Standard Oil Co. (Ky.) 87 S. W. 1090, 1091.

CONTINUING THE BUSINESS

"Continuing the business" as used in bankruptcy with reference to a continuation of the business of the bankrupt by his trustee, means something different from closing out the business, necessitating supervision by the trustee, replenishment of stock, the exercise of intelligent business judgment in continuing a going concern. In re George W. Shiebler & Co., 174 Fed. 336, 337, 98 C. C. A. 208.

CONTINUING TRESPASS

"Continuing trespass," within the statute of limitations, refers to trespass by structures of a permanent nature, and not to separate and distinct acts of wrongfully cutting timber. Sample v. John L. Roper Lumber Co., 63 S. E. 731, 732, 150 N. C. 161, 134 Am. St. Rep. 902.

CONTINUITY OF POSSESSION

"Continuity of possession" is one of the essential requisites to constitute such adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession, the seisin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseisin; and it is equally well settled that, if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute a new adverse possession for the time limited must be taken for that purpose. Merryman v. Hoover, 59 S. E. 483, 488, 107 Va. 485.

CONTINUOUS

The word "uninterrupted," as used in an instruction making uninterrupted adverse enjoyment an element of prescription, means unbroken, and is synonymous with the word "continuous." Evans v. Scott, 83 S. W. 874, 876, 37 Tex. Civ. App. 373.

" 'Continuous,' according to the Standard Dictionary, means 'connected, extended, or prolonged without separation or interruption of sequence; unbroken; unintermitted.' It is also defined as 'having but one direction.' " Hence the word "continuous," as used in section 104 of the Railroad Law, requiring every surface street railroad corporation entering into a contract for the use of another road to give each passenger paying a single fare a transfer entitling him without extra charge to one "continuous" trip to any point or portion of such other railroad, etc., must be construed to mean direct, whenever it can be so applied. Charbonneau v. Nassau Electric R. Co., 108 N. Y. Supp. 105, 107, 123 App. Div. 531.

Within the rule that, to constitute adverse possession, it is necessary that the possession be "continuous"; "continuous" means without interruption. Bradbury Marble Co. v. Laclede Gaslight Co., 106 S. W. 594, 599, 128 Mo. App. 96.

In determining whether title to an easement claimed over land for a railway switching right of way is acquired by prescription, a user is not "continuous" merely because the easement is used at the pleasure of the person claiming it without interruption; and hence, where there were periods of considerable time during which the mill in connection with which the easement was claimed was idle, the user was not "continuous." Dummer v. United States Gypsum Co., 117 N. W. 317, 322, 153 Mich. 622.

In order to claim minerals under the statute of limitations, after a severance from the surface ownership, the surface owner must show actual, notorious, exclusive, "continuous," peaceable, and hostile possession of the mine, independently of his possession of the surface, in the same manner as a stranger; actual possession being shown by opening and operating the mine, and the possession is continuous if the operation is carried on at such seasons as the nature of the work permits or the custom of the neighborhood requires, if there is some evidence of possession in the interval to connect the operations, when resumed, with the prior operations. Gordon v. Park, 117 S. W. 1163, 1167, 219 Mo. 600.

CONTINUOUS ACCOUNT

Where items of service rendered, as disclosed in a cross-petition antedated April 28,

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1895, and of the 10 items 7 were for services rendered prior to 1895, and the dates of two were not given, and the other was for services in an action rendered between December 21, 1892, and February 28, 1896, and cross-petitioner alleged his inability to more specifically state the exact date at which the service was rendered, his claims could not be regarded as a "continuous account" as a matter of law, so as to suspend limitations until the date of the last item. Novak v. Novak, 115 N. W. 1, 2, 137 Iowa, 519.

CONTINUOUS ADVERSE USE

An adverse use of an irrigation ditch during the cropping season only constitutes a "continuous adverse user," as its nonuser when the water is not needed does not interfere with the continuity of use. Silva v. Hawn, 102 Pac. 952, 953, 10 Cal. App. 544.

CONTINUOUS DEALING

Memoranda on sheets of wall calendars, made at the times of transactions evidenced thereby, and memoranda on the blank pages of a patent medicine book, made on the dates of the transactions evidenced thereby, all relating to payments on a note, do not show a "continuous dealing" with persons generally, or several items of charge at different times, in the same book or set of books, within Code, § 4623, and they are not admissible as independent evidence, but may be properly resorted to by the party making them as a means of refreshing his recollection when testifying as a witness, and, where they have been properly identified by him as memoranda made at the time of the transactions evidenced thereby, they are admissible in evidence. Porter v. Madrid State Bank (Iowa) 136 N. W. 666, 669.

CONTINUOUS EASEMENT

See Noncontinuous Easement.

In a practical sense a road is "continuous" as long as it is maintained and used, although the use is unautomatic, and from necessity intermittent; but it is not continuous within the meaning of the technical law of easements. A "continuous easement" is one which operates without the interference of man, such as a water course or a drainpipe. A way is said not to be continuous, because, in the use of it, there is involved the personal action of the owner in setting his foot upon it, or driving his team or cattle upon it. Hoffman v. Shoemaker (W. Va.) 71 S. E. 198, 200, 34 L. R. A. (N. S.) 632 (citing Jones, Easements, §§ 143–153).

The distinction between easements "continuous and discontinuous" is found in the Civil Code of France, where easements or servitudes are divided into continuous and discontinuous, and are defined: "Continuous are those of which the enjoyment is or may be continued, without the necessity of any actual interference by man, as a water-spout or a right of light or air." "Discontinuous are those enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." Fayter v. North, 83 Pac. 742, 746, 30 Utah. 156, 6 L. R. A. (N. S.) 410 (quoting and adopting definition in Washburn, Easements and Servitudes [4th Ed.] 21).

"A drain is classed as a 'continuous easement' because it may be used continuously without the interference of man." Dee v. King, 59 Atl. 839, 840, 77 Vt. 230, 68 L. R. A. 860.

As easement

See Easement.

CONTINUOUS FORCE

The phrase "in continuous force," as used in a provision making a policy of insurance incontestable if it shall have been in continuous force for three years from its date, contemplates that a policy may have been in continuous force, even though the insurance company then had good grounds for avoiding it for nonperformance of a condition precedent. The words are used to distinguish between policies which mature by death or otherwise terminate within the three years and policies which do not so mature or terminate. Mutual Reserve Fund Life Ass'n v. Austin, 142 Fed. 398, 400, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064.

A policy of insurance contained a clause entitling the insured to a cash benefit of $120 on legal surrender of the policy after it had been in "continuous force without delinquency" for 10 years from date. The policy required payments of $1 within 10 days after the 1st day of each month, and provided that, if such payment was not made when due, the policy should be void. Insured made all payments promptly, except one, which was made after the time limited, but was received by the company without objection. Held, that the policy had been in "continuous force without delinquency," within the meaning of the clause. Davis v. National Casualty Co., 131 N. W. 1013, 1014, 115 Minn. 125.

CONTINUOUS GUARANTY

A written statement that the maker's sons needed some help through the summer, and "I ask you to show them all the favors you can, and I will see that you get pay for everything you sell them," is a "continuous guaranty," and bound the maker for all the goods sold within a reasonable time on the faith of the guaranty. A. B. Small Co. v. Claxton, 57 S. E. 977, 979, 1 Ga. App. 83; Consolidated Portrait & Frame Co. v. Same, 57 S. E. 980, 1 Ga. App. 809.

CONTINUOUS LINE

Laws 1890, c. 565, § 105, provides that, when a railroad operates a branch system

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under lease or contract, it shall be run as a "continuous line." This means as a line with branches originally all of one company; that is, a line as specified and included in section 101, providing that no street surface railroad should charge any passenger more than five cents for one continuous ride from any point on its road, or any other road, line, or branch operated by it or under its control, to any other point thereof, or any connecting branch thereof within the limits of a city. Schwartzman v. Brooklyn Heights R. Co., 98 N. Y. Supp. 941, 943, 50 Misc. Rep. 116.

The west half of a railroad bridge over the Missouri river owned by the company which operates through passenger and freight trains continuously through different counties of Nebraska to and over said bridge, and thence through adjoining states, is "a part of the 'continuous line of road,'" within the meaning of sections 39 and 40 of the Nebraska revenue act in force in 1901, and is assessable for taxation by the state board. Chicago, B. & Q. R. Co. v. Cass County, 101 N. W. 11, 12, 14, 72 Neb. 489, 117 Am. St. Rep. 806.

CONTINUOUS MILEAGE RATE

Where the railroad commissioners declared that a "continuous mileage rate" should apply to two connecting railroad companies, the stock and bonds of one of which were owned by the other, though each had its separate directors and was operated separately, applying the rate previously fixed for the owing company, such rate was a joint rate within the meaning of Act Oct. 14, 1879 (Acts 1878, p. 125) § 5, as amended by Acts 1889, p. 131, and Civ. Code 1895, § 2189, declaring that the railroad commissioners shall have the power to make just and reasonable joint rates for all connecting railroads, and the action of the commissioners was not ipso facto illegal on the ground that it was not a joint rate and not authorized by the statute, if the rate so fixed was reasonable and just. Hill v. Wadley Southern R. Co., 57 S. E. 795, 799, 128 Ga. 705.

CONTINUOUS MIXERS

Among the concrete mixing machines "'batch mixers' are to be distinguished from 'continuous mixers.' The latter are long cylindrical devices, which receive materials and discharge them when mixed as a continuous operation." They were said to be less effective than batch mixers in mixing the material and to be subject to other objections. Ransome Concrete Machinery Co. v. United Concrete Machinery Co., 177 Fed. 413, 101 C. C. A. 217.

CONTINUOUS PASSAGE

See, also, Continuous Ride.

Where an agent of a carrier assured the purchaser of a ticket that his wife could take a certain designated train and be conveyed to her home without inconvenience, other than in merely changing cars with a wait of only a few minutes, the words on the ticket, "continuous passage," do not import an agreement that the passenger shall be carried without any stop or change of cars, but indicate that the agent might have had the authority to issue a ticket for such a passage as he assured the purchaser could be had. Southern R. Co. v. Daughdrill, 75 S. E. 925, 927, 11 Ga. App. 603.

CONTINUOUS PERIOD

Where navy officers transferred from one branch of the service to another are required to resign as a preliminary to the new appointment, with no intention of leaving the service, the actual service of each claimant from the time he first entered the navy is for a single and "continuous period" within the longevity pay act. United States v. Alger, 14 Sup. Ct. 346, 347, 151 U. S. 362, 366, 38 L. Ed. 192; Id., 14 Sup. Ct. 635, 152 U. S. 384, 38 L. Ed. 488.

CONTINUOUS QUOTATIONS

The phrase, "continuous quotations," as used in a contract between a board of trade, and a telegraph company, with reference to the decimation of the "continuous quotations" of such board of trade, mean quotations wherein the price of any commodity shall be quoted oftener than at regular intervals of 10 minutes. Board of Trade v. McDearmott Commission Co., 143 Fed. 188, 191.

CONTINUOUS RAILROAD

Act Cong. July 2, 1864, c. 217, 13 Stat. 365, incorporated the Northern Pacific Railroad Company and empowered it to construct and maintain a continuous railroad, etc., between a point on Lake Superior and some point on Puget Sound. Held, that the Northern Pacific Railway Company, as successor of the original grantee, operated a "continuous railroad" within the meaning of the charter, where it operated at least one train each way daily from terminus to terminus directly through without change of cars or deviation from the main line, which train, with the accommodation afforded by others, furnished adequate service over the line, and it was not required to run all its through trains to the terminus of the road. State ex rel. Whitehouse v. Northern Pac. Ry. Co., 102 Pac. 24, 25, 53 Wash. 370.

CONTINUOUS RIDE

See Continuous Passage.

In an ordinance providing that the rate of fare charged by a traction company within the limits of a city for each passenger should be three cents, and outside the city limits within a radius of five miles five cents, and payment of such fares shall entitle the pas-

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sengers to one continuous ride in the same general direction, the words "continuous ride in the same general direction" mean a journey over the traction company's own tracks. Reed v. Inhabitants of City of Trenton, 85 Atl. 270, 272, 80 N. J. Eq. 503.

Railroad Law (Laws 1890, p. 1113, c. 565) § 101, cl. 1, provides that no corporation constructing and operating a street surface railroad under such act or under Laws 1884, p. 309, c. 352, shall charge any passenger more than five cents for "one continuous ride" from any point on its road or on any road, line, or branch operated by it or under its control to any other point thereof or any connecting branch thereof, within the limits of any incorporated city or village. Held, that such section did not provide for a change of cars, but only entitled the passenger to a "continuous ride," as distinguished from "continuous trip," for five cents from any point on the road of the carrying company, or a road operated or controlled by it under a lease or other contract, to the extent of the distance that the car which received the passenger ran or could run over the connecting roads. O'Connor v. Brooklyn Heights R. Co., 108 N. Y. Supp. 471, 474, 123 App. Div. 784.

CONTINUOUS SERVITUDE

"'Continuous servitudes' are those of which the enjoyment is or may be continual without the necessity of actual interference by man, as a waterspout or a right of light or air." German Savings & Loan Soc. v. Gordon, 102 Pac. 736, 738, 54 Or. 147, 26 L. R. A. (N. S.) 331 (quoting and adopting definition in Washburn, Easem. [2d Ed.] 13); Fayther v. North, 83 Pac. 742, 747, 30 Utah, 156, 6 L. R. A. (N. S.) 410 (quoting and adopting Washburn, Easements and Servitudes [4th Ed.] pp. 107, 110).

Under Civ. Code, arts. 727, 766, defining "continuous servitudes" as those whose use is or may be continual without the act of man, and "discontinuous servitudes" as such as need the act of man to be exercised, and providing that discontinuous servitudes can be established only by title, a railroad for the transportation of sugar cane is a discontinuous servitude, and not prescriptible. Ogborn v. Lower Terrebonne Refining & Mfg. Co., 56 South. 323, 129 La. 379.

CONTINUOUS SESSION

Open court distinguished, see Open Court.

CONTINUOUS TOTAL INABILITY

Insured was injured January 31, 1903. He stopped work because of the injury for 15 minutes, and then continued to work until March 25, 1903, and died April 6th following from the injury. An accident policy provided for a specified payment if insured should receive personal injury "at once resulting in continuous" total inability to engage in any business, etc., necessarily resulting independently of all other causes in certain results including illness, loss of members and loss of life. Held, that while the disability occurred "at once," to wit, at the time the accident happened, there was no "continuous total inability" to engage in business from the time of the injury to insured's death, and that the insurer was therefore not liable. Continental Casualty Co. v. Wade, 105 S. W. 35, 36, 101 Tex. 102.

CONTINUOUS TRIP

A statute providing that railroad companies within cities shall forfeit $50 for each failure to give a transfer entitling a passenger to a "continuous trip" to any portion of the railroad is restricted to lines of railroads substantially intersecting; the words "continuous trip" not being satisfied by the mere physical proximity of two lines of railroad, with the attendant ease with which a passenger might walk from one line to the other, where the railroads are physically distinct and are not operated as intersecting lines of one system. Ketcham v. New York City R. Co., 95 N. Y. Supp. 553, 554, 48 Misc. Rep. 367.

Railroad Law (Laws 1890, p. 1114, c. 565) § 104, as amended by Laws 1892, p. 1382, c. 676, requiring every street railway company contracting with another company for the use of their respective roads to carry passengers for one fare between points on the railroads embraced in the contract where the passenger desires to make one "continuous trip," relates to companies that have entered into contracts with other companies to insure a continuous passage from a point on one road to a point on the other road embraced in the contract, and does not apply to a company running short-service and long-service cars over its own line. Baron v. New York City R. Co., 105 N. Y. Supp. 258, 263, 120 App. Div. 134.

Railroad Law (Laws 1890, p. 1114) c. 565, § 104, provides that any street surface railroad corporation which acquires the use and operation of the roads of other companies by contract shall carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one "continuous trip" between any such points for a single fare, and, on demand and without extra fare, shall give to each passenger paying one single fare a transfer entitling the passenger to one "continuous trip" to any point or portion of any railroad embraced in such contract, and for refusal imposes a penalty of $50. Held, that such section does not cover different lines constructed by the same company, but relates only to "a continuous trip" made by changes from the line of one of such companies to that of another; both lines being operated by one company under a lease or other contract. O'Connor v. Brooklyn Heights

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R. Co., 108 N. Y. Supp. 471, 474, 123 App. Div. 784.

Railroad Law (Laws 1890, p. 114, c. 565, as amended by Laws 1892, p. 1406, c. 676) § 104, requiring every street railroad company to carry between any two points on the roads over which it has the right to run cars any passenger desiring to make "one continuous trip" between such points for a single fare, and to give the passenger a transfer entitling him to "a continuous trip" to any point on the road, for the promotion of public convenience by the operation of railroads "as a single railroad with a single rate of fare," does not prevent a street railway company authorized by section 4, subd. 8 (page 1084) to regulate the time and manner in which passengers shall be transported, and the compensation to be paid, from adopting regulations requiring passengers making use of transfers to use the same only in the same general direction of their initial trip; a trip conveying the idea of transportation in one direction, and a continuous trip, like a continuous line, extending in the same general direction. Kelly v. New York City R. Co., 84 N. E. 569, 570, 192 N. Y. 97.

General Railroad Law (Laws 1890, c. 565, as amended by Laws 1892, c. 676) § 104, provides for a single fare in case of a continuous trip by any passenger between any two points on railroads or portions thereof, and for a transfer entitling each passenger to a continuous trip to any point or portion of any railroad embraced in the contract with him, substantially as a single railroad with a single rate of fare, and for a penalty for noncompliance. Held, that where a temporary break occurred in the street car line during the construction of a subway under railroad tracks, requiring passengers to walk some 1,200 feet to get a connecting car, their route over such line was not "continuous" within such section, and a passenger who could be carried by connecting lines in two ways, and the one across the break being slightly shorter and more direct, was entitled to a "continuous" trip by car from his starting point to his destination, and the street railroad company could not insist that he take the shorter route, and any rule refusing the right to travel by means of transfers over the longer but continuous route, and compelling him to take the shorter route to avoid a double fare, was unreasonable under the existing conditions, though it would become reasonable when he is again given a continuous passage by the shorter route through the subway. Mannion v. International R. Co., 121 N. Y. Supp. 263, 265, 66 Misc. Rep. 420.

CONTINUOUSLY

See Entirely and Continuously Confined; Resided Continuously.

In the absence of provisions indicating contrary intention, a covenant in a mining lease that the lessee shall work and mine the property "continuously" means continuously to the end of the term. Zelleken v. Lynch, 104 Pac. 563, 564, 80 Kan. 746.

Under Naturalization Act June 29, 1906, c. 3592, § 4, subd. 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 422), which requires the court, before admitting a minor to citizenship, to be satisfied that he has resided "continuously" within the United States five years at least, and within the state or territory where the court is held one year at least, before his application, the word "continuously" is not used literally as requiring the applicant to remain at all times physically within such jurisdiction, but applies to changes of domicile only; and a sailor, by going to sea, does not abandon his residence. In re Schneider, 164 Fed. 335, 336.

Under a contract with an exposition company that a party would install a German village, with the privilege of selling beer, etc., and that he would operate it continuously from the day the exposition opened until the close thereof, the word "continuously" does not make the contract void as authorizing a sale of liquor on Sunday, as the word "continuously" may reasonably be held to apply only to such days as the exposition would be open to the public, which, in the absence of any allegation to the contrary, will be presumed to be week days only. Horton v. Rohlff, 95 N. W. 36, 38, 69 Neb. 95.

In a provision of a bill of lading which entitles the ship to discharge "continuously," the word must be construed to mean continuously during working days, and "working days" exclude Sundays and holidays usually observed, and include only the usual working hours of days on which usual work is only prevented by weather. Tweedie Trading Co. v. Pitch Pine Lumber Co., 156 Fed. 88, 89.

The word "continuously," in a bill of lading providing that the cargo shall be "received by the consignee immediately the vessel is ready to discharge and 'continuously' at all such hours," etc., is not synonymous with "incessantly" or "uninterruptedly"; but the clause means no more than that the discharge should be reasonably continued, considering the time, place, and circumstances, the nature and character of the cargo, the situation of the vessel, and prevailing conditions generally. United States Shipping Co. v. United States, 146 Fed. 914, 920.

CONTINUOUSLY CONFINED TO BED

See Confined to Bed.

CONTINUOUSLY OPERATED

Under the hours of service act (Act March 4, 1907, c. 2939, § 2), which, in a proviso, provides that no telegraph operator who transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to remain on duty for a longer period than 9 hours in any 24-

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hour period in all towers, offices, or stations "continuously operated" night and day, an office which is closed, each day of 24 hours, four times for a period of one hour each, only, is to be classified as one "continuously operated" night and day. United States v. St. Louis Southwestern R. Co. of Texas, 189 Fed. 954, 963.

CONTRABAND

The right of property in market quotations is not "contraband," because it is susceptible of bad uses, as well as good; hence the right of property in market quotations, based on the transactions of an exchange, and the right to be protected in such property, are not affected by the fact that such quotations may be used for unlawful, as well as lawful, purposes. Board of Trade of City of Chicago v. L. A. Kinsey Co., 130 Fed. 507, 513, 64 C. C. A. 669, 69 L. R. A. 59.

CONTRABAND OF WAR

"Contraband of war" is insusceptible of exact definition as applied to every species of merchandise. While flour is not a general contraband of war, it may be so if intended for military use by a belligerent or destined for a port of miltary or naval equipment, and being thus on the border line, a proclamation of one of the governments at war declaring it contraband is sufficient to impress it with that character. Balfour, Guthrie & Co. v. Portland & A. S. S. Co., 167 Fed. 1010, 1014.

CONTRACT

See Brokerage Contract; Commutative Contracts; Complete Contract; Constructive Contract; Continuing Contract; Divisible Contract; Enforceable Contract; Entire Contract; Executed Contract; Executory Contract; Express Contract; Fraudulent Contract; Gambling Contract; Hedging Contract; Illegal Contract; Implied Contract; Indivisible Contract; Joint Contract and Contractor; Maritime Contract; Mutual Contracts; Parol Contract; Quasi Contract; Separable Contract; Severable Contract; Special Contract; Subcontract; Unconditional Contract; Unilateral Contract; Unlawful Contract; Verbal Contract; Vicinity Contract; Voluntary Contract; Written Contract or Agreement.

See Breach of Contract; Debt Contracted; Doing Work by Contract; Founded upon a Contract; Impairing Obligation of Contract; Interference with Freedom to Contract; Law of Contract; Liberty of Contract; Matter of Contract; Money Demand on Contract; Obligation of Contract; Place of Contract; Pleading a Contract; Right to Contract.

Claim founded on contract, see Claim Arising on Contract.

Expenses on breach of contract, see Expenses.

Grub-stake contract, see Grub-Stake.

Party in contract of sale, see Party.

Privity of contract, see Privity—Privy.

Unconscionable contract, see Unconscionable.

Void contract, see Void.

Wagering contracts, see Wager—Wagering Contracts.

See, also, Public Letting; Tontine Insurance.

A "contract" is an agreement between two or more persons, upon sufficient consideration, to do or not to do a particular thing. Moline Jewelry Co. v. Otwell, Lowe & Tull (Del.) 78 Atl. 300, 302; Merritt & Co. v. Layton (Del.) 75 Atl. 795, 796, 1 Boyce, 212; Modern Machinery Co. v. Perkins (Del.) 80 Atl. 1060, 1061; E. S. Adkins & Co. v. Campbell (Del.) 64 Atl. 628, 629, 6 Pennewell, 96; Blakemore v. Cooper, 106 N. W. 566, 569, 15 N. D. 5, 4 L. R. A. (N. S.) 1074 (quoting and adopting definition in Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793); Weinsberg v. St. Louis Cordage Co., 116 S. W. 461, 465, 135 Mo. App. 553.

A "contract" is but a rule of action, binding upon the parties thereto; that is, a "contract" is a law unto the parties thereto. Kirkpatrick v. Pease, 101 S. W. 651, 657, 202 Mo. 471.

A "contract" is a transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line, 180 Fed. 902, 904.

A "contract" is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. The intention of the parties is to be determined by the meaning usually imposed by law on the words used, in the absence of mutual mistake, etc. Hotchkiss v. National City Bank of New York, 200 Fed. 287.

A "contract" is an agreement between two or more persons for a sufficient consideration to do or not to do a certain thing. It is not necessary that it be in writing, and it may be express or implied. It is express when the terms of the agreement are stated in so many words, and implied where one party receives benefits from the other under such circumstances that the law presumes a promise on the part of the person benefited to pay a reasonable price for the same. Jones v. Tucker (Del.) 84 Atl. 1012.

"'Contracts' are distinguishable into two classes, simple contracts and contracts by specialty; in other words, contracts by parol and contracts under seal." Contracts reduced to writing, but without seal, are comprehended under the first class, or simple con-

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tracts. There is no distinct class of contracts merely in writing. Perrine v. Cheeseman, 11 N. J. Law, 174, 177, 19 Am. Dec. 388 (citing Ballard v. Walker, 3 Johns. Cas. 65, per Kent, J.).

The term "contract" in Const. U. S. art. 1, § 10, relating to the impairment of the obligation of a contract, is used in the ordinary sense as signifying the agreement of two or more minds for consideration from one to the other to do or not to do certain acts, and it is held that there is the same necessity for a consideration to make a contract of exemption as there would be if the contract was between private parties. Columbia Water Power Co. v. Campbell, 54 S. E. 833, 837, 75 S. C. 34.

Ky. St. 1903, § 2768, provides that councilmen shall not be interested in any contract with the city, or hold any office or employment in a corporation having a contract with the city. Section 2822 provides that an expenditure by a contract, written or oral, of an amount less than $2,000, must be made with the mayor's approval unless otherwise provided by ordinance that an expenditure to exceed that amount must have the mayor's approval, and that supplies and other forms of personal property shall be purchased by the city buyer subject to the provisions of that act. Held, that the term "contract" in section 2768 extends to the case of where goods are not ordered or bought under a formal pre-existing contract, and the city simply goes out into the market and buys its daily supplies as it needs them. Bradley & Gilbert Co. v. Jacques (Ky.) 110 S. W. 836, 837.

In Civ. Code, § 11, permitting an act appointed by law or contract to be performed on a particular day falling on a holliday to be performed the next business day, the word "law" means some statutory provision or rule of law, and the word "contract" means a contract such as is defined by Civ. Code, §§ 1549, 1550—actual contracts entered into between all the parties. Cheney v. Canfield, 111 Pac. 92, 93, 158 Cal. 342, 32 L. R. A. (N. S.) 16.

The word "contract," as used in Ky. St. 1903, § 4332, declaring it unlawful for a justice of the peace who by virtue of such office is a member of the fiscal court, to become directly or indirectly "interested in any contract for working roads," means an agreement entered into between the county on one part, and some person or persons on the other, for a consideration to do a certain thing. It may be either verbal or written. The law is violated, where the justice and his teams do work on the road by the day under employment by the road supervisor; it is not necessary that the work be let by the job, and that he be interested in such contract. Commonwealth v. Lane, 102 S. W. 313, 314, 125 Ky. 725.

The word "contracts," as used in the law of Illinois relating to the Chicago City Railways, and providing that all deeds of transfer of rights, privileges, or franchises between railway corporations, or any two of them, and all contracts, stipulations, licenses, and undertakings made, entered into, or given, and as made or amended by and between the common council of the city and any one or more of the railway corporations respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of the city, etc., refers to the stipulated arrangements between the railway companies and the city as to the manner of occupancy of the streets. Govin v. City of Chicago, 132 Fed. 848, 857.

There is no absolute requirement as to what an instrument shall contain, to be susceptible of reformation, and it need not be certain and complete in any respect if there is an honest attempt to reduce the contract to writing; and a writing reciting an agreement by which plaintiff agreed to sell defendant the property described, and defendant agreed to sell and convey to plaintiff certain other property, defendant agreeing to assign a certain mortgage, though imperfectly expressed, contained all the elements of a "contract," within Civ. Code, § 1550, making parties capable of contracting, their consent, a lawful object, and a sufficient consideration essential to every contract and hence was susceptible of reformation for mistake. House v. McMullen, 100 Pac. 344, 346, 9 Cal. App. 664.

The words "contract" and "contracted," in Rev. St. 1895, art 4367, requiring a railroad to maintain its general offices at the place it has contracted or may contract to locate the same, for a valuable consideration, etc., are used according to the common acceptation of the terms, and include all methods of contracting, whether express or implied, and whether written or oral. Kansas City, M. & O. Ry. Co. of Texas v. Sweetwater (Tex.) 131 S. W. 251, 255.

Burns' Ann. St. 1908, § 251, provides that every action must be prosecuted in the name of the real party in interest, except as provided in section 252, which provides that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, and that a trustee of an express trust within the meaning of the section shall include a person with whom or in whose name a contract is made for the benefit of another. Held, that the word "contract" is not used in a restricted sense, but applies to any kind of contract, and where one as agent was carrying on a jewelry business for his wife and sold jewelry to a third person, taking a note therefor secured by a chattel mortgage as his wife's agent, he was

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a trustee of an express trust as to his wife, and could sue for collection of the note and foreclosure of the mortgage without joining his wife as a party plaintiff. Owen v. Harriott, 94 N. E. 591, 593, 47 Ind. App. 359.

Rev. St. 1909, § 1889, provides that actions on contracts, obligations, or liabilities, express or implied, shall be barred in five years, and section 1909 declares that, in actions founded on any contract, no acknowledgment or promise thereafter made shall be evidence of a new or continuing contract, unless it be in writing. Held, that the word "contract," as used in section 1909, included any obligation to which section 1889 had fixed the bar of five years, and hence a new promise to reimburse testator for paying the secured debt of an insane person was insufficient to revive the obligation, unless in writing. Petty v. Tucker, 148 S. W. 142, 144, 166 Mo. App. 98.

Under Rev. Codes Mont. § 4965, defining a "contract" as an agreement to do or not to do a certain thing, section 4966, providing that to a contract there must be parties capable of contracting, their consent, a lawful object and a sufficient cause or consideration, section 4892, defining an "obligation" as a legal duty by which a person is bound to do or not to do a certain thing, section 4893, providing that an obligation arises either from the contract of the parties or by operation of law, section 6446, providing that an action upon a contract, not founded on a writing, must be commenced within five years, and section 6447, providing that an action upon an obligation, not founded on a writing, other than a contract, must be commenced within three years, the terms "contract" and "obligation," as used in sections 6446 and 6447, were used as defined by sections 4965, 4966, 4892, and 4893, so that an action by plaintiff to recover a balance from defendant, who as agent to sell property to plaintiff had received $5,000 on the purchase but $4,000 of which was returned to plaintiff, was not an action on a "contract," but on an "obligation," and, not having been brought within three years, was barred. Schaeffer v. Miller, 109 Pac. 970, 973, 41 Mont. 417, 137 Am. St. Rep. 746.

In an action to recover on an employment contract, an instruction that, if the parties entered into a subsequent contract for a permanent reduction of plaintiff's salary, the verdict should be for defendant, was not improper for failing to insert the word "parol" before contract, where all the evidence was directed to proof of a parol contract, and since the word "contract" includes both written and parol contracts. Frankfort Modes Glass Works v. Arbogast, 145 S. W. 1122, 1124, 148 Ky. 4.

Accrue

The verb "contract" is not synonymous with "accrue." Leman v. Chipman, 117 N. W. 885, 887, 82 Neb. 392.

By association

Where defendant became a member of an exchange which provided by its constitution and by-laws a scheme for the adjustment of differences between members and outsiders, and defined his relation to the exchange, such membership constituted a "contract" by which he was bound. National League of Commission Merchants of United States v. Hornung, 132 N. Y. Supp. 871, 875, 148 App. Div. 355.

By correspondence

To constitute a "contract by correspondence," one letter must contain a distinct proposition, and its answer must be an unqualified acceptance. Harris Bros. v. Reynolds, 114 N. W. 369, 370, 17 N. D. 16 (citing Baxter v. Bishop, 22 N. W. 685, 65 Iowa, 582; Batie v. Allison, 42 N. W. 306, 77 Iowa, 313).

"The rule of law is that a proposition of sale, accepted within a reasonable time, considering the nature of the case, becomes a 'contract' between the parties to the transaction, and where the proof shows that a letter containing a proposition for the sale of yarn arrived in the city after business hours Saturday, and on Monday morning a telegram and letter accepting the proposition were sent, the acceptance was within a reasonable time and made a binding 'contract.'" James E. Mitchell & Co. v. Wallace (Ky.) 87 S. W. 303, 304.

Bonds

"While it is true that a bond is a 'contract,' it is likewise true that, in common parlance, bonds are not included in the term 'contracts,' nor are they so treated by law writers, or in the decisions of the courts: but they constitute a separate and distinct class, usually designated by the term 'bonds.'" City of Tyler v. St. Louis Southwestern R. Co., 91 S. W. 1-5, 99 Tex. 491.

Under Rev. St. 1895, art. 1204, permitting sureties on any contract to be sued without joining the principal, when he is actually or notoriously insolvent, the principal in a supersedeas bond need not be joined as defendant, where it is alleged and proved that he is actually and notoriously insolvent; such bonds being "contracts" within the statute. Wilson v. Dickey (Tex.) 133 S. W. 437, 438.

In replevin, where the property is taken and delivered to plaintiff under the writ, no implied "contract" arises on the express undertaking in the bond to return the property or its value, should a return thereof be adjudged, within the provisions of the federal Constitution, providing that no state shall pass any law impairing the obligation of contracts. Love v. Cavett, 109 Pac. 553, 555, 26 Okl. 179.

Charter of municipality

The charter of a municipal corporation is not a "contract" within the constitutional

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provision which prohibits the obligation of contracts being violated. Chalstran v. Board of Education, etc., of Knox County, 91 N. E. 712, 714, 244 Ill. 470; People ex rel. City of Oswego v. Board of Assessors of Town of Oswego, 134 N. Y. Supp. 177, 181. While a municipal charter can be modified or abolished, yet, if the municipality has become indebted under its charter, the rights of the creditor based upon the obligation of a contract cannot be impaired by any subsequent legislative enactment. Chalstran v. Board of Education, etc., of Knox County, 91 N. E. 712, 244 Ill. 470. The Legislature retains authority to amend or repeal municipal charters independent of special statutes or constitutional reservations, and may enlarge or curtail the powers, privileges, or exemptions granted by the charter. People ex rel. City of Oswego v. Board of Assessors of Town of Oswego, 134 N. Y. Supp. 177, 181.

A "contract" is "an agreement in which the party undertakes to do or not to do a particular thing." The creation of a certain territory into a body corporate for school purposes does not give rise to a contract between the state and the municipality created, and it is not violative of a contract for the Legislature subsequently to take a portion of the territory away from such municipality and add it to another. Board of Education of Union Free School Dist. No. 6 v. Board of Education of Union Free School Dist. No. 7, 78 N. Y. Supp. 522, 525, 76 App. Div. 355 (quoting and adopting definition in Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 197, 4 L. Ed. 529).

"Contracts" result from agreements, express or implied, and not from proceedings in invitum, whether legislative or judicial, and the fact that the state organized a metropolitan police and created a board for its government with authority to demand and receive from defendant city certain taxes, to be levied and collected by the latter for the maintenance of such police, imposed no contract and no obligation upon the city which the board can enforce by any right of its own, or for any purpose beyond that for which it was created. State ex rel. Hubert v. City of New Orleans, 44 South. 321, 322, 119 La. 624.

Charter or articles of incorporation

A corporate charter is a "contract" between the state and corporators, and protected by the federal Constitution from impairment by legislation. Lawrence v. Rutland R. Co., 67 Atl. 1091, 1092, 80 Vt. 370, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475.

The charter of a private corporation is a "contract" between it and the state, which the state, unless it reserves the right to do so, cannot alter to the prejudice of the corporation without its consent. City of Louisville v. Vreeland, 131 S. W. 195, 196, 140 Ky. 400.

Where a corporation is organized under the general laws of the state, its articles of incorporation or charter constitute a "contract" between the state and the corporation, protected by the federal Constitution from legislation of the state impairing its obligation. Arkansas Stave Co. v. State, 125 S. W. 1001, 1003, 94 Ark. 27, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103.

The charter of a private corporation is a "contract" within Const. U. S. art. 1, § 10, prohibiting laws impairing the obligation of contracts, so far as it is a contract between the state and the corporation and between the stockholders and the state, but not as between the corporation and the stockholders. Avondale Land Co. v. Shook, 54 South. 268, 269, 170 Ala. 379.

A corporation's charter is a "contract" between the state and the corporation, between the corporation and the stockholders, and between the stockholders and the state. Garey v. St. Joe Min. Co., 91 Pac. 369–371, 32 Utah, 497, 12 L. R. A. (N. S.) 554.

The charter of a private corporation having capital stock, organized under a general law of the state, constitutes a "contract" between the state and the corporation, between the state and the shareholders in the corporation, and between the corporation and its shareholders, which cannot be violated by the state. Larabee v. Dolley, 175 Fed. 365, 390.

It is universally conceded that the charter of a public corporation is not a "contract," and does not come within the clause of the Constitution under consideration, prohibiting the passage of state laws impairing the obligation of contracts. It follows, therefore, that where a college is a public institution, or, if a corporation, a public corporation its charter may be amended, altered or repealed at the pleasure of the Legislature. The fact that, after the founding and establishment of a public state institution by legislative enactment, property may have been given, devised, or bequeathed to it, or in trust for its benefit, has never been deemed sufficient to change the character of the institution, nor to deprive the Legislature of its plenary power of alteration, amendment, or even repeal of the act. In such cases there is no contract relation between the state and the donor. Such donations must be presumed to have been made with knowledge of the public character of the institution and the power of the Legislature to control it. State ex rel. Wyoming Agricultural College v. Irvine, 84 Pac. 90, 105, 14 Wyo. 318.

Though a charter granted to a corporation by the Legislature is a "contract" within the protection of the federal Constitution prohibiting the impairment of obligations of contracts, yet the state possesses reserved rights to pass reasonable laws for the promotion of the general welfare, and a subsequent

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Legislature may render the corporation subject to general laws enacted under the police power. Venner v. Chicago City R. Co., 92 N. E. 643, 646, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607.

Covenant

"A 'covenant' is a 'contract,' and damages are recoverable for its breach." Pinckard v. American Freehold Land Mtg. Co., 39 South. 350, 351, 143 Ala. 568.

A warranty by a seller is a "contract," and an action for breach thereof raises only the questions of the existence of a warranty, and not fraud. Millsap v. Woolf, 56 South. 22, 24, 1 Ala. App. 599.

A bank's covenant of warranty in a deed is a "contract" and an "engagement," within Rev. St. U. S. § 515, which makes the stockholders of a national bank liable for the bank's contracts, debts, engagements, etc. McLean v. Moore (Tex.) 145 S. W. 1074, 1075.

As creation of debt

The words "shall be contracted," in the charter of Sacramento, providing that no debt shall be contracted or created against the city, do not have any greater prohibitive force than the words "create, audit, allow, or permit to accrue," as used in the Fresno city charter, or the words "incur indebtedness," as used in the Constitution. Doland v. Clark, 76 Pac. 958, 961, 143 Cal. 176.

Deal distinguished

Where an owner of real estate asks a real estate broker "to get a deal," it is not necessary for the real estate broker to assent in words. If he procures a purchaser he makes a "contract" by performance. Lamb v. Prettyman, 33 Pa. Super. Ct. 190, 193.

Revisal 1905, § 2112, establishes the method by which a married woman may become a registered free trader, and section 2113 declares that a married woman, having complied therewith, shall be a free trader and authorized to "contract" and "deal" as a feme sole. Held, that the words "contract" and "deal," in their primary acceptation, refer to the ordinary bargains and trades incident to some business enterprise, the word "deal" being defined to mean to traffic, to transact business, to trade, and that neither of such words included a conveyance of real estate; and if there is a difference between the words, the term "contract" should be construed as referring to executory obligations, while "deal" would uphold her trades and bargains executed, but both, as a general rule, are terms which apply to the ordinary incidents of business, and hence a married woman, though a free trader within the statute, could not convey her separate land without joinder by her husband and acknowledgment as prescribed by Revisal 1905, § 952. Council v. Pridgen, 69 S. E. 404, 406, 153 N. C. 443 (citing Black, Law Dict. 21 Cyc. p. 1338).

Deed

Deeds are "contracts." Negaunee Iron Co. v. Iron Cliffs Co., 96 N. W. 468, 473, 134 Mich. 264.

"A deed is a 'contract' between the grantor and grantee, although the grantee does not sign it." In re Millers' & Manufacturers' Ins. Co. (Parsons, Rich & Co. v. Lane) 106 N. W. 485, 493, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144.

Exemption

A statute of exemption from execution is not a "contract" between the state and the judgment debtor, which the state is prohibited from impairing by subsequent legislation. Myers v. Moran, 99 N. Y. Supp. 269, 113 App. Div. 427.

Where a town offers a tax exemption for a period of years for the location of business interests therein, as authorized by V. S. 365, such exemption, if based on a sufficient consideration, is a binding "contract" between the town and the corporation to which the exemption is accorded. Caverly-Gould Co. v. Village of Springfield, 76 Atl. 39, 40, 83 Vt. 396.

Franchise

See Franchise.

Implied contract included

Rev. Codes, § 6541, subd. 2, providing that in an action on a contract any other cause of action on contract existing at the commencement of the action may be counterclaimed, applies to "implied contracts." First Nat. Bank v. Silver, 122 Pac. 584, 586, 45 Mont. 231.

Judgment

A final judgment is a "contract" representative of property, and beyond the reach of legislative action. Humphrey v. Gerard, 77 Atl. 65, 67, 83 Conn. 346.

A judgment is not a "contract" in the sense that it can be regarded as in the nature of an agreement. Henley v. Myers, 93 Pac. 168, 170, 76 Kan. 723, 17 L. R. A. (N. S.) 779 (citing 23 Cyc. pp. 673, 674).

A judgment, whether the result of agreement or contest, is called a "contract of record"—a quasi contract—in the sense that it is a binding obligation, and no more. Davidson v. Richardson, 89 Pac. 742, 744, 50 Or. 323, 17 L. R. A. (N. S.) 319, 126 Am. St. Rep. 738.

A judgment is a "contract," which is subject to interference by the courts so long as the right of appeal therefrom exists; but when the time within which an appeal may be brought has expired, it ripens into an unchangeable contract, and becomes property, which can be disposed of or affected only by the act of the owner or through the power

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of eminent domain. Lohrstorfer v. Lohrstorfer, 104 N. W. 142, 147, 140 Mich. 551, 70 L. R. A. 621 (quoting and adopting definition in Germania Sav. Bank of Kings County v. Village of Suspension Bridge, 54 N. E. 33, 159 N. Y. 362).

"A judgment is a 'contract,' in the highest sense of the term, and, as an obligation, it possesses a force superior to that of a specialty or simple contract." Weaver v. San Francisco, 81 Pac. 119, 120, 146 Cal. 728 (quoting and adopting definition in Wallace v. Eldredge, 27 Cal. 498).

A "judgment" in a civil case is a judicial determination of rights existing between the parties, or by one party against the other. It does not create any new rights, but only defines and determines what rights already exist. The right to have a judgment enforced is not inherent in the judgment itself. This right and authority comes from other provisions of law. The judgment is itself a creation of law. It is in the nature of a contract, but it is not a "contract" within Const. U. S. art. 1, § 10, and Const. Mont. art. 3, § 11. It lacks the element of consent necessary to a contract, so that a law changing the rate of interest a judgment shall bear after entry is not unconstitutional. Stanford v. Coram, 72 Pac. 655, 28 Mont. 288, 98 Am. St. Rep. 566.

Lease

See Lease.

License

A license to keep an inn and tavern is not a "contract," but is a mere privilege to do business. Balling v. Board of Excise of City of Elizabeth, 74 Atl. 277, 79 N. J. Law, 197; Schwartz v. People, 104 Pac. 92, 103, 46 Colo. 239 (quoting and adopting definition in People v. Raims, 39 Pac. 341, 20 Colo. 489); Meehan v. Board of Excise Com'rs of Jersey City, 64 Atl. 689, 690, 73 N. J. Law, 382.

A license has none of the elements of a "contract," and does not confer an absolute right, but only a personal privilege, to be exercised under existing restrictions, and such as may be subsequently reasonably imposed. Stone v. Fritts, 82 N. E. 792, 794, 169 Ind. 361, 15 L. R. A. (N. S.) 1147, 14 Ann. Cas. 295.

A license to sell intoxicating liquor is not a "contract" between the state and the licensee, which gives him a vested right, but is a mere permit, subject to revocation for cause. State v. Seebold, 91 S. W. 491, 493, 192 Mo. 720 (citing Higgins v. Talty, 57 S. W. 724, 157 Mo. 280; Black, Intoxicating Liquors, § 189; Cherry v. Commonwealth, 78 Va. 375; People v. Wright [N. Y.] 3 Hun, 306); Arle v. State, 100 Pac. 23, 25, 26, 1 Okl. Cr. 250; Barnett v. Pemiscot County Court, 86 S. W. 575, 577, 111 Mo. App. 693.

A license to manufacture or sell intoxicating liquor does not involve a "contract," and the privilege embraced in the license may be annulled before the expiration of the term for which it was given without thereby impairing the obligation of a contract. Portland v. Cook, 87 Pac. 772, 774, 48 Or. 550, 9 L. R. A. (N. S.) 733 (citing Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; State ex rel. Kelley v. Bonnell, 21 N. E. 1101, 49 Ind. 494; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; State v. Cooke, 24 Minn. 247, 31 Am. Rep. 344; Wallace v. City of Reno, 73 Pac. 528, 27 Nev. 71, 63 L. R. A. 337, 103 Am. St. Rep. 747).

"It is well settled by the adjudicated law of this state and country that such licenses [licenses to sell intoxicating liquors], when issued or granted, are merely permits, and that in no case are such licenses 'contracts' between the state and the licensee, in which the dramshop keeper or licensee has a vested right; but, on the contrary, they are at all times subject, by reason of the tendency of the business to deprave public morals, to the police powers of the state, and may be revoked at any time by the state government for a violation of the statutes of the state provided for the regulation of the sale of liquors under such license, whether such stipulation be contained in the license or not. The statutes of the state governing the sale of liquors and the conduct of dramshops thereunder become a part and parcel of the license. The licensee necessarily accepts the license thereunder and subject thereto, and the statutes are as effectively a part of the license as if incorporated therein." Under Rev. St. 1899, §§ 1674, 1788, defining the appellate jurisdiction of the circuit courts, an appeal lies from the county court to the circuit court only in judicial cases involving life, liberty, and property, but not in a case wherein the county court acts in an administrative and ministerial capacity, as in revoking a liquor license for the causes and in the manner prescribed by Rev. St. 1899, § 3012, in which no right of property is involved. Barnett v. Pemiscot County Court, 86 S. W. 575, 577, 111 Mo. App. 693.

A license to conduct games of faro and roulette is a mere permit, and is not a "contract," and does not convey any vested right, but, being issued, in the exercise of the police power of the state, may be modified, revoked, or continued at its pleasure. Littleton v. Burgess, 82 Pac. 864, 866, 14 Wyo. 173, 2 L. R. A. (N. S.) 631.

A license to sell intoxicating liquors is in no sense a "contract" made by the state with the party holding the license. It is a mere permit, subject to be modified or annulled at the pleasure of the Legislature, who have the power to change or repeal the law under which the license was granted. Clark

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v. Tower, 65 Atl. 3, 5, 104 Md. 175 (quoting Fell v. State, 42 Md. 89, 20 Am. Rep. 83).

"A license, whether revocable in terms or not revocable, is neither a 'contract' nor property in any constitutional sense, but is subject at all times to the police power of the state." Borck v. State (Ala.) 39 South. 580 (quoting and adopting definition in Powell v. State, 69 Ala. 10).

"Licenses to sell liquors are not 'contracts' between the state and the person licensed, giving the latter vested rights, and partaking of the nature of contracts, but are merely temporary permits to do what otherwise would be an offense, issued in the exercise of police powers, and subject to the direction of government, which may revoke them as it deems fit." Wallace v. City of Reno, 73 Pac. 528, 532, 533, 27 Nev. 71, 63 L. R. A. 337, 103 Am. St. Rep. 747 (quoting and adopting definition in 1 Dillon's Mun. Corp. [4th Ed.] § 363, note 2).

"A license is not a 'contract.' It is a mere permission, which may not only be changed or annulled by statute, but can only be enjoyed upon the terms prescribed by the law making power. When so understood there is no incongruity in the holding that a license to sell intoxicating liquors at a particular place cannot be exercised, except as the location of the place complies with the requirement of law." State v. Harrison, 70 N. E. 877, 879, 162 Ind. 542.

"A license to sell liquor is neither a 'contract' nor a right of property within the legal and constitutional meaning of those terms. It is no more than a temporary permit to do that which would otherwise be unlawful, and forms a part of the internal police system of the state." The granting and revoking of licenses is purely statutory, and a license cannot be revoked, except as provided by statute. State v. Lichta, 109 S. W. 825, 828, 130 Mo. App. 284 (quoting and adopting definition in Black, Intoxicating Liquors, § 189).

Marriage

See Marriage.

Meeting of minds

A "contract" is the meeting of minds upon and agreement to do a definite thing. Loma Prieta Lumber Co. v. Hinton, 108 Pac. 528, 530, 12 Cal. App. 766.

To constitute a binding "contract," there must be a meeting of the minds of the parties; they must assent to the same thing in the same sense. Luckey v. St. Louis & S. F. R. Co., 113 S. W. 703, 704, 133 Mo. App. 589.

A "contract" cannot exist between parties whose minds have not agreed upon one and the same thing. Miller v. Sharp (Ind.) 100 N. E. 108, 110.

A "contract" is a voluntary agreement between two parties; the coming together of two minds by a common intent. McNeill v. Durham & C. R. Co., 47 S. E. 765, 767, 135 N. C. 682, 67 L. R. A. 227.

To constitute a "contract" for the sale of a lot there must be a common understanding between the parties, their minds must meet as to all its terms, and if any portion of the proposed terms is unsettled, there is no contract. Phelps v. Good, 96 Pac. 216, 218, 15 Idaho, 76.

To constitute a "contract" there must, in general, be a meeting of the minds of the parties, and both must agree to the same thing, in the same sense; but, in so far as their intention is an element, it is only such intention as the words or the acts of the parties predicate, and not one secretly cherished, which is inconsistent therewith. Embry v. Hargadine, McKittrick Dry Goods Co., 105 S. W. 777, 778, 127 Mo. App. 383.

The word "contract" is used in the federal Constitution providing that no state shall pass any law impairing the obligation of contracts in its ordinary sense as signifying the agreement of two or more minds for considerations proceeding from one to the other to do or not to do certain acts; mutual assent to its terms being of its essence. Love v. Cavett, 109 Pac. 553, 555, 26 Okl. 179.

"A writing is not a 'contract,' when it fails to express that on which the minds of the parties met, and courts freely exercise the power to correct mistakes when the proof leaves no doubt that the real contract was something else." Wolfgram v. Town of Schoepke, 100 N. W. 1054, 1056, 123 Wis. 19, 3 Ann. Cas. 398.

While a "contract" may be either express or implied, or written or oral, it must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, mutual, free from fraud or undue influence, not against public policy, and sufficiently definite to be enforced. American Lead Pencil Co. v. Nashville, C. & St. L. Ry., 134 S. W. 613, 615, 124 Tenn. 57, 32 L. R. A. (N. S.) 323.

A "contract" is an agreement between competent parties, supported by a legal consideration, and there can be no contract in its true sense without a meeting of minds. The parties must have a distinct intention, common to both, in order to constitute a contract or agreement. It is evident, therefore, that the minds of the contracting parties must meet, and if one of them is so weak, unsound, or diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the agreement, whether that state of his mind was produced by mental or physical disease, or whether it results from intoxication. J. I. Case Thresh-

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ing Mach. Co. v. Meyers, 111 N. W. 602, 603, 78 Neb. 685, 9 L. R. A. (N. S.) 970.

Memorandum of sale

A broker's memorandum of sale, containing the names of the seller and buyer and the terms of sale, and signed by him and delivered to both parties, is a binding "contract," within the statute of frauds; the broker being the agent of both parties. Pope Metals Co. v. Sadek, 135 N. W. 851, 852, 149 Wis. 394.

Mutuality

Mutuality is an essential element of every valid "contract." W. J. Oliver Const. Co. v. Reeder, 66 S. E. 955, 7 Ga. App. 276.

A "contract" implies a legal obligation, and, except in the case of mere options, is not enforceable unless both parties thereto are bound, so that an action can be maintained by each against the other for a breach. Fowler Utilities Co. v. Gray, 79 N. E. 897, 898, 168 Ind. 1, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344 (citing Bish. Cont. [Enlarged Ed.] § 78; Lawson, Cont. § 97; Henry School Tp. v. Meredith, 70 N. E. 393, 32 Ind. App. 607, 612).

A "contract" is an agreement to do or not to do a particular thing, and it must be by consent which is free, mutual, and communicated by each to the other, and the consent is not mutual unless the parties agree on the same thing in the same sense. American Can Co. v. Agricultural Ins. Co. of Watertown, N. Y., 106 Pac. 720, 722, 12 Cal. App. 133.

In legal contemplation, a "contract" is an agreement between two or more persons on a sufficient consideration to do or not to do a particular thing. To make a contract there must be an offer by one person for a sufficient consideration to do or not to do a particular thing, and there must be an acceptance by the other party of that offer, which offer and acceptance must be equally binding on both parties to the agreement, and must be to do or not to do a particular thing. Speakman v. Price (Del.) 80 Atl. 627, 630.

One of the essential elements of a "contract" is the aggregatio mentium, or mutual assent of the parties. This assent must comprehend the whole proposition; it must be exactly equal to its extent and provisions, and must not qualify them by any new matter. If one party intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, there is no contract, unless the circumstances are such as preclude one of the parties from denying that he agreed to the terms of the other. Hubbard City Cotton Oil & Gin Co. v. Nichols (Tex.) 89 S. W. 795, 796 (citing Summers v. Mills, 21 Tex. 78; San Antonio Gas & Electric Co. v. Marx [Tex.] 87 S. W. 1166; Beach on Contracts, § 1).

Notes

Acts 1901, p. 386, regulating the business of foreign corporations, provides (section 1) that before such corporation shall establish a business in the state it shall file a copy of its articles of incorporation with the Secretary of State, etc. Section 2 provides that no foreign corporation may make any contract in the state until it has complied with the provision of the preceding section. Held, that the word "contract" as used in section 2 refers to a contract pertaining to the continuing business, and the act does not preclude a foreign corporation, not having complied with the act, from taking in the state notes and a deed of trust for goods sold by it, and delivered in another state to the persons giving the notes and deed, nor from suing thereon in the state. Simmons, Burks Clothing Co. v. Linton, 117 S. W. 775, 777, 90 Ark. 73.

Offer and acceptance

An offer or proposal made by one person and the acceptance thereof by the other constitutes a "contract." Haskell & Barker Car Co. v. Allegheny Forging Co., 91 N. E. 975, 47 Ind. App. 392.

To constitute a "contract" on the theory of an offer and acceptance, the offer itself must be complete and reasonably definite as to terms; such contracts arising only upon an agreement of minds, so that particular terms other than those which the law implies are not included, unless set forth with reasonable certainty in the offer or its acceptance. The doctrine that where a proposition sufficiently clear is submitted to another to act upon, and the person to whom it is submitted makes such statement or does such act with respect thereto as would lead an ordinarily prudent person, acting in good faith, to believe that the proposition has been accepted, and the proposer proceeds to the fulfillment of the conditions and terms imposed, a "contract" may be found from such conduct, notwithstanding the secret intentions of the party claimed to have accepted the proposition, proceeds in accordance with the principles of natural justice, and is akin to an estoppel in pais. Northrup v. Colter, 131 S. W. 364, 366, 150 Mo. 639 (quoting Page, Contracts, §§ 22, 27).

To constitute a "contract" there must be a proposition by one party, accepted by the other, without any modification whatever. If the acceptance modifies the proposition in any particular, however trifling, it amounts to no more than a counter proposition; it is not in law an acceptance which will complete the contract. The mere proposal of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer is made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed

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to by the person who made it. Baird Bros. v. Walter Pratt & Co., 89 S. W. 648, 652, 6 Ind. T. 38.

"The statement of a need is not the offer of a position, unless the terms are definite and the offer is so worded as to indicate intent to make a contract by acceptance." Plaintiff, who on receipt of defendant's letter stating, "I have work immediately for 200 colored longshoremen, and can guarantee the above number continuous work providing they are good men," etc., went to work for defendant with 96 other colored men, who had assigned their claims to him, and who, after employment and pay for a certain time, was discharged, had no cause of action for "breach of contract"; the letter being no more than an advertisement or invitation, leaving the terms of any contracts to be settled between the parties when the hirings were made. Clarke v. Atlantic Stevedoring Co., 163 Fed. 423, 424.

An invitation to prospective buyers to negotiate for a license, and to trade, even when confined to a definite class, does not bind the sender to accept any offer thereafter received. The order of the prospective buyer does not ripen into a "contract," which is an agreement which creates an obligation, until the defendant's acceptance, and then only as to goods specifically ordered. Montgomery Ward & Co. v. Johnson, 95 N. E. 290, 209 Mass. 89.

"A 'contract' is an agreement which creates an obligation." A circular, issued by a manufacturer of revolvers to secure uniformity in their retail sale price, setting forth the terms upon which revolvers would be furnished to the jobbing trade, and that no order would be filled except upon the terms set forth, and reciting that the manufacturers would not be liable for failing to fill orders, etc., was not a general offer to sell, but an invitation of proposals for sales on the terms stated, which might be accepted or rejected; and hence plaintiff's transmission of an order which the manufacturer refused to fill did not form a "contract" subject to specific performance. Montgomery Ward & Co. v. Johnson, 95 N. E. 290, 209 Mass. 89 (quoting Ashcroft v. Butterworth, 136 Mass. 511, 514).

Option distinguished

See Option.

Ordinance

An ordinance changing the provisions of a prior ordinance embracing a contract between the city and a water company of which one of the councilmen was president, embracing conditions constituting an agreement between the city and the water company and the compensation which the water company was to receive, was a "contract" within the meaning of the city charter, forbidding any member of the common council to be interested in any contract with the city. Antigo Water Co. v. City of Antigo, 128 N. W. 888, 890, 144 Wis. 156.

Where a street railway company incorporated under P. L. 1886, p. 185, providing for the incorporation of street railway companies and the regulation of the same, made application to a township to lay its tracks along a certain route, pursuant to P. L. 1889, p. 100, and an ordinance was passed granting such location, subject to certain conditions, on acceptance of such ordinance by the company, it constituted a valid "contract," and its provisions could not be impaired by either party without the consent of the other; and hence it was not competent for the township to revoke such ordinance without consent of the company and remove its tracks. Asbury Park & S. G. Ry. Co. v. Township Committee of Neptune Tp. (N. J.) 67 Atl. 792, 793.

Where the power to fix rates for public service corporations is reserved by the people of a state, and there has been no express grant or waiver of the constitutional right, an ordinance of a city granting a franchise to a telephone company and fixing rates is not binding on the state as a "contract" within the contract clause of the federal Constitution, but the contract is in the nature of a license and permissive only, subject to the exercise of the sovereign power of the state. State ex rel. Webster v. Superior Court of King County, 120 Pac. 861, 866, 67 Wash. 37, Ann. Cas. 1913D, 78.

Patent

A patent is a "contract" made by the acceptance by the government of the proposition made by the inventor in his application. O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 343, 72 C. C. A. 304.

A patent is a "contract," and it must be interpreted by the same rules of construction as other contracts. Century Electric Co. v. Westinghouse Electric & Mfg. Co., 191 Fed. 350, 354, 112 C. C. A. 8.

A patent is a "contract" between the government and the patentee, whereby the latter is granted the exclusive right to make, use, and vend his invention for a specified time, after which such right is to inure to the benefit of the public. American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 160 Fed. 108, 115.

Proposals and bids

A "contract," as defined by Pothier, "includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise." The proceedings of the board of public service in the advertising for bids and the adoption of a resolution defining who is the lowest and best bidder is not the making of a contract, but is merely preliminary thereto. State v. Board of Public Service of Columbus (Ohio) 90 N. E. 389, 391.

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Railway ticket

See, also, Railroad Ticket.

An ordinary passenger ticket is not necessarily a "contract," within the scope of the rule excluding oral evidence of the contents of a written instrument. Coine v. Chicago & N. W. R. Co., 99 N. W. 134, 135, 123 Iowa, 458.

Receipt

A freight receipt is not a "contract," but a mere admission, and can always be explained by parol evidence. C. H. Rugg Co. v. Ormrod, 91 N. E. 366, 367, 198 N. Y. 119.

A receipt by an administrator of money in settlement of liability for the death of the intestate and for the release of all claims is a "contract" within the rule excluding parol evidence to contradict or vary the terms of a written contract. Dronenburg v. Harris, 71 Atl. 81, 85, 108 Md. 597.

Parol evidence is admissible to show the purpose of a written receipt; it not being a "contract," within the parol evidence rule. Farmers' Savings Bank v. Aldrich, 133 N. W. 383, 386, 153 Iowa, 144.

Recognizance

A recognizance is not a "contract" between individuals, to which the statute of frauds will apply. Gay v. State, 7 Kan. 394, 402.

Reward distinguished

See Reward.

Separate contracts distinguished

A contract for the construction of a shed, and subsequent contracts for remodeling an adjacent stable and the removal of the partition wall between the shed and stable, so as to make both structures one building, cannot be joined together and treated as one individual "contract"; but they must be treated as separate and distinct contracts, within Code Civ. Proc. § 1183, requiring the recording of a building contract when the amount to be paid thereunder exceeds $1,000. Acme Lumber Co. v. Wessling, 126 Pac. 167, 169, 19 Cal. App. 406.

Special tax bill

St. Louis City Charter, art. 6, § 25, declares that a special tax bill, after the prescribed notice has been given and after maturity, bears interest at 8 per cent., and Rev. St. 1899, § 3707, provides that a judgment on a contract which bears more than 6 per cent. interest, shall bear interest at the same rate as that expressed in the contract, but that all other judgments shall bear interest at 6 per cent. Held, that a special tax bill is not a "contract," and that a judgment thereon bears interest at 6 per cent. Gilsonite Roofing & Paving Co. v. St. Louis Fair Ass'n, 132 S. W. 657, 661, 231 Mo. 589.

Statute

A statute of exemption from execution is not a "contract" between the state and the judgment debtor, which the state is prohibited from impairing by subsequent legislation. Myers v. Moran, 99 N. Y. Supp. 269, 113 App. Div. 427 (citing Cooley, Const. Lim. p. 383; Bull v. Conroe, 13 Wis. 233; Harris v. Glenn, 56 Ga. 94; Bramble v. State, to Use of Twilley, 41 Md. 435; Morse v. Goold, 11 N. Y. 282, 62 Am. Dec. 103).

Will

A will, absolute in terms and unconditional, is not a "contract," within the constitutional inhibition against the impairment of contractual obligations. Brearley School v. Ward, 94 N. E. 1001, 1005, 201 N. Y. 358, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251.

A "contract" is an agreement between the parties, while a "will" is no contract at all, but a unilateral disposition of property. Isler v. Griffin, 67 S. E. 854, 855, 134 Ga. 192.

As written contract

The term "contract," for purposes of pleading, prima facie imports that the agreement was reduced to writing. Brooks v. State (Ga.) 76 S. E. 765.

CONTRACT CONCERNING REAL RIGHTS

A transfer of a lease of real property which, among other obligations imposed on the lessee, stipulates for the immobilization of machinery to be installed by the tenant, is a "contract concerning real rights to immovable property," within the meaning of P. R. Civ. Code, § 613, relating to the registration of property. Valdes v. Central Altagracia, 32 Sup. Ct. 664, 672, 225 U. S. 58, 56 L. Ed. 980.

CONTRACT DEBTS

See Simple Contract Debt.

For a town to expend its current revenues and accrued funds is not to "contract debts" within the constitutional inhibition. Camden Clay Co. v. Town of New Martinsville, 68 S. E. 118, 120, 67 W. Va. 525.

CONTRACT FOR BENEFIT OF SEPARATE PROPERTY.

See Benefit.

CONTRACT FOR BROKER'S SERVICES

See Broker's Services.

CONTRACT FOR PAYMENT OF MONEY

The contract of an indorser of a promissory note or guarantor of a bill of exchange is a "contract for the direct payment of money," and an attachment may issue against the property of such indorser or guarantor when action is brought to enforce payment of the debt, the same as against the acceptor or maker, under the provisions of section 4302, Rev. St. 1887. Armstrong v. Slick, 93 Pac. 775, 14 Idaho, 208.

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Where the president of a bank authorized to lend plaintiff's money on real estate security only loaned it to a partnership consisting of himself and his cashier, for which he took notes, two of which were signed by himself and one by himself and the cashier, which he kept with his private papers in the bank, plaintiff having no knowledge that the money had been so loaned until after the failure of the bank, the notes did not constitute "contracts for the payment of money" for want of delivery. Morris v. Butler, 122 S. W. 377, 378, 138 Mo. App. 378.

Mortgage distinguished

See Mortgage.

CONTRACT FOR REAL ESTATE

See Real Property.

CONTRACT FOR SALE

See Contract of Sale.
As conveyance, see Conveyance.

CONTRACT FOR SALE OF REAL ESTATE

See Agreement for Sale of Real Estate.
As mortgage, see Mortgage.

CONTRACT FOR THROUGH SHIPMENT

A bill of lading dated in one state, showing a destination in another, and containing stipulations governing the entire transportation, specifying not only rights, duties, or limitations relating to the parties, but also to subsequent carriers, was a "contract for a through shipment" within Act Cong. June 29, 1906, c. 3591, § 7, 35 Stat. 593, making an initial carrier of an interstate shipment liable for loss on connecting lines. Southern Pac. Co. v. W. T. Meadors & Co. (Tex.) 129 S. W. 170, 172.

CONTRACT HOLDERS

Laws 1891, p. 126, c. 116, § 1, provides that every contract whereby a benefit may accrue to a party named therein on the death of a person insured thereunder, or for the payment of any sum dependent on the collection of assessments from persons holding similar contracts, shall be deemed a contract of mutual insurance on the assessment plan, and that such contracts must show that the liability of the insured thereunder are not limited to fixed premiums. Section 2 provides corporations may be formed to carry on the business of mutual insurance on the assessment plan, that no such corporation shall issue contracts of insurance till 200 persons have paid in $5,000, which sum shall be paid to the State Treasurer, and held in trust for the "contract holders" of such corporation. Held, the "contract holders" included only the holders of insurance contracts issued by the company within the scope of its authority under such law, and that a debenture issued by the company, in substance merely a promise of the company to pay at its office a certain sum, two years after date, with interest, and making reference to insurance only by a concluding provision giving the owner the option at its maturity to take a policy in lieu of the money, was not such an insurance contract. Engwicht v. Pacific States Life Assur. Co., 96 Pac. 7, 8, 153 Cal. 183.

CONTRACT IMPLIED BY LAW

"Constructive contracts," or "contracts implied by law," are obligations imposed or created by law without the assent of the party bound, and sometimes even notwithstanding his actual dissent, on the ground that they are dictated by reason and justice. They are fictions of law adopted to enforce legal duties. Harty Bros. & Harty Co. v. Polakow (Ill.) 86 N. E. 1085, 1086 (citing Keener, Quasi Contracts, p. 5; Bishop, Contracts, § 205; Hertzog v. Hertzog, 29 Pa. 465; 9 Cyc. p. 242; Lillard v. Wilson, 77 S. W. 74, 178 Mo. 145; Columbus, H. V. & T. Ry. Co. v. Gaffney, 61 N. E. 152, 65 Ohio St. 104).

A "contract implied by law" results from a legal fiction, used for the sake of the remedy it affords, and may obtain contrary to the intention of the parties, or in the absence of any intention, while a "contract inferred from facts" is an actual contract, resulting from an actual meeting of the minds of the parties as shown by the facts. Weinsberg v. St. Louis Cordage Co., 116 S. W. 461, 465, 135 Mo. App. 553.

Where there was no agreement between plaintiff and defendant that defendant was to return money advanced on the purchase price of real property if the negotiations failed, or at all, yet where equity and good conscience required him to do so, the law implied a promise on his part, and the obligation created or implied is termed a "quasi contract," a "contract implied by law," or a "constructive contract." Schaeffer v. Miller, 109 Pac. 970, 972, 41 Mont. 417, 137 Am. St. Rep. 746.

CONTRACT IMPLIED IN FACT

The terms "express contracts" and "contract implied in fact" are used to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved, and the same elements essential to constitute a contract of the one character are necessary to the existence of the other. Fordtran v. Stowers, 113 S. W. 631, 634, 52 Tex. Civ. App. 226.

CONTRACT IMPORTING A CONSIDERATION

A fire policy reduced to writing is a written "contract importing a consideration" within Rev. St. 1895, art. 1265, subd. 10, requiring a verified answer setting up failure of consideration of the contract sued on; and, in the absence of a verified answer alleging failure of consideration because of nonpayment of the premium, the defense is

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not available. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Tex.) 147 S. W. 629, 631.

CONTRACT IN AID OF MONOPOLY

The "contract" of one having a monopoly in shoe machinery with one employed by it to design and improve such machinery, the same that it makes with all others employed by it for such purpose, constituting 90 per cent. of those skilled in the manufacture of such machinery that he shall assign to it all inventions made by him within 10 years after termination of his contract of employment, is "in direct aid of the monopoly" of interstate trade and commerce, within the federal anti-trust act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209), prohibiting such a contract. United Shoe Machinery Co. v. La Chapelle, 99 N. E. 289, 293, 212 Mass. 467, Ann. Cas. 1913D, 715.

CONTRACT IN ISSUE

Under P. S. § 1590, providing that when an executor, etc., is a party, the other party cannot testify in his own favor, unless the "contract in issue" was originally made with a person living and competent to testify, the words "contract in issue" relate to the issues made by the evidence, as well as to those made by the pleadings; and, in an action for malpractice upon decedent, wherein plaintiff alleged that decedent employed defendant to treat her, but showed that he himself made the contract, defendant could testify to the contract, but he was not a competent witness generally. Wilkins' Adm'r v. Brock, 70 Atl. 572, 575, 81 Vt. 332.

Where, in a suit to set aside a deed, executed by one since deceased, as a cloud on title, there was no issue raised as to the executed contract pursuant to which the deed was made, defendants were not disqualified to testify in proof of the contract as to their acts in compliance therewith by Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520), providing that in actions where one of the original parties to the "contract or cause of action in issue" is dead, the other party shall not be admitted to testify since a contract is "in issue" within such act only when it is in dispute, or where it is the subject of the action on trial, and there must be a finding and judgment concerning it in whole or in part. Griffin v. Nicholas, 123 S. W. 1063, 1066, 224 Mo. 275.

CONTRACT IN RESTRAINT OF TRADE

See Restraint of Trade.

CONTRACT IN WRITING

See Written Contract or Agreement.

Unconditional contract in writing, see Unconditional Contract.

CONTRACT INFERRED FROM FACTS

A "contract implied by law" results from a legal fiction, used for the sake of the remedy it affords, and may obtain contrary to the intention of the parties, or in the absence of any intention, while a "contract inferred from facts" is an actual contract, resulting from an actual meeting of the minds of the parties as shown by the facts. Weinsberg v. St. Louis Cordage Co., 116 S. W. 461, 466, 135 Mo. App. 553.

CONTRACT LABORER

Petitioner, who was a Greek boy then 16 years old, wrote to a distant relative in Chicago to know if the latter would give him employment if he came to the United States, and, receiving an affirmative answer, he came; his father paying his passage. On his arrival the relative gave him work at $15 per month and board, where he remained for 14 months, and then bought a horse and wagon and started in business for himself as a fruit peddler. He had no contract for employment before he came, and no wages were mentioned, and he would have come merely on the relative's promise to give him a home until he found employment. Held, that he did not come as a "contract laborer," within the meaning of Act Feb. 26, 1885, c. 164, 23 Stat. 332, which makes it a criminal offense to solicit or encourage the immigration of any alien under contract to perform labor, and makes such contracts void. Botis v. Davies, 173 Fed. 996, 998.

An alien upon promise to employ him on arrival at this country at stipulated wages in a definite occupation, made by one who advanced him money for his passage, secured by mortgage on his property, and who accompanied him on his journey, came to this country, went to work for such person at the stipulated wages, and designated occupation, repaid the advance out of his wages, and continued in the employment of the person who made the promise and advance for a year. Held, that he was a "contract laborer," expressly included by Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898. Ex parte George, 180 Fed. 785, 786.

CONTRACT LIABILITY

The personal liability of shareholders in a national bank, under Rev. St. U. S. § 5151, for the contracts, debts, and engagements of the bank, cannot be regarded as a "contract liability," for the purpose of making applicable the limitation prescribed by Ballinger's Ann. Codes & St. Wash. § 4800, subd. 3, for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." McClaine v. Rankin, 25 Sup. Ct. 410–413, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500.

CONTRACT MADE TOUCHING THE LAND

A lease of an Indian allotment is a "contract made touching the land," within Act

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Cong. Feb. 8, 1887, c. 119, § 5 (24 Stat. 390), providing that if any conveyance shall be made of the lands set apart and allotted, or "any contract made touching the same," the conveyance or contract shall be void. Williams v. Steinmetz, 82 Pac. 986, 987, 16 Okl. 104.

CONTRACTS MADE WITH THE CITY

Act June 1, 1885 (P. L. 47) art. 8, § 1, cl. 2, requiring the city solicitor to prepare all "contracts to be made with the city" and to indorse his approval on them before they shall take effect, applies only to contracts made between various executive officers of the municipality and other persons, and not to contracts executed by the city council in pursuance of powers conferred upon them by statute. Brode v. City of Philadelphia, 79 Atl. 659, 667, 230 Pa. 434.

CONTRACTS MALA IN SE

"Contracts mala in se" include all those of an immoral nature, iniquitous in themselves, and those opposed to sound public policy, and where both parties are in pari delicto, neither as a general rule will be accorded relief by a court of justice. A contract between a layman and a lawyer, by which the former undertakes and agrees, in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void. Holland v. Sheehan, 122 N. W. 1, 2, 108 Minn. 362, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687 (citing 9 Cyc. p. 551).

CONTRACT OF AGENCY

See Agency.

CONTRACT OF CARRIAGE

A "contract of carriage" is, in effect, that the carrier, in consideration of the payment of the rate demanded, will use all possible care and diligence in delivering the passenger safely and promptly at the place of destination. The utmost care is contracted for, and, while the carrier is not an insurer of the safety of the passenger, he does guaranty that the passenger shall receive the utmost care, and any failure to provide the same is a breach of his statutory duty, and of the duty imposed by the contract of carriage, and negligence, for which he is liable. Taillon v. Mears, 74 Pac. 421, 423, 29 Mont. 161, 1 Ann. Cas. 613.

The "contract of carriage" is one of insurance against every loss or damage except such as may be occasioned by the act of God or the public enemy, or the fault of the owner of the goods or his agent. Where a carrier is intrusted with goods for transportation, and they are lost, the law holds him responsible for the loss, unless exempted by showing that the loss was caused by the act of God or the public enemy. To avail himself of such exemption, he must show that he was free from fault at the time. Where a carrier retained in its possession cotton received for transportation for a period of eleven days, without forwarding the same, and on the eleventh day the cotton was destroyed by a cyclone which practically destroyed the town from which the cotton was to be shipped, the carrier was guilty of negligence in failing to transport the cotton within a reasonable time, and was therefore precluded from claiming that the cotton was destroyed by an act of God, in defense of an action for loss thereof. Alabama Great Southern R. Co. v. Quarles & Couturie, 40 South. 120, 121, 145 Ala. 436, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308.

CONTRACT OF DEPOSIT

A "contract of deposit" is a loan, but not a loan pure and simple. It implies an agreement on the part of the bank and its officers to safeguard the depositor by using the money in a legal manner.—Boyd v. Schneider, 131 Fed. 223, 226, 65 C. C. A. 209.

CONTRACT OF GUARANTY

See Guaranty.

CONTRACT OF HIRING

"A 'contract of hiring' is not indefinite, nor terminable at will, because the precise number of days, months, or years that the service is to continue are not specified. If there is a period of time, be the same fixed or indefinite, during which neither party is at liberty to terminate the contract, then the contract is not so indefinite or uncertain as to its duration as to be incapable of enforcement." Prescott v. Puget Sound Bridge & Dredging Co., 82 Pac. 606, 607, 40 Wash. 354 (quoting and adopting from a former decision on appeal, 71 Pac. 772, 31 Wash. 177).

"To constitute a contract one of hiring, the test is whether those doing the work 'hold such a relation to the employer that he can direct and control them in and about the work which they are doing for him.'" A contract whereby the board of control of a penitentiary agreed to work a plantation with convicts and receive the crops, the convicts to remain under the supervision and control of the board, was a lease of the land, and not a hiring of the convicts to the owner. Henry v. State, 39 South. 856, 870, 87 Miss. 1, per Truly, J. (quoting and adopting definition in Heard v. Crum, 18 South. 935, 73 Miss. 159, 55 Am. St. Rep. 520).

CONTRACT OF INDEMNITY

See Indemnity.

CONTRACT OF INSURANCE

See Insurance.
All contracts of insurance, see All.

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CONTRACT OF MARRIAGE

See, also, Marriage.

"The use of the expression 'contract of marriage' is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean only an irrevocable engagement to be afterwards carried into effect, the parties not meaning then to become husband and wife, and their engagement therefore, though words in the present tense are used, not amounting to nuptiæ." Where a present agreement of marriage is entered into in good faith by persons capable of entering into the contract, the relation of husband and wife is thereby fixed, though such agreement is not followed by cohabitation. Davis v. Stouffer, 112 S. W. 282, 287, 132 Mo. App. 555.

CONTRACT OF RECORD

A judgment for damages estimated in money is sometimes called "a contract of record," because it establishes a legal obligation to pay the amount recovered, and by a fiction of law a promise to pay is implied. Brun v. Mann, 151 Fed. 145, 156, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

A judgment, whether the result of agreement or contest, is called a "contract of record," a quasi contract, in the sense that it is a binding obligation, and no more. Davidson v. Richardson, 89 Pac. 742, 744, 50 Or. 323, 17 L. R. A. (N. S.) 319, 126 Am. St. Rep. 738.

CONTRACT OF SALE

"Contract of sale" is defined by Civ. Code, art. 2439, as an agreement by which one gives a thing for a price in money, and the other gives the price in order to have the thing, and a sale and return is a sale with the right of the buyer to return the goods at his option within a reasonable time. Wm. Frantz & Co. v. Fink, 52 South. 131, 134, 125 La. 1013.

By statute, to the completion of a "contract of sale" four things are essential: (1) Parties legally capable of contracting; (2) their consent legally given; (3) a thing; and (4) a price. Werner Sawmill Co. v. O'Shee, 35 South. 919, 920, 111 La. 817.

A "contract of sale" is an agreement by which one gives a thing for a price in current money, and the other gives a price in order to have the thing itself. Three things concur to the perfection of the contract, to wit: The thing sold, the price, and the consent. Civil Code, art. 2439. Smith v. Hussey, 43 South. 902, 904, 119 La. 32; Barber Asphalt Paving Co. v. St. Louis Cypress Co., 46 South. 193, 194, 121 La. 152.

A "contract of sale" is perfect as between the parties by mere consent, and the parties may by their contract make a law for themselves in everything not contrary to public policy or good morals. Girault v. Feucht, 41 South. 572, 575, 117 La. 276 (citing McDonald v. Aubert, 17 La. 448; Thomson v. Mylne [La.] 11 Rob. 349; Barrett v. His Creditors [La.] 12 Rob. 474; Stephens v. Chamberlin, 5 La. Ann. 656; Peck v. Overton, 7 La. Ann. 70; Thompson v. Mylne, 6 La. Ann. 80; Peck v. Bemiss, 10 La. Ann. 160; Knox v. Payne, 13 La. Ann. 361; Garrett v. Crooks, 15 La. Ann. 488; Foreman v. Saxon, 30 La. Ann. 1117; Broadwell v. Raines, 34 La. Ann. 677; Thompson v. Duson, 5 South. 58, 40 La. Ann. 712; Collins v. Desmaret, 12 South. 121, 45 La. Ann. 108).

A "contract of sale" occurs when there is an agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price, and an agreement of the latter to buy and pay the agreed price. In re Allen, 183 Fed. 172, 174; In re Columbus Buggy Co., 143 Fed. 859, 860, 74 C. C. A. 611.

There can be no binding "contract of sale," until the parties have agreed to the same proposition, which is the subject of contract, and there must be an offer to sell on the one hand and an acceptance of the same offer, before the contract of sale has been consummated. A binding "contract of sale" may be entered into by letters and telegrams, and when an offer is made either by letter or telegram, and is accepted, the contract is complete and binding; no particular form of offer or acceptance being necessary, unless the parties have stipulated otherwise. C. C. Emerson & Co. v. Stevens Grocer Co., 130 S. W. 541, 543, 95 Ark. 421.

A "contract of sale" is a relinquishment of all the rights and claims of the seller. A lessee of school lands, who fully released the lands to a third person, provided the latter fully complied with specified conditions, and who gave to the third person the right to hold the premises for the unexpired term of the original lease, relinquished all his rights in the original lease to the third person. Whitaker v. Hughes, 78 Pac. 383, 386, 14 Okl. 510.

A contract whereby defendant agreed to sell plaintiff or his assigns certain land for $150 per acre, plaintiff to plat the land and sell it and to pay all proceeds to defendant until the latter had received $150 per acre, was a "contract for the sale of land," not a mere brokerage contract, which defendant had a right to forfeit by reason of nonperformance. Whipple v. Lee, 89 Pac. 712, 713, 46 Wash. 266, 280.

The term "contract," in Gen. St. 1902, § 4864, providing that all conditional contracts for the sale of personal property shall be in writing, describing the property, was not used as meaning the particular form of instrument by which a conditional sale might be made. An order given for the purchase of a cash register, signed and acknowledged

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by the buyer, stating the names of the parties to the transaction, the price, etc., and that the title was to remain in the seller until paid for, when acknowledged and recorded, constituted a sufficient contract within such section. National Cash Register Co. v. Lesko, 58 Atl. 967, 968, 77 Conn. 276.

Bond for deed

A bond for a deed is a "contract for the sale of real estate," and is assignable. Royce v. Carpenter, 66 Atl. 888, 890, 80 Vt. 37.

As contract of sale or contract to manufacture

A contract for the sale of articles, which the vendor, in the ordinary course of his business, will manufacture or procure for the general market, whether he handled them at the time or not, is a "contract for the sale of goods." Lombard Water Wheel Governor Co. v. Great Northern Paper Co., 63 Atl. 555, 557, 101 Me. 114, 6 L. R. A. (N. S.) 180.

An order for sashes and doors for a special purpose to be manufactured by the seller at a stated price to be paid on completion of the work, is a "contract for the sale of goods," and not for labor, within the statute of frauds. Tower Grove Planing Mill Co. v. McCormick, 106 S. W. 113, 114, 127 Mo. App. 349.

A contract for the sale of articles then existing, or such as the seller, in the ordinary course of business, manufactures or procures for the general market, whether on hand at the time or not, is a "contract for the sale of goods" to which the statute of frauds applies; but, if the goods are to be manufactured on a special order, and not for the general market, the agreement is not a contract for the sale of goods within the statute. Courtney v. Bridal Veil Box Factory, 105 Pac. 896, 897, 55 Or. 210.

As conveyance

See Conveyance.

Land

A contract by citizens of a town with a railroad company to pay it a certain amount for extending its railroad was not a "contract for the sale of land," within the statute of frauds. Texas & G. Ry. Co. v. Whiteside, 119 S. W. 126, 127, 55 Tex. Civ. App. 593.

An agreement that a deed conveying land shall operate as a mortgage to secure a debt is not within the statute of frauds as a "contract for the sale of lands" or any interest therein. De Bartlett v. De Wilson, 42 South. 189, 191, 52 Fla. 497, 11 Ann. Cas. 311 (citing 1 Jones, Mort. [6th Ed.] § 322; Gillespie v. Stone, 70 Mo. 505; Walls v. Endel, 20 Fla. 86).

An agreement between two persons that one shall purchase land on joint account is not a "contract for sale of lands," within the statute of frauds. Evans v. Green, 23 Miss. 294, 295.

A parol agreement by an owner employing a broker to procure a purchaser, made with the purchaser procured by the broker, to give the purchaser a specified time to decide whether he will accept the terms specified, is a "contract for the sale of real estate" within the statute of frauds (Rev. St. 1895, art. 2543, § 4). Granger Real Estate Exch. v. Anderson (Tex.) 145 S. W. 262, 263.

An instrument recited that the first party would give the second party full control of the former's farm, that whatever improvements the latter made should be his, and that he might also trade or sell the land, but in such event the former should have $4,000 in land or money. It further stipulated that, if either party should become dissatisfied, the first party would turn over all the property, except $4,000 or its equivalent, to the second party, who should be responsible for taxes and debts made by him. Held, that the instrument did not constitute a "contract for the sale of the land," but gave the second party an equitable right in the hand, leaving in the first party merely the naked legal title and a claim thereon for $4,000. Squires v. O'Maley (Ky.) 84 S. W. 1172, 1175.

Intestate died seised of 957 acres of land, subject to a mortgage for $15,000. The land was purchased by the mortgagee on foreclosure for $16,005.39, after which he agreed to assign the purchase certificate to the widow on payment of such amount, with interest, which agreement was extended until September 1, 1889, when a redemption was effected by a payment of the amount due, made up of two partial payments previously made by the widow, $6,326.67, the price of 100 acres of land sold by J., one of the heirs, for their benefit to another, $9,000 raised by a deed of trust on the remaining 857 acres, and $153.53, furnished by J. A quitclaim deed to the land was made by the purchaser under the mortgage sale to J. in his own right. At this time the land was worth $38,000. Held, that such transaction operated as a redemption of the land for the benefit of the widow and heirs of intestate and not a purchase by J. for his sole use. Donason v. Barbero, 82 N. E. 620, 625, 230 Ill. 138.

An agreement or award, whereby an uncertain and unknown division line between adjoining tracts of land, owned by different persons, is identified and made certain as to its location, is not a "contract for the sale or conveyance of land," and as the legal remedy for nonperformance is full, complete, and adequate, there is no jurisdiction in equity to decree specific performance of such agreement or enforcement of such award. Orr v. Cox, 56 S. E. 522, 524, 61 W. Va.

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361 (citing Pasley v. English [Va.] 5 Grat. 141).

An instrument, executed by one as a part of the consideration for a conveyance to him of land, binding him to offer a specified sum for the land of another at a time specified, does not bind him to pay the specified sum, but only binds him to make an offer to buy, and a breach of the obligation does not render him liable to pay absolutely the specified sum, but renders him liable only for such damages as result from the breach. Richards v. Gee (Tex.) 107 S. W. 61, 62.

Plaintiff, the owner of property insured, made an agreement to sell to H. for a specified price, possession to be given March 1, 1902. The contract, however, was conditioned on the ability of H. to raise $5,500 on the property; it being agreed that, unless such sum was raised, the deal was off. To enable H. to raise such loan, a contract and deed were executed, and placed in the hands of loan brokers to hold, and not to be delivered without plaintiff's permission. The title being defective, an action was brought in H.'s name to cure the same, and thereafter a portion of the property was destroyed by fire before H. obtained the money or any sale was consummated. Held, that such transaction did not constitute a "sale or contract to sell" the property, within a policy providing that it should be void in case of a "sale or contract to sell" the property, or if any change or diminution other than death take place in the interest, title, or possession of insured. Swank v. Farmers' Ins. Co. of Cedar Rapids, 102 N. W. 429, 430, 126 Iowa, 547.

Lease distinguished

A contract binding the party of the first part to rent certain land to the party of the second part, providing for the payment of three installments of rent, and agreeing that if these are paid the party of the first part will convey the land to the party of the second part, was a lease, and not a "contract of sale." Thomas v. Johnston, 95 S. W. 468, 469, 78 Ark. 574 (citing Quertermous v. Hatfield, 14 S. W. 1096, 54 Ark. 16; Ish v. Morgan, 3 S. W. 440, 48 Ark. 413; Watson v. Pugh, 10 S. W. 493, 51 Ark. 218; Cheney v. Libby, 10 Sup. Ct. 498, 134 U. S. 68, 33 L. Ed. 818; Blanchard v. Raines, Ex'x, 20 Fla. 467; Houston v. Smythe, 5 South. 520, 66 Miss. 118).

Option distinguished

The test in determining whether a contract is a "contract of sale or purchase" or a mere "option" is: Could the agreement be specifically enforced? Brickell v. Atlas Assur. Co., 101 Pac. 16, 17, 10 Cal. App. 17.

An "option" to purchase land is not a "contract for a sale," but merely an offer by one to sell within a limited time, and a right acquired by the other to accept or reject such offer within that time. Swift v. Erwin (Ark.) 148 S. W. 267, 269.

A contract binding one party to sell certain land upon certain terms, and binding the other party to purchase same upon such terms, was a "contract of sale," and not an "option." Heimberger v. Rudd (S. D.) 138 N. W. 374, 376.

An "option" does not become a "contract" to convey on the one side and to purchase on the other until it is exercised by the optionee. Barnes v. Rea, 68 Atl. 836, 838, 219 Pa. 279.

An agreement to sell realty, "cash on delivery of deed, or one-half on time, if terms can be agreed on," is a mere "option," and not a "contract for a sale." Wallace & Eves v. Figone, 81 S. W. 492, 493, 107 Mo. App. 362.

An "option" to purchase land is not an actual or existing "contract," but merely a right reserved in a subsisting agreement, being at best but a right to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract. Rampton v. Dobson (Iowa) 136 N. W. 682, 684.

The use of the word "option" in a contract relating to water rights excludes the idea of an absolute agreement to purchase, as an option is simply a "contract" by which the owner agrees that another shall have the right to buy the property at the price fixed within a certain time, and is nothing more than a continuing offer to sell. Gard v. Thompson, 123 Pac. 497, 500, 21 Idaho, 485.

"Generally an 'option' may be defined as a contract by which the owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a limited time. It is neither a 'sale' of land nor an 'agreement to sell,' but merely the disposal of a privilege in electing to buy at a fixed price within the time limited. The other party acquires no lands, or interest in land, not even a chose in action prior to his election, but he does obtain what is often of large value, the privilege at his election to demand and receive a conveyance of land." Cameron v. Shumway, 113 N. W. 287, 290, 149 Mich. 634 (quoting and adopting definition in Myers v. J. J. Stone & Son, 102 N. W. 507, 128 Iowa, 10, 111 Am. St. Rep. 180, 5 Ann. Cas. 912).

"An 'option' is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end. A 'contract of sale' fixes defi-

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nitely the relative rights and obligations of both parties at the time of its execution. The offer and acceptance are concurrent, since the minds of the contracting parties meet in the terms of the agreement." Indiana & A. Lumber & Mfg. Co. v. Pharr, 102 S. W. 686, 689, 82 Ark. 573 (quoting and adopting the definition in Re McMillan v. Philadelphia Co., 28 Atl. 220, 159 Pa. 142.

A "contract of sale" involves an offer to buy or to sell, and an acceptance of that offer. An offer may be withdrawn before acceptance, and a bare offer is ordinarily held to be withdrawn, unless accepted immediately. The offer may be accompanied by a promise not to withdraw it within a specified time. In that case it may be accepted within the time specified before an actual withdrawal. The promise not to withdraw is without consideration and cannot be enforced. The power to withdraw an offer or retract a promise to keep such offer open is a valuable advantage, which may itself be the subject of sale, and an option contract is the sale and purchase of this advantage or right belonging to the owner of the property. Patterson v. Farmington St. Ry. Co., 57 Atl. 853, 858, 76 Conn. 628.

While an "option" to purchase, if based upon a sufficient consideration, binds the party granting it, it is not a "contract of purchase," but simply a contract granting to the holder of the option the privilege of purchasing, and binds the party by whom it is given to sell and convey the property involved, upon the acceptance of the option, in accordance with the terms, and the compliance on the part of the acceptor with its requirements. Tilton v. Sterling Coal & Coke Co., 77 Pac. 758, 760, 28 Utah, 173, 107 Am. St. Rep. 689.

An agreement to sell conditioned on the payment of a certain sum at a specified date, the prospective purchaser promising, in case of his failure to pay, to return the property delivered to him is an "option to purchase" and not a "contract" to pay the price or to return the property purchased. Smith & Standifer v. Ivey Bros., 44 South. 126, 127, 119 La. 357.

An "option" to purchase land is a "contract" by which the owner agrees with another that the latter shall have the right to buy the property within a specified time, but the owner does not thereby sell the property, nor agree to do so, but merely sells the right or privilege to buy at the election of the opposite party. Hamburger & Dreyling v. Thomas (Tex.) 118 S. W. 770, 773.

An option is an unaccepted offer to sell and convey within the time fixed and on the conditions set forth in the written agreement. An agreement whereby the owner of coal contracted to sell the same for a certain sum per acre, with the understanding that, if the first payment agreed on was not made on a day named, "or within 10 days thereafter, this agreement shall be considered as rescinded and neither party shall be bound thereby," was an option, and not a "contract to sell" the coal. Barnes v. Rea, 68 Atl. 836, 838, 219 Pa. 279.

A contract binding plaintiffs to convey to defendant an interest in mines in consideration of $500 paid on the signing and $14,500 within a year, and binding defendant to pay all taxes on the mines during the "life of this option," was properly treated as a "contract" on defendant's part to purchase, and not a mere "option." Chenoweth v. Butterfield, 94 Pac. 1131, 1132, 11 Ariz. 315.

An agreement embodied in a letter, reciting that the writer will give $250 for a tract of land, $100 payable on or about a specified date, and the balance on or before another date, and offering to give notes for the price, and a reply by the owner reciting his willingness to sell on the terms proposed, and enclosing notes for the price, is an agreement on the part of the owner to sell, and is not a mere option to sell. Roberts v. Braffett, 92 Pac. 789, 790, 33 Utah, 51.

An "option" is not a sale. An option to purchase does not become a "contract to purchase" until the privilege given by the option has been exercised by an acceptance. Owners of land agreed to sell and convey the same to another, and it was provided that a deed thereof should be placed in escrow to be delivered on payment of the balance of the price, and that, if the balance was not paid on or before a specified date, the deed should be returned to the owners. Held not a "contract of sale" of the land, but only an "option" to purchase. Kessler v. Pruitt, 93 Pac. 965, 971, 14 Idaho, 175 (citing Hopwood v. McCausland, 94 N. W. 469, 120 Iowa, 218).

A contract between the owner of land and another, reciting the receipt of a certain sum of money by the owner as earnest money and part payment for the land, providing that a warranty deed should be furnished as soon as the title should be examined, the title being guarantied perfect, and providing that the entire deal should be closed within a certain number of days, and setting forth the terms of payment, amounted to an "option," and not to a "contract of sale." Indiana & A. Lumber & Mfg. Co. v. Pharr, 102 S. W. 686, 689, 82 Ark. 573.

Even if a contract by which plaintiff agreed to sell mines to C. for $7,500, of which $3,500 was to be paid at a certain time and $4,000 later, was an "option," yet the transaction became one of sale on $1,000 being paid, and plaintiff executing an agreement reciting that, whereas, there was then "due and owing" $2,500 on the claim, he agreed to accept in lieu thereof the note of C. and another of even date for that amount payable

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60 days later. Menzel v. Primm, 91 Pac. 754, 756, 6 Cal. App. 204.

A contract for the sale of timber on land owned by a husband and wife, providing that if the owners failed to deliver the timber the purchaser might enter the land and cut it, was a "contract of purchase" and not an "option" on the land, and hence proceeds from said sale accruing after the death of the wife descended to the husband and a minor daughter. McIntosh Bros. v. Rutland, 41 South. 372, 88 Miss. 718.

Plaintiff, a mortgagor, conveyed the mortgaged land to S., the holder of the mortgage, whereupon S. surrendered the secured notes, took possession of the land, and dismissed the foreclosure proceedings. As a part of the same transaction S. agreed to reconvey to plaintiff, at any time within two years, any of the tracts, upon certain considerations. Held, that the agreement to reconvey was an "option," and not a "conditional sale contract," and plaintiff had no rights thereunder as a purchaser which would continue beyond the two years, unless he had within that time complied with its provisions, though the agreement did not expressly provide that time was of its essence. Neeson v. Smith, 92 Pac. 131, 132, 47 Wash. 386.

A written agreement, providing that an owner of land bound himself to sell it to another for a specified sum to be paid as therein provided, and that if the vendor's title was not good the down payment should be refunded, but if he should furnish a good and sufficient warranty deed and abstract of title, and the other party should fail or refuse to carry out the contract, the down payment should be forfeited to the vendor, was an enforceable "contract of sale," and not an "option"; an agreement by the purchaser to take the land being implied, and the provision for the forfeiture of the down payment not rendering the contract an option in the absence of an agreement by the vendor to accept such sum as his liquidated damages. Heath v. Huffhines (Tex.) 152 S. W. 176, 177.

M. agreed in writing to sell certain land to plaintiff at a specified price per acre and convey it to any one to whom plaintiff might sell it on payment of such sum. The agreement recited a consideration of a dollar paid by plaintiff, and required payment of the balance within 12 months. Held that, plaintiff not being bound to purchase, the agreement was a mere "option," terminable at M.'s election before acceptance. Noble v. Mann (Ky.) 105 S. W. 152.

An agreement provided that in consideration of $1 and of a certain sum per acre for every acre used by the second parties for a railroad over the premises, to be paid on delivery of the deed after notice of acceptance, it was agreed that, if a railroad was not commenced across the land described within 12 months, the contract should be void, but, if the road is commenced or constructed, the second party should hold said land in fee simple, and pay reasonable damages for the buildings thereon, and, if they fail to complete the road within 24 months, shall pay penalty of $200 for every year they fail to complete the road. No notice of acceptance was ever given, and no railroad was commenced within the time mentioned. Held, that the agreement was an "option," and not an "executory contract." John v. Elkins, 59 S. E. 961, 963, 63 W. Va. 158.

Where the grantor placed the deed with a bank, to be delivered on the payment of a note given him by the grantee, the transaction did not amount to an "option to purchase," but constituted a "contract for the sale of land." As stated in McMillan v. Philadelphia Co., 28 Atl. 220, 159 Pa. 142: "The distinction between a 'contract of sale or lease' and an 'option' is broad and plain. An 'option' is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a binding contract. If the acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end. A 'contract of sale or lease' fixes definitely all the relative rights and obligations of both parties at the time of its execution. The offer and acceptance are concurrent, since the minds of the contracting parties meet in the terms of the agreement." And as stated in Litz v. Goosling, 19 S. W. 527, 93 Ky. 185, 21 L. R. A. 128: "An 'option' is simply a contract by which the owner of property agrees with another that he shall have a right to buy the property at a fixed price within a certain time." Bonanza Mining & Smelter Co. v. Ware, 95 S. W. 765, 768, 78 Ark. 306 (citing Hopwood v. McCausland, 94 N. W. 469, 120 Iowa, 218; Hanly v. Watterson, 19 S. E. 536, 39 W. Va. 214; Johnston v. Trippe, 33 Fed. 530).

Order

A traveling salesman of a manufacturer, authorized to take orders subject to approval, sold a bill of goods to a buyer as indicated by an order specifying the goods and the price to be paid therefor, and signed by the salesman. Held, that the order did not constitute a "contract," in the absence of acceptance by the manufacturer. Gould v. Cates Chair Co., 41 South. 675, 676, 147 Ala. 629.

Taking an order is in substance the making of an executory contract of sale, and the making of a contract for the sale of intoxicating liquors is established by proof that an order therefor was taken. The words "contract for a sale" do not refer to a completed sale but to a sale agreed upon only;

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and in this sense there is no substantial difference between that transaction and taking an order. State v. Sherman, 107 Pac. 33, 35, 81 Kan. 874, 135 Am. St. Rep. 403.

Sale distinguished

See Sale.

CONTRACT OF SURETYSHIP

See Suretyship.

CONTRACT PRICE

The term "contract price," in Ky. St. § 2463, as amended by laws 1896, c. 29, providing that mechanics' liens shall not be for more in the aggregate than the "contract price" of the original contractor, means the sum which the original contractor is actually entitled to receive for the whole work done by him; and where the original contractor is not entitled to any compensation because the building, when nearly completed, was wrecked, either through his own act or through the act of God, subcontractors may not enforce liens. Doll v. Young, 149 S. W. 854, 855, 149 Ky. 347.

CONTRACT RATE

When a statute fixes a rate of interest at 6 per cent., and provides that 8 per cent. may be contracted for, the former rate is generally termed the "legal rate," and the latter the "contract rate." McDonnell v. De Soto Sav. & Bldg. Ass'n, 75 S. W. 438, 443, 175 Mo. 250, 97 Am. St. Rep. 592.

CONTRACT TO ANSWER FOR DEFAULT OF ANOTHER

Where relators furnished supplies, labor, and materials to a subcontractor for the construction of a highway, and treated the latter as their debtor until after he absconded, the undertaking of the contractors, if any, to liquidate such indebtedness, was not an original undertaking, but a "contract to answer for default of another," within the statute of frauds. Miller v. State ex rel. Prather, 74 N. E. 260, 261, 35 Ind. App. 379.

CONTRACT TO CONVEY

An instrument, signed by both the parties thereto and acknowledged, which recited that one of the parties, in consideration of a sum paid and to be paid, had granted and conveyed, "with deed in fee," to the other party certain lands "to have and hold" on the condition that the other party should make a certain payment within a specified time, and recited that a lien was retained to secure payment, and that, on full payment, the wife of the granting party should join in a conveyance, did not amount to a deed, but to a "contract to convey." Powell v. Hunter, 102 S. W. 1020, 1023, 204 Mo. 393.

CONTRACT TO PURCHASE

Plaintiff having authorized an agent to sell land, defendants thereafter wrote to such agent to purchase the same land for them at a certain price. Plaintiff agreed with the agent to sell to defendants, and made a notation at the bottom of their letter, "I accept the above," which he signed. Held, that the letter was not a "contract to purchase," within the statute of frauds (Code 1904, § 2840), but a mere authority to the agent. Jordan & Davis v. Mahoney, 63 S. E. 467, 109 Va. 133.

A "contract to purchase or sell" creates a mutual obligation on the one party to sell and the other to purchase. A contract whereby a vendor agrees to convey premises to the purchaser, and whereby the latter agrees to buy the same, and which acknowledges a receipt of a part of the price, and which calls for partial payments monthly, the whole price to be paid by a fixed date, and which requires the purchaser to pay taxes and keep the improvements insured for the benefit of the vendor, and which provides for re-entry by the vendor on the purchaser's default with an option to retain payments made as for use and occupation, creates a "contract to purchase or sell." Brickell v. Atlas Assur. Co., 101 Pac. 16, 17, 10 Cal. App. 17 (quoting and adopting definition in Menzel v. Primm, 91 Pac. 756, 6 Cal. App. 204).

CONTRACTED

The inhibition in Act Cong. March 3, 1901 (51 Stat. 1093, c. 846) providing that no indebtedness shall be "contracted or incurred" by counties prior to the time of collecting county taxes in the calendar year next succeeding the opening of the territory of Oklahoma, excepting where authorized by the Secretary of the Interior, does not relate only to contractual obligations. The word "contracted" includes all of one class, and the word "incurred" includes another class. The word "incurred" is defined as to become liable or subject to; to render liable or subject to. Men contract debts. They incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law. "Incurred" means something beyond contracts, something not embraced in the word "debt." It has been held to mean "became liable for," "brought on himself," "brought on, occasioned, or caused." Hence the word "incurred" means more, and embraces a different class of liabilities or obligations from those "contracted." It means the indebtedness imposed by salaries of county officers and other required and necessary expenses. Bank of Indian Territory v. Eckles, 91 Pac. 695, 697, 19 Okl. 159 (citing Webster's Dict.; Black's Law Dict.; Scott v. Tyler [N. Y.] 14 Barb. 202; Flanagan v. Baltimore & O. R. Co., 50 N. W. 60, 83 Iowa, 639; Beekman v. Van Dolsen, 24 N. Y. Supp. 414, 70 Hun, 288; Deyo v. Stewart [N. Y.] 4 Denio, 101; Ashe v. Young, 3 S. W. 454, 68 Tex. 123).

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Under Membership Corporations Law (Consol. Laws 1909, c. 35) § 11, which provides that the directors of membership corporations shall be liable for debts of the corporation contracted during their term of office and payable within one year or less from the date it was contracted, if an action on an unsatisfied judgment against the corporation is brought against the directors within one year of its return, a contingent liability, or a liability for breach of an executory contract, is not a "debt," and a debt is "contracted" only when the contingency upon which it is to arise occurs, and, where a lease for one year is executed by the directors of a membership corporation at a yearly rental payable monthly in advance, no debt is "contracted" for monthly installments of rent maturing after their term of office has expired. Dunn v. Neustadtl, 129 N. Y. Supp. 161, 163, 72 Misc. Rep. 1.

The word "contracted," in Rev. St. 1895, art. 4367, requiring a railroad to maintain its general offices at the place it has contracted or may contract to locate the same, for a valuable consideration, etc., is used according to the common acceptation of the terms, and includes all methods of contracting, whether express or implied, and whether written or oral. Kansas City, M. & O. Ry. Co. of Texas v. Sweetwater (Tex.) 131 S. W. 251, 255.

A judgment against a patentee is not a lien on land acquired under the homestead laws, if the debt was "contracted prior to the issuing of the patent," under Rev. St. § 2296. The time when a debt was "contracted," within Rev. St. § 2296 relating to exemptions of homestead, is the time when the consideration was received and the obligation to pay was assumed by the patentee, though thereafter renewal notes were given, and by assignments the creditor changed. Ash v. Eriksson, 132 N. W. 997, 115 Minn. 478.

CONTRACTED APERTURE

"Contracted" means lessened, narrowed, diminished, abridged, or reduced, as well as drawn together. The Standard Dictionary gives the word the meaning "not extensive." The words "contracted aperture," as used in specifications of an article sought to be patented, should not be construed to mean an aperture once larger and made smaller by some means, natural or mechanical. Universal Brush Co. v. Sonn, 146 Fed. 517, 520.

The Morrison patent, No. 717,014, for a method of making brushes, which consists in depositing a mass of heated plastic composition, which becomes hard when cooled, within a chambered brush frame having a "contracted aperture," and forcing one end of the groups of bristles into the composition when in the plastic state, is not a pioneer, but covers merely an improvement on known methods, and must be limited strictly to the particular advance made. It is not infringed by a construction in which the aperture of the chamber is not contracted, but the sides are perpendicular to the bottom, but in which the chamber has a raised portion in the center, which assists in holding the composition in place by adhesion and also lightens the brush. The court said: "The words 'contracted aperture' mean smaller opening, an opening smaller than the chamber, an opening caused by drawing in, abridging, bringing within narrower compass, the walls of the chamber at that point." Universal Brush Co. v. Sonn, 154 Fed. 665, 668, 83 C. C. A. 422.

CONTRACTED OR INCURRED

The phrase "contracted or incurred," in Act Cong. March 3, 1901, c. 846, § 1 (31 Stat. 1094), providing that no indebtedness of any character shall be "contracted or incurred" by designated counties prior to the time for collecting county taxes for the calendar year, except where the same shall have been authorized by the Secretary of the Interior, includes two classes of county obligations, contractual and imposed. The word "contracted" includes all of one class, and the word "incurred" includes the other class. The word "incurred" embraces a different class of liability from those "contracted," and means the indebtedness imposed on the county by salaries of county officers and other required and necessary expenses, all of which, to be a valid charge, must be authorized or approved by the Secretary of the Interior. Bank of Indian Territory v. Eckles, 91 Pac. 695, 696, 19 Okl. 159.

CONTRACTING A DEBT

The issuance by the state of bonds in settlement and payment of an obligation acknowledged to be justly owing for past considerations is not "contracting a debt," within Const. art. 10, § 5, prohibiting any law authorizing the contracting of any debt on behalf of the state, except in enumerated cases. Hanly v. Sims, 93 N. E. 228, 229, 175 Ind. 345.

CONTRACTOR

See Independent Contractor; Joint Contract and Contractor; Original Contractor; Subcontractor.

A "contractor" is one who, in pursuit of an independent business, undertakes to do specific jobs of work for other persons without submitting himself to their control with respect to all petty details of the work. Halstead v. Stahl, 94 N. E. 1056, 47 Ind. App. 600 (citing 2 Words and Phrases, pp. 1534, 1535; Shearm. & R. Neg. §§ 76, 77; Carey-Lombard Lumber Co. v. Jones, 58 N. E. 347, 187 Ill. 203).

"The term 'contractor' is applicable to all persons following a regular, independent employment, in the course of which they offer their services to the public to accept or-

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ders and execute commissions for all who may employ them in a certain line of duty, using their own means for the purpose and being accountable only for final performance." Mullich v. Brocker, 97 S. W. 549, 551, 119 Mo. App. 332 (quoting Cooley, Torts [2d Ed.] p. 647).

"Although, in a general sense, every person who enters into a contract may be called a 'contractor,' yet the word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details; the true test of a 'contractor,' appearing to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." Caldwell v. Atlantic B. & A. R. Co., 49 South. 674, 161 Ala. 395 (citing 2 Words and Phrases, pp. 1534, 1535).

The term "contractor," as used in Acts 1898, No. 171, p. 415, § 14, imposing a license tax "upon master builders, stevedores, bill posters or tacking contractors and mechanics who employ assistance," is of uncertain signification. Every person engaged in business may be called a contractor, whether he be a retailer, a wholesaler, an insurer, a pawnbroker, a manufacturer, or a mechanic. State v. C. C. Hartwell Co., 41 South. 444, 445, 117 La. 144 (citing Theobalds v. Conner, 7 South. 690, 42 La. Ann. 789; State v. McNally, 12 South. 117, 45 La. Ann. 45; City of New Orleans v. O'Neil, 10 South. 245, 43 La. Ann. 1182).

As a county need not keep a highway open to the public or adjacent owners while ordinary or reasonable repairs are in progress, the only liability, if any, is under Laws 1898, p. 218, c. 115, § 11a, as added by Laws 1904, p. 653, c. 298, § 1, whereby the keeping a highway open till the engineer in charge certifies it is necessary to close it is placed on the "contractors," meaning the person having the contract and actually doing the work. Herbert v. Rockland County, 118 N. Y. Supp. 358, 363, 64 Misc. Rep. 352.

Although in a general sense every person who enters into a contract may be called a "contractor," yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details. The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as the means by which it is accomplished. Jann's Adm'r v. Wm. H. McKnight & Co., 78 S. W. 862, 863, 117 Ky. 655 (quoting Shear. & R. Neg. § 164; Poor v. Madison River Power Co., 99 Pac. 947, 953, 38 Mont. 341; citing Shearman & Redfield on Negligence, §§ 164, 165; Jensen v. Barbour, 89 Pac. 906, 15 Mont. 582).

Laws 1897, p. 515, c. 418, § 2, defines the term "contractor" as a person who enters into a contract with the owner of real property for the improvement thereof. The question involved was as to whether the assignee of a "contractor" stood in the latter's place, so as to procure a discharge of a lien against the amount due a contractor from a municipal corporation. The court held in the affirmative, but said: "Under the strictest interpretation of the statute, an assignee of the contractor might procure a discharge of the lien if only the contractor himself be upon the bond. * * * We are of opinion, therefore, that this provision should not receive the strict construction contended for by the respondent, but that within the permission of the statute an assignee of the contract and of the moneys due thereupon may procure a discharge of the lien by filing an undertaking in which the assignee shall appear as principal and with such surety as is provided by the act of which the justice may approve." In re Hudson Waterworks, 98 N. Y. Supp. 33, 35, 111 App. Div. 860.

Rev. Code 1852, as amended to 1893, p. 818, c. 110 (16 Del. Laws, c. 145), provides that any person who has furnished work or materials or both for a building under any contract with the owner thereof, or his agent, or with any contractor, may obtain a lien, subject to the restriction that no contractor who shall have contracted for the erection of the structure in whole or in part shall file his claim until after 90 days from the completion of the building, but he shall file the same within 30 days after the expiration of the 90 days, and all others shall file their claims within the 90 days from the completion of the work and labor performed, etc. Held, that the "contractor" entitled to file his claim after 90 days is one who has furnished both labor and materials under contract with the owner, all other persons being required to file their claims within 90 days; and hence, where petitioner performed labor and furnished materials for a building under contracts, but with the contractor, his claim, not filed within 90 days after the completion of the labor or the last delivery of materials, was too late. Cantera v. Trustees of Eighth St. Baptist Church of Wilmington (Del.) 84 Atl. 1035, 1036.

Where defendant railroad company contracted with an individual for the construction of an extension of the railroad, and the contractor in turn made a contract with plaintiff, a foreign corporation, for the same work, which contract was guaranteed by the

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railroad company, and after completion of the work an arbitration followed and an award was made, a judgment for plaintiff on the award against the railroad company was conclusive in an action on a scire facias sur judgment, that the plaintiff in its relation to the railroad company was a "contractor" within the resolutions of January 21, 1843 (P. L. 367), and April 4, 1862 (P. L. 235), giving contractors building railroads prior liens. Pittsburg Const. Co. v. West Side Belt R. Co., 81 Atl. 884, 886, 232 Pa. 578.

Acts 1899, p. 33 (Van Epps' Code, § 6176), provides that "when work done or material furnished for the improvement of real estate is done or may be furnished upon the employment of a contractor, or some other person than the owner, and in that case, the lien given by this section shall attach upon the real estate improved, as against such true owner, for the amount of the work done or material furnished, and unless such true owner shows that such lien has been waived in writing, or produces the sworn statement of the contractor, or other person, at whose instance the work was done or material was furnished, that the agreed price or reasonable value thereof has been paid; provided that in no event shall the aggregate amount of liens set up hereby exceed the contract price of the improvements made." Held, that the word "contractor" is not to be construed in its technical sense, which would embrace any person who had any contract of any character, but is to be given its limited, colloquial sense, meaning a person engaged in the business of making contracts for the improvement of real estate, and the other persons referred to in the statute embrace that class who may furnish material for the improvement of real estate, but may not be engaged in a business commonly known as the business of a contractor. Pittsburgh Plate Glass Co. v. Peters Land Co., 51 S. E. 725, 727, 123 Ga. 723.

A contractor rented from a third person a hod elevator with appliances, which were installed in a building under construction. The contractor ran the elevator with his own employés, with the exception of the engineer, who ran the engine, who moved the elevator on signals by the employés of the contractor. The compensation of the engineer was included in the rental for the machinery. Held, that the third person was not a "contractor and owner," within Laws 1899, p. 351, c. 192, § 20, requiring contractors and owners constructing buildings to inclose shafts or openings in each floor. Anderson v. Pelham Hod Elevating Co., 113 N. Y. Supp. 989, 990, 129 App. Div. 639.

St. 1878, p. 152, c. 209, provides that, when public buildings are to be built upon which liens might attach for lumber and materials if they belonged to private persons, it shall be the duty of the officers or agents contracting in behalf of the commonwealth, to provide sufficient security, by bond or otherwise, for payment by the "contractor and all subcontractors" for all labor performed or furnished and all materials used in the construction of the building. It is not the meaning of this statute that the debt to be secured shall be due from the contractor and subcontractor jointly, but the words are used distributively and require only that the debt shall be due from either the contractor or some one of the subcontractors. "It is enough if it be due from any one of them. The primary purpose of the use of the phrase 'contractor and all subcontractors' is not to exclude them from the right to a lien, but to describe the individual debtors whose creditors on account of labor and materials are to be secured." Fosburgh Co. v. Hampden County, 90 N. E. 851, 856, 204 Mass. 494.

The term "contractor," within Wilson's Rev. & Ann. St. Okl. 1903, § 386, granting cities of the first class power to levy and collect an occupation tax on contractors, is one who contracts or covenants, either with a public body or private parties, to construct works and erect buildings on a large scale at a certain price or rate. The power is not sufficiently generic to cover "persons doing contract work"; and that part of an ordinance seeking to levy such tax on persons doing contract work is illegal and void. In re Unger, 98 Pac. 999, 1001, 1 Okl. Cr. 222 (quoting and adopting the definitions in Century Dictionary and Webster's International Dictionary).

"In its primary meaning, the word 'contractor' means one who agrees to do anything for another. * * * The courts of this state in lien cases have recognized the broader meaning of the term, and have recognized a contractor as one who agrees to do a specific work for another upon his own responsibility and credit." One who agrees to sell machinery to be delivered f. o. b. cars at his factory and set up by the buyer is not a contractor for the furnishing thereof, so as to entitle the person from whom he subsequently buys the machinery, and who delivers it to him, to a mechanic's lien as a subcontractor under Burns' Rev. St. 1894, § 7255, but is a materialman. Caulfield v. Polk, 46 N. E. 932, 933, 17 Ind. App. 429.

A superintendent of public schools is not a "contractor," within Const. art. 4, § 21, prohibiting the Legislature from authorizing extra compensation to any contractor, etc., after the contract has been entered into or the services rendered. Attorney General ex rel. Zacharias v. Board of Education of City of Detroit, 118 N. W. 606, 609, 154 Mich. 584.

As laborer

See Laborer.

Lessee

A "contractor" is one who, as an independent business, undertakes to do specific

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jobs of work without submitting himself to control as to the petty details. Lessees who agreed to erect a permanent building upon the leased lot were not "contractors" within the meaning of the mechanic's lien statute. Carey-Lombard Lumber Co. v. Jones, 58 N. E. 347, 349, 187 Ill. 203.

Though in a general sense every party to a contract is a 'contractor,' the term as used in statutes relating to mechanics' liens has a restricted meaning. It refers to one who, under contract with the owner, undertakes for a consideration to furnish the material, labor, and superintendence required in the improvement of the owner's premises, either in the erection of a structure thereon, or in the alteration or repair of one in existence. A lessee, who, for the purpose of enhancing the value of his leasehold, agrees to make improvements at his cost, is not a "contractor" who is to be paid a specific consideration, for which, in case of nonpayment, he is entitled to a lien. Dougherty-Moss Lumber Co. v. Churchill, 90 S. W. 405, 407, 114 Mo. App. 578.

The word "contractor," as used in a statute giving a lien for work done and material furnished for the improvement of real estate on the employment of a contractor, is not to be construed in its technical sense, which would embrace any person who had any contract of any character, but is to be given its limited colloquial sense, meaning a person engaged in the business of making contracts for the improvement of real estate. A tenant does not come within the meaning of the phrase "contractor, or some other person," even though the instrument under which he became a tenant specifically provided for the erection of the building into which the materials of the claimant went. Central of Georgia Ry. Co. v. Shivers, 53 S. E. 610, 611, 125 Ga. 218 (citing Pittsburgh Plate Glass Co. v. Peters Land Co., 51 S. E. 725, 123 Ga. 726.

Materialman

A materialman is one whose charge is for materials alone. If his charge is for work and labor in putting the materials in the building, then he is a "contractor," and not a materialman, within the meaning of P. L. N. J. 1898, p. 538, c. 226, § 3, providing that, when a contractor shall refuse to pay any person who has furnished materials for the erection of a building for which a contract has been filed, it shall be the duty of such materialman to give written notice, etc., in order to procure a lien. Beckhard v. Rudolph, 59 Atl. 253, 256, 68 N. J. Eq. 315.

Under Laws 1897, p. 516, c. 418, § 3, giving a lien to a "contractor, subcontractor, laborer, or materialman, who performs labor or furnishes material for the improvement of real property," the terms "contractor," "subcontractor," "laborer," and "materialman," while they refer primarily to the man who has a formal contract with the owner, or a subcontractor, with the contractor, or who performs manual labor or furnished material, also embrace the man who buys the labor and material which enter into the improvement. Kerwin v. Post, 104 N. Y. Supp. 1005, 1007, 120 App. Div. 179.

Under Lien Law (Consol. Laws, c. 33) § 2, defining a "contractor" as one entering into a contract with the owner of real property for the improvement thereof, and defining a materialman as any person other than the contractor furnishing materials for such improvement, and defining the term "improvement" as including the erection, alteration, or repair of any structure on real estate, and any work done on the property or materials furnished for its improvement, a contract requiring one to furnish all the window frames, sash, glass, and trim in and to buildings in course of construction for a lump sum, payable in installments as the work progressed, and requiring him to make a large part of the materials according to plans, is a contract for the permanent improvement of real estate within the lien law, and he is entitled to a lien for the materials furnished and work done. Western Sash, Door & Lumber Co. v. Gaul Const. Co., 126 N. Y. Supp. 1110, 1111.

Code Civ. Proc. § 3414, makes a laborer's or materialman's lien prior to a contractor's. Lien Law (Consol. Laws, c. 33) § 2, defines a "contractor" as one who contracts with an owner of land to improve it, a "materialman" as one, other than a contractor, who furnishes material for such improvement, and an "improvement" as including work done on property or "materials furnished for its permanent improvement." Held, that the lien of one who installed plumbing of one who furnished trim for the building under contract with the owner, and of one who sold brick and mason's building materials to the owner for use in the building, are all on equality, being entitled to preference in the order of time. Jackson v. Egan, 94 N. E. 211, 200 N. Y. 496.

As mechanic

See Mechanic.

Servant distinguished

See Servant.

Subcontractors

Under a statute making railroad companies liable for debts for labor contracted by any contractor for the construction of any part of the railroad, the word "contractor" includes "subcontractors." Redmond v. Galena & S. W. Ry. Co., 39 Wis. 426, 430.

The phrase "persons supplying the contractor with labor and material," used in Act. Cong. Aug. 13, 1894, and Act Cong. Feb. 24, 1905, providing that "persons supplying the contractor with labor and material" shall have a certified copy of the contract and

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bond for the purposes of an action thereon, etc., includes not only a subcontractor, but one furnishing labor and materials to the subcontractor for carrying out the work contracted for. Mankin v. United States, to Use of Ludowici-Celadon Co., 30 Sup. Ct. 174, 176, 215 U. S. 533, 54 L. Ed. 315.

"Contractor" is defined by the Standard Dictionary as one who executes plans under a contract; by the Century Dictionary, as one who contracts to furnish supplies, or to construct work, or erect buildings, or perform any work or service at a certain price or rate. One who contracts with a subcontractor to have the sole hauling, at a certain amount per hundredweight, of all the cement needed for the structure, not being bound to personal service, and the amount of work requiring assistants, is not an employé, but a subcontractor of the subcontractor, and therefore not within Rev. St. 1898, §§ 3314, 3315, giving a lien to a principal contractor, subcontractor, or employé of either, who performs any work or labor for, in, or about the erection or construction. Farmer v. St. Croix Power Co., 93 N. W. 830, 834, 117 Wis. 76, 98 Am. St. Rep. 914.

Act March 30, 1892, expressly provides that the lien given on moneys due on a contract for a municipal improvement shall exist in favor of subcontractors and their assigns or legal representatives. Subsequent sections, relating to the time of attachment of the lien or the procedure for recovery, referred to the liability of the "contractor" for the claim preferred, and section 14 (P. L. p. 373) defines "contractor" as meaning the person with whom the contract of the municipality is made. Held, that such subsequent sections did not so modify section 1 as to deprive a subcontractor of his right to a lien thereunder. Herman & Grace v. Board of Chosen Freeholders of Essex County, 64 Atl. 742, 745, 71 N. J. Eq. 541.

Lien Law (Consol. Laws 1909, c. 33) § 19, subd. 4, provides that a lien may be discharged by an owner or contractor executing an undertaking to the clerk of the county where the premises are situated in such sums as the court or judge may direct, not less than the amount claimed in the notice of the lien, conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien. Held, that the right to discharge a lien by filing an undertaking is not limited to the contractor named in the notice of the lien, but accrues to any one within the meaning of the term "contractor," as defined by section 2, viz., a person who enters into a contract with the owner of real property for the improvement thereof; and hence an original contractor, having agreed to keep the premises free from liens, could not be deprived of the right to an order fixing an amount of the undertaking necessary to discharge a lien, because the lienors, who were subcontractors, did not name the original contractor in their notice of lien as a contractor. In re Hedden Const. Co., 129 N. Y. Supp. 827, 828, 72 Misc. Rep. 153.

As workman

See Workman.

CONTRADICTION

See Self-Contradiction.

CONTRARY

See Cause to the Contrary.

CONTRARY TO GOOD MORALS

A contract entered into by an outgoing board of county commissioners for county printing is not "contrary to good morals," within Civ. Code, § 2240, providing that "that is not lawful which is * * * contrary to good morals," though entered into shortly before the expiration of the term of office of members of such board, and after the election of a new board. Picket Pub. Co. v. Board of Com'rs of Carbon County, 92 Pac. 524, 526, 36 Mont. 188, 13 L. R. A. (N. S.) 1115, 122 Am. St. Rep. 352, 12 Ann. Cas. 986.

CONTRARY TO HIS TRUST

An information charging embezzlement, and alleging that defendant did "feloniously convert, embezzle, and appropriate to his own use, contrary to his said trust as such officer as aforesaid," was held sufficient on the ground that "contrary to his trust" was the equivalent of "not in the due and lawful execution of his trust." People v. McMahill, 87 Pac. 404, 405, 4 Cal. App. 225 (citing People v. Ward, 66 Pac. 372, 134 Cal. 301).

CONTRARY TO LAW

A verdict is "contrary to law," within Civ. Code Proc. § 304, subd. 6, authorizing a new trial where the verdict is "contrary to law," when it is contrary to the instructions, whether they are right or wrong; the term "law," referring to the law as declared or given by the court, and not as it should have been given. Lynch v. Snead Architectural Iron Works, 116 S. W. 693, 695, 132 Ky. 241, 21 L. R. A. (N. S.) 852 (citing Gausman v. Paff, 10 Ky. Law Rep. 240; Palmer v. Johnson's Adm'r, 13 Ky. Law Rep. 590; Burns v. McGibben, 9 Ky. Law Rep. 441; Bertman v. Ebert's Adm'r, 9 Ky. Law Rep. 198).

The term "contrary to law," as used in Rev. St. § 3082, providing for the forfeiture of merchandise fraudulently or knowingly imported or brought into the United States "contrary to law," etc., and the fining of the offender, relates to specific statutory provisions not found in the section itself, as the importation of merchandise is not per se contrary to law, and a count charging the violation of the section in question must show what particular provisions of the stat-

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ute are violated. One Pearl Chain v. United States, 123 Fed. 371–373, 59 C. C. A. 499 (quoting and adopting Keck v. United States, 19 Sup. Ct. 254, 172 U. S. 434, 43 L. Ed. 505).

Rev. St. § 3082, provides that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise "contrary to law," or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender fined or imprisoned. Held, that the words "contrary to law," as used in such section, relate to legal provisions other than those found in such section. Rogers v. United States, 180 Fed. 54, 56, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264.

The words "contrary to law" in an information do not enlarge or extend the force and effect of the words used to describe the act imputed to defendant, so as to make it unlawful, when it is not so by the description itself. An information for misprision having shown knowledge of the felon's abode, an allegation that defendant "did conceal and keep secret, contrary to the law of the land," was insufficient, as not showing a neglect to discover the felon and his place to the officers of justice. State v. Wilson, 67 Atl. 533, 534, 80 Vt. 249.

On proceedings under section 3082, Rev. St., for the forfeiture of merchandise imported "contrary to law," which would have been admissible free of duty on compliance with regulations which the Secretary of the Treasury is authorized by law to prescribe, it may not be maintained in defense that the regulations have not been promulgated, and that therefore the importer was justified in importing the merchandise according to his own convenience, independently of the requirements of law. Such an importation would be "contrary to law," under said section. United States v. Fifty Waltham Watch Movements, 139 Fed. 291, 296.

That Rev. St. § 2802, provides for a forfeiture and penalty of treble the value of an article subject to duty found in the baggage of a person arriving within the United States, which was not mentioned to the collector, does not indicate that the offense is not within section 3082, imposing a penalty of fine or imprisonment for fraudulently or knowingly importing any merchandise "contrary to law," the latter section making the act a crime and imposing a severer penalty for the act done fraudulently and knowingly. United States v. Chesbrough, 176 Fed. 778, 783.

A complaint by a city by its attorney which alleges that accused did the prohibited act "contrary to law" fails to charge a violation of a municipal ordinance; the phrase "contrary to law" having been appropriated by Code 1907, § 7353, to the definition in indictments of violations of statutes, and the word "law," unless otherwise qualified in a penal proceeding, presumptively referring to the common law, in the absence of a statute giving it another meaning. Rosenberg v. City of Selma, 52 South. 742, 743, 168 Ala. 195.

CONTRARY TO LAW AND EVIDENCE

Under Code Cr. Proc. 1895, art. 817, declaring that new trials in felonies shall be awarded where the verdict is "contrary to law and evidence," where accused is found guilty of an offense of inferior grade, but of the same nature to that proved, a conviction of manslaughter, while the evidence shows guilt of a higher grade of homicide, is not prejudicial to accused. High v. State, 112 S. W. 939, 940, 54 Tex. Cr. R. 333.

The words "contrary to law or evidence," as used in Pen. Code, § 1181, subd. 6, providing for the granting of a new trial where the verdict is contrary to the law or evidence, do not mean that a new trial may be granted for misconduct of the district attorney. People v. Amer, 90 Pac. 698, 699, 151 Cal. 303.

CONTRARY TO THE FORM OF THE STATUTE

An indictment, concluding "contrary to the form of the statute," clearly indicates that the prosecution is under a statute, and not the common law. Steil v. Territory, 71 Pac. 653, 654, 12 Okl. 377.

CONTRARY TO THE GENERAL LAWS OF THE LAND

The phrase "contrary to the general laws of the land," when used in reference to the acts to restrain which a writ of prohibition will lie, means nothing more than an excessive jurisdiction, and does not authorize the issuance of such writ to regulate mere erroneous rulings. People ex rel. Hummel v. Davy, 94 N. Y. Supp. 1037, 1039, 105 App. Div. 598.

CONTRIBUTE—CONTRIBUTION

See Substantial Contribution.

The meaning of the word "contribute" is to furnish as a share or constituent part of anything. Sharpton v. Augusta & A. Ry. Co., 51 S. E. 553, 556, 72 S. C. 162 (quoting and adopting definition in 9 Cyc. p. 791).

"One thing is understood to 'contribute' to a given result when such thing has some share or agency in producing such result, and is not understood to convey the idea that such thing was the efficient cause of such result, in the sense that without it such result would not have occurred, for it is possible such result may have occurred, even in the absence of the thing which is supposed to have had some share or agency in producing

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such result." Wragge v. South Carolina & G. R. Co., 25 S. E. 76, 83, 47 S. C. 105, 33 L. R. A. 191, 58 Am. St. Rep. 870.

The word "contributed," in the petition in an action against a street railroad for injuries to a boy at a crossing struck by a car, which alleged several pretermitted duties, and averred several acts of negligence, and followed these allegations with the averment, "all of which directly contributed to cause the injuries hereinafter complained of," did not plead plaintiff's own contributory negligence, and plaintiff was entitled to use the word "contributed," without thereby implying his own negligence, and the allegation meant that the pleaded acts of negligence "contributed" with one another to form an aggregation which caused the injuries complained of. Deschner v. St. Louis & M. R. R. Co., 98 S. W. 737, 744, 200 Mo. 310.

The word "contributed," when used with reference to plaintiff's negligence, means having a share or agency, in the sense of being the proximate cause of the injury. Burns v. Southern R. Co., 43 S. E. 679, 681, 65 S. C. 229.

Within Civ. Code 1902, § 1347, providing that no person can recover for injury or damage through a defect or negligent repair of a highway, if he in any way brought about the injury or negligently "contributed thereto," the injured party does not "contribute" to the injury, unless his act of negligence was a direct and proximate cause thereof. Duncan v. Greenville County, 53 S. E. 367, 368, 73 S. C. 254.

The words "caused" and "contributed," in an instruction in an action for personal injury to an employé, stating that the jury should find for defendant if plaintiff's negligence "caused or contributed" to the injury, were synonymous. Fourche River Valley & I. T. Ry. Co. v. Tippett, 142 S. W. 520, 524, 101 Ark. 376.

The jury being instructed that plaintiff to recover must prove he did not contribute to his injuries by his own negligence, they will be held to have understood that the word "contributed" was used in the sense of "caused," in the further instructions as to determining whether defendant's negligence, if they find any, was the proximate cause of or contributed to plaintiff's injuries. Collier v. McClintic-Marshall Const. Co. (Iowa) 138 N. W. 522, 523.

The use of the word "contributed" in an instruction in personal injury cases, in speaking of the relation of defendant's negligence to the injury, has been frequently condemned by the courts, where there is for consideration only the negligence of defendant and plaintiff, for in such cases the negligence of defendant must be the sole cause of the injury, in order to entitle plaintiff to recover. In other words, in such cases the mere contributing to an injury by the negligence of defendant is not sufficient to authorize a recovery, for it may be plaintiff's negligence contributed thereto as well, in which event, of course, no recovery could be allowed. But where plaintiff was without fault, and the injury occurred through negligence of defendant, which concurred with other causes in producing it, the use of the word "contributed," in speaking of the relation of defendant's negligence to the injury, is not improper. Troll v. St. Louis Portland Cement Co., 140 S. W. 963, 966, 160 Mo. App. 501.

CONTRIBUTION (In Practice)

Strictly speaking, the right of "contribution" does not arise out of a contract, but rests upon the principle that, where all are equally liable for the payment of a debt, all are bound equally to contribute to that purpose. Sledge v. Dobbs, 98 N. E. 243, 245, 254 Ill. 130.

The doctrine of "contribution" is not founded on contract, but on the principle that equality of burden as to a common right is equity; that, wherever there is a common right, the burden is also common. "The doctrine rests on the principle that, where the parties stand in equali jure, the law requires equality, which is equity; and one of them shall not be obliged to bear the burden for the ease of the rest." Vandiver v. Pollak, 19 South. 180, 181, 107 Ala. 547, 54 Am. St. Rep. 118 (quoting and approving Campbell v. Mesier [N. Y.] 4 Johns. Ch. 338, 8 Am. Dec. 570).

The doctrine of "contribution" is founded, not on contract, but on the principle that equality of burden as to a common right is equity, and the obligation to contribute arises from the nature of the relation between the parties. Lee v. Larkin, 109 N. Y. Supp. 480, 482, 125 App. Div. 302.

The right of "contribution" is one which belongs to one of two or more joint obligors, arising out of the relation of the parties, and is given to protect one of the joint obligors, where he has been compelled to discharge more than his share of the whole debt. The right of "contribution" is individual and personal growing out of what the individual himself does; and each is entitled to recover from the others what he has paid beyond his proper share. Yore v. Yore, 144 S. W. 847, 850, 240 Mo. 451.

CONTRIBUTORY INFRINGEMENT

"Contributory infringement" of a patent is the making and selling of one element of a combination covered by a patent, with the intention and for the purpose of bringing about its use in such a combination, and of aiding or abetting another to infringe, and it renders the maker and seller equally liable to the patentee with him who organizes the complete combination. Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co., 129 Fed. 105, 111, 63 C. C. A. 607.

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"It would seem clear that 'contributory infringement' ought to include and does include more than the intentional aiding of one person by another in the unlawful making or selling, or using of the patented invention," and "the essence of 'contributory infringement' lies in concerting or planning with others in an unlawful invasion of patentee's rights." Cortelyou v. Charles Eneu Johnson & Co., 138 Fed. 110, 119 (quoting and adopting Goodyear Shoe Machinery Co. v. Jackson, 112 Fed. 146, 148, 50 C. C. A. 159, 55 L. R. A. 692).

"Contributory infringement" exists when one knowingly concerts or acts with another in an unlawful invasion of a patentee's rights. If such assistance is given by furnishing an essential part of an infringing combination and the part furnished is adapted to no other use than an infringing use, such contribution makes him a contributory infringer; but, if the part furnished is adapted to other and lawful uses, in addition to infringing uses, then an intent to furnish for infringing use must be established before the furnisher can be held a contributory infringer. General Electric Co. v. Sutter, 186 Fed. 637, 638.

To sustain the jurisdiction of the court of a suit for infringement of a patent in a district wherein neither party resides or is a citizen under Act March 3, 1897, c. 395, 29 Stat. 695, there must have been a completed act of infringement by defendant in such district, and, where a contributory act is relied on as in the making and selling of an element in a patented combination, it must be shown to have resulted in a completed infringement. Consolidated Rubber Tire Co. v. Republic Rubber Co., 195 Fed. 768, 770.

A repairer who supplies an essential part of the patented combination for an infringing machine thereby becomes a "contributory infringer." Union Special Mach. Co. v. Maimin, 161 Fed. 748, 750.

The sale of ink to a purchaser of a rotary mimeograph sold with a license restriction that it could be used only with the ink supplied by the patentee, with the expectation that the ink sold would be used in connection with such mimeograph, constitutes "contributory infringement" of the patent. Henry v. A. B. Dick Co., 32 Sup. Ct. 364, 379, 224 U. S. 1, 56 L. Ed. 645.

"'Contributory infringement' is intentional aid or co-operation in transactions which collectively constitute complete infringement. For example: Where a person furnishes one part of a patented combination, intending that it shall be assembled with the other parts thereof, and that the complete combination shall be used or sold, that person is liable to an action as infringer of the patent on the complete combination; and where a person furnishes a machine which is useful only for the purpose of making a patented article, intending that it shall be thus used, that person is himself liable for any infringement which is afterward committed in the manufacture of that article with that machine. So, also, a person is chargeable with contributory infringement of a patent on a machine, where he furnishes articles for that machine to operate upon, intending that the machine shall be used by operating on those articles. Furthermore, where a person furnishes a machine, composition of matter, or other article, which is particularly adapted to be used in performing a patented process, and which the person furnishing the same intends shall be thus used, that person is liable as a contributory infringer for any infringement which afterward occurs in accordance with his intention. But where the machine or other property thus furnished is useful for some other purpose than to be a part of a patented combination, or to make a patented article, or to be operated upon by a patented machine, or to be used in performing a patented process, and where he who furnishes the property does not intend or know, when furnishing the same, that it is to be thus used, he incurs no liability to an action for infringement; but if he knew or intended that the property furnished by him was to be used in either of the infringing ways, he cannot defeat an action for infringement by showing that the furnished property could have been used in some noninfringing way." A. B. Dick Co. v. Henry, 149 Fed. 424, 428.

CONTRIBUTORY NEGLIGENCE

See Free from Contributory Negligence; Proximate Contributory Negligence.

"Contributory negligence" is nothing more nor less than negligence on the part of the person injured; and the rules of law applicable to the negligence of a defendant are applicable thereto. Ladow v. Oklahoma Gas & Electric Co., 119 Pac. 250, 259, 28 Okl. 15.

"Contributory negligence" is the want of that care which the law requires of a plaintiff under the circumstances, and which causes or contributes to the injury sued for. St. Louis, I. M. & S. Ry. Co. v. Dillard, 94 S. W. 617, 619, 78 Ark. 520.

There are two essential elements in "contributory negligence"—a want of ordinary care, and a causal connection between the act and the injury complained of. Kansas City Southern Ry. Co. v. Prunty, 133 Fed. 13, 20, 66 C. C. A. 163 (citing Beach, Contrib. Neg. [2d Ed.] §§ 7, 19).

The term "contributory negligence" is usually employed to indicate some fault on the part of one who is seeking to recover for injuries resulting, at least in part, from the proven negligence of another, and the question is whether the injured party has also been at fault in such way as to contribute, with the negligence of the other party, to the

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resulting injury. Brown v. Rockwell City Canning Co., 110 N. W. 12, 13, 132 Iowa, 631.

Negligence as "contributory" only implies a supplemental cause; something else that also contributed to the effect. Lewis v. Barton Salt Co., 107 Pac. 783, 82 Kan. 163.

"Contributory negligence" is negligence of the plaintiff contributing to the injuries complained of. It is a defense, and if it is shown by the evidence to exist plaintiff cannot recover. Town of Sellersburg v. Ford, 79 N. E. 220, 222, 39 Ind. App. 94.

The forgetfulness or inattention to one's surroundings may and usually does constitute the very gist of "contributory negligence." Ft. Worth & R. G. Ry. Co. v. Robinson, 84 S. W. 410, 412, 37 Tex. Civ. App. 465 (citing Truntle v. North Star Woolen Mills Co., 58 N. W. 832, 57 Minn. 52).

"Contributory negligence" by a servant is a matter of conduct, and is not based upon an expressed or implied contract, like the doctrine of assumed risk. Miller v. White Bronze Monument Co., 118 N. W. 518, 522, 141 Iowa, 701, 18 Ann. Cas. 957.

A plaintiff who fails to do what the law requires, or what one of prudence would ordinarily do under the same or similar circumstances, is negligent, barring recovery. Oswald v. Utah Light & Ry. Co., 117 Pac. 46, 47, 39 Utah, 245.

"Contributory negligence" is a failure to act in a given case as a man of ordinary prudence would have acted in the same or other circumstances. Gulf Pipe Line Co. v. Clayton (Tex.) 150 S. W. 268, 271.

A servant is bound to use reasonable care for his own safety with reference to the tools and appliances furnished, whether the master has furnished tools and appliances reasonably safe or not. O'Toole v. New England Gas & Coke Co., 87 N. E. 608, 609, 201 Mass. 126.

"Negligence" and "contributory negligence" are relative terms, to be determined upon the facts of each case. Quinn v. West Jersey & S. R. Co., 74 Atl. 456, 78 N. J. Law, 511, 539.

Heedlessness is not the equivalent of "contributory negligence." Decatur Light, Power & Fuel Co. v. Newsom (Ala.) 59 South. 615, 617.

In determining whether one injured was guilty of "contributory negligence," it is necessary to consider his conduct prior to the accident as well as at the time of the injury, and if, with the knowledge of which he was possessed and with which he was chargeable, he was not justified in doing as he did, he was negligent. Snow v. Coe Brass Mfg. Co., 66 Atl. 881, 882, 80 Conn. 63.

"Contributory negligence" in its judicial sense is usually the personal default of the plaintiff himself. The general rule is that, when the plaintiff's own want of ordinary care is a proximate cause of the injury, he cannot recover damages from another therefor. Smith v. Centennial Eureka Min. Co., 75 Pac. 749, 756, 27 Utah, 307 (citing Beach, Contrib. Neg. § 100).

In actions arising out of noncontractual relations, the term "incurring risk" is synonymous with "contributory negligence." Cleveland, C., C. & St. L. Ry. Co. v. Lynn (Ind.) 95 N. E. 577, 582.

"Acquiescence with knowledge" is not synonymous with "contributory negligence." An averment in a petition that the injury occurred without fault of the plaintiff is insufficient. Hesse v. Columbus, S. & H. R. Co., 50 N. E. 354, 355, 58 Ohio St. 167.

Application of doctrine

"Contributory negligence" of a servant is a matter relating solely to torts, and is governed by the principles peculiarly applicable to that branch of jurisprudence. Brown v. Rome Machine & Foundry Co., 62 S. E. 720, 724, 5 Ga. App. 142.

The term "contributory negligence" is properly applied to acts of negligence on plaintiff's part that may have contributed to the injury, and not to negligence subsequent to the injury aggravating the same. Indiana Union Traction Co. v. Ohne, 89 N. E. 507, 508, 45 Ind. App. 632.

The doctrine of contributory negligence does not apply unless there is negligence on both sides; "contributory negligence" being such an act or omission of plaintiff amounting to want of ordinary care as, concurring or co-operating with defendant's negligence, proximately caused the injury complained of. Fourche River Valley & I. T. Ry. Co. v. Tippett, 142 S. W. 520, 524, 101 Ark. 376.

"Contributory negligence" rests in the law of tort as applied to negligence, and, when such defense is established, the plaintiff's action is defeated, not because of any agreement, expressed or implied, to assume the risks of employment, but because his own misconduct or want of ordinary care was a proximate cause of the injury. To be guilty of contributory negligence, the employé must by his acts or omissions contribute proximately and concurrently with the negligence of the master to produce the injury. Such negligence by an employé involves a breach of some duty owed by the employé to the employer growing out of such relation, which in this case involved the duty of the plaintiff to exercise ordinary care in the management of the machinery under his control and in protecting himself against personal injury from contact therewith, an injury the probable consequence of which would interfere with or interrupt the performance of his duties under the contract with his employer. James v. Fountain Inn

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Mfg. Co., 61 S. E. 391, 393, 80 S. C. 232 (citing Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 479).

Same—As implying defendant's negligence

The term "contributory negligence" implies the existence of negligence on the part of defendant. Hummer's Ex'x v. Louisville & N. R. Co., 108 S. W. 885, 887, 128 Ky. 486.

"Contributory negligence" necessarily presupposes primary negligence, which would of itself sustain an action, but for the concurrence of the contributory negligence. Booth v. McLean Contracting Co., 70 Atl. 104, 105, 108 Md. 456 (quoting and adopting the definition in Vonderhorst Brewing Co. v. Amrhine, 56 Atl. 833, 836, 98 Md. 414).

Same—Willful or wanton injury

"Contributory negligence" is not a defense to an action for inflicting a willful or wanton injury. Murphy v. Wabash R. Co., 128 S. W. 481, 486, 228 Mo. 56.

The doctrine of "contributory negligence" has no application in cases of aggressive acts resulting in wanton or willful injury. "The doctrine that 'contributory negligence' will defeat recovery has no application where the injury is the result of the willful, wanton, reckless conduct of defendant." Southern Pac. R. Co. v. Svensden, 108 Pac. 262, 264, 13 Ariz. 111.

In a personal injury action against a railroad, where the evidence tended to show a conscious and reckless failure of defendant's train crew to use due care, the refusal to direct a verdict on the ground of plaintiff's contributory negligence was proper, "contributory negligence" not being a defense where defendant willfully or recklessly disregards its duty; and the fact that the verdict was for compensatory damages only, thus excluding the idea that the injury was willfully inflicted, did not render the ruling erroneous. Mills v. Atlantic Coast Line Ry. Co., 67 S. E. 565, 566, 85 S. C. 463.

To constitute "contributory negligence," barring a recovery, plaintiff's negligence must have been a portion of the efficient proximate cause of the injury complained of, and defendant's negligence must not have been willful, wanton, or malicious. Where a person's failure to exercise reasonable care for his own protection concurs with the mere negligence of another and proximately causes injury, there can be no recovery at common law; but the common-law rule may be modified by statute by allowing a recovery, but requiring the damages to be apportioned where plaintiff and defendant are both negligent, provided such statutes observe the constitutional limitations. Florida Ry. Co. v. Dorsey, 52 South. 963, 966, 59 Fla. 260.

Assumption of risk distinguished

"Assumption of risk" and "contributory negligence" are not synonymous. Parks v. St. Louis & S. R. Co., 77 S. W. 70, 73, 178 Mo. 108, 101 Am. St. Rep. 425.

"Assumption of risk" is a form of "contributory negligence." Tosty v. Morgan Co., 139 N. W. 402, 404, 151 Wis. 601.

The defenses of "assumed risk" and "contributory negligence" are separate and independent: the former arising out of contract relations, and the latter not. St. Louis, I. M. & S. R. Co. v. Brogan (Ark.) 151 S. W. 699, 704.

"Assumption of the risk of unusual danger is a form of "contributory negligence.'" But it is not the equivalent of contributory negligence where other forms, phrases, or species of contributory negligence are shown. Campshure v. Standard Mfg. Co., 118 N. W. 633, 634, 137 Wis. 155 (quoting Hennesey v. Chicago & N. W. Ry. Co., 74 N. W. 554, 99 Wis. 109).

"'Assumption of risk' and 'contributory negligence' are separate and distinct defenses; the one is based on contract, the other on tort; the former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain, or remote and improbable." Choctaw, O. & G. R. Co. v. O'Nesky, 90 S. W. 300, 302, 6 Ind. T. 180 (quoting and adopting St. Louis Cordage Co. v. Miller, 126 Fed. 495, 508, 61 C. C. A. 477, 63 L. R. A. 551).

The distinction between "assumed risk" and "contributory negligence," as defenses, is that, if assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal to the plaintiff's case, while, if contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal, or may not be, dependent upon whether a person of ordinary prudence under the circumstances would have done what the injured person did. Galveston, H. & S. A. Ry. Co. v. Hanson (Tex.) 125 S. W. 63, 68 (citing St. Louis & S. F. Ry. Co. v. Mathis, 107 S. W. 530, 101 Tex. 342; Southern Pac. Co. v. Allen, 106 S. W. 441, 48 Tex. Civ. App. 66; St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 Fed. 495, 63 L. R. A. 551; Davis Coal Co. v. Pollard, 62 N. E. 492, 158 Ind. 607, 92 Am. St. Rep. 319; Rase v. Minneapolis, St. P. & S. S. M. Ry. Co., 120 N. W. 360, 107 Minn. 260, 21 L. R. A. [N. S.] 138).

"Assumed risk" and "contributory negligence" are distinct doctrines of law. The distinction, briefly and generally stated, is: Where negligence or want of proper care on the part of a person brings about injury which he suffers, then "contributory negligence" could be applied to his act; where a servant is injured from one of the more known dangers ordinarily incident to his

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service, without negligence on his part, then his injury is ascribed to one of the ordinary risks of employment which he assumed in entering upon the service. Louisiana & Texas Lumber Co. v. Brown, 109 S. W. 950, 954, 50 Tex. Civ. App. 482.

"The two defenses of 'assumption of risk' and 'contributory negligence' are unlike because of the different states of mind in which they are rooted. Negligence is the result of inattention or oversight, whereas consent to a risk implies knowledge of the danger of the act to be performed, and the performance of the act understandingly and without constraint." A section hand was not guilty of contributory negligence in failing to use a brake and stop the hand car, when such act would merely have added to the sudden stoppage of the car which caused his injury. Lee v. St. Louis, M. & S. E. R. Co., 87 S. W. 12, 15, 112 Mo. App. 372 (quoting and adopting language of Dean v. St. Louis Woodenware Co., 80 S. W. 292, 106 Mo. App. 167, citing Adolff v. Columbia Pretzel & Baking Co., 73 S. W. 323, 100 Mo. App. 206).

"Assumption of risk" and "contributory negligence" are entirely distinct. One has to do with contract, and the other rests in tort. "Assumption of risk" is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor; while "contributory negligence" is the casual action or omission of the servant without ordinary care of the consequences, or the omission to use those precautions which ordinary prudence requires. Chicago & E. R. Co. v. Ponn, 191 Fed. 682, 687, 688, 112 C. C. A. 228.

While the doctrine of "assumption of risk" sometimes shades into that of "contributory negligence," there is a clear distinction between the doctrines; an employé being held to assume the risk of ordinary dangers of his occupation, and also those risks which are known to him or are so clearly observable that he may be presumed to know of them, while contributory negligence constitutes omission of an employé to use those precautions for his own safety which ordinary prudence requires. Wright v. Yazoo & M. V. R. Co., 197 Fed. 94, 96.

"'Contributory negligence,' as distinguished from 'assumption of risk,' rests in the law of torts as applied to negligence, and when such defense is established the plaintiff's action is defeated, not because of any agreement, expressed or implied, but because his own misconduct was a proximate cause of the injury. Nearly every case of contributory negligence on the part of an employé involves in a general sense some assumption of risk, because, in order to be guilty of contributory negligence, there must be the risk of apparent danger. When a servant risks this danger in the discharge of duty imposed on him in the course of usual duty, this would be, in an exact sense, a case of assumption of risk. But if he improperly risks the danger, which becomes the proximate cause of the injury, in doing that which is not imposed on him in the course of his usual duty, it would be contributory negligence. It should be said, however, that the two defenses are so similar that they may fade into each other." Montgomery v. Seaboard Air Line Ry., 53 S. E. 987, 988, 73 S. C. 503 (quoting and approving definition in Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 718, 61 S. C. 468, 478).

Many cases seem to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his "contributory negligence." That under certain circumstances the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employés worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. "Assumption of risk" is in such cases the acquiescence of any ordinarily prudent man in a known danger, the risk of which he assumes by contract. "Contributory negligence" in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the Supreme Court of the United States. Swick v. Ætna Portland Cement Co., 111 N. W. 115, 116, 147 Mich. 454.

The defenses of "assumption of risk" and "contributory negligence" must be regarded as distinct, and an injured servant, who has not been guilty of contributory negligence, may be precluded as a matter of law from recovery of damages from his master because he had assumed the risk. "Voluntary assumption negatives the idea of even prima facie liability. Contributory negligence displaces liability prima facie established. The former is mere passive subjection by the servant to risk of injury in known defective conditions. The latter is an act or omission on complainant's own part tending to add new danger to the situation, not necessarily incident to conditions, and bringing upon himself a harm caused not solely by them, but created in part, at least, by his own misconduct. 'Contributory negligence' is a breach of legal duty to take due care, imposed by law upon the servant, however unwilling or protesting he may be. Assumption of risk is not a duty, but is purely voluntary upon the part of the servant. The doctrine of assumption of risk rests on intelligent acquiescence with knowledge of danger and appreciation of the risks. The distinction varies from

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being clear and vital at one extreme to being vague and insignificant at the other." Assumption of risk is based, not upon the contract, but on the principle expressed by the maxim, "volenti non fit injuria." Rase v. Minneapolis, St. P. & S. S. M. Ry. Co., 120 N. W. 360, 363, 107 Minn. 260, 21 L. R. A. (N. S.) 138.

"There is a vast difference between the doctrines of 'assumption of risk' and 'contributory negligence'; the first rests in contract, and the second arises out of the negligence of the servant. The result to the person injured is the same in both cases, but the underlying principles are different and should be carefully borne in mind in every case. The maxim, 'volenti non fit injuria' cuts off a recovery where the injury is caused by one of the risks incident to the business which the servant assumes when he enters the employment. The right of recovery is cut off in the second case under the rule of law which prohibits a recovery where the negligence of the person injured contributes thereto." Obermeyer v. Logeman Chair Mfg. Co., 96 S. W. 673, 677, 120 Mo. App. 59 (quoting and adopting the distinction laid down by Judge Marshall in Blundell v. William A. Miller Elevator Mfg. Co., 88 S. W. 103, 105, 189 Mo. 552, 560).

"The doctrine of assumption of risks by the employé is distinct from the doctrine of contributory negligence, although there may arise a certain condition of facts capable of supporting either inference. This has given rise to a great deal of confusion of statement when dealing with these defenses. 'Assumption of risk' rests in the law of contract, and involves an implied agreement by the employé to assume the risk ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for breach of duty in this regard. Hooper v. Railroad, 21 S. C. 547, 53 Am. Rep. 691. The law as to waiver applies, because the relation between the employer and employé is contractual, and waiver is the voluntary relinquishment of a known right. By the contract, the employé and employer each assume certain risks; but, as in all contracts, either party may waive his right to insist upon strict performance of the other's contractual duty. When, therefore, a case arises in which it is shown (upon proper pleading) that the employé has assumed the risks from which the injury arose, or, what is the same thing in effect, has waived his right to hold the employer responsible for the risk, the employé's action is defeated because of his agreement, and not because of negligence. 'Contributory negligence,' on the other hand, rests in the law of torts as applied to negligence, and when such defense is established the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury." Wood v. Victor Mfg. Co., 45 S. E. 81, 82, 66 S. C. 482 (quoting and adopting Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 478). See, also, Chase v. Spartanburg Railway, Gas & Electric Co., 41 S. E. 899, 64 S. C. 212.

The rules of "assumed risk" and "contributory negligence" are dependent on widely separated tests and principles. Entering the employment of one who is known to furnish defective appliances might be assuming the risks arising therefrom, but it is not contributory negligence. The latter is the doing of some act or omission amounting to a want of ordinary care as, concurring with some negligent act of the defendant, is the proximate cause of the injury for which redress is sought. There must be some positive act of commission or omission that caused the injury or contributed thereto. To illustrate: If the explosion had been caused by allowing the water to get too low in the boiler, and it had been the duty of appellee to keep the water up to the safety mark, he might have been guilty of contributory negligence in failing to perform his duty; or if he had been working with the water glass at the time and thereby caused the explosion, such act might have been contributory negligence. "Assumed risk' refers to a general course of action in connection with the master's way of doing business and the appliances furnished. "Contributory negligence" refers to the question as to whether the servant acted prudently in connection with a certain matter that arose for his consideration at a certain time and place. The first is an intelligent choice; the latter is carelessness. El Paso & S. W. R. Co. v. Foth (Tex.) 100 S. W. 171, 173.

The conscious negligence of a servant in doing or omitting an act is not "assumed risk," as used in the rule of law exempting a master in such a case from liability for injury to a servant, as such words relate to the risk of injuries resulting from dangers necessarily incident to the work, or due to conditions within the servant's knowledge, or of which he must have known, had he exercised ordinary care. Houston, E. & W. T. Ry. Co. v. McHale, 105 S. W. 1149, 1151, 47 Tex. Civ. App. 360.

"Assumption of risk" and absence of "contributory negligence" may coexist; the former relating to assumption by an employé of a risk already in existence when assumed, and the latter to conduct on his part increasing an existing risk or creating or contributing proximately to a new one. Van Dinter v. Worden-Allen Co., 138 N. W. 1016, 1018, 153 Wis. 533.

"Assumption of risk" is an element distinct from "contributory negligence," and is not affected by Burns' Ann. St. 1908, § 362, providing that want of contributory negli-

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gence need not be alleged but shall be a matter of defense. "Assumption of risk" is a matter of contract, while "contributory negligence" is a matter of conduct. Cleveland, C., C. & St. L. R. Co. v. Bossert (Ind.) 87 N. E. 158, 169 (citing Cleveland, C., C. & St. R. Co. v. Scott, 64 N. E. 896, 29 Ind. App. 519–531; Bowles v. Indiana R. Co., 62 N. E. 94, 27 Ind. App. 672, 87 Am. St. Rep. 279; Baltimore & O. S. W. R. Co. v. Hunsucker, 70 N. E. 556, 33 Ind. App. 27; Indianapolis & G. Rapid Transit Co. v. Foreman, 69 N. E. 669, 162 Ind. 85, 94, 102 Am. St. Rep. 185).

"Assumption of risk" and "contributory negligence" are regarded and treated as distinct defenses in this state. The servant may be guilty of "contributory negligence" in using a machine which he knows to be defective and dangerous, notwithstanding he has protested against such use, and received the master's promise to repair. Such protest and promise relieves him in continuing in the service with such knowledge of the imputation by law of such negligence. But, if the danger to the servant arising from the use of the defective appliance is so great than an ordinarily prudent person, under the circumstances, would not have incurred it, or the servant by his own negligence in performing his work increased the risk, and thereby contributes to his injury, a recovery will be denied. St. Louis Southwestern Ry. Co. of Texas v. Kern (Tex.) 100 S. W. 971, 973.

"Contributory negligence" rests in the law of torts, as applied to negligence, and when such defense is established the plaintiff's action is defeated not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury, and is distinguished from "assumption of risk," as it rests in the law of contract, and involves an implied agreement by the employé to assume the risks ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to hold the employer for a breach of duty in this regard. Hall v. Northwestern R. Co., 62 S. E. 848, 850, 81 S. C. 522 (citing and quoting Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 468).

"Contributory negligence" is founded upon an absence of ordinary care, which causes or contributes to the injury, being distinct from the doctrine of "assumed risk," which is founded upon the maxim, "volenti non fit injuria." St. Louis Cordage Co. v. Miller, 126 Fed. 495, 505, 61 C. C. A. 477, 63 L. R. A. 551.

Children and persons under disability

An ordinarily bright and intelligent boy, 12 years old, living in a city in which electric light and power wires are in constant use on nearly all of the principal streets and highways, who, having knowledge of the danger, but not of its extent, purposely takes hold of such a wire in order to obtain a shock, and is injured thereby, is as a matter of law guilty of "contributory negligence." Johnston v. New Omaha Thomson-Houston Electric Light Co., 113 N. W. 526, 527, 78 Neb. 27, 17 L. R. A. (N. S.) 435.

A child playing on a stack of building materials must exercise for his own protection the degree of care usually exercised by persons of his age, experience, and intelligence under similar circumstances; and where he fails to do so, and by reason thereof he is injured, he is guilty of "contributory negligence," precluding recovery. Louisville R. Co. v. Esselman (Ky.) 93 S. W. 50, 52.

The concurrence of the fault of two wrongdoers by which one of them is injured is called "contributory negligence" on the part of the injured party. When the plaintiff is an infant of tender years, that fact is one circumstance to be weighed by the jury in determining the fact of culpable negligence in the defendant, and also in determining the fact of contributory negligence in the plaintiff. If the jury is satisfied that in fact the plaintiff by reason of his extreme youth was incapable of committing a culpable fault or negligence in his acts or omissions as proved, the plaintiff has sustained his allegation that his own fault did not concur with that of the defendant in causing the injury. The fact that the fault of a third party may have concurred with that of the defendant in producing the injury does not prevent the plaintiff from pursuing his remedy separately against the defendant for his tort, and it is immaterial that this concurring fault of a third party is that of an infant plaintiff's parents in negligently permitting their child to be unattended in a place of danger. Wilmot v. McPadden, 61 Atl. 1069, 1072, 78 Conn. 276.

A person whose hearing has been so far impaired that he is compelled to use an ear trumpet in ordinary conversation, who walks along a railroad track without a continual exercise of vigilance for approaching trains, and who is a trespasser while on the track, is guilty of "contributory negligence," precluding a recovery for his death by being struck by a train, in the absence of willful negligence on the company's part. Hamlin v. Columbia & P. S. R. Co., 79 Pac. 991, 992, 37 Wash. 448.

Comparative negligence

"Contributory negligence" in most jurisdictions is used as referring to such negligence on the part of plaintiff, contributing to or causing the injury to himself, as will prevent a recovery by him. In Georgia there is a doctrine, sometimes called that of "comparative negligence," under which, if plaintiff is not without fault, but his negligence does not amount to such failure to use ordinary care as will prevent a recovery, he may recover damages of defendant in a proper cause, but the amount of his recovery will be re-

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duced in proportion to the amount of default attributable to him. In this term "contributory negligence" will generally be found to have been used in Georgia, rather than in the sense of negligence which will prevent a recovery. Savannah Electric Co. v. Crawford, 60 S. E. 1056–1058, 130 Ga. 421.

"One is guilty of 'contributory negligence' who negligently does or omits to do something which helps to bring about an accident whereby he is injured, and contributory negligence is a complete bar to an action for damages by the injured party, even if the other party was also guilty of negligence which contributed to cause the accident, and it is immaterial which party was the most negligent, or which contributed most to cause the accident." St. Louis Southwestern Ry. Co. of Texas v. Arnold, 87 S. W. 173, 176, 39 Tex. Civ. App. 161.

One whose negligence contributes to his injury cannot recover from another, though the carelessness of the latter was the more proximate cause of the injury. Chicago, M. & St. P. R. Co. v. Bennett, 181 Fed. 799, 801, 104 C. C. A. 309.

As confession and avoidance

The defense or plea of "contributory negligence" is in the nature of a confession and avoidance. It, standing alone, necessarily admits that the plaintiff was injured by the negligence of defendant. Buechner v. City of New Orleans, 36 South. 603, 605, 112 La. 599, 66 L. R. A. 334, 104 Am. St. Rep. 455.

Contributing or proximate cause

" 'Contributory negligence' is a want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury could not have occurred." Birsch v. Citizens' Electric Co., 93 Pac. 940, 942, 36 Mont. 574; Burns v. Southern R. Co., 43 S. E. 679, 681, 65 S. C. 229 (quoting and adopting definition in Bowen v. Southern Ry. Co., 36 S. E. 590, 58 S. C. 222); Charping v. Toxaway Mills, 50 S. E. 186, 188, 70 S. C. 470 (quoting and adopting definition in Cooper v. Georgia, C. & N. Ry. Co., 34 S. E. 16, 56 S. C. 91, 95); Duncan v. Greensville County (S. C.) 53 S. E. 367, 368 (quoting and adopting definition in Bowen v. Southern Ry. Co., 36 S. E. 590, 58 S. C. 222); Hone v. Mammoth Min. Co., 75 Pac. 381, 383, 27 Utah, 168; Texas & N. O. R. Co. v. Reed, 116 S. W. 69, 74, 54 Tex. Civ. App. 26; Webster v. Atlantic Coast Line R. Co., 61 S. E. 1080, 1085, 81 S. C. 46; Winters v. Baltimore & O. R. Co., 177 Fed. 44, 49, 100 C. C. A. 462 (citing Alaska United Gold Min. Co. v. Keating, 116 Fed. 561, 566, 53 C. C. A. 655; Montgomery Gaslight Co. v. Montgomery & E. Ry. Co., 5 South. 735, 86 Ala. 372; Moakler v. Willamette Val. Ry. Co., 22 Pac. 948, 18 Or. 189, 6 L. R. A. 656, 17 Am. St. Rep. 717; Woodell v. West Virginia Imp. Co., 17 S. E. 386, 38 W. Va. 23, 40. See, also, 1 Beach, Contrib. Neg. § 7; Missouri Pac. R. Co. v. Moseley, 57 Fed. 921, 925, 6 C. C. A. 641; Southern Bell Telephone & Telegraph Co. v. Watts, 66 Fed. 460, 466, 13 C. C. A. 579; Motey v. Pickle Marble & Granite Co., 74 Fed. 155, 157, 20 C. C. A. 366; Plant Inv. Co. v. Cook, 74 Fed. 503, 20 C. C. A. 625); Central Texas & N. W. Ry. Co. v. Gibson (Tex.) 83 S. W. 862, 863. Also such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. St. Louis Nat. Stock Yards v. Godfrey, 65 N. E. 90, 93, 198 Ill. 288 (citing Beach, Contrib. Neg.). "To constitute 'contributory negligence' there must be a want of ordinary care on the part of the plaintiff and a proximate connection between that and the injury." Where the contributory negligence of a passenger, injured by the derailment of a car of the train on which he was riding, contributed to the injury, he was not entitled to recover, though his negligence did not contribute to the derailment." Winters v. Baltimore & O. R. Co., 163 Fed. 106, 110 (quoting and adopting definition in Plant Inv. Co. v. Cook, 74 Fed. 503, 20 C. C. A. 625, which adopted definition as given in 1 Beach, Contrib. Neg. § 7). "It is thus seen that contributory negligence by a plaintiff can never exist, except when the injury has resulted from the negligence of defendant as a concurring proximate cause." Scott v. Seaboard Air Line Ry., 45 S. E. 129, 132, 67 S. C. 136 (quoting and adopting Cooper v. Georgia, C. & N. Ry. Co., 34 S. E. 16, 56 S. C. 95). "To constitute 'contributory negligence,' there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. To make such a want of care a proximate cause of an injury, it must, according to this well-considered definition, contribute directly and materially to the infliction of the injury." Indianapolis & M. Rapid Transit Co. v. Edwards, 74 N. E. 533, 534, 36 Ind. App. 202 (quoting and adopting from Beach, Contrib. Neg. p. 7).

"Contributory negligence" is such negligence on the part of plaintiff as helped to produce the injury complained of. Akin v. Bradley Engineering & Machinery Co., 99 Pac. 1038, 1039, 51 Wash. 658.

"Contributory negligence" is such an act of omission of one suing as amounts to a want of ordinary care concurring or co-operating with a negligent act of another as a proximate cause of the injury complained of. International & G. N. R. Co. v. Schubert (Tex.) 130 S. W. 708, 710; Philbin v. Denver City Tramway Co. (Colo.) 85 Pac. 630, 631 (quoting and adopting the definition in Beach, Con. Neg. § 7); Thompson & Ford Lumber Co. v. Thomas (Tex.) 147 S. W. 296, 303;

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Richmond & D. R. Co. v. Pickleseimer, 10 S. E. 44, 45, 85 Va. 798; Galveston, H. & S. A. R. Co., v. Pendleton, 70 S. W. 996, 998, 30 Tex. Civ. App. 431 (citing Galveston, H. & S. A. Ry. Co. v. Henning, 39 S. W. 302). To constitute contributory negligence there must be a want of care on the part of the plaintiff, and a proximate connection between that and the injury. Lincoln Traction Co. v. Brookover, 109 N. W. 168, 77 Neb. 217.

"Contributory negligence" which will defeat a recovery for a personal injury must be such as directly contributes to the injury at the time of its infliction, and the negligence must be the proximate cause of the injury. Neary v. Northern Pac. Ry. Co., 110 Pac. 226, 235, 41 Mont. 480; Acton v. Fargo & M. St. Ry. Co., 129 N. W. 225, 227, 20 N. D. 434; Basler v. Sacramento Gas & Electric Co., 111 Pac. 530, 532, 158 Cal. 514, Ann. Cas. 1912A, 642.

" 'Contributory negligence' is the want of reasonable care upon a part of the person injured, which concurred with the negligence of the servants or employés of defendant inflicting the injury." International & G. N. R. Co. v. Trump, 94 S. W. 903, 906, 42 Tex. Civ. App. 536 (quoting and adopting the definition in Texas & P. Ry. v. Curlin, 36 S. W. 1004, 13 Tex. Civ. App. 505; citing Rost v. Missouri Pac. Ry. Co., 12 S. W. 1131, 76 Tex. 172; Texas & P. Ry. Co. v. Gorman, 21 S. W. 158, 2 Tex. Civ. App. 144; Grand Trunk Ry. v. Ives, 12 Sup. Ct. 679, 144 U. S. 408, 36 L. Ed. 485; Baltimore & P. Ry. Co. v. Jones, 95 U. S. 441, 24 L. Ed. 506; Texas & N. O. Ry. Co. v. Black [Tex.] 44 S. W. 674).

"Contributory negligence" is such negligence on the part of one injured as that, but for the same, his injury would not have been received. Louisville & N. R. Co. v. Ueltschi's Ex'rs (Ky.) 97 S. W. 14, 16; Kent Mfg. Co. v. Zimmerman, 110 Pac. 187, 191, 48 Colo. 388.

"Contributory negligence" is negligence on the part of the party injured which directly and proximately contributed to and caused the injury. Gulf, C. & S. F. Ry. Co. v. Tullis, 91 S. W. 317, 319, 41 Tex. Civ. App. 219 (quoting and adopting the definition in Citizens' Ry. Co. v. Creasy [Tex.] 27 S. W. 945); Brister & Co. v. Illinois Cent. R. Co., 36 South. 142, 144, 84 Miss. 33.

"Contributory negligence" is such negligence on the part of plaintiff as helped to produce the injury complained of. Akin v. Bradley Engineering & Machinery Co., 99 Pac. 1038, 1040, 51 Wash. 658.

"Contributory negligence" is such negligence on the part of the injured party as materially contributes to his injury. Cleveland, C., C. & St. L. Ry. Co. v. Henry (Ind.) 80 N. E. 636, 640.

"Contributory negligence" involves the doing by the injured party, or an omission to do, some act or duty which a reasonably prudent person would have done or omitted to do, which doing or omission proximately contributed to the injury complained of. Columbia Creasoting Co. v. Beard, 89 N. E. 321, 323, 44 Ind. App. 310.

"Contributory negligence" is a negligent act committed by the person injured, which was the proximate cause of his being injured, and such negligence is a proximate cause of his injury, if the injury would not have occurred had the negligent act not been committed. Atoka Coal & Mining Co. v. Miller, 104 S. W. 555, 561, 7 Ind. T. 104.

Pleas of "contributory negligence" must impute to the plaintiff an omission of duty or commission of some negligent or dangerous act which proximately contributes to the injury, and such conduct or acts must be shown to be negligent or culpable otherwise than by the mere statement that they are so. Louisville & N. R. Co. v. Barganier, 53 South. 138, 141, 168 Ala. 567.

"Contributory negligence" is such negligence on the part of plaintiff as, concurring with the negligence of defendant, proximately contributes to cause the injury complained of. Contributory negligence, to preclude a recovery, must concur with a negligent act or omission of defendant and proximately contribute to cause the injury. St. Louis Southwestern Ry. Co. of Texas v. Parks, 90 S. W. 343, 347, 40 Tex. Civ. App. 480.

The defense of "contributory negligence" rests on some fault or omission of duty on the part of the plaintiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff, but for which the injury would not have happened. It applies when the plaintiff is asking for damages for an injury which would not have happened but for his own carelessness. Choctaw, etc., R. Co. v. Jones, 92 S. W. 244, 246, 77 Ark. 367, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430.

"Contributory negligence" means any failure on the part of plaintiff to exercise that degree of care for his own safety usually exercised by persons of his age, experience, intelligence, and discretion, and when by such failure he caused or helped to bring about the injuries of which he complains, and when he would not have been injured but for such failure. D. H. Ewing & Sons v. Callahan (Ky.) 105 S. W. 387, 388.

"Contributory negligence" must be such as contributed directly to the injury complained of. The court below erred in instructing that plaintiff was required to prove his case by preponderance of the evidence "without disclosing any negligence on his part," without adding the words "which contributed to the injury complained of." Ver-

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trees v. Gage County, 115 N. W. 863, 864, 81 Neb. 213.

It was proper to define "contributory negligence" as "where plaintiff does some negligent act, or omits to perform some act which, co-operating with some negligent act or omission on the part of defendant, contributes to and is the proximate cause of the injury." Texas Cent. R. Co. v. Johnson, 111 S. W. 1098, 1099, 51 Tex. Civ. App. 126.

"When a plaintiff, through the negligence of defendant, is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency for which he is not responsible and for which defendant is responsible, he acts wildly or negligently and suffers in consequence, such negligent conduct under these circumstances is not 'contributory negligence'; for the reason that persons in great peril are not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. In such case the negligence of the defendant is the 'proximate cause' of the injury, and plaintiff may have his action, * * * even though the injury would not have happened if the acts had not been done." Texas Midland R. Co. v. Byrd, 90 S. W. 185, 187, 41 Tex. Civ. App. 164 (quoting and adopting definition in Beech. Contrib. Neg. § 14; International & G. N. Ry. Co. v. Neff, 28 S. W. 283, 87 Tex. 303).

"Contributory negligence" consists in the performance of some negligent act or negligently omitting to do some act, which, co-operating with some act or omission of the defendant, contributes to the injury; hence the omission of the modifier "negligently" in in an instruction on that subject, in a personal injury action by a passenger, is error. Selman v. Gulf, C. & S. F. Ry. Co. (Tex.) 101 S. W. 1030, 1031.

"Contributory negligence" is the casual action or omission of the person injured, without ordinary care of consequences. It rests in tort. Contributory negligence is no element or attribute of assumption of risk. To constitute contributory negligence there must be a want of ordinary care on the part of the servant and a proximate connection between that and the injury. Missouri, K. & T. R. Co. v. Wilhoit, 98 S. W. 341, 343, 6 Ind. T. 534.

An instruction that "contributory negligence" in its legal signification is such an act or omission on plaintiff's part, amounting to want of ordinary care and prudence, as, concurring or co-operating with some negligent act of the defendant, is a proximate cause or occasion of the injury complained of, was proper. Missouri, K. & T. Ry. Co. of Texas v. Turner (Tex.) 138 S. W. 1126, 1127.

"Contributory negligence" in its legal signification is such an act or omission on the part of plaintiff, amounting to want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause for the occasion of the injury complained of. An instruction defining "contributory negligence" as such negligence on plaintiff's part that, but for the same, he would not have been injured, is erroneous. Leary v. Anaconda Copper Min. Co., 92 Pac. 477, 478, 36 Mont. 157 (quoting and adopting 1 Beach, Contrib. Neg. § 7).

There can be no "contributory negligence" by plaintiff, except there is a failure on his part, or on the part of some person with whose negligence he is chargeable, to exercise ordinary care to avoid the injury, and such lack of ordinary care is the proximate cause of the injury. Jackson v. Sumpter Val. Ry. Co., 93 Pac. 356, 360, 50 Or. 455.

"By the phrase 'contributory negligence' * * * is meant a want of ordinary care on the part of said plaintiff * * * which concurred with the negligence of the defendant or its agents or employés, if any negligence there was on the part of defendant, its agents and employés, causing the injury, if any." International & G. N. Ry. Co. v. Tasby (Tex.) 100 S. W. 1030, 1031.

The plea of "contributory negligence" as a bar to recovery of damages in an action against a party primarily liable for an injury resulting from his negligence is available on proof that the accident could not have occurred if plaintiff had not failed to exercise care to avoid danger commensurate with his mental and physical capacities. Hovden v. Seattle Electric Co., 180 Fed. 487, 488.

An instruction that a man is guilty of "contributory negligence" either when he does something which an ordinarily prudent, careful man would not do under the circumstances, or when he fails to take such precautions for his safety as an ordinarily prudent man would take under the same circumstances and conditions, and that if such negligence contributes to any injury, which he receives, and is the proximate cause thereof, he cannot recover, whether defendant was guilty of negligence or not, was not error. Duteau v. Seattle Electric Co., 88 Pac. 755, 756, 45 Wash. 418.

Though defendant may be guilty of negligence and of violation of law, plaintiff cannot recover if his own negligence contributed proximately to the happening of the accident causing the injury. Curtis v. St. Louis & S. F. R. Co., 131 S. W. 947, 948, 96 Ark. 394, 34 L. R. A. (N. S.) 466, Ann. Cas. 1912B, 685.

"Contributory negligence" implies some negligence on the part of the defendant; and the general rule is that a plaintiff, complaining of personal injuries caused by a train or car, who was himself guilty of negligence, which contributed proximately and directly to the injuries, cannot recover, although the

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defendant was also guilty of negligence. Bennichsen v. Market St. Ry. Co., 84 Pac. 420, 421, 149 Cal. 18.

"Contributory negligence" is negligence, not only of the one committing the injury, but also of the person injured, and both must proximately contribute to the injury to defeat recovery therefor; and hence an instruction that "any" omission by plaintiff co-operating with defendant's negligence causing the injury defeats recovery is erroneous. Adams v. Gulf, C. & S. F. Ry. Co. (Tex.) 105 S. W. 526, 527.

There are two essential elements of "contributory negligence"; want of ordinary care and causal connection between the act and the injury complained of and where the injury does not, according to the ordinary course of events, follow from the act, then the act and the injury are not sufficiently connected to make the act the proximate cause of the injury. Fitzgerald v. International Flax Twine Co., 116 N. W. 475, 479, 104 Minn. 138.

The term "contributory negligence" assumes that it is contributory only to some other act or omission constituting negligence in the opposite party. The fact that a cow, struck at a public crossing by a railroad train, was at large, did not contribute to the injury any more than the construction or operation of the railroad contributed thereto; and where proof that it was at large was the only proof of contributory negligence, the court properly refused to submit the question of contributory negligence to the jury. France v. Salt Lake & O. R. Co., 88 Pac. 1, 2, 31 Utah, 302.

Plaintiff, in an action for personal injuries, who was at the time and place of the accident guilty of negligence but for which it would not have happened, was guilty of "contributory neglect"; but it was not error to refuse to so instruct, where the court in its instruction pointed out in a general way the acts in which the negligence, if any, consisted. South Covington & C. St. Ry. Co. v. Cleveland (Ky.) 100 S. W. 283, 285.

"Contributory negligence" is a want of ordinary care on the part of a person injured by actual negligence of another, combining and concurring with that negligence and contributing to the injury, and can never exist except where the injury has resulted from the negligence of the defendant as a concurrent proximate cause. Wilson v. Southern Ry., 53 S. E. 968, 975, 73 S. C. 481.

Same—One of causes or sole cause

Negligence, to be contributory, must be one of the proximate causes of the accident. Bourrett v. Chicago & N. W. Ry. Co. (Iowa) 121 N. W. 380, 382.

Same—Remote cause

An instruction which, while purporting to give a legal definition of "contributory negligence," demands that such negligence shall be found the sole and direct cause of the accident, is incorrect. Hanheide v. St. Louis Transit Co., 78 S. W. 820, 822, 104 Mo. App. 323.

An act or omission, to constitute "contributory negligence," must be something more than a remote cause in the chain of circumstances, but must be such as operates as the proximate cause, or one of the proximate causes, and not merely as a condition. Union Pacific Ry. Co. v. Connolly, 109 N. W. 368, 377, 77 Neb. 254 (citing 2 Words and Phrases, p. 1544).

Degree of care

"'Contributory negligence' is simply want of ordinary care in the situation." Yazoo & M. V. R. Co. v. Humphrey, 36 South. 154, 156, 83 Miss. 721.

"'Contributory negligence' is any negligence upon the part of the plaintiff directly contributing to her injury." Hensler v. Stix, 88 S. W. 108, 114, 113 Mo. App. 162.

"Contributory negligence" is shown by evidence that plaintiff himself was guilty of some negligence which entered into and contributed to the injury at the time of the accident. Wagner v. People's Ry. Co. (Del.) 75 Atl. 610, 611, 7 Pennewill, 393.

"Contributory negligence" is the want of such care and prudence as an ordinarily careful and prudent person would have used under the same circumstances. Buckner v. Stockyards Horse & Mule Co., 120 S. W. 766, 769, 221 Mo. 700; St. Louis Southwestern Ry. Co. v. Burdg, 124 S. W. 239, 240, 93 Ark. 88; Williams v. Ballard Lumber Co., 83 Pac. 323, 326, 41 Wash. 338; Marshall & E. T. Ry. Co. v. Petty (Tex.) 145 S. W. 1195, 1197; Hull v. Seattle, R. & S. Ry. Co., 110 Pac. 804, 805, 60 Wash. 162.

"Contributory negligence" means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from harm, which failure helped or caused the injury. Schultz v. Michigan United Rys. Co., 123 N. W. 594, 599, 158 Mich. 665, 27 L. R. A. (N. S.) 503 (dissenting opinion).

In a personal injury action, where the plaintiff is guilty of "contributory negligence," the negligence which is to preclude him from recovering is such that he could by ordinary care have avoided the consequence of defendant's negligence. Vizacchero v. Rhode Island Co., 59 Atl. 105, 107, 26 R. I. 392, 69 L. R. A. 188.

A person who receives an injury is guilty of "contributory negligence" where he does that thing which no reasonable man would do, and is thereby made the subject of the injury complained of. Chicago & N. W. Ry. Co. v. Thomson, 128 Ill. App. 594, 599, 600.

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"Contributory negligence" is a question of conduct. If a servant is defeated by the rule of contributory negligence, it must be because his conduct at the time of the accident and under all of the existing circumstances fell short of ordinary care. Diamond Block Coal Co. v. Cuthbertson, 76 N. E. 1060, 1067, 166 Ind. 290.

An instruction that "negligence means the failure to use or exercise that degree of care which the law requires; that is, ordinary care, or the doing of that which ordinary care and caution would dictate should not be done," followed by an instruction that "contributory negligence would be negligence as above defined, on the part of plaintiff, uniting with the negligence of the defendant, and contributing to the result and injury and damage complained of," does not give an incorrect definition of "contributory negligence," in that it excludes from consideration acts of omission, since the error, if any, in the first instruction consists only in the punctuation thereof, and by the transposition of the semicolon, after the word "requires," with the comma, after the words "ordinary care," the error would be cured. Struble v. Burlington, C. R. & N. R. Co., 103 N. W. 142, 144, 128 Iowa, 158.

"Contributory negligence," when predicated on the omission to do some act to avoid the injury complained of, is the failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, where such failure contributed to cause the injury; and an instruction that if a man of ordinary care, situated as a shipper of live stock was situated, and while his cattle were in cattle pens preparatory to loading, could and would have taken the cattle to water, he was guilty of negligence in not watering the cattle, was properly refused, because submitting an improper test. San Antonio & A. P. Ry. Co. v. Broad-Davis Cattle Co. (Tex.) 140 S. W. 514, 515.

The test as to whether a party injured by his horse becoming frightened by a hand car was guilty of "contributory negligence" was whether he acted as an ordinarily prudent person, and not whether it was necessary for him to drive over the railroad tracks. St. Louis Southwestern R. Co. v. Everett, 89 S. W. 457, 458, 40 Tex. Civ. App. 285.

"Contributory negligence" is the absence of that care for safety which the law exacts from him who seeks redress for an injury done him by the negligence of another. In this respect the law exacts such judgment respecting dangers and risks incident to the circumstances as a reasonable man would form, and such vigilance in observing the approach of danger, and such care in avoiding it, as a prudent man, reasonably careful of his safety, would exercise. Miller v. Atlanta & C. Air Line R. Co., 57 S. E. 345, 348, 144 N. C. 545 (quoting with approval from New York, L. E. & W. R. Co. v. Ball, 21 Atl. 1052, 53 N. J. Law, 283).

Where defendant, by his wrongful acts or omissions, constituting a breach of legal duty, throws the plaintiff off his guard, or when the plaintiff acts on a reasonable supposition of safety induced by the defendant, when there is in reality danger, to which the plaintiff is exposing himself in a way and to an extent which, but for defendant's inducement, might be imputed to plaintiff as negligence sufficient to prevent a recovery, such conduct on plaintiff's part, so induced, is not "contributory negligence." Millsap v. Beggs, 97 S. W. 956, 959, 122 Mo. App. 1.

The standard for determining whether plaintiff has exercised due care is the conduct of an ordinarily prudent person under similar circumstances; and, if plaintiff did not exercise the care which an ordinarily prudent person would have exercised for her own protection under similar circumstances, she was guilty of "contributory negligence," irrespective of her actual intelligence or prudence in general. Dobson v. Duncan, 73 S. E. 875, 878, 90 S. C. 414.

Error of judgment

A person placed by another's negligence in such circumstances as to him appear to threaten his life or serious personal injury, who in an effort to save his life makes a choice of means from which injury results, is not guilty of "contributory negligence," although his act is not such as might have been expected from an ordinarily prudent person under like circumstances. Gulf, C. & S. F. Ry. Co. v. Knott, 36 S. W. 491, 493, 14 Tex. Civ. App. 158.

Failure to avoid danger

"By 'contributory negligence' is meant such negligence or want of reasonable care on the part of the plaintiff as was a cooperating cause, and was directly instrumental in causing or bringing the injuries in question upon him, and may consist in his voluntarily and unnecessarily exposing himself to the danger, or in failing to avoid danger when the danger is known to him, or when by the exercise of reasonable care and prudence on his part he would have discovered the danger in time to have avoided it." Huggard v. Glucose Sugar Refining Co., 109 N. W. 475, 479, 132 Iowa, 724.

Same—By employé

A servant, though knowing of defects in appliances operated by him, may recover for injuries resulting therefrom, where he did not know of the danger in the use of the appliances. Muse v. Abeel (Tex.) 124 S. W. 430.

A servant's knowledge of defective condition and of the dangers arising therefrom shows "contributory negligence," or not, ac-

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cording to whether a person of ordinary prudence under all the circumstances would have done as the servant did. Muren Coal & Ice Co. v. Copeland, 90 N. E. 489, 491, 46 Ind. App. 230.

Where a servant continues to work with knowledge, actual or constructive, of danger to which an ordinarily prudent person refuses to subject himself, the servant is guilty of "contributory negligence." Novelty Theater Co. v. Whitcomb, 106 Pac. 1012, 1013, 47 Colo. 110, 37 L. R. A. (N. S.) 514.

Where defendant telephone company gave plaintiff, a lineman, a tape measure which contained metal wires concealed inside, and directed him to measure the distances between the wires, plaintiff, not knowing that the tape contained metal which might come into contact with the telephone wires, was not guilty of "contributory negligence," where the tape came into contact with the wires and injured him. Murphy v. Hudson River Telephone Co., 89 N. E. 1106, 196 N. Y. 505.

An employé is guilty of "contributory negligence," which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them, if in his power to do so. Neeley v. Southwestern Cotton Seed Oil Co., 75 Pac. 537, 541, 13 Okl. 356, 64 L. R. A. 145 (citing Kane v. Northern C. Ry. Co., 9 Sup. Ct. 16, 17, 128 U. S. 91, 95, 32 L. Ed. 339).

If the servant is skilled in the work required, and equally or better qualified than the master to know the danger and the danger is so obvious that he must have known it, but nevertheless undertakes it, he cannot complain if injured. Nicholas v. E. H. Abadie Co. (Ky.) 124 S. W. 325, 327.

"If a workman, by some overt act of his, comes in contact with the machinery which he is operating, and which is under his immediate control, he will ordinarily be held guilty of 'contributory negligence'; but where, in the course of his employment, he comes in contact with unguarded machinery which he is not operating, and which is not under his immediate control, a different rule applies. * * * The rule is well established that a person is not necessarily guilty of contributory negligence as a matter of law simply because he had previous knowledge of the defect which caused the injury." Rector v. Bryant Lumber & Shingle Mill Co., 84 Pac. 7, 8, 41 Wash. 556.

Where a section hand knew that all the trains on a track on which he stepped, on being warned by his foreman of the approach of a train on the track where he was working, approached from the same direction and that about 25 trains a day passed that point on double tracks, and he failed to look in the direction from which a train was approaching on the track on which he was injured, he was guilty of "contributory negligence." St. Louis & S. F. R. Co. v. McMinn, 84 Pac. 134, 135, 72 Kan. 681.

A brakeman, thrown from a freight car and injured by the pulling out of a defective handhold, was not charged with notice of its condition, unless he either had actual knowledge thereof, or must have necessarily obtained such knowledge in the ordinary discharge of his duties. The rule that a servant is negligent in voluntarily choosing a dangerous way when a safe way is open to him, precluding a recovery for injuries sustained, applies only when the way chosen is obviously unsafe, or the danger known to the servant. Missouri, K. & T. Ry. Co. of Texas v. Hawley (Tex.) 123 S. W. 726, 731.

A servant on a railroad engine, who carelessly failed to discover that there was plenty of sand in the sand bucket, and got off the engine, in the dark and without a lantern, to get sand, in consequence of which he fell and was injured by having his hand run over by the engine, was guilty of "contributory negligence." Walker v. Louis-Werner Sawmill Co., 88 S. W. 988, 990, 76 Ark. 436.

A servant who has been induced to continue work by his master's promise to remedy dangerous conditions is not guilty of "contributory negligence" so long as he may reasonably expect the master's promise to be kept, unless the danger is so obvious that a reasonably prudent person would not continue the work. Benak v. Paxton & Vierling Iron Works, 124 N. W. 461, 462, 85 Neb. 836.

A carpenter, who sat on a beam and used a timber as a lever to pry out the overlap in other timbers, and fell when the lever timber broke under his pressure, was guilty of "contributory negligence," barring recovery, when no such danger would arise from the method in which he was directed to perform the work. Quick v. Millfort Mill Co., 59 S. E. 365, 78 S. C. 472.

Where in a mine it was customary to push giant powder into holes in the rock by means of pieces of gas pipe with wooden plugs driven in the end, and a miner, finding that the pieces of gas pipe were in use by others temporarily, placed a stick of powder by means of a shank of a steel drill belonging to himself, and was injured by an explosion from a spark resulting from the contact between the steel drill and the flinty rock, he could not recover, because of his "contributory negligence." Whaley v. Coleman, 88 S. W. 119, 120, 113 Mo. App. 594.

Where an employé of a railroad company in charge of a hand car is running the car out of the yards on the main track, and is charged with the duty of looking out for switches in the yard limits, if he knew, or by

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the exercise of ordinary care could have seen, that a switch was open in time to avert the derailment of his car, and he failed to use such care, he would be guilty of "contributory negligence," precluding a recovery for injuries received by such derailment. St. Louis Southwestern Ry. Co. of Texas v. Anderson (Tex.) 124 S. W. 1002, 1003.

An employé of a railroad company, whose duty it is to work on the track over which trains are being run to assist in the work of repairing, is not guilty of "contributory negligence" as a matter of law because he fails to constantly look and listen for the approach of trains. St. Louis, I. M. & S. Ry. Co. v. Jackson, 93 S. W. 746, 748, 78 Ark. 100, 6 L. R. A. (N. S.) 646, 8 Ann. Cas. 328.

"Contributory negligence" implies fault and want of care, and a person to be guilty of it must be invested with the right and power to act for himself or by his agent, and be in such a position of independence that he can voluntarily do or not do the thing that charges him with negligence. Although the rules of a railroad company direct that the enginemen must show their orders to the firemen, who are required to read them, and that after reading them they must keep such orders in mind, and, should there be occasion to do so, must remind the enginemen of them, the fireman could not be held guilty of "contributory negligence," precluding recovery for death caused by collision by reason of the disobedience by the conductor and engineer of a train dispatcher's order, in the absence of a showing that such order was shown to the fireman. Sinclair's Adm'r v. Illinois Cent. R. Co. (Ky.) 100 S. W. 236, 238.

Deceased was injured by falling into a lye vat maintained on defendant's premises, where deceased was employed to clean machinery. Deceased had been working on the premises for six years, and knew that the lye was heated by the injection of steam, and when so heated in cold weather gave off steam in such volume that when the doors of the vat were open it concealed the top from view. Held, that deceased was guilty of "contributory negligence," whether he could have seen that the vat was open, and thoughtlessly walked into it, or whether it was so clouded with steam that he could not see it, and walked into it without knowing whether it was open or not. Missouri, K. & T. Ry. Co. of Texas v. Barnes, 85 S. W. 1006, 1008, 37 Tex. Civ. App. 645.

Where the complaint, in an action by a servant for personal injuries, showed that plaintiff continued for a month in the use of appliances so simple in construction and use as to be easily understood by the inexperienced, the complaint was bad, since, if it was negligence per se for defendant to use them, it was "contributory negligence" for plaintiff to continue in the employment. Goure v. Storey, 105 Pac. 794, 795, 17 Idaho, 352.

Though a servant incurs the risks of place or machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose that they may be safely used with great skill and care, the mere knowledge of the defects on the servant's part will not defeat a recovery for injuries. George v. St. Louis & S. F. R. Co., 125 S. W. 196, 209, 225 Mo. 364.

In an action for injuries to an employé operating a sausage machine, in consequence of his fingers being caught by the revolving worm, the evidence showed that he had been advised as to how to operate such a machine, and had been cautioned to be careful of his fingers, and not to put them into the machine. He knew that, if he got his fingers into the machine, they would be cut off. Held, that he was guilty of "contributory negligence" as a matter of law. Fortune v. Hall, 89 N. E. 1100, 195 N. Y. 578.

Where a timberman, in the employ of a lumber company at a log chute, had a right to expect that nothing would come through the mill except freshly sawed light-colored timber and an old dark-colored boomstick came over the chute at night, which he could not see, though he had kept an outlook, without a light, which the company had omitted to furnish at the chute, and could not be apprised of its approach any other way before it was so close to him that he could not escape, he was not negligent in failing to get out of the way. Forseth v. Iron River Lumber Co., 124 N. W. 1036, 1038, 142 Wis. 87.

Where it was an employé's duty to put his hand under the die of a leather stamping machine and remove the leather after the ram plate had descended, and it would not have been hurt except for a secret danger, he was not guilty of "contributory negligence" where he neither knew, nor ought in the exercise of ordinary care to have known, of the danger. Berger v. Abel & Bach Co., 124 N. W. 410, 413, 141 Wis. 321.

A servant is not entitled to recover for injuries sustained while in the service of his master unless he has established that he did not know of the defects which caused his injury, and did not have equal opportunities with his master of knowing thereof at the time he was so injured. Bettis v. Chicago Coated Board Co., 145 Ill. App. 390, 393.

Same—Crossing or going upon railroad tracks

"Contributory negligence" is a failure to exercise ordinary care for one's own safety. The failure of a volunteer on a railroad right of way to stop, look, and listen, which failure directly contributed to his death, precludes a recovery. Springer v. St. Louis Southwestern R. Co., 161 Fed. 801, 811, 88 C. C. A. 619.

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A person who drives rapidly over a railroad crossing without looking at all for an approaching train, or taking any precautions as to his own safety, is "negligent," though the gates at the crossing are open. Koch v. Southern California R. Co., 84 Pac. 176, 177, 148 Cal. 677, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795.

A person who, for his own convenience, walks on the main track of a railroad, and does not look or listen, or take any precaution for his own safety, and while so walking is injured, is guilty of "contributory negligence," which will bar a recovery of damages for such injury. Limb v. Kansas City, Ft. S. & M. R. Co., 84 Pac. 136, 73 Kan. 220.

Failure of one about to drive across a railroad crossing to stop, look, or listen was not of itself proof of "contributory negligence" sufficient to prevent a recovery, especially where no train was due at the time and such fact was known to him. Louisville & N. R. Co. v. Lucas' Adm'r (Ky.) 98 S. W. 308, 311.

By the term "contributory negligence" is meant a failure of the part of plaintiff to use ordinary care for his own protection and safety, under the facts and circumstances in evidence preceding and attending his injury. The failure to look and listen for a train at a street crossing is not per se negligent, where the railroad company keeps a watchman and gates at the crossing and the gates are up. Louisville & N. R. Co. v. Wilson, 100 S. W. 302, 303, 124 Ky. 836.

Where plaintiff, a miner 34 years of age and in full possession of his faculties, walked on defendant's railroad track, a distance of more than half a mile, without once looking back or stopping to listen for an approaching train, by which he was struck and injured, he was guilty of "contributory negligence" as a matter of law, precluding a recovery. Northern Pac. R. Co. v. Jones, 144 Fed. 47, 49, 75 C. C. A. 205.

"'Contributory negligence' is such want of care on the part of the person injured as materially helps in producing his injury." A person who attempts to cross a railroad when he knows a train is due, and that he cannot make the passage in safety if the slightest delay or mishap occurs to him, is guilty of negligence. Palys v. Receiver of Erie Ry. Co., 30 N. J. Eq. 604, 605.

In an action for injuries to an automobile in a railroad crossing accident, instructions defining "contributory negligence" as the want of the exercise of ordinary care which proximately causes the injury complained of, and defining proximate cause as such a cause as operates to produce particular consequences without the interference of any independent, unforeseen cause, without which the injury would not have occurred, were not objectionable as in effect charging that, in order to bar plaintiff's recovery, the "contributory negligence" must have been the immediate and sole cause of the accident, where the court also charged that the act or omission, in order to be "contributory negligence," must contribute to the happening of the act or event causing the injury, and that, if plaintiff or his daughter were actually guilty of negligence which contributed to the accident, plaintiff could not recover, and that plaintiff and his daughter, in order not to have been negligent, must have operated the automobile as a reasonable and ordinarily prudent person would have done, and requiring that they should have taken the same precautions in crossing the track that an ordinarily prudent and reasonable man would have taken. Pendroy v. Great Northern Ry. Co., 117 N. W. 531, 533, 17 N. D. 433.

Where decedent, not employed by defendant railroad, got upon a locomotive in order to ride thereon, and jumped off without looking and listening, and immediately stepped onto another track in front of a moving car, which ran over him, he was guilty of "contributory negligence." St. Louis Southwestern Ry. Co. of Texas v. Hunt (Tex.) 100 S. W. 968, 969.

Where a woman of mature age, in full possession of her faculties, approached a railroad track on foot by daylight at a point from which it was plainly visible for a distance of 800 feet to the eastward, beyond which it made a curve, and when 30 feet beyond the track she looked toward the east and advanced along a path which crossed the track at an angle of 30 degrees, but she did not again look up, and when in the act of stepping on the track was struck by a locomotive approaching from the east, and which she had probably not seen before, as it had not, at the time she looked, rounded the curve, she was guilty of "contributory negligence" as a matter of law. Green v. Los Angeles Terminal Ry. Co., 76 Pac. 719, 720, 725, 143 Cal. 31, 101 Am. St. Rep. 68.

Plaintiff, while attempting to get a fishing pole from under a platform alongside of a railroad track, knelt beside the platform, his feet extending over one rail of the track about 50 feet from a switch, and, while so engaged, a car was switched on the track and approached him at the rate of 3 or 4 miles an hour. He was not aware of the approaching car until an instant before it reached him and in endeavoring to escape was struck by the brakesman's ladder. Held to constitute "contributory negligence." Burde v. Chicago, B. & Q. Ry. Co., 100 S. W. 509, 123 Mo. App. 629.

Same—Entering or leaving car

Where plaintiff boarded a crowded street car, and was permitted to take a seat in a box on the front platform, being unaware that an electrical explosion might occur in close proximity to her, she was not guilty of

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"contributory negligence," barring recovery, for injury received in leaping from the car when an explosion occurred. Williamson v. St. Louis Transit Co., 100 S. W. 1072, 1073, 202 Mo. 345.

"'Contributory negligence' is defined to be the omission by a passenger to exercise such a degree of care as the circumstances of the case demand from a person of ordinary prudence having a proper and reasonable regard for his or her own personal safety. The care one must take in entering a railroad train must be proportionate to the ordinary risks incurred in such entering; that is, it is the duty of the passenger to use the means provided with reasonable circumspection and care." Weaver v. Pennsylvania R. Co., 61 Atl. 1117, 1118, 212 Pa. 632.

Where plaintiff boarded a train to assist a passenger, her jumping off after the train started was "contributory negligence," precluding recovery for injury. Louisville & N. R. Co. v. Wilson, 100 S. W. 290, 292, 124 Ky. 846, 8 L. R. A. (N. S.) 1020.

As defendant's open trolley car was approaching a customary stopping place, and slowing down to make the stop, plaintiff, a passenger, stepped on the running board and then to the ground, and was injured. Defendant's conductor, who had frequently seen plaintiff alight at the same place, saw his movements at the time, and gave him no warning. Held, that plaintiff was guilty of "contributory negligence." Cosgrove v. Consolidated Ry. Co., 68 Atl. 249, 250, 80 Conn. 717.

"Contributory negligence" on the part of a passenger, which will avoid a recovery, must be an act committed under such circumstances as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby. Chicago, B. & Q. R. Co. v. Winfrey, 93 N. W. 526, 529, 67 Neb. 13.

Same—Traveling on highway

A half of a street was safe for travel, while the other half was being excavated for the construction of a street car track. Plaintiff, who knew the facts, entered on the part of the street that was safe, riding a bicycle. She met a team, and while endeavoring, to pass, and save herself from being struck by the overhanging part of the load, she went so near the excavation that she fell into it and was injured. There was ample room for her to have passed on the other side of the team, or she could have stopped and got off her wheel. Held, that she was guilty of "contributory negligence" as a matter of law, precluding a recovery. Harvey v. City of Malden, 74 N. E. 327, 188 Mass. 133.

"Contributory negligence" is the failure to exercise ordinary care which a reasonably prudent person would have exercised under like circumstances; but, if "contributory negligence" could be attributed to one injured by a defective sidewalk, then if such injury should happen after night, and the injured person did not know of the existence of the defect, and could not have discovered it by the exercise of ordinary care such as reasonably prudent persons should have exercised, then there can be no doubt but that the city would be liable for the injury. Parrish v. City of Huntington, 50 S. E. 416, 418, 57 W. Va. 286.

It is the duty of a person before going on a public highway to provide himself with a reasonably safe conveyance and safe horse, and in driving along the highway and over bridges to exercise reasonable care and prudence; and a person failing or neglecting to observe any of these precautions is in law guilty of what is known as "contributory negligence," and cannot recover. "Contributory negligence" means in this connection that by her own carelessness or negligence she has contributed to her own injury. The mere fact that such person may have seen a hole in the bridge when she traveled over it in the forenoon of the day would not make her guilty of contributory negligence in endeavoring to pass over the bridge on her return; but if a reasonably careful and prudent person would not, with the knowledge she had, have offered to pass over the bridge, she was guilty of "contributory negligence." Bratfisch v. Township of Mason, 79 N. W. 576, 577, 120 Mich. 323.

Defendant, a subcontractor, had made an excavation in a park just off a street, and extending from the excavation to the street was an approach used by trucks backing on it in order to cart away the earth, and a pedestrian, when he reached the bridge, dropped a coin which rolled down the bridge, and in his effort to recover it he lost his balance and fell into the excavation. Some of the planks of the bridge were shorter than others, which was the cause of his losing his balance. Held, that plaintiff was not free from "contributory negligence." Bell v. City of New York, 99 N. Y. Supp. 684, 685, 114 App. Div. 22.

Incurring risk synonymous

In actions arising out of noncontractual relations, the term "incurring risk" is synonymous with "contributory negligence." Cleveland, C., C. & St. L. R. Co. v. Lynn, 95 N. E. 577, 582, 177 Ind. 311.

CONTRIVANCE

See Mechanical Contrivance.

An "idler," consisting of a pulley on a frame, which could be thrown against a belt communicating power to a shaft to increase the effectiveness of the power, was not a "contrivance," within the factory act (Acts 29th Gen. Assem. p. 107, c. 149), as affecting machinery situated in an adjoining room, to which power was communicated from such

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shaft. McCreery v. Union Roofing & Mfg. Co., 119 N. W. 738, 739, 143 Iowa, 303.

CONTROL

See Beyond the Control; Exclusive Control; Limit and Control; Loss of Control; Possession or Control; Reasonable Control; Under Control: Under Full Control; Under the Control, Management, or Operation.

Operate or control, see Operate.

The word "control" has no legal or technical meaning distinct from that given in its popular acceptation, as used in a mining lease providing for the suspension of royalties during the disability of the lessee because of strikes, accidents, or any cause of stoppage of transportation, "over which the lessee has no control," and it will be construed to mean the immediate control of the party, and not to refer to some remote control or uncertain remedy of control. It is simply another way of saying "for which another party is not to blame," or "without the fault of the party of the second part." Robinson v. Kistler, 59 S. E. 505, 508, 62 W. Va. 489.

To "control" means to direct, regulate, or govern. It does not express the idea of repealing, extinguishing, or doing away with. The provision of Pen. Code, §§ 758–769, for removal from office of any municipal officer for misconduct in office, by presentment by the grand jury and proceedings before a court with trial by a jury, in case of a denial of the charges, are, so far as concerns a member of the police department of the city and county of San Francisco, superseded by the charter thereof, providing for such a removal only after a trial before the police commissioners; Const. art. 11, § 8, providing that the charter, on the adoption thereof by the Legislature, shall supersede all laws inconsistent with it, and article 20, § 16, as amended, providing that in case of an officer or employé of a municipality governed under a charter the provisions of the charter with reference to dismissal from office of any such officer or employé shall control. Dinan v. Superior Court of City and County of San Francisco, 91 Pac. 806, 808, 6 Cal. App. 217 (citing Standard Dict.; Byrne v. Drain, 60 Pac. 433, 127 Cal. 663).

"The phrase 'full control,' when unqualified, of necessity implies complete dominion, and there can be no complete dominion where there is only a life estate. It includes, in the absence of any qualifications or restrictions, every incident of absolute ownership." Where a will contained but five clauses, the first directing payment of debts and funeral expenses, the second giving testator's dwelling house to his wife, "she to dispose of same at her pleasure," the third giving his wife moneys arising from collections which might be made, "she to dispose of same at her pleasure," the fourth providing, "All the rest of my estate I give her full control," and the fifth appointing executors, it was held that the wife took an absolute estate in the residue, and not merely a life estate. Welsh v. Gist, 61 Atl. 665, 666, 101 Md. 606.

An agreement by a member of a beneficial association that he should "be governed" by all rules, laws, and regulations of the association then in force or that might be thereafter enacted bore reference to such laws as were then in force or future laws as might be provided tending to regulate his conduct as a member and the internal affairs of the association; and a further agreement that his contract should "be controlled" by all laws, rules, and regulations then in force or that might be thereafter enacted bore reference only to such present and future laws as were in aid and in furtherance of the essential elements of indemnity, vouchsafed in his contract, and did not authorize a subsequent by-law reducing the amount of recovery in case of suicide. Lewine v. Supreme Lodge, Knights of Pythias of the World, 99 S. W. 821, 825, 122 Mo. App. 547.

To be "subject to" is "to become subservient to," or "subordinate to," and to "control" is defined as "to exercise a directing, restraining, or governing influence over; to direct; to counteract; to regulate" (quoting and adopting the definitions in Cent. Dict.). Under these definitions, Pen. Code, §§ 758, 772, which confer on the superior court jurisdiction to remove municipal officers for official misconduct and neglect, do not subordinate and control a provision of a freeholders' charter, providing for the removal of such officers by the municipal board of trustees, but leave them in full operation, prescribing merely a concurrent remedy, and are not, as so construed, displaced as to the municipality by Const. art. 11, § 6, declaring that municipal charters shall be "controlled" by general laws, except in municipal affairs. Coffey v. Superior Court of Sacramento County, 82 Pac. 75, 79, 147 Cal. 525.

The charter of a city, authorizing the council to "direct and control" the location of railroad tracks, does not include the power to authorize the construction of railroads and the exercise of the right of eminent domain. It merely vests in the council as part of the police power, to be exercised in providing for the public safety and convenience in the use of streets and alleys, a supervision over the location of railroad tracks, where the authority to construct the railroad already exists. Chicago, B. & N. R. Co. v. Porter, 46 N. W. 75, 43 Minn. 527, 529.

A watchman employed to give signals of the approach of trains to workmen on the railroad track is a person in the employ of a railroad company who has the "control or direction of a movement of a signal" within the meaning of Laws 1906, p. 1682, c. 657, amend-

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ing section 42a of the Railroad Law. Laws 1890, p. 1082, c. 565, providing that such persons shall be classed as vice principals, and not as fellow servants, in actions for injuries to employés. Schradin v. New York Cent. & H. R. R. Co., 109 N. Y. S. 428, 432, 124 App. Div. 705.

As giving power of disposition

"The ordinary meaning of the word 'control,' when asserted by a person in charge of an estate, is that he has its management. It might imply a power to invest and reinvest, but does not imply a power to dispose of the estate itself, so as to defeat the rights of those entitled to its future use. It implies such powers as are usually conferred upon trustees of express trusts. A proper control might necessitate a sale or a purchase of specific property; but either, if made, would inure to the benefit of the estate." Testator, after providing for the payment of his debts, declared that "the remainder that is left" should go to his wife (whom he made executrix) "during her natural lifetime, she to have the entire control of the same," and then, after describing the kinds of property devised (viz., real estate, moneys, notes, and all personal property, "and effects of all kinds") added, "To go to her, for her to have full control of the same as long as she lives, and that, after her death, what is left to go to A. and L.," etc. Held, that the widow took a life estate, without any power of disposition. Nor was the widow entitled absolutely to the accumulated income and profits of the life estate; the intention being that the entire estate remaining in her hands at her decease, whether diminished by losses or increased by profits, and whether it consisted of personal property or had been invested in real estate, should go to the remaindermen. Bramell v. Cole, 37 S. W. 924, 927, 136 Mo. 201, 58 Am. St. Rep. 619.

As power to license

"The words 'to control' and 'to regulate,' ex vi termini, imply to restrain, to check, to rule and direct. And, in my judgment, the power to do either of these implies the right to license, as a convenient and proper means to that end. By this means the persons or occupations to be regulated are located and identified and brought within the observation of the municipal authorities, so that whatever regulations are made concerning them may be the more easily and certainly enforced." A charter provision authorizing a city to "control," prescribe, and regulate the use of its streets, etc., confers power to require automobiles to be registered and numbered. People v. Schneider, 103 N. W. 172, 173, 139 Mich. 673, 69 L. R. A. 345, 5 Ann. Cas. 790 (quoting and approving definition in the Laundry License Case, 22 Fed. 703).

As regulate

See Regulate.

Of ballot

A third person permitted by the officers of election to inspect a ballot, or who by force took a ballot within his control, is a "person having custody or control" of a ballot, within the meaning of Ky. St. § 1476 making it a felony for any person intrusted with the custody or control of a ballot to mutilate or place distinguishing marks thereon. Commonwealth v. Goulet, 125 S. W. 1083, 1085, 137 Ky. 464.

Of bank

Laws 1909, c. 222, entitled "An act to revise the laws authorizing the business of banking, providing for the organization and control of banks, and to establish a banking department for the supervision of such business," which, by sections 29 and 30, makes it an offense for officers and directors of a bank to permit shareholders to become indebted to it at one time in excess of 50 per cent. of its paid-up capital, does not conflict with Const. art. 3, § 21, which provides that no law shall embrace more than one subject which shall be expressed in its title; since to "control" has the same sense as to "regulate," and since the term "control of banks" means the control of the banking business, indicates new legislation and means to check or restrain, and hence appropriately covers the provisions declaring the offense and the penalty therefor. State v. McPherson (S. D.) 139 N. W. 368, 369 (citing 2 Words and Phrases, p. 1549; 7 Word and Phrases, p. 6041).

Of bridge or highway

The words "control and direction," in Laws 1859, p. 359, c. 143, as amended by Laws 1889, p. 7, c. 7, providing that the free bridge over the Mohawk river between certain towns shall be under the control and direction of the commissioners of highways of the towns, were of no broader significance, with reference to the duties and powers of the commissioners of highways of the two towns in question, than the words "care and superintendence" in the highway law, with reference to the duties and powers of commissioners of highways in the towns of the state. Town of Palatine v. Canajoharie Water Supply Co., 86 N. Y. Supp. 412, 414, 90 App. Div. 548.

Laws 1859, p. 359, c. 143, as amended by Laws 1889, p. 7, c. 7, provided that thereafter the free bridge over the Mohawk river between the towns of C. & P. should be "under the control and direction" of the commissioners of highways of said towns. Held, that the words "control and direction," as so used, did not give the commissioners of highways any greater powers than those generally conferred on highway commissioners by highway law (Laws 1890, p. 1177, c. 568), declaring that such commissioners shall have the care and superintendence of the highways and bridges in their respective towns, etc. Town

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of Palatine v. Canajoharie Water Supply Co., 77 N. E. 1197, 184 N. Y. 582.

Under Pol. Code, § 4041, subd. 4, requiring county boards of supervisors when the cost of construction of any bridge, etc., exceeds $500 to advertise for bids, but providing that, on being advised by the county surveyor that the work can be done for less than the lowest bid, the board may reject all bids and order the work done or structure built by day's work under the "supervision and control" of such surveyor, the latter to be held personally responsible under his official bond to construct such structure at a cost not exceeding the lowest bid, the board did not exceed its power in directing the surveyor on his being instructed to construct a bridge to purchase material therefor; "supervision" implying oversight, and the word "control" being used to authorize additional power, such as is contained in one of its definitions, "to exercise a restraining or governing influence over, to regulate." McCarthy v. Board of Sup'rs of Merced County, 115 Pac. 458, 459, 15 Cal. App. 576.

Under the law of Kentucky (Acts 1881–82, p. 817, c. 461), which holds that the use of a street by a telephone company is for a public and not a private purpose, general power expressly given to a city by a special charter to "regulate" the streets, alleys, etc., imports power to control their use, the word "regulate" being a word of wider import than "control," and authorizes the city to grant the right to a telephone company to erect and maintain its poles in the streets. City of Owensboro v. Cumberland Telephone & Telegraph Co., 174 Fed. 739, 750, 99 C. C. A. 1.

In an action against an abutting owner for injuries from defects in the cover of a coal hole, where the complaint predicates negligence of the defendant in the management, operation, and control of the sidewalk, and in keeping the coal hole in defective order, and in failing to provide proper warning as to the defective state of the coal hole cover, there is no legal differentiation between the terms "management," "operation," and "control," and any one of them would be sufficient to justify the admission of testimony to sustain a delinquency intended to be charged. Maldosky v. Germania Bank, 127 N. Y. Supp. 292, 293.

Of building

There is no rule of law which makes the civil law of property rights inapplicable to criminal cases, and it was not improper to instruct in the trial of one for permitting gambling upon his premises that one who rents the whole of a building and uses a part of it and sublets other parts is in "control" of the whole building within the meaning of the gaming laws. De Los Santos v. State (Tex.) 146 S. W. 919, 923.

Of business of corporation

"Control" of the business of a corporation, within the meaning of anti-trust legislation, means power to dictate the corporate action of the corporation, not the mere management of some special limited department of its operations. The phrase "control to any extent" is synonymous with the expression "control of any part of its business." Yazoo & M. V. R. Co. v. Searles, 37 South. 939, 953, 85 Miss. 520, 68 L. R. A. 715.

Of probate matters

Const. art. 5, § 8, provides that the district court shall have appellate jurisdiction and control in probate matters over the county court, and Rev. St. 1895, arts. 1099, 1841, provide that it shall have appellate jurisdiction and "general control" of probate matters over the county court. Held, that the words "control" and "general control," as so used, did not enlarge the district court's jurisdiction, which was limited to appellate jurisdiction over courts sitting in probate, to be exercised only by appeal or certiorari, and hence the district court cannot issue mandamus requiring the county court to perform a duty not merely ministerial but involving judicial discretion. Shook v. Journeay (Tex.) 149 S. W. 406, 409.

Of railroad

If a railroad owns a majority of the stock of another company, so that it elects its directors and dictates its policy, it "controls" such other company within the meaning of Ky. St. § 4079, requiring a railroad company to report to the Auditor of Public Accounts for purposes of taxation its lines "operated, owned, leased or controlled." Commonwealth v. Louisville & Nashville R. Co., 150 S. W. 37, 40, 149 Ky. 829.

Under Railroad Law (Laws 1890, p. 1113, c. 565) § 101, as amended by Laws 1897, p. 776, c. 688, relating to street surface railroads and providing that no corporation constructing and operating a railroad under the provisions of this article, etc., shall charge any passenger more than five cents for one etc., the operation or "control" of a road, "or on any point thereof," etc., and Railroad Law (Laws 1890, p. 1096, c. 565) § 89, imposing a penalty on any railroad corporation receiving more than the lawful rate of fare, etc., the operation or "control" of a road, within the meaning of such section, means a control of the operation of the road, and not merely a control of the corporation or individuals operating it, by reason of the ownership of a majority of the road's capital stock. Senior v. New York City R. Co., 97 N. Y. Supp. 645, 650, 111 App. Div. 39.

"Controlled," as used in the Kentucky revenue act (Acts 1892, p. 302, c. 103, art. 3, § 5, as amended by Acts 1893, p. 991, c. 217, § 4), which provides that the proportion of the value of the capital stock of a rail-

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road which the length of the lines operated, owned, leased, or controlled in the state bears to the lines owned, leased, or controlled in the state and elsewhere shall be considered in fixing the value of the corporate franchise liable for taxation in the state, does not mean roads operated, but rather the ownership of a majority of the stock of another railroad corporation. Louisville & N. R. Co. v. Coulter, 131 Fed. 282, 307.

Of separate property

The words "management and control," as used in Rev. St. 1887, § 2498, relating to the management and control by a husband of his wife's separate property, have a well-defined meaning, and under the provisions of section 15 must be construed according to the context and approved usage of the language. The power to manage implies the power to control. To manage money is to employ or invest it. The word "control" means to have authority over a particular matter or thing, and the phrase "management and control" implies the possession of the thing managed or controlled, or the right to the possession thereof. Sencerbox v. First Nat. Bank of Omaha, 93 Pac. 369, 371, 14 Idaho, 95 (citing 2 Words and Phrases, p. 1549, and 5 Words and Phrases, p. 4317).

The syntax of the term "control" is to restrain, rule, govern, manage, guide, regulate, hinder, direct, curb, counteract, subdue (Webster). Where, by an antenuptial agreement, a husband agreed not to control or claim any of his wife's property during her life or after her death, he agreed not only to never claim any of his wife's property, but to forever keep his hands off it, and thereby waived his right to appointment as her administrator, since a person who has the administration of an estate necessarily has the management and control of the personal assets thereof. In re Evans' Estate, 93 S. W. 922, 923, 117 Mo. App. 629.

Of waterworks

A city, entitled to take water from a reservoir through a pipe line, under a contract providing that no water shall be sold or furnished by the contractor to any other person or city from any point on the main pipe line, the pipe line being intended for the exclusive use of the city, "controls" the waterworks, within Act April 16, 1897 (P. L. 232), authorizing a city controlling a waterworks to contract with an adjoining city, or any private corporation therein, to furnish water. Town of Kearny v. Jersey City, 73 Atl. 110, 78 N. J. Law, 77.

CONTROLLER

The control of electric motors is effected by controlling the electric current which flows through them. The apparatus by which it is controlled is termed the "controller" or "switch." The Brown patent for a method of electrical control, designed to secure an acceleration of speed of motors and at the same time protect them from injury, is void for anticipation by the Potter patent. Westinghouse Electric & Mfg. Co. v. Toledo, P. C. & L. R. Co., 172 Fed. 371, 373, 97 C. C. A. 69.

CONTROVERSY

See Amount in Controversy; Matter in Controversy; Property in Controversy; Separable Controversy; Severable Controversy; Substantial Controversy; Thing in Controversy; Value in Controversy or Dispute.

The term "controversies" in article 3 of the Constitution of the United States refers to cases in which such controversies are brought to the attention of the court, and not to quarrels, disputes, or controversies at large. So there could be no controversy of which the court could take or retain jurisdiction without a cause pending. Hence a case which has been dismissed by order of the court is not a "controversy," but merely a dispute at large. -Baltimore & O. R. Co. v. Larwill, 93 N. E. 619, 621, 83 Ohio St. 108, 34 L. R. A. (N. S.) 1195.

"The 'controversy' in a suit is the one actually presented by the pleadings, and not what it might have been. The cause of action is the subject-matter of the 'controversy.'" Vulcan Detinning Co. v. American Can Co., 130 Fed. 635, 637.

Under Act March 3, 1891, § 6, declaring the judgments of Circuit Courts of Appeals final in all cases in which the jurisdiction of federal courts is dependent entirely on the diverse citizenship of the opposite parties to the suit or controversy, and providing that in all cases not hereinbefore made final there shall be right of appeal to the Supreme Court where the amount in controversy exceeds $1,000, where jurisdiction in a foreclosure suit in which receivers were appointed depended entirely on diverse citizenship, jurisdiction of a petition of intervention asking for damages by reason of the negligence of the receivers and their agents is also wholly dependent on diverse citizenship, and the use of the words "suit or controversy" does not affect the conclusion. If the word "controversy" added anything to the comprehensiveness of the section, the power of disposition over intervention, whether styled "suit or controversy," was the exercise of power invoked at the institution of the main suit. Rouse v. Letcher, 15 Sup. Ct. 266, 268, 156 U. S. 47, 39 L. Ed. 341.

Under Gen. St. Conn. 1902, § 618, providing that any person may be made a defendant who has or claims an interest in the "controversy" or any part thereof adverse to the plaintiff, a complaint in an action by a town against several banks, alleging that its selectmen without authority borrowed money

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from defendant S., giving negotiable notes, which were paid in full, and that defendant S. agreed to cancel the notes and deliver them to plaintiff, but failed to do so, and that the other defendants claimed to be bona fide holders of some of such notes, and praying for a decree determining what rights, if any, the several banks had in the notes claimed by them, and that the notes be canceled and delivered to the plaintiff, and that plaintiff recover of defendant S. the amount paid on such unauthorized notes, shows such a joint or mutual interest between defendants in the controversy as warranted the joinder of defendants in a single action; the word "controversy" having a broad and comprehensive meaning, not easily susceptible to any precise general definition, and, as applied to the case, meaning the adverse claims of the parties with respect to the ownership of, liability on, and possession of the notes set forth in the complaint. Town of Fairfield v. Southport Nat. Bank, 59 Atl. 513, 514, 77 Conn. 423.

A person sued for broker's commissions cannot have another broker claiming commissions on the same sale under a separate contract brought in and the rights of both brokers determined in one action under St. 1898, § 2610, providing that the court may determine any controversy between the parties when it can be done without prejudice to the rights of others, but, when a complete determination of the controversy cannot be had without the presence of other parties, it shall order them to be brought in, since "controversy" means dispute, and the dispute, whether defendant employed plaintiff, whether plaintiff procured a purchaser, and the amount of his compensation, may be determined without prejudice to the rights of the other broker, and a complete determination of the controversy may be had without his presence, defendant having the right to show without making him a party that the purchaser was procured by the other broker. Schenck v. Sterling Engineering & Construction Co., 138 N. W. 637, 638, 151 Wis. 266 (citing 2 Words and Phrases, p. 1553).

"The controversy" as the term is used in Code Civ. Proc. § 389, providing that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, but that, when a complete determination of "the controversy" cannot be had without the presence of other parties, the court must order them brought in, etc., means any controversy between the parties before it, named in the first clause, and includes a controversy presented by a cross-complaint, as well as that presented by the original complaint. Alpers v. Bliss (Cal.) 79 Pac. 171, 173.

Case distinguished

By "cases" and "controversies," as used in the Constitution, limiting the judicial power. was intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, repression, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such form that the judicial power is capable of acting upon it, then it has become a "case." The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. "Controversies," if distinguishable at all from "cases," is so in that it is less comprehensive, and includes only suits of a civil nature. Muskrat v. United States, 31 Sup. Ct. 250, 254, 219 U. S. 346, 356, 55 L. Ed. 246 (quoting and adopting definition by Chief Justice Marshall in Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60).

As cause of action

A "controversy" is involved, within a statute requiring the amount in "controversy" to exceed a certain sum to give federal courts jurisdiction, whenever any claim of the parties capable of pecuniary estimation is the subject of litigation, and is presented by the pleadings for judicial determination. Where the amount of claims for alimony reduced to judgment reach the statutory limit, it is a controversy over which the federal courts will exercise jurisdiction. Israel v. Israel, 130 Fed. 237, 240 (quoting and adopting definition in Schunk v. Moline, M. & S. Co., 13 Sup. Ct. 416, 147 U. S. 500, 37 L. Ed. 255).

Within the meaning of Act March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433, providing when a controversy may be removed into the circuit court of the United States, the "controversy" is the plaintiff's cause of action, and that cause of action is whatever the plaintiff, in good faith, has declared it to be in his petition. Painter v. Chicago, B. & Q. R. Co., 177 Fed. 517, 518 (citing Powers v. Chesapeake & O. R. Co., 18 Sup. Ct. 264, 169 U. S. 92–97, 42 L. Ed. 673; Alabama G. S. R. Co. v. Thompson, 26 Sup. Ct. 161, 200 U. S. 206–216, 50 L. Ed. 441, 4 Ann. Cas. 1147; Wecker v. National Enameling & Stamping Co., 27 Sup. Ct. 184, 204 U. S. 176–182, 51 L. Ed. 430, 9 Ann. Cas. 757).

CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS

By "controversies arising in bankruptcy proceedings" as used in the Bankruptcy Act, investing the Supreme Court of the United States, the Circuit Court of Appeals and the Supreme Courts of the territories with appellate jurisdiction of controversies arising in bankruptcy proceedings, is meant those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustee representing

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the bankrupt's estate and claimants asserting some right of interest adverse to the bankrupt or his general creditors. Judgments or orders of a District or Circuit Court, entered in controversies arising in bankruptcy proceedings, as distinguished from those entered in bankruptcy proceedings proper, are reviewable by the Circuit Courts of Appeals only by appeal or writ of error under their general appellate jurisdiction, as provided in Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553. In re Mueller, 135 Fed. 711, 713, 68 C. C. A. 349.

"Controversies arising in bankruptcy proceedings," as used in Bankr. Act July 1, 1898, § 24a, which invests the Circuit Court of Appeals with appellate jurisdiction of controversies arising in bankruptcy proceedings in courts of bankruptcy, is not the same as "proceedings of the several inferior courts of bankruptcy." Thus, the summary order by a bankruptcy court for a sale may be a "proceeding in bankruptcy," while the controversy as to the title of the property may be a "controversy arising in bankruptcy proceedings." Mason v. Wolkowich, 150 Fed. 699, 702, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765 (quoting and adopting definition in Burleigh v. Foreman, 125 Fed. 217, 60 C. C. A. 109, 112).

Nothing can be regarded as a "controversy arising in bankruptcy proceedings," within Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553, where the subject-matter and object of the proceedings are within the power of the trial court to make a summary order, especially where a plenary action is not sought; a complaint in regard to a summary order to turn over assets not being specially made appealable under such subdivision. In re Farrell, 176 Fed. 505, 509, 100 C. C. A. 63.

Where the decision of a trial court in a bankruptcy proceeding is brought under review in an appellate court, it presents a "controversy arising in a bankruptcy proceeding." Thomas v. Woods, 173 Fed. 585, 587, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080.

Proceedings by a court of bankruptcy upon a petition filed by a trustee for an order to sell real estate, and also to bring in third persons asserting liens thereon for the purpose of determining their rights as incidental to such sale, are "proceedings in bankruptcy," as distinguished from "controversies arising in bankruptcy proceedings" and are reviewable by the Circuit Court of Appeals on petition for revision under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 552. In re McMahon, 147 Fed. 684, 689, 77 C. C. A. 668.

A dispute between a receiver in bankruptcy and an outside person as to whether a contract was made between them for the sale and purchase of property of the estate, brought before the bankruptcy court for determination, is a "controversy arising in bankruptcy proceedings," within the meaning of Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 and an order made therein is reviewable by appeal. In re J. Jungmann, 186 Fed. 302, 304, 108 C. C. A. 380.

"Controversies arising in bankruptcy proceedings," appealable under section 24a, embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, not directly affecting the administrative orders and judgments ordinarily known as "proceedings in bankruptcy," which are confined to questions arising between the bankrupt and his creditors, and are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, including intermediate administrative steps, and such controversies as arise between the parties to the bankruptcy proceedings as are involved in the allowing of claims and fixing their priorities, sales, allowances, and other matters which are disposed of summarily, and hence the term "controversies arising in bankruptcy proceedings" does not include an order dismissing a petition for the revocation of the bankrupt's discharge. Thompson v. Mauzy, 174 Fed. 611, 614, 98 C. C. A. 457.

The petition of a trustee in bankruptcy, filed in the bankruptcy court, to have adverse claims and lien on property of the estate declared void, and for a sale of the property free and clear of the same, has the elements of a suit in equity, and the decision therein is reviewable by the Circuit Court of Appeals on appeal, under Bankr. Act July 1, 1898, c. 541, § 24a, as involving a "controversy." Thomas v. Woods, 173 Fed. 585, 589, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1109, 19 Ann. Cas. 1080.

The disallowance of certain claims against a bankrupt's estate by the District Court of the United States for Porto Rico, sitting as a court of bankruptcy, is not reviewable in the federal Supreme Court under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553, since the allowance or disallowance of a claim in bankruptcy is not a "controversy arising in bankruptcy proceedings," but is a "proceeding in bankruptcy," the mode of reviewing which is confined, by section 25a, to an appeal to the appropriate Circuit Court of Appeals or Territorial Supreme Court. Tefft, Weller & Co. v. Munsuri, 32 Sup. Ct. 67, 69, 222 U. S. 114, 56 L. Ed. 118.

When an adverse claimant voluntarily comes into a court of bankruptcy and claims property in the possession of the trustee, wherever situated, or asserts a lien thereon and seeks to have it established, enforced, or protected, the proceeding becomes a "proceeding in bankruptcy" in the course of collecting the estate, reducing the same to money, and distributing the same, and a "controversy" in

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relation to the estate within the jurisdiction of the bankruptcy court, under Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 546. In re MacDougall, 175 Fed. 400, 405.

An appeal lies to the federal Supreme Court, under Act March 3, 1891, c. 517, § 6, 26 Stat. 828, from a judgment of a Circuit Court of Appeals, entered on an appeal from a judgment of a court of bankruptcy, sustaining a title to property in the possession of a trustee in bankruptcy, asserted by intervention, raising a distinct and separable issue, since the controversy may be regarded as one of those "controversies arising in bankruptcy proceedings," over which the Circuit Court of Appeals could, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553, exercise appellate jurisdiction as in other cases. Hewit v. Berlin Mach. Works, 24 Sup. Ct. 690, 691, 194 U. S. 296, 48 L. Ed. 986.

There is a distinction between steps in bankruptcy proceedings, proper, and "controversies arising out of the settlement of the estates of bankrupts." In re Levitt, 126 Fed. 889, 891.

The distinction between "proceedings in bankruptcy," reviewable by petition for review, as authorized by Bankr. Act July 1, 1898, c. 541, § 24b, and "controversies arising in bankruptcy proceedings," reviewable by appeal, as authorized by section 24a, is that the former refers to and includes administrative orders and decrees in the ordinary course of the administration of a bankrupt's estate between the filing of the petition and the final settlement thereof, while the latter refers to and includes those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustees representing the estate and claimants representing some right or interest adverse to the bankrupt or his general creditors; the remedies afforded by the two subsections being mutually exclusive. Where a bankrupt's trustee instituted proceedings to set aside certain conveyances of real estate alleged to have been made to defraud the bankrupt's creditors, and also to vacate the lien of a mortgage thereon as against the mortgage, who was no party to the bankruptcy proceedings and was not a creditor of the estate, but a stranger thereto, asserting rights paramount to and independent of those of the estate, the controversy, so far as it related to such lien, was not a "proceeding in bankruptcy," reviewable by petition for review, as authorized by Bankr. Act July, 1898, c. 541, § 24b, 30 Stat. 553, but was instead a "controversy arising in bankruptcy proceedings," reviewable only as provided by section 24a. Barnes v. Pampel, 192 Fed. 525, 528, 113 C. C. A. 81.

CONTROVERSY ARISING UNDER FEDERAL CONSTITUTION

A "controversy arising under the federal Constitution," of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties, is presented by a bill which asserts that the obligation of a contract for the exclusive privilege of supplying water to a city and its inhabitants is impaired by a subsequent municipal ordinance and a legislative enactment under which the municipality is proceeding to issue and market its bonds for the purpose of constructing its own waterworks system. Mercantile Trust & D. Co. v. Columbus, 27 Sup. Ct. 83, 86, 203 U. S. 311, 51 L. Ed. 198.

CONTROVERSY BETWEEN CITIZENS OF DIFFERENT STATES, AND BETWEEN CITIZENS OF STATE AND FOREIGN SUBJECTS

The language of the Judiciary Act, providing that the jurisdiction of the Circuit Courts of the United States shall extend to "controversies between citizens of different states" and also to "controversies between a citizen of a state and foreign citizens or subjects," cannot be construed to include a controversy between aliens, or a controversy between citizens of different territories, or between a citizen of a state and a citizen of a territory. "Territory" is not a state, within the meaning of the act defining the jurisdiction of the federal courts. McClelland v. McKane, 154 Fed. 164, 165 (citing Barney v. Baltimore, 6 Wall. [73 U. S.] 280, 287, 18 L. Ed. 825; Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Weller v. Hanaur, 105 Fed. 193; Johnson v. Bunker Hill & S. M. & C. Co., 46 Fed. 417; Seddon v. Virginia, T. & C. S. & I. Co., 36 Fed. 6, 1 L. R. A. 108).

The phrase "controversy between citizens of different states" in the federal Constitution, extending judicial power to controversies between citizens of the different states, and Act Cong. March 3, 1887, as corrected by Act Cong. August 13, 1888, providing that the Circuit Courts of the United States shall have original cognizance concurrent with the courts of the several states of all suits where there shall be a controversy between citizens of the different states, does not mean a controversy between citizens of the same state and citizens of another state, and two citizens of different states may maintain in the federal court an action against a citizen of a third state in the federal Circuit Court for the district of the residence of the latter. Sweeney v. Carter Oil Co., 26 Sup. Ct. 55, 56, 199 U. S. 252, 50 L. Ed. 178.

A suit by Pennsylvania and New Jersey corporations against a New York corporation operating a street railway system in the city of New York, the bill in which avers an unsatisfied indebtedness due each complainant from the defendant, substantially involves a "controversy between citizens of different states," within the meaning of Act Aug. 13, 1888, 25 Stat. 433, c. 866, § 1, defining the jurisdiction of the federal Circuit Courts, although the defendant admits the indebted-

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ness and the other allegations of the bill, and joins with the complainants in a request that receivers be appointed. In re Reisenberg, 28 Sup. Ct. 219, 223, 208 U. S. 90, 52 L. Ed. 403.

CONTROVERSY BETWEEN STATES

A conflict between the authorities of the states of Louisiana and Mississippi, arising out of the enforcement of the oyster legislation of those states, which involves a dispute respecting the true boundary line, creates a "controversy between the states" in their sovereign capacity, which is within the original jurisdiction of the Supreme Court of the United States. Louisiana v. Mississippi, 26 Sup. Ct. 408, 416, 202 U. S. 1, 50 L. Ed. 913.

CONTROVERSY CONCERNING CONSTRUCTION OF CONSTITUTION

A contention by importers that the treasury regulations respecting the polariscopic test for sugar assumed to add something to the dutiable standard prescribed by Tariff Act July 24, 1897, so that the Secretary of the Treasury thus exercised legislative power confided by the Constitution solely to Congress, does not constitute a real and substantial "controversy concerning the construction or application of the federal Constitution," within the meaning of Act March 3, 1891 (26 Stat. 828, c. 517) § 5, so as to sustain a direct appeal from a federal court to the Supreme Court. American Sugar Refining Co. v. United States, 29 Sup. Ct. 89, 91, 211 U. S. 155, 53 L. Ed. 129.

CONTROVERSY CONCERNING PROPERTY

A claim for damage for the flowage of land by a milldam under the mill acts is not a "controversy concerning property," within the meaning of Const. art. 1, § 20, declaring that in civil suits and in controversies concerning property the party shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. Ingram v. Maine Water Co., 57 Atl. 893, 894, 98 Me. 566.

CONTROVERSY RESPECTING EXISTENCE OF WILL

Under P. L. 1898, p. 715, § 2, which declares that the orphans' court shall have "full power and authority to determine all controversies respecting the existence of wills," and section 174 et seq., which provides for process to compel the appearance of any person before the orphans' court and the making of orders for publication and for the enforcement of decrees, it has the power to inquire whether a writing executed as a will, and that was in existence unrevoked at the time of the testator's death, has been since lost or destroyed, and, if so, to prove the contents thereof. In re Cassidy's Will, 82 Atl. 920, 80 N. J. Eq. 163.

CONVENIENCE—CONVENIENT

See Early as Convenient; Facilities and Conveniences; Inconvenience; Most Convenient; Public Convenience; Public Service Facilities and Conveniences.

A telephone is a "convenience," within Const. art. 9, § 18, authorizing the corporation commission to require carriers to establish and maintain all "public service facilities and conveniences" as may be reasonable and just, and the commission may require a carrier to install and maintain in its station a telephone. Atchison, T. & S. F. Ry. Co. v. State, 100 Pac. 11, 14, 23 Okl. 210, 21 L. R. A. (N. S.) 908.

A requirement that a notice of incorporation be published in some newspaper as "convenient" as practicable to the principal place of business of the corporation means that it shall be published in the nearest or most handy. Any other construction would be strained and unnatural. The requirement was not satisfied by publication in a newspaper published in some small town more distant from such place of business by wagon road, and much more so by railroad, than many other towns, some of them much larger, in all of which newspapers are published. Clinton Novelty Iron Works v. Neiting, 111 N. W. 974, 975, 134 Iowa, 311.

The word "convenient," used by the courts in sustaining equitable jurisdiction, has not always been aptly used and may be misleading. It was never intended as a definition of equity jurisdiction in the sense of saying that an action at law is less "convenient" and a bill in equity more "convenient." It is a convenience of the court, and not of the pleader, to which the term applies. Wagner v. Fehr, 60 Atl. 1043, 1046, 211 Pa. 435, 3 Ann. Cas. 608.

Ky. St. § 772, requiring railroad companies to provide "convenient" water-closets or privies, and maintain them in decent order at their stations, is to be reasonably construed, and, before a company could be held liable for failure to do so, it must be shown that it suffered a privy to remain in an indecent or unclean condition; and it is not enough to show that on one or two occasions it was found out of order or unclean. If a railroad company builds and maintains a closet suitable for the wants of the traveling public, as convenient to a depot as the circumstances permit, and keeps it in decent order and repair, it has substantially complied with the requirements of such section; the word "convenient" being defined as "handy" and as "easy of access." In complying with such section, if the location of public buildings and dwellings near a depot is such that a privy cannot be maintained nearer than where it is located, without being objectionable and offensive, if not injurious to the health of citizens living there, the

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company would not be required to maintain it nearer to the depot. In determining whether a railroad company has complied with Ky. St. § 772, in providing a "convenient" water-closet at a station, not only its distance from the depot, but the means of approach thereto, must be considered. It was not contemplated by such section that companies should be put to the expense of establishing and maintaining a waterworks system at a depot to maintain a privy immediately adjacent thereto to accommodate the traveling public. Such section was not made or intended to apply to the wants of persons who use a passenger depot as a lodging house, for section 784, Ky. St. (Russell's St. § 5333), only requires passenger depots to be kept open for the reception of passengers a limited time prior to the arrival and departure of regularly scheduled trains. Nor does such section require a company to meet a condition when travel on particular days is abnormal or congested, but only that its accommodations shall be such as will meet the requirements of its ordinary and usual travel. Louisville & N. R. Co. v. Commonwealth, 127 S. W. 152, 153, 137 Ky. 802.

As reasonable time

One who borrows money, to be repaid "when convenient, or when business picks up," is bound to repay within a reasonable time, and is not entitled to hold the money indefinitely at his election. One year is a reasonable time for repayment of the money. Samuels v. Larrimore (Cal.) 104 Pac. 1001, 1002.

CONVENIENT IN POINT OF DISTANCE

The phrase "convenient in point of distance," as used in Code Iowa, § 4420, providing that application for the writ of habeas corpus must be made to the judge most convenient in point of distance to the applicant, and that more remote judges, if applied to, may refuse the same, is of quite indefinite meaning, and often might reasonably be applied to any one of several judges presiding in different localities. The restriction serves to put the judge upon his guard and suggest inquiry into the propriety of his entertaining the proceeding and the good faith of the applicant in coming to him, but it is not a jurisdictional question. When application is made to a Supreme Court judge, the provisions of such section do not apply, since the Supreme Court has original jurisdiction coextensive with the state. Ware v. Sanders, 124 N. W. 1081, 1084, 146 Iowa, 233.

CONVENIENCE OR COMMODITY

A contract between two telephone companies having connecting exchanges gave each the exclusive right to have transmitted over its lines all messages coming from the lines of the other destined to points on the lines of the connecting company not reached by the lines of the other company, and provided that the connecting carrier should receive for its service a percentage of the charge made, to be determined on the basis of the relative number of miles the message was transmitted on their respective lines. Rev. St. 1899, § 8978 (Ann. St. 1906, p. 4157), forbids two or more corporations engaged in buying or selling any commodity or thing to agree to limit competition by refusing to buy from or sell to any other such article or thing for the reason that such other is not a party to such agreement or combination. Held, that telephone service was a "convenience or commodity" within the statute, and the contract was void for prohibiting the parties from buying such service as to messages destined to points on the lines of the other from other companies, and attempting to create a monopoly as to such business. Home Telephone Co. v. Granby & Neosho Telephone Co., 126 S. W. 773, 782, 147 Mo. App. 216.

CONVENTION

See Constitutional Convention; Joint Convention; Political Convention.
Adjournment of convention, see Adjournment.
See, also, Primary Election.

"Convention," as used and employed in the direct primary election law (Laws 1909, p. 196), means an organized body of delegates or representatives assembled for the purpose of making nominations, and does not have reference to a mass meeting or assemblage of persons who represent themselves only, but is intended to be an assemblage or body selected or appointed by some class, body, or party of electors as representatives of the people, party, or district making the selection or appointment. State ex rel. Spofford v. Gifford, 126 Pac. 1060, 22 Idaho, 613; State ex rel. Peters v. Superior Court of Kitsap County, 127 Pac. 310, 312, 70 Wash. 662.

In view of Laws 1911, c. 891, defining a "convention," as used therein, as an assemblage of delegates elected according to the provisions of the chapter and representing a political party duly convened to nominate candidates for public office, etc., or for the transaction of any other business relating to the affairs of the party, section 112 of the chapter, relating to the organization of conventions, would not apply to the meeting of a party congressional committee appointed before the statute was enacted. In re Daniel, 134 N. Y. Supp. 254, 255, 149 App. Div. 777.

"A 'convention,' within the meaning of the statute relating to nominations [for public office], is an organized assembly of delegates or electors representing a political party or principle. Such a convention may name candidates for public offices to be filled by any public election within this state. All nominations made by such conventions are required to be certified in the prescribed man-

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ner." A county central committee of a political party called a convention for a certain time and place, and a majority of the committee thereafter selected a building for holding it, of which all had notice. A minority of the committee selected another building. At the first place a convention was had, which was called to order by the chairman of the committee, and, being organized in the usual manner, proceeded to make the nominations provided for in the call. At the second place certain delegates, who did not attend the other convention, met, were called to order by a member of the committee, organized, and made nominations for the same offices. The first convention was the regular convention, and its nominees were entitled to have their names placed on the ballot as the nominees of the party. State ex rel. Howells v. Metcalf, 100 N. W. 923, 925, 18 S. D. 393, 67 L. R. A. 331.

Twelve members of a city council were to be elected, four from each of three wards, and the Democratic committee determined that nominations for the common council should be made at a primary election, and in the call therefor it was provided that, if there were not more than four candidates for either of the three wards of the city, the committee would declare such candidates the nominees of the party, and no primary would be held. Twelve defendants in the action were the only announced candidates, and the committee declared them the nominees, and issued to them certificates of nomination. Ky. St. § 1453 (Russell's St. § 4012) requires the county clerk to print on the respective ballots "the names of the candidates nominated by the convention or primary election" of any party entitled to have its candidates placed upon ballots. Held, in an action for a mandatory injunction, requiring the clerk to put the names of plaintiffs on the ballot as candidates of the Democratic party, that the word "convention" was not used in any technical sense, and that the committee, as the governing authority of the party, had the power to determine how its nominations should be made, and that plaintiffs were not entitled to an injunction. Gilbert v. Smith, 140 S. W. 147, 145 Ky. 165.

As assemblage

See Assemblage.

CONVENTION HALL

As public utility, see Public Utility.

CONVENTIONAL DIVISION OF CHARGE

Where goods are received in transit under a "conventional division of the charges," there is an apportionment of the charges by agreement of the participating carriers. Mutual Transit Co. v. United States, 178 Fed. 664, 668, 102 C. C. A. 164.

CONVENTIONAL LIFE ESTATE

"Conventional life estates" are those made by act, contract, or convention of the parties, and may be an estate to one for his own life, or during the life of another, or for an uncertain period, terminating upon the happening of a certain event, which may last a lifetime. Disley v. Disley, 75 Atl. 481, 483, 30 R. I. 366.

CONVENTIONAL SUBROGATION

"Conventional subrogation" may result from a direct agreement between a debtor and a third person who pays the debt that he shall be subrogated to all the rights and securities existing in behalf of the creditor whose debt is paid off, but nothing short of an express agreement to that effect will move a court of equity in behalf of such a creditor. A mere understanding on the part of such a third person, under no obligation to pay the debt, that he by such payment will be subrogated to liens of the creditor, is not enough. J. P. Browder & Co. v. Hill, 136 Fed. 821, 823, 824, 69 C. C. A. 499 (citing Sheld. Subr. §§ 243, 248, 250; Receivers of New Jersey M. R. Co. v. Wortendyke, 27 N. J. Eq. 658, overruling Coe v. New Jersey M. R. Co., 27 N. J. Eq. 111; Unger v. Leiter, 32 Ohio St. 210; Brice v. Watkins, 30 La. Ann. 21; Hutchinson v. Rice, 29 South. 898, 105 La. 474; Cumberland Bldg. & Loan Ass'n v. Sparks, 111 Fed. 648, 49 C. C. A. 510).

CONVERSION

See Constructive Conversion; Equitable Conversion; Fraudulent Conversion; Reconversion.
See, also, Trover.

Any distinct act of dominion wrongfully exerted over another's property, in denial of his right or inconsistent with it, is a "conversion." Crawford v. Thomason, 117 S. W. 181, 183, 53 Tex. Civ. App. 561; Aylesbury Mercantile Co. v. Fitch, 99 Pac. 1089, 22 Okl. 475, 23 L. R. A. (N. S.) 573; Baldwin v. G. M. Davidson & Co. (Tex.) 143 S. W. 716, 717; Quitman Naval Stores Co. v. Conway, 58 South. 840, 63 Fla. 253; Continental Gin Co. v. De Bord, 123 Pac. 159, 160, 34 Okl. 66.

The action of trover being founded on a concurrent right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a "conversion." Roper Wholesale Grocery Co. v. Favor, 68 S. E. 883, 884, 8 Ga. App. 178; Swauk v. Elwert, 105 Pac. 901, 905, 55 Or. 487.

"Conversion" is any unauthorized act which deprives a person of his property permanently. Phillipos v. Mihran, 80 Pac. 527, 528, 38 Wash. 402.

"Conversion" is the turning or applying of the property of another to one's own use. Crow v. Ball (Tex.) 99 S. W. 583, 584.

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"Conversion" is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Reich v. Cochran, 99 N. Y. Supp. 755, 756, 114 App. Div. 141 (citing Industrial & General Trust v. Tod, 63 N. E. 285, 170 N. Y. 233, 245).

A "conversion" is shown when one person unlawfully interferes with the property of another, and assumes and exercises dominion over it in disregard, and to the exclusion, of the owner's rights therein. People's State Savings Bank v. Missouri, K. & T. Ry. Co., 138 S. W. 915, 158 Mo. App. 519.

"Conversion" is the unlawful turning or applying the personal goods of another to the use of the taker or of some other person than the owner, or the unlawful destroying or altering their nature. National Bank of Commerce of Kansas City v. Southern Ry. Co., 115 S. W. 517, 518, 135 Mo. App. 74.

To constitute a "conversion" of personal property, there must be some repudiation of the owner's rights, or some exercise of dominion over it inconsistent with such right, or some act done which has the effect of destroying or changing its character. Merz v. Croxen, 112 N. W. 890, 891, 102 Minn. 69.

"Conversion" consists either in the appropriation of the property of another or in its destruction, or in exercising dominion over it in defiance of the owner's rights, or in withholding the possession from him under an adverse claim of title, and all who aid or participate in the commission of the unlawful acts are liable. Merchants' Nat. Bank of Baltimore v. Williams, 72 Atl. 1114, 1117, 110 Md. 334.

"Conversion" may be shown by the exercise of control over the property inconsistent with the right of the owner, and by excluding him from the possession, or depriving him of it. McGonigle v. Victor H. J. Belle Isle Co., 71 N. E. 569, 571, 186 Mass. 310.

"Conversion" is the unlawful and wrongful exercise of dominion, ownership, or control by one person over the property of another, to the exclusion of the exercise of the same rights by the owner, either permanently or for an indefinite time, and may be effected by taking actual corporal possession and control over the property of another so as to prevent the owner from the exercise of such rights. France v. Gibson (Tex.) 101 S. W. 536.

In order to constitute an actual conversion of goods, there must be some repudiation of the owner's right, or some exercise of dominion over them inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel. Kitchen v. Schuster, 89 Pac. 261, 264, 14 N. M. 164 (quoting Woodside v. Adams, 40 N. J. Law, 417).

"A 'conversion' of property is an act of malfeasance, and not a mere nonfeasance; a positive wrong, and not the mere omission of what was right. The manner in which possession of the property was acquired by defendant in an action in trover may be material with regard to the evidence of a conversion. To maintain an action for conversion, there must have been on the part of defendant some unlawful assumption of dominion over the personal property involved, in defiance or exclusion of plaintiff's rights, or else a withholding of the possession under a claim of right or title, inconsistent with that of plaintiff. Lee Tung v. Burkhart, 116 Pac. 1066, 1069, 59 Or. 194 (citing 8 Words and Phrases, p. 7112).

To constitute "conversion," there must be a positive tortious act, a tortious detention of personal property from the owner or its destruction or an exclusion or defiance of the owner's right, or the withholding of possession under a claim of title inconsistent with that of the owner. Taugher v. Northern Pac. Ry. Co., 129 N. W. 747, 750, 21 N. D. 111.

One who wrongfully seizes and exercises control over the chattels of another, especially if upon demand he refuses to surrender them to the true owner, is guilty of "conversion," whatever his motive or excuse, and there is a conversion where a sheriff under a writ of attachment seizes the property of another and holds it as against a demand by the true owner. Seivert v. Galvin, 113 N. W. 680, 682, 133 Wis. 391.

The illegal taking or wrongful assuming of a right to personal property, constitutes a "conversion," and no further step is necessary to perfect the right of action therefor. Meyer v. Doherty, 113 N. W. 671, 673, 133 Wis. 398.

"Any wrongful exercise of dominion by one person over the goods and chattels of another, which is inconsistent with and exclusive of the owner's rights therein, amounts to a 'conversion' thereof." Where one was intrusted with certificates of stock for a particular purpose, and transferred them to another, and converted the proceeds to his own use, his dealing constituted a "conversion." Wilkinson v. Misner, 138 S. W. 931, 932, 158 Mo. App. 551.

Defendant's exercise of acts of ownership or dominion over plaintiff's property does not constitute "conversion" if it is not inconsistent with plaintiff's right or title, or if plaintiff consents or acquiesces therein. Sigel-Campion Live Stock Co. v. Holly, 101 Pac. 68, 72, 44 Colo. 582.

"Any distinct act of dominion wrongfully exercised over one's property in denial of his right or inconsistent with it is a 'conversion.' * * * The test is whether the

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wrongdoer has exercised a dominion over the property in exclusion or in defiance of the plaintiff's rights." In an action against a sheriff and undersheriff for "conversion" of personal property belonging to plaintiff, and located in a houseboat levied on, an instruction that if the man in charge of the boat knew that plaintiff was the owner, or if at that time he was so informed by plaintiff, and he forbade plaintiff to take the property, such denial of plaintiff's right was a denial by defendants, and amounted to a "conversion," entitling plaintiff to recover the full value of the property which was removed by defendants from the boat, was proper. Lucas v. Sheridan, 102 N. W. 1077, 1028, 124 Wis. 567 (quoting and adopting definition in Cernahan v. Chrisler, 107 Wis. 645, 647, 648, 83 N. W. 778).

A contract of sale of soda in bottles stipulated that the bottles should remain the property of the seller, and that the buyer at his own expense should return them. The buyer delivered them to a carrier's agent, consigned to the seller, and they were loaded and waybilled. Held, that the buyer was not guilty of "conversion," which consists either in the appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the owner's rights, or in withholding possession from the owner under a claim of title inconsistent with his title. C. H. Eddy & Co. v. Field, 81 Atl. 249, 250, 85 Vt. 188.

"The words 'converted' and 'conversion,' have a well-defined meaning in the law, and when used in connection with the taking and appropriation of personal property of another imply a wrongful or unlawful act." It is not necessary, in an action in trover or conversion, to allege in the complaint that the property was "wrongfully" or "unlawfully" converted. The allegation that it was "converted" implies a wrongful act. Cordill v. Minnesota Elevator Co., 95 N. W. 306, 307, 89 Minn. 442.

As element of larceny

"Any direct act of dominion, wrongfully exercised over one's property, in denial of his right or inconsistent with it, is a 'conversion.'" There is a conversion, within the statute declaring guilty of larceny one who receives money of the state and converts it, where money, being deposited in a bank by the state treasurer for safe-keeping, is paid out to others than such treasurer. "Convert to his own use," within the statute, is equivalent to the term "conversion" in its legal sense; and it is enough to constitute it that one assumes to dispose of the property of another without right, as if it were his own, though he gets no personal benefit from it. State v. Ross, 104 Pac. 596, 602, 55 Or. 450, 42 L. R. A. (N. S.) 601, 613 (quoting and adopting definition in 2 Words and Phrases, p. 1564).

As injury to property

See Injury to Property.

By officer of national bank

The word "conversion," as used in an indictment of an officer of a national bank, under Rev. St. § 5209, for misapplication of the funds or property of the bank, means the officer's misapplication of the funds or property of the bank by unlawfully and fraudulently converting the same to his own use. United States v. Eastman, 132 Fed. 551, 553.

Delay

Mere delay in the delivery of goods by a carrier does not constitute a "conversion." St. Louis Southwestern Ry. Co. of Texas v. Tyler Coffin Co. (Tex.) 81 S. W. 826, 827.

Delay on the part of a carrier does not constitute a "conversion" of the goods, no matter how long continued, so as to make him liable for their value. Ryland & Rankin v. Chesapeake & O. R. Co., 46 S. E. 923, 924, 55 W. Va. 181.

An unreasonable delay in the shipment of goods does not amount to a "conversion," and the owner is bound to receive the goods when tendered at the proper place, however long the delay. Higgins v. United States Exp. Co., 85 Atl. 450, 452, 83 N. J. Law, 398.

"Delay on the part of a carrier does not constitute a 'conversion' of the goods, no matter how long continued, so as to make him liable for their value; and so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, and can recover from the carrier only the damages which he has sustained by the delay." Gulf, C. & S. F. Ry. Co. v. Everett & Long, 83 S. W. 257, 37 Tex. Civ. App. 167 (citing Hutch. Carr. §§ 770d, 775; Gulf, C. & S. F. Ry. Co. v. Jackson [Tex.] 15 S. W. 128; Gulf, C. & S. F. Ry. Co. v. Booton [Tex.] 15 S. W. 502; Baumbach v. Gulf, C. & S. F. Ry. Co., 23 S. W. 693, 4 Tex. Civ. App. 650).

Demand necessary

Plaintiff sold wagons to H., retaining title till they were paid for, which was never done. H. then mortgaged them to defendant, thereafter had the key to the building in which they were kept, and acted as agent for her as respected her right as mortgagee, keeping the wagons for her under a claim of right inconsistent with plaintiff's rights. Held, there was a "conversion" by defendant, authorizing an action therefor without a prior demand. Geneva Wagon Co. v. Smith, 74 N. E. 299, 188 Mass. 202.

Where goods are lawfully taken from a chattel mortgagor by the mortgagee under the mortgage, a detention thereof by the mortgagee is not unlawful, where no demand is shown to have been made on the mortgage

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for a compliance with the terms of the mortgage, or a demand for the return of the property, accompanied with tender of the amount due thereon, before sale. Shelton v. Holzwasser, 91 N. Y. Supp. 328, 330, 46 Misc. Rep. 76.

One who contracted to furnish the ironwork for a building, reserving title pending payment, even if not himself in default, should have demanded a part of the ironwork furnished or payment therefor before suing as for "conversion" one who purchased the land at foreclosure sale, at least in absence of proof that the purchaser was a bona fide purchaser. Klein v. Cohen, 127 N. Y. Supp. 171, 172, 142 App. Div. 500.

Intent

A chattel mortgage gave the mortgagors the right to exclusive possession of the property before default, but obligated them not to permit the property to be attached. In violation of this condition, the mortgagors suffered an attachment, which the mortgagees attempted to dissolve, under Pub. St. 1882, c. 161, § 75, but ineffectually, because of failure to make a proper demand on the attaching creditor or sheriff. Subsequently the mortgagors assigned for the benefit of creditors, under Pub. St. 1882, c. 157, section 46 of which declares the assignment to vest in the assignee all the property of the debtor. The mortgagee took no steps to foreclose his mortgage, and failed, after the assignment, to make any demand on the sheriff for the property, and the latter turned it over to the assignee. Held, that the sheriff was not guilty of a "conversion." Cousins v. O'Brien, 74 N. E. 289, 290, 188 Mass. 146.

Wrongful intention is not essential to a "conversion," it being sufficient if the owner has been deprived of his property by an unauthorized assumption of control and dominion, so that defendants who purchased land in the construction of the building on which plaintiff furnished the ironwork, reserving title in himself until payment therefor, were liable for conversion of such iron before it was paid for if they altered the condition of the property without authority from plaintiff, but the conveyance of the property to one not a bona fide purchaser, but who held subject to plaintiff's rights therein, did not constitute a conversion of the ironwork as to plaintiff. Klein v. Cohen, 127 N. Y. Supp. 171, 174, 142 App. Div. 500.

Where defendants, claiming under authority from the owner of land on which plaintiffs were conducting a refreshment stand, forcibly and wrongfully removed plaintiffs' chattels from the land and deposited them a short distance away, and exercised no further acts of dominion, it did not amount to a "conversion." The court said: "From the time that it was set down there by the defendants nothing prevented the plaintiffs from taking immediate possession of it. They were practically assured by the defendants that the only interference which they had to apprehend from them was the prevention of their use of this property in the spot in the highway where the plaintiffs insisted upon using it. In my judgment, such an interference with the property, although it was beyond doubt an asportation of the goods, was not a 'conversion.' Such asportation was not done with any intent to assert any right in the chattels or to deny any title of the owner, nor did it have the effect of destroying the chattels or altering their nature. It was not, therefore, a 'conversion' of them, so that the plaintiffs had the right to abandon them entirely to the defendants, to refuse to take them back, had the defendants offered to return them, and enable the plaintiffs to treat them as having been purchased by the defendants from the plaintiffs." Hammond v. Sullivan, 99 N. Y. Supp. 472, 473, 112 App. Div. 788 (citing People v. Bank of North American, 75 N. Y. 547, 564; O. J. Gude Co. v. Farley, 54 N. Y. Supp. 998, 25 Misc. Rep. 502).

Misdelivery or refusal to deliver

Taking and using a horse without consent of the owner, and refusing to give him up on demand, constitutes a "conversion." Pepper v. Price, 107 N. Y. Supp. 559, 560.

Where a purchaser of drafts, drawn by a shipper, payable to itself, and bills of lading, consigning to itself goods against which the drafts were drawn, and which goods the shipper had agreed to sell to a third person, forwarded the drafts and bills of lading to a banker for collection with instructions to deliver documents only on payment, the purchaser reserved the title and jus disponendi, and the banker delivering the goods to the third person before payment was guilty of "conversion," a wrongful delivery of goods, either negligently or willfully, made by one intrusted with the custody of them, being a conversion. Where the banker delivered the goods to the third person prior to payment, the purchaser could ratify the tortious act and could sue the banker for conversion. First Nat. Bank of Cincinnati v. Felker, 185 Fed. 678, 681.

"Conversion," such as will sustain an action of trover, imports an unlawful act, and a mere nonfeasance is not sufficient. "It is generally laid down that any act that is an interference with the owner's dominion and right of property is a conversion;" but it must be an interference that cannot, as against the owner, be justified or excused by one who comes lawfully into possession. Where defendant took up plaintiff's stray heifer, and failed to post and advertise the same as required by statute, defendant having come lawfully into possession, such failure did not constitute a conversion. Andrews v. Carl, 59 Atl. 167, 77 Vt. 172.

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Where receivers appointed for an insolvent corporation were dispossessed from rented premises occupied by them, and thereafter demanded possession of trade fixtures left on the premises of the lessor, which he refused, such refusal amounted to a "conversion" of the property. Bergh v. Herring-Hall-Marvin Safe Co., 136 Fed. 368, 371, 69 C. C. A. 212, 70 L. R. A. 756 (citing Lewis v. Ocean Nav. & Pier Co., 26 N. E. 301, 125 N. Y. 341; Moore v. Wood [N. Y.] 12 Abb. Prac. 393).

In order to charge a person with the "conversion" of the goods of another, "he must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with the plaintiff's right of ownership, or in repudiation of such right." Hence a person who, having undertaken to sell certain property as the agent of another, returned some of the property to persons from whom it was purchased, receiving credit therefor, and placed the remainder in his own stock, so that its identity was substantially lost, and thereafter sold the property as his own, without keeping any account of his transactions, although he had agreed to dispose of the property as rapidly as possible and to report the sales as they were made, is liable for the value of the property as of the date he assumed control over it. Allsopp v. Joshua Hendy Mach. Works, 90 Pac. 39, 41, 5 Cal. App. 228 (quoting and adopting definition in Steele v. Marsicano, 36 Pac. 920, 102 Cal. 666).

Same—By carrier

A delivery of goods by a carrier or warehouseman to the wrong person constitutes a "conversion" for which an action of trover will lie. Seaboard Air Line Ry. Co. v. Phillips, 70 Atl. 232, 236, 108 Md. 285.

Loss of goods by wrongful delivery negligently made by a carrier is "conversion," for which it is liable to account at the full value of the goods. Atlantic Coast Line R. Co. v. Goodwin, 57 S. E. 1070, 1072, 1 Ga. App. 351.

The failure of an express company to deliver goods intrusted to it for carriage, or to return them on demand, because of their loss, does not constitute a "conversion" by it of the goods. Goldbowitz v. Metropolitan Exp. Co., 91 N. Y. Supp. 318.

"'Conversion,' as defined by Bouvier's Law Dictionary, is the unlawful turning or applying the personal goods of another to the use of the taker, or of some other person than the owner, or the unlawful destroying or altering their nature." A shipper of goods has the right to designate the consignee, and the carrier is bound to obey the shipper's direction, or comply with the terms of the shipment as to delivery, and if it disobeys it is liable for a conversion. National Bank of Commerce of Kansas City v. Southern Ry. Co., 115 S. W. 517, 518, 135 Mo. App. 74.

A wrongful delivery by a common carrier is technically a "conversion," and the measure of damages is the value of the goods at the place of delivery, and interest from the date when delivery should be made, but, if the goods are reclaimed by the carrier and delivered to a consignee or the proceeds paid to him, such tender or payment will mitigate the damages. Clarke-Lawrence Co. v. Chesapeake & O. Ry. Co., 61 S. E. 364, 365, 63 W. Va. 423.

"'Conversion' is the gist of an action of trover, and to support the action there must be a concurrence of the right of property, general or special, and of possession, or the immediate right of possession, in the plaintiff at the time of the 'conversion.'" Where a buyer, to whom goods are consigned, wrongfully refuses to receive them on their arrival within a reasonable time, and the seller is authorized to rescind the sale, the carrier is not guilty of "conversion" in complying with the seller's orders to ship the goods back to him. Stafsky v. Southern Ry. Co., 39 South. 132, 143 Ala. 272 (citing Booker v. Jones' Adm'x, 55 Ala. 266; Bolling v. Kirby, 7 South. 914, 90 Ala. 215, 24 Am. St. Rep. 789).

Ownership and right of possession

The essential elements of "conversion" is that plaintiff has a property or ownership in the thing converted or the right of possession at the time of the conversion. Innovation Trunk Co. v. Platt, 107 N. Y. Supp. 816, 817, 56 Misc. Rep. 645.

"A 'conversion' is any unauthorized act which deprives a man of his property permanently or for an indefinite time. Any distinct act of dominion wrongfully exerted over one's property, in denial of his right or inconsistent with it, is a 'conversion.'" A complaint for conversion of a chattel must show a general or special ownership in the property and a right to immediate possession at the time of the wrongful taking. Glass v. Basin & Bay State Min. Co., 77 Pac. 302, 304, 31 Mont. 21 (citing Union Stockyard & Transit Co. v. Mallory, Son & Zimmerman Co., 41 N. E. 888, 157 Ill. 554, 48 Am. St. Rep. 341).

The word "conversion" means "detaining goods, so as to deprive the person entitled to the possession of them of his dominion over them." Where, in an action for conversion of certain stock, defendant's answer expressly denied plaintiff's title, and alleged defendant's possession of the stock and dividends, and its refusal to surrender them to plaintiff, and the court found that the defendant had converted such stock and dividends to its own use, the finding was a sufficient finding that defendant was in possession of the stock and dividends, and that it denied and acted in defiance of plaintiff's title. Eureka County Bank v. Clarke, 130 Fed. 325, 328, 64 C. C. A. 571.

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Property pledged

Where a pledgee's sale of the pledged property, contrary to the terms of the pledge agreement is not ratified by the pledgor, a failure to return the property upon demand and tender of the indebtedness constitutes a "conversion." Manning v. Heidelbach, 138 N. Y. Supp. 750, 753, 153 App. Div. 790.

Where pledged property was sold on foreclosure, and at the sale bought by the pledgee under circumstances rendering the sale voidable, and afterwards without the pledgor's knowledge transferred for other property at a fair price, there was no "conversion" of either the pledged stock or the other property, but the pledgor's rights remained in the new property as in the property pledged. Hebblethwaite v. Flint, 101 N. Y. Supp. 43, 48, 115 App. Div. 597.

Where a check is deposited in aid of a bond and to strengthen the security, the transaction is a "bailment," and the application of a check to any other purpose than that for which it was deposited is a "conversion" on the part of the bailee, entitling the bailor to recover the check or the value thereof with interest. Haines v. Chappell, 58 S. E. 220, 222, 1 Ga. App. 480.

A firm of stockbrokers purchased a block of stock upon a margin for a customer, and were holding it as collateral security for a balance due on the purchase price. Subsequently the firm hypothecated the stock as collateral security for a call loan. The customer tendered the balance due on his stock and demanded its delivery, which was refused. Held, that the legal title to the stock was vested in the customer, and the unauthorized loan of it was a "conversion" thereof. Strickland v. Magoun, 104 N. Y. S. 425, 427, 119 App. Div. 113.

Property sold conditionally

One who contracted with the owner of a building to furnish the ironwork, reserving title pending payment, cannot recover for the "conversion" of a part of the ironwork unless he himself was not in default under the contract, and was entitled to possession of the material. One who purchased land subject to plaintiffs' reservation of title under an agreement to furnish and install ironwork for the building thereon could sell the land, at least before default in the building contract, without being guilty of conversion. Klein v. Cohen, 127 N. Y. Supp. 171, 172, 142 App. Div. 500.

A threshing machine agency contract prohibited delivery of any machine to the purchaser until settled for, either in cash or notes and securities, and declared that a violation of the provision should be deemed a "conversion" by the agents, and render them personally liable for machinery so delivered. Held, that the word "conversion" was used in such contract in the sense of "default" of the agents, and that an action against them for the value of a separator so wrongfully delivered was for breach of contract, and not for conversion. J. I. Case Threshing Mach. Co. v. Folger, 117 N. W. 944, 945, 136 Wis. 468.

Sale of another's property

A sale of the property alleged to have been converted is not necessary to establish a "conversion." Lewis v. State, 87 S. W. 831, 48 Tex. Cr. R. 309.

A statement by a farm landlord in possession of the tenant's hay that he intended to sell it and appropriate the proceeds, and other acts in asserting a right inconsistent with the tenant's general dominion over the hay, constitute a "conversion." Gaw v. Bingham (Tex.) 107 S. W. 931, 932.

Where a bank which had received as collateral for debts assignments of certain property purchased from plaintiffs, and in selling the property, which was in a warehouse, sold property not covered by the assignments, and which had been bought by the debtor on credit with the intention to defraud the seller, the bank was liable to the seller for the property not covered by the assignments, as for a "conversion." Kirkpatrick's Ex'r v. E. Rehkoph Saddlery Co., 137 S. W. 862, 864, 144 Ky. 129.

"Convert to his own use," within B. & C. Comp. § 1807, providing that if any person shall receive any money for the state, or shall have in his possession money belonging to the state, and shall convert it to his own use, is equivalent to the term "conversion" in its legal sense; and it is enough to constitute it that one assumes to dispose of the property of another without right, as if it was his own, though he gets no personal benefit from it. State v. Ross, 104 P. 596, 602, 55 Or. 450, 42 L. R. A. (N. S.) 601, 613.

Trespass distinguished

"The distinction between 'trespass' and 'conversion' is this: That trespass is an unlawful taking as, for example, the unlawful removal of the property, while conversion is an unlawful taking or keeping, in the exercise, legally considered, of the right of ownership. A mere seizure or unlawful handling may amount to trespass, while conversion is usually characterized by a usurpation of ownership." Montgomery Water Power Co. v. William A. Chapman & Co., 126 Fed. 68, 72, 61 C. C. A. 124 (citing Bigelow, Torts [7th Ed.] 510).

Use of gas

Natural gas, when extracted from the earth and put into a pipe line, is personal property; and when the pipe line is opened, and the gas extracted and consumed, without the knowledge or consent of the owner, the act constitutes "conversion." Crystal Ice & Cold Storage Co. v. Marion Gas Co., 74 N. E. 15, 16, 35 Ind. App. 295.

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CONVERTIBLE CAR

See Self-Containing Convertible Car; Semiconvertible Car; Wholly Convertible Car.

CONVEX

The word "convex," used in a claim of a patent as applied to a surface, is to be given its generally accepted meaning, as indicating a surface of a more or less spherical form, rather than cylindrical. Malleable Iron Range Co. v. Beckwith, 189 Fed. 74, 78, 110 C. C. A. 638.

CONVEY

See Sell and Convey; Sold and Conveyed; These Conveyed Premises.
Otherwise convey, see Otherwise.

The word "convey," ordinarily speaking, means to transfer property from one person to another by means of a written instrument. Radebaugh v. Scanlan, 82 N. E. 544, 547, 41 Ind. App. 109.

Where one agrees to "convey" land on a payment of money, the word "convey" is construed as meaning the making and delivery of a deed. Quinton v. Mulvane, 81 Pac. 486, 487, 71 Kan. 687 (quoting and adopting the definition in Fuller v. Hubbard [N. Y.] 6 Cow. 13, 17, 16 Am. Dec. 423).

Land is "conveyed" when the title thereto is deeded. Duff v. Keaton, 124 Pac. 291, 294, 33 Okl. 92, 42 L. R. A. (N. S.) 472 (citing Perkins v. Morse, 2 Atl. 130, 78 Me. 17, 57 Am. Rep. 780).

To "convey" means to transfer title to realty. The word in its widest sense means transfer of property from one person to another by means of a written instrument or conveyance and other formalities. While as used in Const. art. 10, § 6, which provides that the real and personal property of a married woman shall remain her sole and separate estate and may be devised and bequeathed, and, with the written assent of her husband, conveyed as if she were unmarried its operation is restricted to such property as is by law required to be transferred by written instrument, and, as it is not technically or legally correct to speak of conveying personal property by writing, permits a married woman to dispose of a note by gift and deliver without the assent of her husband. Vann v. Edwards, 47 S. E. 784, 786–788, 135 N. C. 661, 67 L. R. A. 461.

The term "conveyed" in its strict legal sense imports a transfer of legal title to land, but it is also habitually used to define any transfer of title legal or equitable, and the meaning of the term in any particular case must be ascertained from the context. Seal of Gold Mining Co. v. Slater, 120 Pac. 15, 19, 161 Cal. 621.

A bill for specific performance of a contract for the conveyance of land, which alleges that defendant offered to give plaintiff certain land, provided plaintiff would not erect a building in a certain place and manner, and that plaintiff accepted the offer, changed the plan of the building, took possession of the land, and erected the building in accordance with the agreement, states a cause of action as against a demurrer; the allegation of an agreement "to give" being construed as an agreement "to convey."—Shipley v. Fink, 62 Atl. 360, 361, 102 Md. 219, 2 L. R. A. (N. S.) 1002.

In a deed of trust providing that if a husband and wife, the beneficiaries, shall both die leaving issue of their marriage, "then in trust to convey said separate property to the said issue living at the time of the death of the survivor of them share and share alike," the use of the words "to convey" and "share and share alike" indicates an intention that there should be distribution among the children, and also conveyances to them by the trustee. Jones v. Rountree, 76 S. E. 55, 56, 138 Ga. 757.

As grant

The word "convey" or "transfer" as operative words in a deed is of equivalent signification and effect as "grant." State v. Kelliher, 88 Pac. 867, 868, 49 Or. 77 (quoting and adopting definition in Lambert v. Smith, 9 Or. 193, citing Field v. Columbert, 4 Sawy. 527, 9 Fed. Cas. 12).

In modern law, the terms "grant" and "convey," when used in instruments intended to alienate or transfer real estate, have substantially the same meaning. A deed reciting that the grantor has "granted," bargained, and sold is a substantial compliance with the statute providing that bargain and sale deeds for conveyance of land, reciting that the grantor does bargain, sell, and "convey," shall be adjudged an express convenant that the grantor had the fee. Blood v. Sielert, 80 Pac. 799, 801, 38 Wash. 643.

The word "grant," as used in Code 1899, c. 52, § 1, providing that every corporation, as such, shall contract and be contracted with by simple contract or specialty, purchase, hold, use, and grant estate real and personal, is the equivalent of "convey" and similar terms, and thus gives the corporation power to sell and convey equally broad with its power to purchase and hold. Germer v. Triple-State Natural Gas & Oil Co., 54 S. E. 509, 513, 60 W. Va. 143.

A deed, reciting that the grantor does "give, grant, remise, release and forever quitclaim" all the right and title the grantor has or ought to have in and to the property described, is not a quitclaim deed; but under Shannon's Code, § 3672, providing that every grant shall pass all the estate of the grantor, it conveys the grantor's whole estate, and must be taken in connection with

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the chain of title on which it is based, whereby it must appear what estate was owned by the grantor, the word "grant" being equivalent to the word "convey." Hitt v. Caney Fork Gulf Coal Co., 139 S. W. 693, 696, 124 Tenn. 334.

While it may be that the word "conveyed" usually implies the passing of the legal title, it is not inaptly nor incorrectly used to describe a transfer of title, legal or equitable, and, whether used with a narrow and technical meaning or in a broad and general sense, is to be determined by the context and the circumstances under which the entire instrument or document in which it was found is framed. When a railroad company received full payment for lands granted to it by Act Minn. May 22, 1857, and executed an instrument by which all its equitable and substantial interests in them was transferred, the lands were "conveyed" within the meaning of the provision that the lands so granted should be exempt from taxation until "sold and conveyed." Winona & St. P. Land Co. v. Minnesota, 16 Sup. Ct. 83-85, 159 U. S. 531, 40 L. Ed. 247.

As mortgage

The word "convey," within Code 1907, § 7423, prohibiting conveyance of mortgaged personalty without the mortgagee's consent, includes a subsequent chattel mortgage. Fort v. State, 55 South. 434, 436, 1 Ala. App. 195.

The words "convey," "conveyed," and "conveyances," as used in the amendments of March 3, 1893, and March 4, 1897, import a transfer of title, ordinarily used as to real property, and the amendments do not apply to a married woman's mortgage on land to secure a debt, a mortgage being merely a lien which passes no title in view of Civ. Code, § 2872, defining a lien; section 2877 providing that mortgages shall be subject to all the provisions of the chapter (on liens), and section 2888 declaring that a lien transfers no title in the subject-matter. Booker v. Castillo, 98 Pac. 1067, 1068, 154 Cal. 672.

As transmit

The words "send" and "convey" import different modes of transmission. An indictment under a statute making it an offense to "send and convey" an insulting, lascivious letter or communication to any female, which charges that accused did "send and convey," is technically defective. Larison v. State, 9 Atl. 700, 701, 49 N. J. Law, 256, 60 Am. Rep. 606.

Warranty implied

By the express provisions of Rev. St. 1901, par. 728, a conveyance of a fee simple in which the use of the word "grant" or "convey" is made impliedly covenants that the estate is free from incumbrance. Sherman v. Goodwin, 89 Pac. 517, 519, 11 Ariz. 141.

In modern law, the terms "grant" and "convey," when used in instruments intended to alienate or transfer real estate, have substantially the same meaning. A deed reciting that the grantor has "granted," bargained, and sold is a substantial compliance with the statute providing that bargain and sale deeds for conveyance of land, reciting that the grantor does bargain, sell, and "convey," shall be adjudged an express covenant that the grantor had the fee. Blood v. Sielert, 80 Pac. 799, 801, 38 Wash. 643.

From the use of the words "grant" and "convey" in a deed, the law implies a covenant that at the time of such conveyance the land is free from incumbrances, and taxes are included in the term "incumbrances" as here used. Bullitt v. Coryell, 85 S. W. 482, 483, 38 Tex. Civ. App. 42.

By statute the words "grant or convey" in a deed carry with them an implied warranty that the estate conveyed is at the time of the execution of the deed free from incumbrances, unless restrained by express terms contained therein. Rotan v. Hays, 77 S. W. 654, 655, 33 Tex. Civ. App. 671.

Where defendant C. and wife conveyed certain land in controversy in fee, with covenants of warranty, and thereafter purchased the land on foreclosure of a trust deed which they had previously given to secure a loan on the land, the title so acquired by them inured to the benefit of their grantee by estoppel, under Rev. St. 1895, art. 633, providing that the use of the words "grant" or "convey," in any conveyance by which an estate of inheritance or fee simple is passed, implies a covenant that the estate is at the time of the execution of the conveyance free from incumbrances. Lowry v. Carter (Tex.) 102 S. W. 930, 931.

CONVEY AND WARRANT

In a deed in statutory form, the terms "convey and warrant," when given their legal purport, fully indicate an intention to convey a present estate to the grantee and defend the title thereto, and in no way is it apparent, or to be inferred from these words, that the grantor intended to devise the real estate in question though the deed is not to take effect until the death of the grantor. McLain v. Garrison (Tex.) 88 S. W. 485, 487.

The words of a grant, "convey and warrant," convey the fee, unless they are limited to a lessor estate by words found in the granting clause or in the habendum of the deed, if it contain an habendum. They may be used, however, in conveying a life estate or an estate for years, and words limiting the estate conveyed to an estate of the character of either of the two last mentioned are not inconsistent with such words of grant; and where there is language, either in the granting clause or in the habendum of the deed, limiting the estate conveyed by such

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granting words to one less in extent than a fee, such words of limitation will be given effect. Walker v. Shepard, 71 N. E. 422, 426, 210 Ill. 100.

Burns' Ann. St. 1908, § 3958, declares that any conveyance of lands reciting that A. B. "conveys and warrants" to C. D. the premises described for a specified consideration, dated, signed, sealed, and acknowledged by the grantor, shall convey a fee simple to the grantee, his heirs and assigns, and section 3960 provides that it shall not be necessary to use the words "heirs and assigns" of the grantee to create an estate of inheritance, and if it be the intention of the grantor to convey any lessor estate, it shall be so expressed in the deed. Held that, under such sections, the grantor may use the words "convey and warrant" without using the words "heirs and assigns of the grantee," and yet effectually express "in the deed," after the description of the land, his intention to convey a less estate than one of inheritance to the first taker. Adams v. Merrill, 85 N. E. 114, 116, 45 Ind. App. 315.

CONVEY BY WARRANTY DEED

An agreement to convey land by "warranty deed" means that the grantor will convey a merchantable title only, and not a perfect title of record. Bear v. Fletcher, 96 N. E. 997, 1000, 252 Ill. 206.

CONVEYANCE

See As Being a Conveyance; Fraudulent Conveyance; Involuntary Conveyance; Public Conveyance; Voluntary Conveyance.

Such conveyance, see Such.

The terms "conveyed" and "conveyance" are used in several senses. In the strict legal sense, the latter term imports a transfer of legal title to land; but it is also habitually used by lawyers to denote any transfer of title, legal or equitable, and the last is also the popular sense of the term. Adams v. Hopkins, 77 Pac. 712, 719, 144 Cal. 19.

A "conveyance" is the transfer of the title of land from one person or class of persons to another. Frame v. Bivens, 189 Fed. 785, 789 (citing 1 Bouv. Law Dict. p. 434).

Rev. Codes, § 3161, defines "conveyance" as embracing every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged, or incumbered, or by which the title may be affected, except wills. Harris v. Reed, 121 Pac. 780, 781, 21 Idaho, 364.

The word "conveyance," in Civ. Code, § 1214, providing that every conveyance of realty other than a lease for a term not exceeding one year is void as against any subsequent purchaser or mortgagee in good faith, whose conveyance is first duly recorded, etc., embraces every instrument in writing by which any estate or interest in real property is created, alened, mortgaged, or incumbered. Hibernia Savings & Loan Soc. v. Farnham, 96 Pac. 9, 11, 153 Cal. 578, 126 Am. St. Rep. 129.

The term "conveyance" embraces every instrument in writing by which the title to any real estate may be affected. Civ. Code, § 1215. Kent v. Williams, 79 Pac. 527, 529, 146 Cal. 3.

An instrument which does not purport to convey any present interest in an existing patent, or one for which an application is pending, is not a "conveyance" within Rev. St. § 4898. National Cash Register Co. v. New Columbus Watch Co., 129 Fed. 114, 116, 63 C. C. A. 616.

The term "conveyance" in its strict legal sense imports a transfer of legal title to land, but it is also habitually used to define any transfer of title legal or equitable, and the meaning of the term in any particular case must be ascertained from the context. Seal of Gold Min. Co. v. Slater, 120 Pac. 15, 19, 161 Cal. 621.

A "conveyance" is an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another. A conveyance is an instrument in writing under seal (anciently termed an "assurance") by which some estate or interest in lands is transferred from one person to another, such as a deed, mortgage, etc. "Conveyance" is a general word which comprehends the several modes of passing title to real estate and is the transfer of the title of land from one person or class of persons to another. Vann v. Edwards, 47 S. E. 784, 787, 135 N. C. 661, 67 L. R. A. 461 (quoting and adopting Kelly v. Fleming, 18 S. E. 81, 113 N. C. 138; Black, Law Dict. p. 273; Klein v. McNamara, 54 Miss. 105).

In a suit for reformation of a deed, a prayer for a conveyance is sufficient to justify the court, on decreeing the relief sought, to require that the deed should have a seal under Gen. St. 1902, § 4029, defining a "conveyance of land" as a writing sealed by the grantor. Jenner v. Brooks, 59 Atl. 508, 510, 77 Conn. 384.

Agreements concerning land

An agreement which preserves a tract of land for residence purposes, and which prohibits the use thereof for hotel, club, or camping purposes, executed so as to be entitled to record, affects title to real estate, within St. 1898, § 2242, defining a conveyance within the recording act as an instrument by which title may be affected. Boyden v. Roberts, 111 N. W. 701, 705, 131 Wis. 659.

Burns' Ann. St. 1908, § 7852, provides that no lands of any married woman shall be liable for the debts of her husband, but, with the profits therefrom, shall be her separate property as fully as if she were unmarried, provided that she shall have no power to in-

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cumber or convey the lands except by deed in which her husband shall join. Section 7853 provides that a married woman may take and hold property by conveyance, gift, devise, or descent, and it shall be her separate property, together with all the rents, issues, income, and profits thereof, and under her control the same as if unmarried. Held, that a written contract whereby a married woman granted the exclusive right to explore land for gas and oil for five years, with the privilege of renewal for five years, and as much longer as gas and oil might be found in paying quantities, was not an incumbrance or conveyance within section 7852, and was valid, though her husband did not join therein. Kokomo Natural Gas & Oil Co. v. Matlock, 97 N. E. 787, 788, 177 Ind. 225, 39 L. R. A. (N. S.) 675.

An agreement, by a cestui que trust of a life interest, that if the property was sold his interest in the proceeds should be applied by the trustee on certain family notes and obligations of the cestui que trust, was not a "conveyance of an equitable interest in real property," which Rev. Laws, c. 127, § 4, and chapter 117, § 3, requires to be recorded in order to be valid as against attaching creditors, but was only an assignment of the proceeds of the sale when made, and was therefore valid as against creditors, though not recorded. Cashman v. Bangs, 86 N. E. 932, 934, 200 Mass. 498.

Assignment of mortgage

An assignment of a real estate mortgage is a conveyance within the recording acts, and if not recorded is void as to a purchaser in good faith, who, relying upon the record, secures a satisfaction of the mortgage from the mortgagee. Foss v. Dullam, 126 N. W. 820, 821, 111 Minn. 220.

An assignment of a mortgage lien is not a "conveyance" or a "transfer" of "any interest" in land covered by the mortgage within the meaning of section 2480, Gen. St. 1906, relating to recording of conveyances and transfers of lands or interests therein. Garrett v. Fernauld, 57 South. 671, 672, 63 Fla. 434.

Under Real Property Law (Laws 1896, p. 607, c. 547) § 240, defining a "conveyance" so as to include every written instrument by which any estate or interest in real property is created, transferred, mortgaged, or assigned, a written assignment of a mortgage is a "conveyance" which may be recorded under section 241 of the law, authorizing properly acknowledged conveyances of real property to be recorded. Weideman v. Pech, 92 N. Y. Supp. 493, 495, 102 App. Div. 163.

Real Property Law (Laws 1896, c. 547, § 240) defines the term "conveyance" as every written instrument by which any estate or interest in real property is created, transferred, mortgaged, or assigned. Where a bankrupt, having no knowledge that a mortgage given by him had been assigned, scheduled the original mortgagee as his creditor, his discharge in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 17, is a defense to an action on the bond, though the assignment was recorded. Mueller v. Goerlitz, 103 N. Y. Supp. 1037, 53 Misc. Rep. 53.

Chattel mortgage

B. & C. Comp. § 5357, made applicable to chattel mortgages by section 5634, requires the county clerk to certify on every conveyance recorded the time when received and the place of record; and section 5355 makes a conveyance duly acknowledged competent evidence without further proof. Held, that such certificate was no part of the "conveyance duly acknowledged," but was an independent instrument, which must be identified and offered in evidence in order to be evidence of the time and place of record. Ayre v. Hixson, 98 Pac. 515, 517, 53 Or. 19, 133 Am. St. Rep. 819.

Condemnation for public use

The taking of land for public use is not in the nature of a "conveyance," but is the exercise of the superior title of the government, and hence the appropriation of lands of a married woman is completed by the decision by proper authority to take the land and the payment of compensation, however effected; compliance with statutory requirements as to conveyances by married women being unnecessary. City of San Antonio v. Grandjean, 41 S. W. 477, 479, 91 Tex. 430.

Contract to sell

The word "conveyance," as used in the Recording Act Minn. June 1894, § 4185, expressly excepts an executory contract for the sale of real estate. Klatt v. Dummert, 73 N. W. 404, 405, 70 Minn. 467.

That one's wife did not join him in signing a contract to sell their homestead does not prevent plaintiff from recovering damages for defendant's refusal to accept a conveyance, regardless of whether defendant could have specifically enforced the contract. White v. Bates, 84 N. E. 906, 907, 234 Ill. 276.

Delivery

"A delivery is essential to render a deed operative and give it force as a 'conveyance.'" When a father and his wife deeded land belonging to the father to a daughter by a former marriage, and at her death to her minor children, reserving a life estate in himself and wife, and the deed was delivered to the wife and kept under her control, there was a sufficient delivery to constitute a conveyance. Riegel v. Riegel, 90 N. E. 1108, 1109, 243 Ill. 626.

Discharge of mortgage

Laws 1910, c. 227, providing that a recording officer shall not accept for record any "conveyance of real estate" unless the

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residence of the purchaser shall be stated, does not apply to a certificate of discharge of a mortgage, since such an instrument does not create, transfer, mortgage, or assign any interest in real property, nor assign any mortgage, lease, or other conditional estate, nor is there any "purchaser," properly so called, and the register must accept for record a satisfaction piece, though it does not state the residence of the purchaser. Blume v. Lundy, 130 N. Y. Supp. 836.

Homestead declaration

"A declaration of homestead is not a 'conveyance' as that word is generally used in the Code." Smith v. Bangham, 104 Pac. 689, 694, 156 Cal. 359, 28 L. R. A. (N. S.) 522 (dissenting opinion by Melvin, J., quoting Ontario State Bank v. Gerry, 27 Pac. 531, 532, 91 Cal. 97).

Lease

As conveyance generally, see Lease.

The word "conveyance," as used in Act Cong. June 6, 1900, c. 786, tit. 3, § 98, 31 Stat. 321, 505, providing that "every 'conveyance' of real property with the district hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded," is not to be narrowly construed, but includes leases as well as transfers in fee. Waskey v. Chambers, 32 Sup. Ct. 597, 598, 224 U. S. 564, 566, 56 L. Ed. 885 (citing 2 Blackstone's Comm. 317; Sheppard's Touchstone, 267).

A copy of a lease for less than three years, the original of which was recorded in the register's office, certified by the register "to be a correct transcript therefrom and of the whole of said instrument," not being a "conveyance" within the terms of Real Property Law, Laws 1896, p. 607, c. 547, § 240, defining the term "conveyance" as including every written instrument except a lease for a term not exceeding three years, is not admissible in evidence, under the terms of Code, § 935, providing that a "conveyance," or a transcript thereof, duly certified and acknowledged in the manner prescribed by law to entitle it to be recorded, is evidence without further proof. Goodman v. Greenberg, 103 N. Y. Supp. 779, 780, 53 Misc. Rep. 583.

The word "conveyance" in the by-laws of a corporation, declaring that no mortgage or conveyance shall be made without the consent of the holders of at least two-thirds of the stock of the corporation, is used in its more restricted sense as importing an act whereby the legal and equitable title to real property of the corporation is transferred, and a lease of a part of the property of the corporation for a term of five years is not a conveyance, and the board of directors may execute such a lease under their power to manage and control the affairs and property of the corporation. Seal of Gold Min. Co. v. Slater, 120 Pac. 15, 19, 161 Cal. 621.

Under Civ. Code Alaska, § 181, which defines "real property" as including "all lands, tenements and hereditaments and rights thereto, and all interests therein, whether in fee simple or for the life of another," a lease of a mining claim for years conveys a chattel interest only and not an interest in the land, and is not a "conveyance," within the meaning of section 98, the recording of which will protect the lessee against a prior unrecorded deed; nor is such lessee an innocent purchaser in good faith for a valuable consideration within such section, where he is to work the same and pay the lessor a royalty. Eadie v. Chambers, 172 Fed. 73, 78, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879, 18 Ann. Cas. 1096.

Mortgage

A mortgage is in form a "conveyance." Tucker v. Ottenheimer, 81 Pac. 360, 362, 46 Or. 585.

A mortgage is a "conveyance" within the meaning of Civ. Code, §§ 1640, 1641, 1642, relative to the recording of conveyances. Cornish v. Woolverton, 81 Pac. 4, 10, 32 Mont. 456, 108 Am. St. Rep. 598.

The term "conveyance," as used in Laws 1896, p. 608, c. 547, § 241, declaring that a conveyance not recorded is void as against any subsequent purchaser, etc., includes a mortgage. O'Brien v. Fleckenstein, 73 N. E. 30, 180 N. Y. 350, 105 Am. St. Rep. 768.

The word "conveyance," as used in Recording Act June 1894, § 4185, includes a mortgage. Klatt v. Dummert, 73 N. W. 404, 405, 70 Minn. 467.

A mortgage is a "conveyance" of an estate or property by way of pledge for the security of a debt, to become void on the payment of it. Poarch v. Duncan, 91 S. W. 1110, 41 Tex. Civ. App. 275 (quoting and adopting the definition in 4 Kent, 136).

The term "conveyance," as used in Acts 1899, p. 132, c. 99, § 3, providing that in all cases where, during the life of the second or subsequent childless wife, and after the death of her husband, the children of the latter execute "conveyances" in fee to all or any part of the lands affected by the life estate, they shall be bound thereby, includes mortgages executed by such heirs with covenants of warranty. Griffis v. First Nat. Bank (Ind.) 79 N. E. 230, 232 (citing O'Kane v. Terrell, 43 N. E. 869, 144 Ind. 599).

Though the word "conveyance" is sometimes construed to include a mortgage, yet a mortgage is not a conveyance within Gen. St. Kan. 1901, § 7880, which provides that when a conveyance is made to one person upon a consideration paid by another no use or

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trust shall result in favor of the latter, but the title should vest in the former. Hanrion v. Hanrion, 84 Pac. 381, 382, 73 Kan. 25, 117 Am. St. Rep. 453.

Civ. Code, § 986, makes a conveyance of real property void as against a subsequent purchaser or incumbrancer, in good faith, for a valuable consideration, whose conveyance is first recorded. Section 987 defines a "conveyance" as any instrument by which an estate in real property is created, etc. Held, that a mortgage, though given to secure an antecedent debt, is supported by a sufficient consideration to constitute mortgagee an incumbrancer for value within the protection of the recording act (sections 986, 987), where a definite extension of the time of payment is granted. Farmers' & Merchants' Bank v. Citizens' Nat. Bank of Sisseton, 125 N. W. 642, 643, 25 S. D. 91.

Civ. Code, § 1215, defining the term "conveyance," as used in the recording act, to be any instrument in writing by which any estate or interest in real property is mortgaged, etc., applies only to the recording act, and does not make a mortgage a conveyance in any other sense. The words "convey," "conveyed," and "conveyances," as used in the amendments of March 3, 1893 (St. 1893, p. 71, c. 62), and March 4, 1897 (St. 1897, p. 63, c. 72), import a transfer of title, ordinarily used as to real property, and the amendments do not apply to a married woman's mortgage on land to secure a debt, a mortgage being merely a lien which passes no title in view of Civ. Code, § 2872, defining a lien; section 2877 providing that mortgages shall be subject to all the provisions of the chapter (on liens), and section 2888 declaring that a lien transfers no title in the subject-matter. Booker v. Castillo, 98 Pac. 1067, 1068, 154 Cal. 672.

In states where there is no statutory definition, the word "conveyance" retains its common-law meaning, which is the transfer of the title to real estate. In states where a real estate mortgage conveys the legal title of the land to the mortgagee, mortgages are held to be conveyances. A real estate mortgage is not a conveyance or assurance within Gen. St. 1901, § 2092, providing that every person executing with intent to defraud a writing for a conveyance or assurance of lands or chattels which he had previously sold or assured to any other person shall on conviction be adjudged guilty of a misdemeanor. State v. Rhodes, 93 Pac. 610, 611, 77 Kan. 202.

Rev. Civ. Code, § 986, provides that every conveyance of real property except a lease for less than a year is void as to certain classes of persons whose conveyances are first recorded. Section 987 provides that "conveyance," as used in the last section, embraces instruments in writing by which an interest in real property is incumbered. Held that, in order to protect a mortgagee against certain classes of persons, his mortgage must be recorded, and therefore, if given by an insolvent, will be deemed a preference if not recorded four months before the filing of his petition in bankruptcy, under the express provisions of Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, as amended by Act Cong. Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, relating to preferences. Bowler v. First Nat. Bank, 113 N. W. 618, 621, 21 S. D. 449, 130 Am. St. Rep. 725.

Mortgage on leasehold

Laws 1905, p. 2061, c. 729, as amended by Laws 1906, p. 1449, c. 532, § 293, imposes a tax on mortgages recorded after July 1, 1906, and section 290 defines the words "real property" to include everything, a conveyance or mortgage of which can be recorded as a conveyance or mortgage of real property under the laws of the state. Laws 1896, art. 8, p. 607, c. 547, provides for the recording of instruments affecting real property, and declares (section 240) that the term "real property" includes lands, tenements, hereditaments, and chattels real, except a lease for a term not exceeding three years, and the term "conveyance" to include every written instrument by which an estate or interest in real property is created, transferred, mortgaged, or assigned, except a will, a lease for a term not exceeding three years, etc. Section 241 provides that a conveyance of real property within the state, duly acknowledged by the grantor, etc., is entitled to record. Held, that a mortgage on certain leaseholds, each for a term of five years, but having less than three years to run when mortgaged, being duly acknowledged, etc., is a conveyance of real property entitled to record, and is subject to the payment of the mortgage tax. People ex rel. Henry Elias Brewing Co. v. Gass, 104 N. Y. Supp. 885, 886, 120 App. Div. 147.

Patent

See Patent.

Power to convey

Rev. St. 1898, § 2237, provides that a letter of attorney containing power to convey lands may be recorded with the register of deeds; and section 2246 provides that no letter of attorney, when recorded, shall be deemed revoked unless the instrument containing such revocation be also recorded in the same office. Section 2242 of the chapter in relation to the conveyance of real estate provides that the term "conveyance" embraces every instrument in writing by which any estate or interest in real estate is created, mortgaged, or assigned, or by which the title may be affected. Held that, a power to convey real estate not being a conveyance, it is not within the statutory provisions declaring the effect of recording conveyances of real estate, and the fact that, after a power was recorded, the revocation thereof was recorded, did

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not terminate the power in the absence of actual notice to the agent. Best v. Gunther, 104 N. W. 82, 83, 125 Wis. 518, 1 L. R. A. (N. S.) 577, 110 Am. St. Rep. 851.

Quitclaim

A quitclaim deed is a conveyance within recording act (Civ. Code, §§ 986, 987), making every conveyance void as against any subsequent bond purchaser whose conveyance is first recorded, and defining a "conveyance" as every instrument by which any estate in real property is created or aliened, and a quitclaim deed duly recorded conveys to the grantee therein a good title as against a prior warranty deed subsequently recorded, and of the existence of which the grantee had no notice. Shutz v. Tidrick, 128 N. W. 811, 812, 26 S. D. 505.

As release

See Release.

Sale

"'Sale' may be defined as a contract founded on a money consideration by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer." The words "sale" and "conveyance," when applied to real estate, are in common parlance in judicial decisions, and by law writers often used interchangeably, and a deed of conveyance of real estate therefore answers a reference to a sale of real estate, especially when the reference is used by persons unlearned in the law in the contract of a sale of real estate and the reference is otherwise substantially accurate. Crotty v. Effler, 54 S. E. 345, 347, 60 W. Va. 258, 9 Ann. Cas. 770.

As sum of money

See Sum of Money.

Tax lease

Laws 1891, c. 217, relating to tax sales, amended Laws 1885, c. 448, § 65, applicable to the same subject, so as to make it apply to all counties of the state except Cattaraugus and Chautauqua, and declared that all applications made to the comptroller for the cancellation of any tax sale by any person interested in the event thereof should be heard and determined by him subject to review by certiorari or otherwise, and then declared that its provisions should be applicable to "all conveyances made by county treasurers or county judges, and to all outstanding certificates from county treasurer's sales." Held, that the provision as to the application of the act should be construed to mean all conveyances by which the comptrollers or county treasurers were authorized to convey the fee and vest an absolute title in the purchaser, and did not include tax leases issued by county treasurers under special laws. In re Ritter Place in City of New York, 124 N. Y. Supp. 351, 355, 139 App. Div. 473.

Tax Law (Laws 1896, c. 908) § 132, re-enacted as Laws 1909, c. 62, provides that every conveyance previously executed by the comptroller, county treasurer, or county judge, and all conveyances of the same land by his grantee or grantees named therein which have for two years been recorded in the office of the clerk of the county in which the lands conveyed are located, and all outstanding certificates of tax sale previously made by the comptroller, in force for two years, shall be conclusive evidence that the sale and proceedings prior thereto from and including the assessment of the lands, and all notices required by law to be given previous to the time allowed for redemption, were regular, etc. Held, that the words "county treasurer, or county judge," were inserted to validate sales by the comptroller and county treasurer, or county judge in counties in which were included lands of the forest preserve, sold pursuant to Laws 1893, c. 711, § 12, re-enacted as Laws 1896, c. 908, § 132, and that the conclusiveness of the conveyances, etc., specified in such section, applied only to conveyances of the fee under the various pre-existing tax acts, and did not apply to a tax lease of land in Westchester county, executed by the county treasurer thereof, as authorized by Special Act 1860 (Laws 1860, c. 454), as amended by Laws 1861, c. 81. In re Ritter Place in City of New York, 124 N. Y. Supp. 351, 357, 139 App. Div. 473.

Will

It has been held that Code 1849, c. 77, § 8, providing that every "conveyance" made thereafter of land for the use or benefit of any religious congregation as a place for public worship, or as a burial place or residence for the minister should be valid, did not apply to devises. Jordan v. Universalist General Convention Trustees, 57 S. E. 652, 653, 107 Va. 79.

A "conveyance" is "an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another," and "in the narrower sense of the word 'conveyance' signifies the instrument employed to effectuate an ordinary purchase of freehold land (e. g., the modern deed), as opposed to settlements, wills, leases, partitions." The word "conveyances" in Const. Wash. art. 2, § 33, providing that conveyances to an alien shall be void, does not include a will, and the provision does not render a will void because it contains a devise to an alien. Brigham v. Kenyon, 76 Fed. 30, 33 (quoting and adopting definitions in 1 Rap. & L. Law Dict. p. 290, and Webst. Dict.).

CONVEYOR

A conveyor, consisting of a long, cylindrical, rotating rod, to which flanges are attached, is a shafting or machinery, within

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the factory act (Acts 1899, p. 234, c. 142, § 9), providing that all shafting and machinery shall be guarded. United States Cement Co. v. Cooper (Ind.) 82 N. E. 981, 982.

CONVICT

See Lease of Convicts.

A person convicted of a felony who has appealed and after affirmance has moved for a rehearing, which motion is still pending, is not an incompetent witness under Code Cr. Proc. 1911, art. 788, subd. 3, providing that all persons who have been, or may be, convicted of felony in this state, or in any other jurisdiction unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime, shall be incompetent to testify in criminal cases, especially in view of Pen. Code 1911, art. 27, defining a "convict" as an accused person after final condemnation by the highest court of resort which by law has jurisdiction of his case, and to which he may have thought proper to appeal. Bowles v. State (Tex.) 150 S. W. 626.

A person confined in state's prison under a sentence of death is a "convict" within Laws 1889, p. 511, c. 382, § 40, authorizing the superintendent of state prisons to make regulations for record of photographs and other means of identifying each convict. Molineux v. Collins, 69 N. E. 727, 728, 177 N. Y. 395, 65 L. R. A. 104.

CONVICT GUARD

As civil officer, see Civil Officer.

CONVICTED—CONVICTION

See Apprehension and Conviction; Former Conviction; Juridical Conviction; On Conviction; Under Conviction.

The word "conviction" ordinarily signifies the finding of the jury by a verdict that the prisoner is guilty. Judge v. Powers (Iowa) 136 N. W. 315, 316.

In Penal Law (Consol. Laws 1909, c. 40) § 1692, relating to rescue, the terms "commitment," "conviction," and "sentence" relate to a case where an officer or another holds a prisoner under lawful custody after he has been judicially held under a commitment, conviction, or sentence for misdemeanor. People v. Marks, 135 N. Y. Supp. 523, 525, 75 Misc. Rep. 404.

The word "conviction" means the ascertainment of defendant's guilt by some known legal mode, whether by confession in open court or by the verdict of a jury, or, under the Constitution and statute, by the judgment of a justice of the peace, where a jury trial is waived, provided the justice has final jurisdiction of the offense. Smith v. Thomas, 62 S. E. 772, 773, 149 N. C. 100.

Two convictions of employés of the holder of a liquor tax certificate within the lifetime of one certificate for two violations of the liquor law, one committed during the lifetime of such certificate and the other during the lifetime of a prior certificate, justify a forfeiture of the certificate under Liquor Tax Law (Consol. Laws, c. 34) § 36, subd. 3, providing for forfeiture on two convictions of employés of the holder of a certificate. Teschmacher v. Clement, 120 N. Y. Supp. 537, 538, 135 App. Div. 538.

Accusation and trial included

The word "convicted," as used in Rev. Codes, § 8655, providing that one who in another state steals, or knowingly receives stolen property and brings it into this state, may be "convicted" in the same manner as if such larceny or receiving had been in this state, is broad enough to include the accusation and trial. State v. Willette, 127 Pac. 1013, 1014, 46 Mont. 326.

As after judgment

The term "persons convicted," as used in Const. art. 2, § 2, providing that the Legislature shall enact laws excluding persons "convicted" of any infamous crime from the right of suffrage, and Election Law (Laws 1901, p. 1669, c. 654), § 2, subd. 10, declaring that no person who has been "convicted" of a felony shall register or vote unless he shall have been pardoned and restored to the rights of citizenship, means a person against whom a judgment of conviction has been rendered for an infamous crime, and is not satisfied by the rendition of verdict of guilty and suspended sentence without judgment. People v. Fabian, 85 N. E. 672, 675, 192 N. Y. 443, 18 L. R. A. (N. S.) 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100.

By the common law and in Florida, the conviction of the principal is an essential prerequisite, except in certain cases, to the punishment of the accessory; and the "conviction" required includes the judgment of conviction, and not merely the verdict of a jury. An indictment against an accessory which fails to allege the guilt of the principal, but merely that he was duly convicted "by a jury" at a specified term of the court, is fatally defective, in that it fails to show a judgment of conviction, but merely a conviction by the verdict of a jury. Daughtrey v. State, 35 South. 397, 398, 46 Fla. 109, 110 Am. St. Rep. 84.

In Ky. St. § 1180, which disqualifies any one as a witness who has been convicted of perjury or allied offenses, the term "conviction" means the final judgment, and not merely the verdict of guilty, and hence one who was found guilty of perjury, and upon whom judgment was pronounced, is competent as a witness, where the trial court set the judgment aside. Dial v. Commonwealth, 133 S. W. 976, 142 Ky. 32.

The term "conviction," as used in Const. art. 6, § 10, authorizing the Governor to grant pardons after conviction, denotes the-

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final judgment of the trial court, on a plea of or verdict of guilty. Gilmore v. State, 108 Pac. 416, 3 Okl. Cr. 639, 139 Am. St. Rep. 981; Chapman v. Same, 108 Pac. 418, 3 Okl. Cr. 643.

In common parlance, the words "conviction" and "judgment" are used interchangeably, and this is done in Acts 27th Gen. Assem. p. 58, c. 109, authorizing a longer term of imprisonment for burglary and larceny in case of two prior convictions referred to in the indictment. State v. Smith, 106 N. W. 187, 188, 129 Iowa, 709, 4 L. R. A. (N. S.) 539, 6 Ann. Cas. 1023.

As after verdict of jury

"'Conviction' means after the verdict of the jury." No statute of the United States provides for bail after conviction and sentence pending an appeal or writ of error to the Supreme Court, nor is bail under such circumstances authorized by the common law. United States v. Hudson, 65 Fed. 68, 75.

The word "conviction" means either the determination of the fact of guilt by the verdict of a jury, or, when used with reference to a state of infamy, means the final judgment in a prosecution. Dial v. Commonwealth, 133 S. W. 976, 142 Ky. 32.

Revisal 1908, §§ 5416a–5416q, establishing the Stonewall Jackson Training & Industrial School for Delinquent, etc., children, is not unconstitutional as amounting to a deprivation of liberty within the declaration of rights; the restraint being of parental nature and not as a punishment for crime, though only persons under 16 years of age, who have been "convicted" of a criminal offense, can be admitted, and a "sentence" of such persons is required; the word "convicted" referring to a verdict of guilty, and the word "sentence" being broad enough to include any judgment of a criminal court, though in its ordinary acceptation it refers to a judgment of imprisonment. Ex parte Watson, 72 S. E. 1049, 1054, 157 N. C. 340.

Rev. St. 1903, c. 135, § 26, as amended by Pub. Laws 1905, p. 112, c. 106, provides that sentence shall be imposed on conviction either by verdict or on demurrer, of a crime not punishable by imprisonment for life, though exceptions are alleged. Held, that the verdict of guilty or the decision overruling a demurrer is the conviction meant by the statute. State v. Morrill, 73 Atl. 1091, 1092, 105 Me. 207.

Appeal as affecting

Where a benefit certificate provided for forfeiture if a member was convicted of a felony, the policy was not forfeited where insured died pending a motion for rehearing on appeal from a conviction of manslaughter, under Code Cr. Proc. art. 884, providing that the judgment of conviction if suspended does not become final while an appeal remains undetermined, and Penal Code, art. 27, declaring that an accused person is a convict only after final condemnation by the court of last resort to which it may have been thought proper to appeal. Woodmen of the World v. Dodd (Tex.) 134 S. W. 254, 255.

As used in Rev. St. 1876, § 1007, providing that, where persons "convicted" of crime shall be sentenced to death or imprisonment at hard labor, the sheriff shall immediately take the person into custody, and keep him confined, notwithstanding any appeal or reprieve, until final action of the Supreme Court, "conviction" means that imposed by the court of the first instance. State v. Williams, 35 South. 140, 141, 110 La. 957.

Arrest of judgment as affecting

Where defendant agreed by contract to pay plaintiff for causing the "conviction" before a jury of an incendiary, plaintiff could recover showing a verdict of convicting the alleged criminal, though the court arrested the judgment and discharged the defendant on the ground that error was committed in trying him for three distinct offenses under one information. Buckley v. Schwartz, 53 N. W. 511, 512, 83 Wis. 304.

Attainted distinguished

"'The difference between a man "attainted" and "convicted" is that a man is said to be "convict" before he hath judgment, as if a man be a convict by confession, verdict, or recreancie. And when he hath his judgment upon the verdict, confession, etc., then he is said to be "attaint."' It is further said: 'By a conviction of a felon his goods and chattels are forfeited, but by "attainder," that is, by judgment given, his lands and tenements are forfeited and his blood corrupted, and not before.' So in Jacob's Law Dictionary ("Attainted") it is said: '"Attainder" of a criminal is larger than conviction; a man is convicted when he is found guilty or confesses the crime before judgment had, but not "attainted" till judgment is passed upon him.' This shows the technical, common-law definition of the word 'convict' or 'convicted'; a felon was 'convicted' by the verdict of a jury; he was 'attainted' by the judgment rendered on the verdict." Shepherd v. People, 25 N. Y. 406, 419.

As conviction in penal action

Under Laws 1899, c. 218, as amended by Laws 1907, c. 72, providing that every person convicted before the district court may appeal to the municipal court of Milwaukee from the judgment of conviction, one defeated in a civil action in the district court of Milwaukee, brought to collect the fine for a violation of the ordinance inhibiting the letting of premises for prostitution or lewdness, may appeal to the municipal court; the term "conviction" including prosecutions by way of civil actions to recover forfeitures provided for in penal statutes. City of Milwaukee v. Beatty, 135 N. W. 873, 875, 149 Wis. 349.

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The term "convicted," as used in Laws 1899, p. 358, c. 218, as amended by Laws 1907, p. 762, c. 72, providing that "every person convicted before said district court may appeal from the sentence or judgment against him to the municipal court of said city," etc., includes persons found guilty of violating an ordinance and adjudged to pay a fine, in view of section 2514, St. 1898, relating to the municipal court, containing the words "all persons convicted in city prosecutions," and in view of general charter law (sections 925—56 and 925—67, St. 1898), which speaks of persons convicted of violating ordinances. State ex rel. Cooper v. Brazee, 121 N. W. 247, 249, 139 Wis. 538 (citing C. Beck Co. v. City of Milwaukee, 120 N. W. 293, 139 Wis. 340, 131 Am. St. Rep. 1061; Cowles v. City of Neillsville, 119 N. W. 91, 137 Wis. 384; City of Oshkosh v. Schwartz, 13 N. W. 552, 55 Wis. 490, 493; State ex rel. Hamilton v. Municipal Court of City and County of Milwaukee, 61 N. W. 1100, 89 Wis. 358; People v. Hanrahan, 42 N. W. 1124, 75 Mich. 611, 613, 4 L. R. A. 751).

As conviction in state court

Pub. Laws 1907, p. 1342, c. 941, § 1, providing that an attorney must be disbarred upon his being "convicted" of a crime, etc., refers only to convictions in the state. In re Ebbs, 63 S. E. 190, 197, 150 N. C. 44, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592.

Criminal proceedings implied

It is not necessary under supplement to P. L. 1906, p. 199, regulating the sale of liquors that the petition for revocation should state that the person complained of had been convicted of the offenses charged; the word "conviction," as used in the act providing that his license shall thereby upon conviction become forfeited, referring to the forfeiture, and not to the complaint. Davis v. Repp, 75 Atl. 169, 170, 79 N. J. Law, 394.

The "conviction" of violation of the liquor law within P. L. 1906, p. 201, § 3, providing that if the holder of a liquor license shall sell liquor contrary to law, his license shall upon conviction become forfeited and void, is not necessarily a conviction before a court of law, but contemplates as well an adjudication of guilt by the board which granted the license, when had upon proper complaint, notice, and hearing. Sawicki v. Keron, 75 Atl. 477, 478, 79 N. J. Law, 382.

The word "convicted" in Laws 1907, c. 90, providing that any railway company or common carrier violating the provisions of the act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined, means a determination of guilt in a criminal prosecution. Western Union Tel. Co. v. State, 124 N. W. 937, 938, 86 Neb. 17.

Pol. Code, § 2811, providing for a civil investigation of a complaint filed against a person for alleged insanity, in so far as it authorizes the conduct of the proceedings in the absence of the person charged, when it appears that his presence would be injurious to him, or attended with no advantage, is not for that reason in violation of the constitutional guaranty of due process of law, because it does not guarantee a hearing before conviction; the term "conviction" implying a finding of guilty of a criminal offense, and therefore inapplicable to insanity proceedings. McMahon v. Mead (S. D.) 139 N. W. 122, 125.

Judgment and sentence distinguished

The principal has not been "convicted," within the meaning of Pen. Code, art. 90, so as to authorize a trial of an accessory, where he has been found guilty and a judgment rendered, but no sentence has been pronounced. Kingsbury v. State (Tex.) 39 S. W. 365, 366.

Where a person is found guilty of violating Act May 29, 1901, prohibiting the coloring of oleomargarine, but is not sentenced, there is no "conviction" within section 7 of the act; so that, if he commits a second offense before he has been sentenced for the first offense, and is tried therefor, he cannot be sentenced to the penalties imposed for a second conviction. Commonwealth v. McDermott, 73 Atl. 427, 224 Pa. 363, 24 L. R. A. (N. S.) 431.

The word "conviction," in Const. art. 4, § 11, which provides that in all criminal cases, except treason and impeachment, the Governor shall have power after "conviction" to grant reprieves, commutations of punishment, and pardons, etc., means simply the determination of guilt by the jury, and does not embrace the sentence, so that a person becomes subject to pardon whenever that issue is finally determined, and a court has no inherent authority by postponement of sentence to relieve a person legally convicted of crime of the punishment fixed by law, and Acts 32d Leg. c. 44, which confers on the district courts the power to relieve from the effect of conviction in certain crimes, is not constitutional as within that power. Snodgrass v. State (Tex.) 150 S. W. 162, 172, 41 L. R. A. (N. S.) 1144.

The term "conviction" is used in common language, and sometimes in the statutes, in two different senses. In its most common use it signifies a jury finding that the person is guilty; but it is frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt. St. 1898, § 4658, subd. 4, provides that an information is sufficient if the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case. Section 4659, subd. 4, provides that an information shall not be deemed invalid because of defects or imperfections in matters of form which do not tend to prejudice accused. Held, that the fact that an information

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alleging conviction of a former offense charges that the "conviction remains of record and unreversed," instead of that the 'sentence remains of record and unreversed," which is the language of St. 1898, § 4737, providing for additional punishment for former offenses in such cases, is not ground for reversal. Davis v. State, 115 N. W. 150, 153, 134 Wis. 632 (quoting and adopting definition in Commonwealth v. Gorham, 99 Mass. 420, 422).

The term "conviction" ordinarily signifies a finding of a jury by verdict that the prisoner is guilty, and a plea of guilty by defendant constitutes a conviction of him. Const. 1894, art. 2, § 2, providing that the Legislature shall enact laws excluding from the right of suffrage all persons "convicted" of bribery or of any infamous crime, authorizes the Legislature to exclude from the right of suffrage a person convicted of a felony but against whom sentence has not been pronounced, and who has not been actually imprisoned. People v. Fabian, 111 N. Y. Supp. 146, 149, 151 (quoting and adopting the definitions in 4 Black. Comm. 362; Bishop, Statutory Crimes, § 348).

Act Cong. June 21, 1902, c. 1140, § 1, entitles any prisoner to the deduction for which the act provides, who "has been or shall hereafter be convicted"; but section 3 declares that the act shall take effect from and after 30 days from its date, and that it shall apply only to sentences imposed subsequent to the time of its taking effect. Held, that the act did not apply to a prisoner who was "convicted" and sentenced on March 24, 1902. "Sentence" is a distinct thing from the "conviction" whereon it is founded. It may be and often is separated from conviction by a considerable interval of time. If the provisions of section 3 are to be regarded as contradicting those of section 1, they can be so regarded only upon the assumption that by "convicted of" in section 1 is meant "convicted of and sentenced for"—an assumption without sufficient warrant. Woodward v. Bridges, 144 Fed. 156, 158.

Judgment synonymous

"Judgments" is used interchangeably with the word "convictions," and this is done in Acts 27th Gen. Assem. p. 58, c. 109, authorizing a longer term of imprisonment for burglary or larceny in case of two prior convictions referred to in the indictment; so that an indictment referring to former "judgments" against defendant for burglary is sufficient to authorize the admission of their record in evidence. State v. Smith, 106 N. W. 187, 188, 129 Iowa, 709, 4 L. R. A. (N. S.) 539, 6 Ann. Cas. 1023.

Judgment for contempt

A judgment decreeing persons guilty of contempt for violating a liquor injunction was not a "conviction" within Acts 33d Gen. Assem. c. 142, § 3, providing that no person convicted of violating the law relating to the sale of intoxicants, or who shall be permanently enjoined for such violation, shall be permitted to sell intoxicants within five years from the date of such conviction; the word "convicted" being the past participle of the verb "to convict" which means to prove or find guilty of an offense or crime charged. Judge v. Powers (Iowa) 136 N. W. 315, 316.

An adjudication of contempt of court is a "conviction." Ex parte Shull, 121 S. W. 10, 11, 221 Mo. 623, 133 Am. St. Rep. 496 (quoting and adopting Church, Hab. Corp. [2d Ed.] § 308).

Pardon as affecting

Code Civ. Proc. § 2612, providing that no person can serve as an executor who at the time the will is proved shall have been "convicted of an infamous crime," does not apply to one who has been convicted of an infamous crime and pardoned. In re Raynor's Will, 96 N. Y. Supp. 895, 48 Misc. Rep. 325.

Plea of guilty or nolo contendere

One is "convicted" of a crime when a verdict of guilty has been given and entered against him, or when a plea of guilty has been given and entered. McKannay v. Horton, 91 Pac. 598, 602, 151 Cal. 711, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146.

A defendant who pleads guilty to a charge is "convicted" of such charge by his own plea. State v. Woodard, 53 Pac. 278, 7 Kan. App. 421.

While in common parlance and for many purposes the word "conviction," when used in a statute, means the judicial ascertainment of guilt by a plea or verdict, when it is made the ground of some disability or penalty, it has been held that a final adjudication by judgment is essential, and it is very questionable whether a plea or verdict of guilty is a conviction within B. & C. Code, § 1067, authorizing the removal or suspension of attorneys convicted of felonies involving moral turpitude. Ex parte Tanner, 88 Pac. 301, 303, 49 Or. 31.

Suspension of sentence as affecting

Within the certificate of insurance and by-laws of a beneficiary society, providing that the certificate shall be void if insured be "convicted" of a felony, there was no conviction though he was tried for a felony, verdict was returned against him, and sentence of imprisonment imposed, appeal having been granted him, supersedeas bond having been approved, and he having been let to bail, with the result, under Rev. St. 1899, § 2698 (Ann. St. 1906, p. 1590), of suspending enforcement of sentence and judgment, and he having died pending action on the case by the Supreme Court, the "abatement" by his death not being simply of the appeal, but of the prosecution and the liability to prose-

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cution, leaving the case as though no prosecution had ever been entered against him. Baker v. Modern Woodmen of America, 121 S. W. 794, 798, 140 Mo. App. 619.

A finding of guilty on which no judgment has been entered, sentence having been suspended, is a conviction within Liquor Tax Law, Laws 1896, p. 65, c. 112, as amended by Laws 1900, p. 857, c. 367, § 23, subd. 1, cl. "d," providing that a liquor tax certificate shall not be issued to one who has been convicted of a violation of that law within three years prior to his application, and the person found guilty is not a person "authorized to sell liquors under the provisions of the act" within section 25, providing for the surrender and cancellation of a liquor tax certificate by a person authorized to sell liquors under the provisions of the act and the payment of a rebate on such certificate. H. Koehler & Co. v. Clement, 111 N. Y. Supp. 151, 152, 125 App. Div. 886.

The term "persons convicted," as used in Const. art. 2, § 2, providing that the Legislature shall enact laws excluding persons "convicted" of any infamous crime from the right of suffrage, and Election Law (Laws 1901, p. 1669, c. 654) § 2, subd. 10, declaring that no person who has been "convicted" of a felony shall register or vote unless he shall have been pardoned and restored to the rights of citizenship, means a person against whom a judgment of conviction has been rendered for an infamous crime, and is not satisfied by the rendition of verdict of guilty and suspended sentence without judgment. People v. Fabian, 85 N. E. 672, 673, 675, 192 N. Y. 443, 18 L. R. A. (N. S.) 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100.

CONVICTED A SECOND TIME

Act No. 176, p. 239, of 1908, § 6, forbids the sale of intoxicating liquor to a minor. Section 10 forbids the allowance of gambling in a barroom. Section 8 forfeits a license to conduct a barroom on a second conviction of violation of that act. Held, that a conviction of permitting gambling in defendant's barroom at the same time as a conviction of selling liquor to a minor, the prosecutions having been tried together, was a second conviction, warranting a revocation of defendant's license, notwithstanding both prosecutions grew out of the same transaction, and the liquor was sold to the minor while playing cards. State v. Apfel, 50 South. 613, 614, 124 La. 649.

CONVICTED FELON

A "convicted felon" may mean either one guilty of a crime which would have involved a forfeiture of goods and chattels at common law, or, where so understood by the public, one convicted of a misdemeanor in violation of the license law. Perry v. Man, 1 R. I. 263, 265.

CONVINCE

See Reasonably Convincing.

One of the principal definitions of the word "convince" is "to satisfy the mind by evidence." State v. Maloni, 74 Atl. 526, 528, 78 N. J. Law, 339, 20 Ann. Cas. 204.

An instruction defining "reasonable doubt" as a doubt which would exist when the judgment of a jury, after careful review of all the evidence, finds itself unconvinced of the guilt of the prisoner, was correct; the word "convince" being used in the sense of an abiding conviction. State v. Leo, 77 Atl. 523, 525, 80 N. J. Law, 21.

COOLING TIME

To constitute "cooling time," there must have been an outrage on accused a short while before the homicide of sufficient moment to constitute adequate cause and thereby produce that degree of anger, rage, sudden resentment, and terror that renders the mind incapable of cool reflection. Jay v. State, 120 S. W. 449, 450, 56 Tex. Cr. R. 111.

Where the evidence shows that a homicide was committed in the heat of passion and with provocation, the jury, in determining whether there was sufficient "cooling time" for the passion to subside and reason to resume its sway, should be governed, not by the standard of an ideal, reasonable person, but from the standpoint of the defendant in the light of all the facts and circumstances disclosed by the evidence. Whether there was cooling time is a question varying with each particular case and with the temperament of the party. State v. Hazlett, 113 N. W. 374, 380, 16 N. D. 426.

CO-ORDINATE

The word "co-ordinate," whenever used with reference to the three departments of state, implies equality in rank, importance, independence, and dignity. Woods v. Sheldon, 69 N. W. 602, 609, 9 S. D. 392.

COPARCENERS

See, also, Parcener.

A widow, to whom dower has been assigned and set off by metes and bounds, is not a "tenant in common," "joint tenant," or "coparcener" with the owner of the fee, within Gen. Laws 1909, c. 330, § 4, authorizing joint tenants, coparceners, and tenants in common to sue for partition, since her estate is a life estate in severalty in the entire premises within the metes and bounds, and she may not sue for partition. Newell v. Willmarth, 76 Atl. 433, 30 R. I. 529, 19 Ann. Cas. 807.

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COPARTNERS

COPARTNERSHIP

See, also, Partnership.

Community of interest in a business enterprise, venture, or undertaking and the profits thereof may constitute a "copartnership" without an express agreement to share in losses. Gates v. Johnson, 77 N. W. 407, 56 Neb. 808 (citing and adopting Waggoner v. First Nat. Bank of Creighton, 61 N. W. 112, 43 Neb. 84).

COPARTY

Appellate tribunals, in vacation appeals, acquire jurisdiction to determine a cause on its merits only when all the parties against whom judgment is rendered are made appellants, and all parties in whose favor judgment is rendered, are made appellees; "coparties," under Burns' Ann. St. 1901, § 647, meaning parties to the judgment, and not parties plaintiff or defendant. First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank of Wabash (Ind.) 82 N. E. 1013, 1014.

In a vacation appeal from a judgment, all parties to the judgment or interested in or affected by it, or interested in its reversal or affirmance, must be made parties; and if they are "coparties"—that is, parties to the judgment—they must be joined as appellants and notice given them. Souers v. Walters (Ind.) 99 N. E. 1002, 1003.

Where a decree foreclosing a mortgage in rem only was rendered, and a reversal on appeal would continue the obligation without any equities giving rise to subrogation, the mortgagor and purchasers of the mortgaged premises were coparties, who would be prejudicially affected by any change in the decree; and hence were entitled to notice of appeal, as provided by Code, § 4111. Tukey v. Foster (Iowa) 138 N. W. 862, 863.

COPE

A "cope" is a part of the double sand-filled flask within which a foundry pattern has been placed and the casting made. Sandt v. North Wales Foundry Co., 63 Atl. 596, 214 Pa. 215.

COPULATION

"That there may be carnal 'copulation' without consummation of all that intended seems too evident for argument, and we are content with holding, without further elaboration, that proof of res in re, without more, is sufficient to justify conviction." State v. McGruder, 101 N. W. 646, 647, 125 Iowa, 741.

COPY

See Certified Copy; Correct Copy; Exemplified Copy; Full Copy; Full, True, and Correct Copy; Office Copy; Sworn Copy; True Copy.

A copy, see A.

The clerk of the district court is entitled to fees for "copying" the papers provided for in Code Cr. Proc. 1895, art. 623, on change of venue, as well as for making the "transcript" mentioned in article 622; a "copy" being equivalent to a "transcript." Escavaille v. Stephens, 119 S. W. 842, 843, 102 Tex. 514.

"Copy of the bonds," as used in Laws 30th Leg. Tex. 1907, p. 78, § 24, approved March 23, 1907, providing that any drainage district desiring to issue bonds shall, before such bonds are offered for sale, forward to the Attorney General a "copy of the bonds" to be issued, mean that one of the bonds so prepared shall be forwarded to the Attorney General for his inspection and examination. The word "copy" as here used has the meaning of "one of a set or number of reproductions or limitations containing the same matter having the same form and appearance, or executed in the same style, etc., as, for instance, a copy of the book printed 60 years ago." The word is often used in this sense with reference to such things as are executed in numbers as the publication of a book. We speak of having a copy of a certain book, while, in fact, it is but one of a great number of productions from the same plates containing the same matter. We think it plain that the purpose of the law was that, after the bonds had been prepared and ready for sale, they should be submitted to the Attorney General for examination, and that, as all the bonds would be the same in substance and form, the submission of one would be equivalent to the submission of all, and an examination of one would determine the validity of each and all of them. Hidalgo County Drainage Dist. No. 1 v. Davidson, 120 S. W. 849, 851, 102 Tex. 539 (citing and quoting Cent. Dict. verbo "Copy," subd. 3).

Under Code Civ. Proc. § 1866, providing that a party to whom costs are awarded in an action is entitled to include in his bill of costs necessary disbursements as follows, the legal fees paid stenographers for per diem or for "copies," the word "copies" refers, not to the copies ordered by the parties from day to day to be used only as an aid in the examination of witnesses, but to such as are furnished for the purpose of making up bills of exceptions, either during or after the close of the trial, or statements on motion for new trial. Montana Ore Purchasing Co. v. Boston & Montana Con. C. & S. M. Co., 84 Pac. 706, 707, 33 Mont. 400.

Where the county clerk, in making complete indexes of all deeds on record in the

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office between designated years, examined every record of deeds and made slips, which were copied into the new indexes, and the existing indexes were only used for comparison, the new indexes were not "copies" of existing indexes, within County Law, § 26, empowering the board of supervisors to authorize county officers to make copies of records. Wadsworth v. Board of Sup'rs of Livingston County, 115 N. Y. Supp. 8, 12, 13.

Carbon copy

Where a carbon copy of a letter is taken and filed by the sender, the original copy being signed and mailed, the carbon is a "copy" and not an original. McDonald v. Hanks, 113 S. W. 604, 607, 52 Tex. Civ. App. 140.

A carbon copy of any longhand transcript of a stenographer's official notes, made by the stenographer at the time he makes the transcript and as a part of that transaction, is not a "copy," in the sense in which the word "copy" is ordinarily used, any more than several books or newspapers printed on the same press at the same time and from the same type are copies of each other. Harmon v. Territory, 79 Pac. 765, 770, 15 Okl. 147.

Duplicate distinguished

See Duplicate.

Certified copy

Burns' Ann. St. 1901, § 7798, authorizing the clerk of the Supreme Court to collect a fee of 10 cents per 100 words for every "copy of record or other paper," applies only to certified copies. Ex parte Brown, 78 N. E. 553, 557, 166 Ind. 593.

Change of language or appearance as affecting

The term "copied," as used in Court of Civil Appeals Rule 29 (67 S. W. xv), declaring that each assignment of error not copied in the brief of appellant with its appropriate propositions and statements shall be regarded as abandoned, means that the assignment of error contained in the record shall be placed in the briefs, and not that reconstructed or amended assignments shall be printed therein. Martin v. German American Nat. Bank (Tex.) 102 S. W. 131, 132.

As triplicate original

See Triplicate Original.

Copy of musical composition

A copyright of a musical composition printed with staff notation is not infringed by a perforated record or sheet designed for use with mechanism to play the composition on a musical instrument; not being a "copy" of the copyrighted publication within the meaning of the copyright statute. White-Smith Music Pub. Co. v. Apollo Co., 147 Fed. 226, 227, 77 C. C. A. 368.

As copy of whole

"The word 'copy' means, not a reproduction of only a portion of the thing copied, but the whole of it." Where a copy of a deed is offered in evidence, a copy of the entire deed should be offered, and it is improper to omit therefrom the description of other lands than those embraced in the controversy. East Coast Lumber Co. v. Ellis-Young Co., 45 South. 826, 832, 55 Fla. 256 (citing 2 Words and Phrases, p. 1595; Edmiston v. Schwartz, 13 Serg. & R. [Pa.] 135; Updergraff v. Perry, 4 Pa. 291).

Photograph

A correct photographic copy of an application for life insurance, reduced in size, but legible, attached to the policy, constituted a compliance with the Pennsylvania laws requiring insurance companies to attach a "copy" of the application to policies, where such application is referred to and made a part of the policy. Arter v. Northwestern Mut. Life Ins. Co., 130 Fed. 768, 769, 65 C. C. A. 156.

A photograph of a copyrighted piece of sculpture is a "copy" thereof, within the meaning of Rev. St. § 4952, and, if made without authority from the proprietor of the copyright, is an infringement thereof. Bracken v. Rosenthal, 151 Fed. 136, 137.

As true copy

Under Pen. Code, § 1893, defining an arraignment, and requiring a "copy" of the information to be delivered to defendant, a true copy is meant. State v. De Wolfe, 74 Pac. 1084, 1085, 29 Mont. 415.

COPY OF ACCOUNT

A "copy of an account" and a "bill of particulars" do not necessarily mean the same thing. A bill of particulars may be demanded on a claim which has reference to an accounting. Hanson v. Lindstrom, 108 N. W. 798, 799, 15 N. D. 584.

In the statute (Rev. Codes, § 7007) which defines the complaint in justices' courts as a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a "copy of the account" upon which the action is based, and section 7016, which provides that when the cause of action arises upon an account the court may require either party to furnish to the other the "items of an account" or a "bill of particulars," the term "bill of particulars" is synonymous with "items of an account" as distinguished from the "account" itself. The term "copy of account" is not used interchangeably with the term "items of account." A complaint in the form of copy of an account which is sufficient to enable a person of common understanding to know what is intended is not objectionable because the items of account are not set out therein. Moran v. Ebey, 104 Pac. 522, 523, 39 Mont. 517.

COPYING

"Copying" means "to make a copy of [a picture or other work of art]; also to repro-

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duce or represent [an object] in a picture or other work of art." Bracken v. Rosenthal, 151 Fed. 136, 137 (quoting and adopting definition in Murray's New English Dictionary).

The term "copying," when used with reference to infringement of copyrighted legal publications, includes not only paraphrasing, but also appropriation of the literary work and ideas of another, which includes arrangement and selection as well as language. West Pub. Co. v. Edward Thompson Co., 169 Fed. 833, 853.

In Rev. St. p. 4952, giving the author of a musical composition the exclusive liberty of copying and vending the same, the word "copying" does not apply to the making of perforated copies of music to be played by means of a mechanism. The word as applied to the subject has been several times construed, and it has been held that perforated music rolls are not infringements of copyright sheets of music, and that the word cannot be enlarged to include the reproduction by the phonograph of the sounds of a musical instrument. White-Smith Music Pub. Co. v. Apollo Co., 139 Fed. 427, 431 (citing Kennedy v. McTammany, 33 Fed. 584; Stern v. Rosey, 17 App. D. C. 562).

COPYRIGHT

Dedication of subject of copyright, see Dedication.

Infringement of copyright, see Infringement.

"Writings" that may be copyrighted, see Writing—Writings.

"A 'copyright,' as the term imports, involves the right of publication and reproduction of works of art or literature." American Tobacco Co. v. Werckmeister, 28 Sup. Ct. 72, 73, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

The word "copyright" means the exclusive right of multiplying copies of a work already published, which is preserved by a compliance with the act of Congress, and the right which an author has in his literary work exists only as long as the work is kept private; if it is published without complying with the copyright act the right is abandoned. State v. State Journal Co., 110 N. W. 763, 766, 77 Neb. 752, 9 L. R. A. (N. S.) 174.

CORAM NOBIS

See Writ of Error Coram Nobis.

CORAM NON JUDICE

Where a committee acts without jurisdiction, it is said to act "coram non judice." Brennan v. United Hatters of North America, 65 Atl. 165, 168, 73 N. J. Law, 729, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698.

CORAM VOBIS

See Writ of Error Coram Vobis.

CORD

See Single Strands or Cords; Three Strands or Cords.

A "cord" is a string, and a string is a ribbon, broadly. Ribbon is one of the synonyms of cord. Wm. Mann Co. v. Kalamazoo Loose Leaf Binder Co., 168 Fed. 284, 289 (citing Soule's Dict. of English Synonyms).

CORDIAL

Vermuth is not a "wine," "cordial," or "liqueur," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174, prohibiting an allowance for the leakage of those three articles. United States v. Julius Wile, Sons & Co., 178 Fed. 269, 270, 101 C. C. A. 574; Julius Wile & Co. v. United States, 172 Fed. 164.

CORE OR FILLER

The "core or filler" of the fireproof door covered by the Rapp patent, No. 653,400 is nothing more nor less than an ordinary wooden door of any construction. Rapp v. Central Fire-Proof Door & Sash Co., 158 Fed. 440, 441.

CORK

See Brown Cork.

Imported corks as articles manufactured from imported materials, see Articles within Tariff Act.

Manufactures of, see Manufactures—Manufactured Articles.

CORKED

"Corked" and "sealed," when used in reference to bottles, are not synonymous. Bottles are corked before sealing, and, when corked, are sealed by incasing the mouth in wax, or other material used for the same purpose, sufficiently close to exclude the air. The term "sealed," as used in Act March 29, 1899, providing that any person who raises grapes or berries may make wine thereof and sell in quantities not less than one-fifth of a gallon, or in sealed bottles, without a license, when the same is properly labeled as provided by "such act," should be construed as requiring the incasing of the mouth of the bottle in wax after it has been corked, and hence the sale of wine in bottles which were corked only was a violation of the statute. Koban v. State, 81 S. W. 235, 72 Ark. 408.

CORN

See Cracked Corn.

Merchantable corn, see Merchantable.

Though in transmitting an order for "corn" a telegraph company made a mis-

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take in the sender's name, he could not recover for a failure to receive "corn whisky," in the absence of a preponderance of proof that the sendee was deceived by the error in the signature, and for that reason failed to ship the whisky, and that the sendee understood that "corn" meant "corn whisky." Newsome v. Western Union Telegraph Co., 56 S. E. 863, 864, 144 N. C. 178.

As perishable freight

See Perishable Property.

As provisions

See Provisions.

CORNCRIB

The word "corncrib," as used in a statute providing that any person who willfully sets fire to or burns any corncrib or corn pen containing corn, or any barn is guilty of arson in the second degree, means a building or structure in its entirety and not a room or apartment in a building or structure. Therefore an indictment charging the burning of a corncrib is not sustained by proof that the building destroyed was a barn in which one room was partitioned off as a corncrib. Jackson v. State, 40 South. 979, 980, 145 Ala. 54 (quoting and adopting definition in Cent. Dict. and Webster's International Dict.).

CORN LIQUOR

In the absence of evidence to the contrary, "corn liquor" will be presumed to be an intoxicating liquor. Wilburn v. State, 68 S. E. 460, 461, 8 Ga. App. 28.

CORNMEAL

Meal as including, see Meal.

CORNER

See Lost Corner; Marked Corners; Meander Corners; Obliterated Corner.

In stock speculation

See, also, Engrossing.

"A 'corner,' when accomplished by a confederation to raise or depress prices and operate on the market, is a conspiracy if the means be unlawful." Klingel's Pharmacy v. Sharp & Dohme, 64 Atl. 1029, 1030, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184.

A "corner" is the securing of such control of the immediate supply of any product as to enable those operating the corner to arbitrarily advance the price of the product. It is ordinarily created by operations on boards of trade or stock exchanges, and by dealings in options and futures. United States v. Patten, 187 Fed. 664, 668.

CORNER BASEMENT

A subtenant could not sustain his right to hold a "corner basement" under a lease covering the "basement adjoining the corner," where there was ample evidence that there was a basement other than the one occupied by the tenant answering such description in the absence of a reformation of the lease or acts of the landlord after the making of such lease recognizing the identity of the basements; the expressions not being apparently synonymous. Kasower v. Sandler, 96 N. Y. Supp. 734, 736.

CORONER

A "coroner" is a public county officer. People v. Warner, 104 N. Y. Supp. 279, 282.

A "coroner," in certain classes of cases, is a magistrate, with power to hold examinations, issue warrants, and commit or discharge a person suspected of crime. Gibson v. McDonald, 123 N. Y. Supp. 504, 139 App. Div. 51; Same v. Schwannecke, 123 N. Y. Supp. 506, 139 App. Div. 53.

As judicial officer

See Judicial Officer.

As peace officer

See Peace Officer.

CORONER'S INQUEST

A "coroner's inquest" means a judicial investigation into the cause of death by the coroner with the aid of the jury. Hence the fee for an inquest could not properly be charged unless a jury had been impaneled to determine the cause of death. People v. Coombs, 53 N. E. 527, 528, 158 N. Y. 532.

CORPORAL

CORPORAL IMBECILITY

The term "corporal imbecility" has no precise technical meaning and does not absolutely import a natural permanent and incurable condition but such imbecility may be temporary merely. Under Civ. Code, § 82, subd. 6, authorizing a divorce for continued and apparently incurable physical incapacity, a plaintiff must allege and prove that such incapacity continues and appears to be incurable. Hobbs v. Hobbs, 101 Pac. 22, 23, 10 Cal. App. 97.

CORPORAL OATH

"A 'corporal oath' is so called because the person sworn touches with his hands some part of the Holy Scripture. The form of administering an oath is not in law essential, and even if a statute prescribes the uplifting of the hand it will be good by laying the hand on the Gospels, because the statutory provision is simply directory." Preston v. State, 90 S. W. 856, 115 Tenn. 343, 5 Ann. Cas. 722 (quoting and adopting definition in Bish. New Cr. Law, § 1018).

CORPORAL PUNISHMENT

"Corporal punishment" has been construed to mean punishment upon the body, such as whipping, rather than punishment

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of the body, such as imprisonment. Ex parte Wisner, 92 Pac. 958, 959, 36 Mont. 298 (citing Ritchey v. People, 43 Pac. 1026, 22 Colo. 251).

CORPORATE

CORPORATE ASSETS

Neither Civ. Code, § 359, prohibiting the issuance of corporate stock or bonds except for money paid, labor done, or property actually received, and making any fictitious increase of indebtedness void, or Const. art. 12, § 11, containing the same provision, nor any rule of public policy, prohibits the sale of corporate bonds at a discount, nor does the "trust fund" doctrine apply to corporate bonds; they not being corporate assets within the meaning of that doctrine. McKee v. Title Ins. & Trust Co., 113 Pac. 140, 146, 159 Cal. 206.

CORPORATE AUTHORITIES

The grant by Act Cong. July 23, 1866, c. 211, 14 Stat. 209, of land within the corporate limits of the town of Santa Cruz, to "the 'corporate authorities' of said town," is to the incorporated body, and not to the individuals then holding office as such authorities. City of Santa Cruz v. Southern Pac. R. Co., 126 Pac. 362, 364, 163 Cal. 538.

The framers of the Constitution must be deemed to have understood the rule of law that the exercise of the taxing power is the exercise of legislative authority, so that, when they determined that the power to levy taxes for city purposes should be exercised only by the corporate authorities of the city, they must be deemed to have meant by the term "corporate authorities" those constituting the legislative branch of the city government. State ex rel. Gerry v. Edwards, 111 Pac. 734, 735, 42 Mont. 135, 32 L. R. A. (N. S.) 1078, Ann. Cas. 1912A, 1063.

Const. Ill. 1870, art. 11, § 4, prohibits the granting of a right to construct a street railroad in a street without the consent of the "local authorities," and street railway act (2 Starr & C. Ann. St. 1896, p. 2110, c. 66, § 3) requires the consent of the "corporate authorities." Held, that the terms "local authorities" and "corporate authorities" were synonymous, and used to indicate those representatives either directly elected by the people or appointed in some mode to which the people had given their assent. Potter v. Calumet Electric St. Ry. Co., 158 Fed. 521, 528.

CORPORATE BODY

A body politic and "corporate" created for the sole purpose of performing one or more municipal functions is a quasi municipal corporation and in common interpretation should be deemed a municipal corporation. Augusta v. Augusta Water Dist., 63 Atl. 663, 664, 101 Me. 148.

Education Law (Consol. Laws, c. 16) § 220, makes the board of education of each school district, or city, a "body corporate," and hence any liability created by the wrongful discharge of a teacher employed by the board is a liability of the board as a corporation, and not of the individual members. Reynolds v. Foster, 123 N. Y. Supp. 273, 277, 66 Misc. Rep. 133.

A local council of a benevolent organization established and operated as a branch of the State Council incorporated under the state laws is a "corporate body in the state" within Pen. Code 1895, § 188, providing that any officer employed in a corporate body in the state who shall embezzle money, etc., shall be punished. Cook v. State, 70 S. E. 31, 34, 8 Ga. App. 522.

Act March 21, 1894 (Ohio Laws, p. 543), creating the road commissioners of Van Wert county "a body corporate" with the powers and duties thereinafter specified and authorizing them to issue certain bonds, is not a violation of Const. Ohio, art. 3, § 1, prohibiting special acts conferring corporate powers; the test being the nature of the power conferred and not the name employed by the Legislature. Rees v. Olmsted, 135 Fed. 296, 299, 68 C. C. A. 50.

Const. art. 11, §§ 4, 11, requiring the Legislature to establish a system of county government and to provide by general law for township organization, etc., do not take away from the Legislature the control of townships organized under laws relating to township organization in all the affairs thereof by general law, and the local option law (Act March 12, 1909; Laws 1909, c. 81), providing that the part of each county outside of cities or fourth class towns shall be a unit, and may vote on the question of the sale of intoxicating liquors within the boundaries thereof, applies to all counties, and prevails over Act March 3, 1909 (Laws 1909, c. 47) amending Act March 23, 1895 (Laws 1895, c. 175), providing that townships are bodies corporate with power to determine whether licenses for the sale of intoxicating liquors shall be granted, and the local option law is applicable to a county which has adopted township organization. Gunther v. Huenke, 108 Pac. 1078, 1079, 58 Wash. 494.

County

See County.

Municipal corporation

See Municipal Corporation.

Township

See Township.

CORPORATE CAPACITY

See Individual and Corporate Capacity.

A judgment of sale of a corporation's property, reciting that it was made by agreement of all the stockholders "both in their

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individual and corporate capacity," should be construed to mean that the corporation entered its appearance and was bound by the order of sale. McNeill v. Thompson (Ky.) 84 S. W. 1145, 1146.

CORPORATE EXISTENCE

"'Corporate existence' becomes complete under the Missouri statute when the articles of association are filed in the office of the Secretary of State." Acceptance of corporate existence by a corporation formed by filing articles of incorporation under a general law need not be directly shown, but may be inferred from acts done in the corporate name. Boatmen's Bank v. Gillespie, 108 S. W. 74, 85, 209 Mo. 217 (quoting and adopting definition in Queen City Furniture & Carpet Co. v. Crawford, 30 S. W. 163, 127 Mo. 356).

CORPORATE FRANCHISE

See Exercising Corporate Franchise; Sale of Franchise and Property; Secondary Franchise.

Whenever a corporation is legally formed, the right to be and exist as such, and, as a corporation, to do the business specified in its articles, whether it be a banking business, grocery business, or the operation of a railroad, or any other business in which individuals may engage without grant from the state, is a grant by the sovereign power —a valuable right, which is generally known as the "corporate franchise." Bank of California v. City & County of San Francisco, 75 Pac. 832, 834, 142 Cal. 276, 64 L. R. A. 918, 100 Am. St. Rep. 130.

A corporation's franchise may be one thing or another. The word is not always used with reference to the same meaning. It is sometimes regarded as the mere right to be a corporation. Again, it is treated as the right to do the particular and peculiar business for which the corporation was created. It is also spoken of as the right to do its business in a certain locality, as, for example, where the Constitution requires certain franchises to be sold by cities and towns, Const. art. 164. The other two qualities of a "corporate franchise" may have existed before the acquisition of the latter, and are therefore in a sense quite distinct from it. For the purposes of taxation, it may be all of them and more. Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73. While corporate franchises have long been recognized factors of incorporated beings, they have only recently come to be regarded as separate subjects of taxation. In the rapid development of these artificial creatures of the law (corporations) as means of holding and using property in active business, the corporate franchise has come to have a recognized value of enormous magnitude, when viewed in the aggregate. It is not the least—indeed, frequently is the greater—element of the corporation's wealth. That it should be taxed, should be made to bear its share of the public burden together with all other wealth, is fundamentally true in justice and in political economy. So far, no exact definition of it has been given on which the courts have felt willing to finally rest the matter. And perhaps it is well enough for the present that this is so. Still certain qualities of the corporate franchise are so well known and classified as to be beyond dispute as being elements of its taxable value. The mere right to be a corporation is taxed, in the exacting of the organization tax on its creation. This is collected once, and absolutely without reference to its property or whether it ever engages in the business contemplated by its articles. The right of certain corporations to do business in a city, which it must acquire (if acquired since the present Constitution) by purchase of the franchise from the city, includes the compensation for occupying the public thoroughfares of the city. But it also may include more than that. Each of these are qualities of the general corporate franchise. Yet, as used in the taxing statute of this state, the word has a more comprehensive meaning. It is treated as property. It is property. It adds materially to the value of the tangible property of the corporation. The right to exercise the powers allowed to the corporation by law, the peculiar and exceptional privileges it enjoys, partaking partially of the quality of sovereignty, give to its use of its tangible property, as well as to its intangible property comprised within its capital stock, a value which otherwise could not attach to them, so that this privileged use becomes to the visible assets of the corporation what the leaven is to the loaf. While it may not be laid hold of separately, it is quite capable of being conceived and valued as a thing worth so much money. This value will depend largely on its money-earning capacity as it may be employed, and depends at last on its being exercised. Unless used substantially as outlined in the articles under which it is created, it could scarcely be said to have a money value at all. For, unlike tangible, or even choses in action, it cannot be sold and trafficked in, nor consumed, nor otherwise enjoyed than in the corporate use of it. It is true that by statute, when treating of railroad corporations, the franchise is deemed to include so much of the capital of the corporation and of its other intangible assets as is represented by the difference between the total value of its money-earning capacity and the separate value of its tangible property. The franchise of a railroad company may then be accepted for purposes of taxation as the earning value ascribed to its capital by reason of its operation as a common carrier of freight and passengers. Further than that the legislation in this state on that subject has not

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gone. Cumberland Telephone & Telegraph Co. v. Hopkins, 90 S. W. 594, 595, 121 Ky. 850.

"A creative or corporate franchise confers upon the aggregation of individuals composing a corporation no greater measure of inherent right than is enjoyed by each individual citizen. In fact, the rights it may enjoy, in common with natural persons, are limited by express powers conferred upon it. The enumeration of powers in its charter is a limitation on corporate capacity, and not an enlargement of inherent rights, attaching to the legal person thus created. * * * A corporation may have power to acquire realty, and yet never own such property. Its corporate franchise, its charter, may grant the power to acquire and exercise separate, distinct, and varied franchises, but none may ever be acquired or owned. This distinction between the power to own, and ownership, is very important when we come to consider the difference between the creative franchise, vesting the power to acquire, and other franchises which it may subsequently acquire by purchase or acceptance. * * * It points the difference between the general, creative franchise to be, and the special franchises which, when accepted or purchased, vest privileges or franchises resting in special grant from governmental sources. Above all things, it eliminates the heresy that all special franchises, enjoyed and exercised by a corporation, whether acquired by acceptance or purchase, are merged in the general franchise which creates the corporation, and endows it with enumerated powers. The mere fact that a corporation is organized for the specific purpose of acquiring, and is given power to acquire, public uses or franchises, does not carry with it the idea that such franchises, when acquired, be they many or few, are merged in, and must be assessed as part and parcel of, the general corporate franchise." Where a corporation was authorized to acquire property, appropriate and distribute water, construct canals, and establish, collect, and receive rates, water rents, and tolls, and was authorized to exercise the right of eminent domain, the actual exercise of such powers by the construction of canals in a county other than that in which the corporation's principle place of business was located constituted the use of a franchise by the corporation in such county which was there subject to taxation. San Joaquin & K. R. Canal & Irrigation Co. v. Merced County, 84 Pac. 285, 286, 287, 288, 2 Cal. App. 593.

The franchises of a corporation are the rights it has to engage in and carry on the business for which it was chartered. Act March 7, 1907, p. 4188, § 1, requiring a foreign corporation to pay annually a franchise tax for the use of the state, based on the amount of capital employed in the state, does not impose a tax on the franchise of a foreign corporation as property, but adds to the license tax already required an additional privilege tax for the continued exercise of the "corporate franchise." Southern R. Co. v. Greene, 49 South. 404, 406, 160 Ala. 396.

In a statute providing for an assessment on the tangible property of express, telegraph, and telephone companies, and on the yearly gross receipts, such gross receipts to be taken and considered in their total as an item of property, etc., and to represent the franchise valuation, which shall not be otherwise assessed, the franchise valuation cannot be construed to mean "a corporate franchise"—the franchise to be a corporation. Western Union Tel. Co. v. Omaha (Neb.) 103 N. W. 84, 85.

CORPORATE OFFICER

See Officer (Of Corporation).

CORPORATE POWERS AND PRIVILEGES

Act May 18, 1905 (Laws 1905, p. 124), is entitled "An act to regulate the admission of foreign corporations for profit, to do business in the state," and section 1 provides that, before such corporations shall be permitted to transact any business or exercise any of their corporate powers in the state, they shall comply with the provisions of the act and be subject to all regulations prescribed for domestic corporations. Sections 2 to 5, inclusive, provide the steps for admission of such corporations to the state, and section 6 imposes a penalty for neglect to comply with the act, and in addition thereto forbids any foreign corporation, failing to comply with the act, to sue upon any claim, legal or equitable. Held, that the terms "doing business" and "transacting business" meant only the transaction of the ordinary business in which the corporation was engaged, and did not include the prosecution of actions; and, in view of the title of the act, the inhibition against the exercise of any "corporate powers" did not change its meaning, "corporate powers" referring to those powers or franchises conferred upon the corporation to enable it to prosecute the business in which it was engaged, together with those implied powers necessary thereto, so that merely bringing a suit in this state by a foreign corporation was not "transacting business" so as to require compliance with the act before bringing such suit. Alpena Portland Cement Co. v. Jenkins & Reynolds Co., 91 N. E. 480, 481, 244 Ill. 354.

Municipal corporations have two aspects. In one their functions are chiefly ministerial, and relate to corporate interests only. These include the making of public improvements, the repair of such improvements, and the holding of property for corporate purposes. The officers of the municipality in exercising

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this class of powers are to be regarded as agents of the lesser public, and the maxim of respondeat superior applies. In the other aspect the municipality is regarded as holding a quasi delegated sovereignty for the preservation of the public peace and safety and the prevention of crime. This includes the maintenance of a police force, the appointment of officers charged with the public health, the establishment of regulations for the suppression of vice, and other matters of public concern in which all people have a common interest. As to this class of powers, the municipal officers are regarded as agents of the greater public, and the maxim respondeat superior does not apply. Barree v. City of Cape Girardeau, 95 S. W. 330, 332, 197 Mo. 382, 6 L. R. A. (N. S.) 1090, 114 Am. St. Rep. 763 (citing Donahoe v. City of Kansas City, 38 S. W. 571, 136 Mo. 657; Bullmaster v. City of St. Joseph, 70 Mo. App. 60; Maxmilian v. Mayor, etc., of City of New York, 62 N. Y. 160, 20 Am. Rep. 468; Conrad v. Village of Ithaca, 16 N. Y. 158; Jones v. City of New Haven, 34 Conn. 1).

The mere fact that a special legislative act authorizing the appointment by a county board of road commissioners for a district in certain cases declares that such commissioners "shall be a body corporate with the powers and duties hereinafter specified" does not render the act invalid under the Ohio Constitution as a special act conferring "corporate powers," where the powers conferred are only those ordinarily conferred on officers charged with the supervision of public improvements. Rees v. Olmsted, 135 Fed. 296, 301, 68 C. C. A. 50.

The term "corporate powers," as used in Const. art. 2, § 28, prohibiting the Legislature from enacting any special law for granting corporate powers or privileges, includes powers conferred upon municipal corporations, as well as those conferred upon private corporations. Terry v. King County, 86 Pac. 210, 211, 212, 43 Wash. 61, 9 Ann. Cas. 1170.

CORPORATE PURPOSE

The issue of bonds by a city for the purpose of purchasing grounds and erecting school buildings thereon is a "corporate purpose," within Const. 1868, art. 9, § 8, providing that cities, etc., may be vested with power to assess and collect taxes for corporate purposes. Jordan v. City of Greenville, 60 S. E. 973, 974, 79 S. C. 436.

The construction and maintenance of a bridge outside of the territorial boundaries of a city, the purpose of which is not to serve the convenience of its inhabitants, but the convenience of the inhabitants of an outlying district, and to promote the business and commercial interests of the city by increasing the trade of its business men, is not such a "corporate purpose" as will sustain the exercise of the power to taxation. Manning v. City of Devils Lake, 99 N. W. 51, 53, 13 N. D. 47, 65 L. R. A. 187, 112 Am. St. Rep. 652 (quoting 2 Dill. Mun. Corp. [4th Ed.] § 736).

Laws 1895, c. 39, providing that all metropolitan cities and cities of the first class having a paid fire department shall pension superannuated firemen, the pensions to be paid from the funds of the fire department, is not violative of Const. art. 9, § 7, prohibiting the Legislature from imposing taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes. State ex rel. Haberlan v. Love, 131 N. W. 196, 198, 89 Neb. 149, 34 L. R. A. (N. S.) 607, Ann. Cas. 1912C, 542.

Municipal "corporate purposes" are such purposes as are germane to the objects of the welfare of the municipality, or have a legitimate connection with those objects, and a manifest relation thereto, and a tax for corporate purposes was held to be one to be expended in a manner which should promote the general prosperity and welfare of the municipality which levied it. The borrowing of money by the issuance of bonds to pay the judgment indebtedness of a city is a pledge of its credit for corporate purposes, within the meaning of City and Village Act, art. 5, § 1, par. 5 (Hurd's Rev. St. 1901, c. 24, § 62), authorizing bonds for such purposes. Stone v. City of Chicago, 69 N. E. 970, 973, 207 Ill. 492 (citing And. Law Dict. p. 265; Board of Sup'rs of Livingston County v. Weider, 64 Ill. 427; People ex rel. Cairo & St. L. Ry. Co. v. Dupuyt, 71 Ill. 651; Burr v. City of Carbondale, 76 Ill. 455; Taylor v. Thompson, 42 Ill. 9; National Life Ins. Co. of Montpelier, Vt., v. Mead, 82 N. W. 78, 13 S. D. 37, 48 L. R. A. 785, 79 Am. St. Rep. 876).

CORPORATE SEAL

Where a corporation adopts a seal for a special occasion, different from its corporate seal, the seal adopted is the corporate seal for that time and occasion. New York Life Ins. Co. v. Rhodes, 60 S. E. 828, 830, 4 Ga. App. 25.

CORPORATE STOCK

See Stock (In Corporation Law).

CORPORATE STOCKHOLDER

See Stockholder.

CORPORATION

See Business Corporation; Civil Corporation; Clerk of Corporation; Commercial Corporations; De Facto Corporation; De Jure Corporation; Domestic Corporation; Domicile of Corporation; Educational Corporation; Federal Corporation; Foreign Corporation; Incorporation; Investment Company; Mechanical Corporation; Membership Corporation; Missionary Societies or Corporations; Moneyed Corporation; Municipal Corporation; Political Corporation; Private Corpo-

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ration; Private Person, Partnership, or Corporation; Public Corporation; Public Improvement Corporation; Public Service Corporation; Quasi Corporation; Quasi Public Corporation; Railroad Corporation; Religious Corporation; School Corporation; Stock Corporation; Street Railroad Corporation.

Any corporation, see Any.
Any incorporated company, see Any.
Any individual or copartnership as including, see Any.
Any two corporations, see Any.
Assets of, see Assets.
Benevolent corporation, see Benevolent Association.
Charter of, see Charter.
Corporation for profit, see Profit; Profit Sharing.
Creditor of corporation, see Creditor.
Dissolved corporation, see Dissolve.
Dissolution of, see Dissolution.
Every corporation, see Every.
Foreign corporation doing business without authority as partnership, see Partnership.
Insolvency, of see Insolvency—Insolvent.
Insurance corporation, see Insurance Company.
Joint-stock company as in nature of corporation, see Joint-Stock Companies and Associations.
Manager of, see Manager.
Manufacturing corporation, see Manufacturer.
Member of, see Member.
Merger of, see Merger.
Officer of corporation as employé, see Employé.
Other corporations, see Other.
Residence of, see Residence.

"A 'corporation' is simply an aggregation of individuals." Wolff Chemical Co. v. City of Philadelphia, 66 Atl. 344, 345, 217 Pa. 215.

" 'Corporations' are artificial creations, existing by virtue of some statute, and organized for the purposes defined in their charters." Jemison v. Citizens' Sav. Bank of Jefferson, 25 N. E. 264, 265, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482.

A "corporation" is an artificial being, possessing only the rights granted by the state and bearing the burdens imposed in its charter. Julian v. Kansas City Star Co., 107 S. W. 496,.499, 209 Mo. 35.

A "corporation" is an artificial person created by law for specific purposes, the limit of whose existence, powers, and liabilities is fixed by its charter. Venable Bros. v. Southern Granite Co., 69 S. E. 822, 823, 135 Ga. 508, 32 L. R. A. (N. S.) 446.

Domestic as well as foreign corporations are embraced by Act Ark. Jan. 23, 1905, § 1, imposing a penalty upon any "corporation" doing business within the state while a member of a combination to control prices. Hammond Packing Co. v. Arkansas, 29 Sup. Ct. 370, 377, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

The words "association of persons" are often and not inaptly employed to describe a "corporation," which is an association of individuals acting as a single person and by their corporate name. A private corporation is an "association of persons" within Rev. St. U. S. § 2347, giving such an association the right to enter and purchase coal lands, and such corporation is also subject to the restrictions imposed on associations of persons by section 2350. United States v. Trinidad Coal & Coking Co., 11 Sup. Ct. 57, 61, 137 U. S. 160, 34 L. Ed. 640.

Code, § 943, prohibiting any member of a city becoming interested in any contract for work to be performed for "the corporation," does not prevent his being employed by the city's board of health to attend, at the expense of the county, smallpox patients for whose care the county is liable. Dewitt v. Mills County, 101 N. W. 766, 126 Iowa, 169.

As agent

See Agent.

As association

See Association.

Characteristics and kinds

"A 'corporation' is an intangible creature of the law, which cannot be seized and held, or imprisoned, or hung like a human being. Therefore the only method for obtaining the necessary control of it is by notice served on its proper officer and steps to force it to appear by attorney. For without an appearance there can be no sentence; judgment by default being unknown in criminal cases." United States v. Standard Oil Co. of Indiana, 154 Fed. 728, 730 (quoting and adopting the definition in Bishop's New Crim. Proc. § 950a, par. 3).

A "corporation" is "an artificial being, invisible, intangible, and existing only in contemplation of law." Havemeyer v. Dahn (Neb.) 67 N. W. 489, 490, 33 L. R. A. 332, 58 Am. St. Rep. 706 (quoting in dissenting opinion definition of Chief Justice Marshall in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629).

A "corporation" is a legal person, with power to act as a natural one to the extent that its charter authorizes it to. Henderson v. Ogden Ry. Co., 26 Pac. 286, 287, 7 Utah, 205.

A "corporation" is defined to be a franchise which, "like other franchises, is an incorporeal hereditament issuing out of something real or personal, or concerning or annexed to and exercisable within a thing corporate. To this grant or this franchise the parties are the king and the persons for whose benefit it is created, or trustees for them." First Nat. Bank of Deadwood, S. D.,

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v. Rockefeller, 93 S. W. 761, 767, 195 Mo. 15 (quoting definition in Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 658, 4 L. Ed. 629).

"Corporations" is defined by Bankr. Act July 1, 1898, c. 541, § 1, cl. 6, 30 Stat. 544, as meaning all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, including limited or other corporate associations organized under laws making the capital subscribed alone responsible for the debts of the association. Burkhart v. German-American Bank, 137 Fed. 958, 959.

A "corporation" has no personal attributes and must be judged by its corporate acts. Where a corporation applies for a brewer's license under P. L. 1891, 257, relating to the licensing of wholesale dealers, brewers, etc., its unfitness may be established by showing unlawful acts of its officers or authorized agents, such as sale on Sunday, or to minors, or to persons of known intemperate habits, since, though a corporation by its act of incorporation is made fit to engage in the business of brewing liquors, it may become unfit within the license law by illegal corporate acts. In re Indiana Brewing Co.'s License, 75 Atl. 29, 30, 226 Pa. 56.

The word "corporation," as used in Rev. St. 1899, § 4194, defining mandamus as a writ issued in the name of the state to any inferior tribunal, a corporation, board, or persons, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, is a generic term and includes public, quasi public, and private corporations. Wyoming Coal Min. Co. v. State ex rel. Kennedy, 87 Pac. 984, 985, 15 Wyo. 97, 128 Am. St. Rep. 1014.

"Corporations" are defined by Bankr. Act, § 1, to mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, but including limited or other partnership associations, organized under laws making the capital subscribed alone responsible for the debts of the association. Dressel v. Northern State Lumber Co., 107 Fed. 255, 256.

A "corporation" is an intellectual body created by law, composed of individuals united under a common name, the members of which succeed each other so that the body continues the same, notwithstanding change of individuals composing it, and which for certain purposes is considered as a natural person. Rhodes v. Love, 69 S. E. 436, 437, 153 N. C. 468.

"A 'corporation' is somewhat like a partnership, if one were possible, conducted wholly by agents where the co-partners have power to appoint the agents, but are not responsible for their acts. The power to manage its affairs resides in the directors, who are its agents, but the power to elect directors resides in the stockholders." Stokes v. Continental Trust Co., 78 N. E. 1090, 1093, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738.

"Corporations" are but associations of individuals united for a lawful purpose and permitted to use a common name in their business and to have a change of members. The abstract idea of a corporation, the legal entity, is itself a fiction and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law, and the substantial inquiry always is: What in a given case has been that collective action and agency? It has also been defined as an artificial person, created by law as the representative of those persons, natural or artificial, who contribute to and become the holders of shares in the property intrusted to it for a common purpose. A corporation will be looked upon as a legal entity as a general rule, until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. Where one corporation was organized and is owned by the officers and stockholders of another making their interest identical, they may be treated as identical when the interests of justice require it. United States v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 254.

As citizen

See Citizen.

As company

See Company.

Creation

A "corporation" is the creature of the state, and every corporation owes its existence and its right to incorporate to express legislative enactment. Feiner v. Reiss, 90 N. Y. Supp. 568, 571, 98 App. Div. 40.

"A 'corporation' is a creation of the Legislature. Persons are not obliged to incorporate against their will. If, however, they do incorporate, they must accept the burdens imposed upon them by general law." Cook County v. Fairbank, 78 N. E. 895, 898, 222 Ill. 578.

A "corporation" is not a tangible thing, becoming a legal entity only by statutory permission; it is a mere legislative creation; a creature existing only by virtue of law. Fifth Avenue Coach Co. v. City of New York, 111 N. Y. Supp. 759, 768, 58 Misc. Rep. 401.

"Corporations" are recognized as creatures of the law, and they owe obedience thereto, and when they fail to perform duties which they were created to discharge, or where

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they do unauthorized acts, the state has the right to wrest from the offending corporation its franchise. State ex. inf. Hadley v. Standard Oil Co., 116 S. W. 902, 1008, 218 Mo. 1.

A "corporation" is an artificial being, invisible, intangible, and existing only in contemplation of law. In State v. Topeka Water Co., 61 Kan. 547, 558, 60 Pac. 337, 341, it is said: "A corporation exists by the will of a sovereign power. To this superior authority it owes an allegiance which it cannot abjure." Williams v. Metropolitan St. R. Co. 74 Pac. 600, 602, 68 Kan. 17, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6.

The annexation of a town to a city, and the consolidation of the two municipalities, under the provisions of Acts 1903, p. 201, c. 105, which authorizes the annexation of a town to a city having a population of between 6,000 and 7,000, is the creation of a corporation, within Const. art. 11, § 13, providing that "corporations other than banking shall not be created by special act, but may be formed under general laws"; and the act, being special, is unconstitutional. Town of Longview v. Crawfordsville, 73 N. E. 78, 80, 164 Ind. 117, 68 L. R. A. 622, 3 Ann. Cas. 496.

A "corporation" is a creature of statute, having no existence except by virtue of local laws. The grant of its corporate existence is a grant of special powers and privileges to its incorporators to pursue the objects of its creation and transact its corporate business the same as an individual transacts his private business. Being such a creature of local laws, it has no legal existence without the limits of the jurisdiction which created it. It exists only in contemplation of law and by virtue of the law, and, where the law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty. It is endowed with no natural attributes but has only such powers as are conferred by its charter and the laws of its creation, and one state or country can make no laws or create any corporation for another, although the corporate existence of a corporation may be recognized by another state and its contract made therein enforced by the comity of the state. A. Booth & Co. v. Weigand, 79 Pac. 570, 571, 28 Utah, 372.

"A 'corporation' is but an artificial person created and limited by the statute. Both the individual and the corporation are subject to the laws governing the business conducted by them. The public duty springs not alone from contract, but it is the result of the character of the business and the laws regulating it. The business is subjected to constitutional and legislative control and lawful police regulations. The public duty does not arise from any question of ownership but from the nature and character of the business and the fact that it is conducted by public franchise granted by public authority." Lowther v. Bridgeman, 50 S. E. 410, 411, 57 W. Va. 306.

As distinct from stockholders

A "corporation" is a legal entity distinct from the stockholders, and this rule applies, though all the stock is owned by one person, but in cases of fraud the courts will treat as identical a corporation and its stockholders. Roberts v. W. H. Hughes Co. (Vt.) 83 Atl. 807, 812.

A "corporation" is an entity and exists irrespective of the persons owning its stock. State ex rel. City of Tacoma v. Tacoma Ry. & Power Co., 112 Pac. 506, 508, 61 Wash. 507, 32 L. R. A. (N. S.) 720.

A "corporation" is in law an entity entirely distinct from its stockholders and officers, and it may have interests distinct from theirs. J. J. McCaskill Co. v. United States, 30 Sup. Ct. 386, 391, 216 U. S. 504, 54 L. Ed. 590.

A "corporation" is an entity distinct and separate from officers and stockholders, and corporate liabilities do not attach to the latter. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 89 N. E. 193, 207, 203 Mass. 159, 40 L. R. A. (N. S.) 314.

A "corporation" is an entity wholly separate and distinct from the individuals who compose and control it. The law does not contemplate that partners may incorporate with intent to obtain the advantages and immunities of a corporate form and then become at will a partnership or a corporation as the purposes of their joint enterprises may require. Jackson v. Hooper (N. J.) 75 Atl. 568, 571, 27 L. R. A. (N. S.) 658.

"A 'corporation' is but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law and is protected, under Const. Amend. 14, against unlawful discrimination." The privilege against self-incrimination afforded by Const. Amend. 5 is purely personal to the witness, and he cannot claim the privilege of another person or of the "corporation" of which he is an officer or employé. Hale v. Henkel, 26 Sup. Ct. 370, 379, 201 U. S. 43, 50 L. Ed. 652.

"A 'corporation' is a legal entity, distinguished from any or all of its stockholders. That one person may own a majority or all of the stock of the corporation does not establish an identity between him and the corporation, so as to make acts by him in his individual name its acts." Garmany v. Lawton, 53 S. E. 669, 670, 124 Ga. 876, 110 Am. St. Rep. 207.

A corporation is an artificial person, a distinct legal entity, and its officers are its

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agents. Ex parte Rickey, 100 Pac. 134, 139, 31 Nev. 82, 135 Am. St. Rep. 651.

"A 'corporation' is an association of natural persons united as one body, and endowed by law with the capacity to act in many respects as an individual, as a separate and distinct entity, but a corporation can only act or think or purpose through its officers (directors, or stockholders." Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 829, 101 C. C. A. 39.

A corporation is an artificial person, like the state, having a distinct existence from that of its stockholders and directors. People's Pleasure Park Co. v. Rohleder, 61 S. E. 794, 796, 63 S. E. 981, 109 Va. 439.

"Corporations," being creatures of the law and deriving their right to exist and their powers from the law, have not all the rights and powers of individuals, and the rule that a corporation is an entity separate and distinct from its stockholders will be disregarded, when invoked in support of an end which is subversive of the policy of the state. Southern Electric Securities Co. v. State, 44 South. 785, 789, 91 Miss. 195, 124 Am. St. Rep. 638.

A corporation is an artificial entity existing in contemplation of law in the state of its creation, and, though it is a citizen within the meaning of certain provisions of the federal Constitution, it has no existence outside of the state of its creation, and is recognized elsewhere only by comity. In re Willmer's Estate, 138 N. Y. Supp. 649, 651, 153 App. Div. 804.

"A corporation is an entity, irrespective of the persons who own all of its stock, and the fact that one person owns all the stock does not make him and the corporation one and the same person." Control of the property of a corporation is not in its stockholders. A majority of the stockholders control the election of its officers and agents, but the control of the company's property is in the corporation itself, and its officers and agents, who are intrusted with such control by virtue of the by-laws. Ulmer v. Lime Rock R. Co., 57 Atl. 1001, 1007, 98 Me. 579, 66 L. R. A. 387 (citing Pullman's Palace Car Co. v. Missouri Pac. R. Co., 6 Sup. Ct. 194, 115 U. S. 587, 29 L. Ed. 499; Exchange Bank v. Macon Construction Co., 25 S. E. 326, 97 Ga. 1, 33 L. R. A. 800; Button v. Hoffman, 20 N. W. 667, 61 Wis. 20, 50 Am. Rep. 131; Mor. Priv. Corp. § 227).

Extraterritorial rights

A "corporation" is a mere creature of the law; and, inasmuch as laws have no force beyond the limits of the territory over which the lawmaking power has jurisdiction, it necessarily extends its operations into another state than that by force of whose laws it exists, and it can demand recognition only on the principles of comity, and not as a matter of right. Walker v. Rein, 106 N. W. 405, 406, 14 N. D. 608.

"A 'corporation' is an artificial being which exists only in contemplation of law, and its residence, so far as it can be said to have one, is in the state which creates it. It may exercise a permissive right to do business in other states but may not migrate to another sovereignty. Its home, its residence, as has been often held, is in the state of its creation, and the recognition it receives elsewhere is accorded under the rules of interstate courtesy and comity. * * * Since a corporation is a creation of the state, its residence may be said to be a state residence." Ham v. Booth, 83 Pac. 24, 25, 72 Kan. 429.

The artificial being termed a "corporation" is in this country largely if not solely a creature of statute. It "can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law, and, where that law ceases to operate and is no longer obligatory, the 'corporation' can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty." Groel v. United Electric Co. of New Jersey, 60 Atl. 822, 827, 69 N. J. Eq. 397 (quoting and adopting the definition in Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519, 10 L. Ed. 274).

Foreign corporations included

State courts have no jurisdiction, apart from statute, over a foreign corporation, except so far as its property is attached or it makes a voluntary appearance; and jurisdiction is not conferred upon the municipal court of Boston in actions at law against foreign corporations by Rev. Laws, c. 167, § 7, cl. 3, providing that a natural person may sue a corporation in any county in which the corporation has a place of business, or the person lives or has a place of business, as that statute only fixes the venue, and "corporations," as there used, does not include a foreign corporation. Potter v. La Pointe Mach. Tool Co., 88 N. E. 418, 201 Mass. 557.

As individual or person

See Individual; Person.

Incorporation distinguished

The phrase "a corporation," after the name of plaintiff in the title of a case, is merely descriptive of plaintiff and is not an allegation of incorporation, and defendant has in the first instance the burden of showing that plaintiff has no legal capacity to sue. Boyce v. Augusta Camp No. 7429, Modern Woodmen of America, 78 Pac. 322, 14 Okl. 642.

As inhabitant or resident

See Inhabitancy—Inhabitant; Resident.

Natural person distinguished

A corporation is not a natural person, but is a creature of the state, possessing no

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powers or franchises except those conferred by the state. Cassatt v. Mitchell Coal & Coke Co., 150 Fed. 32, 44, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; Same v. Pennsylvania Coal & Coke Co., 150 Fed. 48, 81 C. C. A. 97.

As owner

See Owner.

As part of public

See Public.

Powers

A "corporation" is an artificial being, invisible, intangible, existing only in contemplation of law, and, being the mere creation of law, it possesses only those properties which the charter of its creation confers. United States v. MacAndrews & Forbes Co., 149 Fed. 823, 835 (citing Dartmouth College Case, 4 Wheat. 636, 4 L. Ed. 629).

A "corporation" is a creature of the law, having no powers but those conferred upon it. A corporation has no natural rights or capacities, such as an individual or an ordinary partnership, and, if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter or it does not exist. Scott v. Bankers' Union of the World, 85 Pac. 604, 608, 73 Kan. 575 (quoting and adopting the definition in National Home Building & Loan Ass'n v. Home Savings Bank, 54 N. E. 619, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245).

"A 'corporation' is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Myatt v. Ponca City Land & Imp. Co., 78 Pac. 185, 196, 14 Okl. 189, 68 L. R. A. 810.

"A 'corporation' is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the state and the limitations of the charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose." International Coal Mining Co. v. Pennsylvania R. Co., 152 Fed. 557, 558 (quoting and adopting definition in Hale v. Henkel, 26 Sup. Ct. 370, 201 U. S. 43, 50 L. Ed. 652).

"A 'corporation' is but the creature of the statute, and it can exercise no greater powers than those which are expressly conferred upon it by its charter or which must be necessarily implied from its charter." A corporation empowered by its charter only to engage in the business of manufacturing and selling certain articles has no implied authority to participate in the organization of other corporations. Converse v. Emerson, Talcott & Co., 90 N. E. 269, 272, 242 Ill. 619.

"A corporation is a creature of law. It has no powers except those expressly granted or necessarily implied, and none can be implied except such as are necessary to the exercise and enjoyment of those expressly granted. Powers which are not thus granted or implied are defined." Cumberland Telephone & Telegraph Co. v. City of Evansville, 127 Fed. 187, 191 (quoting Board of Com'rs of Tippecanoe County v. Lafayette, M. & B. Ry. Co., 50 Ind. 85).

Bishop

"A bishop is not a corporation sole." Kain v. Gibboney, 101 U. S. 362, 365, 25 L. Ed. 813.

A Catholic bishop is not an institution within Code 1873, § 1101, which provides that no person leaving a wife, child, or parent shall devise or bequeath to such institution or corporation more than one-fourth of his estate after payment of his debts. The word "institution" manifestly has reference to an association similar to a corporation and not to an individual in trust for charitable uses. While a bishop is for some purposes designated a "corporation," he is none the less an individual and as such may act as a trustee for any legal purpose. Rine v. Wagner, 113 N. W. 471, 473, 135 Iowa, 626.

Board of agriculture

Laws 1899, p. 208, provides that five citizens of the state, to be named by the Governor, shall constitute a board of agriculture which shall be charged with the exclusive management of the State Agricultural Society, have the direction of its entire business affairs, and be authorized to purchase and hold real estate. The board is required to provide for an annual fair, and in no event is the state to be liable for any premium awarded or debt created beyond the amount annually appropriated therefor. The act also provides for an annual appropriation from the state treasury to aid in carrying on the purposes of the board; no part of such allowance to be paid as a premium for trials of speed. Held, that the board is a "corporation," and not a branch of the state government, nor for the administration of state affairs; it not being accountable to the state for money received by it, except the legislative appropriation, and it having the pow-

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er to make contracts, and, as a necessary incident thereto, the right to appeal to the courts for the enforcement of them, it may be sued for a like purpose. Tongue v. State Board of Agriculture, 105 Pac. 250, 251, 55 Or. 61.

Express company

Act April 5, 1893, containing Ky. St. 1903, § 457, is entitled, "An act providing for the creation and regulation of private corporations." The first section of the act (Ky. St. 1903, § 538) provides for what purposes such corporations may be formed, and the next section (Ky. St. 1903, § 539) provides what the articles of incorporation shall specify, neither of which sections have any application to partnerships or unincorporated companies. Ky. St. 1903, § 571, provides that all corporations except foreign insurance companies doing business within the state shall have an authorized agent to accept service in the state and shall file with the Secretary of State a specified statement; that if any corporation fails to comply with such requirements, it shall be guilty of a misdemeanor and fined. Held, that section 571 had no application to an express company which was a joint-stock association, notwithstanding section 457, providing that the word "corporation" may be construed to include any person, persons, partnership, joint-stock company, or association. Commonwealth v. Adams Exp. Co., 97 S. W. 386, 387, 123 Ky. 720.

Improvement districts

The effect of Kirby's Dig. §§ 5665, 5666, authorizing the organization of improvement districts, which, when organized, are given a particular name and endowed with perpetual succession until their object is accomplished, with power to make contracts, incur debts, issue bonds, collect assessments, to sue, and to compel the city to make assessments, is to make them "corporations," though they are not denominated as such. Whipple v. Tuxworth, 99 S. W. 86, 90, 81 Ark. 391.

Joint-stock company

Const. § 208, providing that the word "corporation," as used "in this Constitution" shall embrace joint-stock companies and associations, does not control the definition of the word "corporation" when used in the statutes of the state. Commonwealth v. Adams Exp. Co., 97 S. W. 386, 387, 123 Ky. 720.

Under Const. § 208, providing that the word "corporation" as used therein shall embrace joint-stock companies and associations, a joint-stock company organized in another state and having a franchise to exist in Kentucky to acquire mining property and conduct the business of mining, was subject to Ky. St. § 2731, regulating mine ventilation. Stearns Coal Co. v. McPherson, 139 S. W. 971, 972, 144 Ky. 780.

The term "corporation," under the express provisions of Rev. St. 1889, § 2480, relating to corporations, includes all joint-stock companies or associations having any powers or privileges not possessed by any individuals or partnership; hence under section 7755, relating to taxation and providing for the taxation of a bridge owned by any joint-stock company, a bridge owned by a corporation may be taxed. State ex rel. Pearson v. Louisiana & M. R. R. Co., 94 S. W. 279, 282, 196 Mo. 523.

A joint-stock association brought into being wholly by the contract of its individual members is not subject to taxation under the acts of Pennsylvania of May 1, 1868, April 24, 1874, March 20, 1877, and June 7, 1879, imposing taxes on the capital stock of incorporated companies. Gregg v. Sanford, 65 Fed. 151, 153, 12 C. C. A. 525.

Const. art. 11, §§ 2, 16, declaring that no charter of incorporation shall be granted, extended, or amended by special law, except for certain corporations under the control of the state, but that the Legislature shall provide by general law for the organization of corporations, and that the term "corporation" shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships, does not prohibit the formation of an unincorporated association or joint-stock company by individuals for the purchase of a single tract of real estate, the title to which may be taken in a trustee, and the articles of agreement of the association may provide that the death of a shareholder shall not result in the dissolution of the association, and may so limit the liability of the association, and may provide that either or any of the officers or shareholders shall not sell or dispose of any of the property of the association without the concurrence of the shareholders. Spotswood v. Morris, 85 Pac. 1094, 1098, 12 Idaho, 360, 6 L. R. A. (N. S.) 665 (citing People v. Coleman, 5 N. Y. Supp. 394, affirmed in 31 N. E. 96, 16 L. R. A. 183).

A joint-stock company, though a legal entity, and suable in the name of its president under state laws, is not a corporation, and cannot be deemed to have citizenship for the purpose of removing actions against it to the federal courts. Saunders v. Adams Exp. Co., 136 Fed. 494, 495 (citing Chapman v. Barney, 9 Sup. Ct. 426, 129 U. S. 677, 32 L. Ed. 800; Great Southern Fireproof Hotel Company v. Jones, 20 Sup. Ct. 690, 177 U. S. 449, 44 L. Ed. 482; Thomas v. Ohio State University, 25 Sup. Ct. 24, 195 U. S. 207, 49 L. Ed. 60; Boatner v. American Exp. Co., 122 Fed. 714).

Under Const. § 208 and Ky. St. § 457, which provide that the word "corporation"

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shall embrace joint-stock companies and associations, a corporation is comprehended by Civ. Code Prac. § 51, subsec. 6, which provides for the service of summons against joint-stock companies, associations, etc. International Harvester Co. v. Commonwealth, 145 S. W. 393, 395, 147 Ky. 655.

Under Const. Pa. art. 16, making provisions relating to private corporations, and section 13, which declares that "the term 'corporation' as used in this article shall be considered to include all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships," which definition should be applied in construing state statutes unless precluded by the context or subject-matter, an association formed under Act Pa. May 9, 1899 (P. L. 261), which, although denominated a "partnership," is given powers and privileges far in excess of those possessed by individuals or ordinary partnerships, including the power to limit the liability of its members and to make their interest transferable, is in law a corporation, and as such its franchise and rights may be levied on and sold under Act Pa. April 7, 1870 (P. L. 58). Keystone Bank v. Donnelly, 196 Fed. 832, 833.

Municipal or quasi public corporations

The courts hold that the general word "corporation" must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations and bodies politic and corporate. Emes v. Fowler, 89 N. Y. Supp. 685, 688, 43 Misc. Rep. 603 (citing Wallace v. Lawyer, 54 Ind. 501, 23 Am. Rep. 661).

A municipality is not a "person" or "corporation," within Rev. Laws, c. 171, § 2, as amended by St. 1907, c. 375, which makes persons and corporations liable for negligent death. Donahue v. City of Newburyport, 98 N. E. 1081, 1083, 211 Mass. 561, Ann. Cas. 1913B, 742.

Act Oct. 11, 1907 (P. L. 676) § 1, forbidding any person, firm, or corporation to supply water to another, for use within a municipality, without the consent of the board having charge of the water supply, means a private, and not a municipal, corporation. Town of Kearny v. Jersey City, 73 Atl. 110, 78 N. J. Law, 77.

Const. art. 11, § 2, which, as first adopted, provided that corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes, was amended June 4, 1906, to read: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws." Held, that such section, viewed in the light of the reference to "other corporations" in section 9, providing that no county, city, town, or other municipal corporation shall become a stockholder in any corporation, etc., employed the word "corporation" in its broadest sense, including public, municipal, and private corporations; and hence a corporation for municipal purposes may not be created by special laws. Straw v. Harris, 103 Pac. 777, 780, 54 Or. 424.

Under a Code provision giving personal representatives a right to recover for decedent's death caused by the wrongful act, omission, or negligence of any "person, or persons, or corporation," the personal representative of a person injured by a city sewer ditch had a cause of action against the city. City of Anniston v. Iney, 44 South. 48, 49, 151 Ala. 392.

Code Civ. Proc. § 1391, providing that, on the return of an unsatisfied execution on a judgment for necessaries, the court shall grant an order for execution against the salary or wages of the judgment debtor, and it shall be the duty of any "person or corporation" to whom the execution shall be presented, and who shall be indebted to the judgment debtor, to pay over to the officer the amount of the debt, does not authorize the institution of the supplementary proceedings therein provided for against a municipal corporation to reach the salary of a police officer. Rosenstock v. City of New York, 91 N. Y. Supp. 737, 739, 101 App. Div. 9; Chapman & Co. v. Same, 91 N. Y. Supp. 1090, 101 App. Div. 607.

Where a city, pursuant to its authority to acquire a waterworks system to supply water to its inhabitants, purchases the property, franchise, and business of a corporation engaged in supplying water to the inhabitants of a municipality, and the city possesses as an incident to its power to supply water to its inhabitants power to furnish water to others, the city is a "corporation duly incorporated" within Const. art. 11, § 19, providing that in any city, where there are no municipal waterworks, any "corporation duly incorporated for such purpose" may lay mains in the streets for supplying water. City of South Pasadena v. Pasadena Land & Water Co., 93 Pac. 490, 496, 152 Cal. 579.

Const. art. 9, § 20, providing that for the taking of private property for the benefit of corporations compensation shall be made irrespective of any benefits from any improvement proposed by such corporation, does not apply to municipal corporations. Bramlett v. City Council of Greenville, 70 S. E. 450, 452, 88 S. C. 110.

The phrase "corporation, association, or individual," in Const. art. 3, § 18, which prescribes that the Legislature shall not pass a private or local bill granting to any "corporation, association, or individual" the right to lay down railroad tracks, does not apply to a municipality, and a county, city, town, or village is not included therein. Laws 1901,

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c. 712, authorizing the reconstruction of the Manhattan terminal of the Brooklyn Bridge and conferring power to lay down railroad tracks is not in conflict with the Constitution as such power is conferred on the city. In re City of New York, 91 N. Y. Supp. 987, 989.

"The term 'corporation' includes in its legal, as well as in its popular, sense an incorporated city." Under a statute providing that no member of any "corporation" or public institution or any officer or agent thereof shall be interested in any contract to sell or furnish supplies to any "corporation," municipality, or public institution, of which he shall be a member or officer, etc., the term "corporation" includes any incorporated city. Commonwealth v. Witman, 66 Atl. 986, 987, 217 Pa. 411.

The Manchester & Richmond Free Bridge Company is neither a municipal corporation nor a public institution owned or controlled by the state, which under the express terms of Const. 1902, art. 12, are excluded from the term "corporation," as used in such article; and the general assembly was powerless to pass Act March 5, 1908 (Laws 1908, p. 184, c. 144), being an act amending sections 3, 4, 5, and 9 of Act April 1902, an act incorporating such company and granting certain powers to it and to the Richmond and Manchester city councils for public purposes. Commonwealth v. Manchester & R. Free Bridge Co., 63 S. E. 1083, 109 Va. 499.

The word "corporation," in Rev. Laws, c. 73, § 59, providing that an instrument drawn or indorsed to a person as cashier or other fiscal officer of a corporation is deemed to be payable to the corporation and may be negotiated either by its indorsement or the indorsement of the officer, does not include cities and towns; and hence that section confers no authority on a town treasurer to make the town a party to negotiable paper by indorsement. Franklin Sav. Bank v. Framingham, 98 N. E. 925, 926, 212 Mass. 92.

A county is a "corporation" and subject to be sued as an individual. "Being the mere creature of the law, it possesses only those properties which the character of its charter confers on it expressly or as incidental to its very existence." Covington County v. Kinney, 45 Ala. 176, 187 (quoting Dartmouth College v. Woodward, 4 Wheat. 518, 636, 4 L. Ed. 629).

In Code, § 1026, prohibiting any member of a city council from becoming interested directly or indirectly in any contract for work or service to be performed for the "corporation," the corporation referred to was the city and did not prohibit a member of the council being employed by the city's board of health to attend smallpox patients for whose care the county was liable. Dewitt v. Mills County, 101 N. W. 766, 126 Iowa, 169.

Code Civ. Proc. § 264, provides that no award shall be made on any claim against the state, except upon such legal evidence as would establish liability against an individual or corporation. Canal Law (Consol. Laws, c. 5) § 47 provides that no judgment shall be awarded by the Court of Claims for damages from neglect or conduct of any state officer having charge of canals, or from any accident connected with the canals, unless the facts make out a case which would create a legal liability against the state, were they established in court against an individual or corporation. Held, that the phrase "individual or corporation" includes a town; Town Law (Consol. Laws, c. 62) § 2, defining a "town" as a municipal corporation comprising the inhabitants within its boundaries. O'Bryan v. State, 125 N. Y. Supp. 490, 491, 68 Misc. Rep. 618.

Laws 1909, p. 245, relating to the creation of forest preserve districts, provides, by section 1, that a proposed district must consist of contiguous territory and lie wholly within one county, and that there shall be only one district in any county which must contain within its boundaries one or more cities or villages, and must be petitioned for by 1,000 legal voters within its limits, and empowers the county judge to include part or all the territory described in each petition when two or more petitions are filed, and by section 9 provides for the annexation of territory on petition and vote, but contains no requirement that a forest preserve district shall comprise a forest. Const. art. 4, § 22, prohibits special legislation in enumerated cases, including the grant to any corporation, association, or individual of any special or exclusive privilege, immunity, or franchise, but makes no reference to forest preserves. Held, that the word "corporation," as used in the Constitution, means a private corporation, and not a municipal corporation, and that under such provision the act was invalid. People v. Rinaker, 96 N. E. 897, 899, 252 Ill. 266.

Since a railroad company is a "quasi public corporation," the property of the railroad is private property and cannot be taken for private use, and therefore Act 1905 (24 St. at Large, p. 596), providing that railroad companies shall build side tracks connecting industrial enterprises with their main lines for the delivery and receipt of freight, the cost thereof to be paid by the enterprises and repaid by the companies in annual installments of 20 per cent. of the freight collected, is violative of Const. U. S. Amend. art. 14, and Const. art. 1, §§ 5, 17, as authorizing the taking of private property for private use. Mays v. Seaboard Air Line R., 56 S. E. 30, 34, 75 S. C. 455 (citing Moore v. Columbia & G. R. Co., 16 S. E. 781, 38 S. C. 1).

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Partnership

The word "corporations," in Comp. Laws, § 8553, securing to minority stockholders in "corporations" the power of electing a representative in boards of directors and providing for cumulative voting of stock, does not include a partnership association organized under sections 6079–6089, since the Legislature for years has not applied the name "corporation" to such associations but has designated them by the name "partnerships." Attorney General ex rel. Potter v. McVichie, 101 N. W. 552, 553, 138 Mich. 387.

Under the Constitution of Michigan, providing that "the term 'corporations' shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships," and the Michigan statute, providing for the organization of "limited partnerships," and also for partnership associations in which the capital subscribed is alone responsible for the debt of the association, limited partnership association is not a corporation so as to become a citizen of the state in which it has its domicile for the purposes of federal jurisdiction, independent of the individuals composing it. Fred Macey Co. v. Macey, 135 Fed. 725, 728, 68 C. C. A. 363.

Reclamation district

St. 1905, p. 717, c. 552, creating a reclamation district and fixing its boundaries, creates a governmental agency merely for specific purposes, and does not create a corporation within Const. art. 12, § 1, prohibiting the creating of corporations by special act. Reclamation Dist. No. 70 v. Sherman, 105 Pac. 277, 280, 11 Cal. App. 399.

Road district

A road district is not a corporation. Custer County Bank v. Custer County, 100 N. W. 424, 426, 18 S. D. 274.

The mere fact that a special legislative act authorizing the appointment by a county board of road commissioners for a district in certain cases declares that such commissioners "shall be a body corporate with the powers and duties hereinafter specified" does not render the act invalid under the Ohio Constitution as a special act conferring "corporate powers," where the powers conferred were only those ordinarily conferred on officers charged with the supervision of public improvements. Rees v. Olmsted, 135 Fed. 296, 301, 68 C. C. A. 50.

School corporation

A school corporation or the board of school trustees of a school city is not a "corporation" within Acts 1905, p. 257, c. 129, § 54, authorizing the common council of every city to investigate the affairs of any "corporation" in which the city may be interested or with which it may have entered into a contract or may be about to do so. Agar v. Pagin, 79 N. E. 379, 380, 39 Ind. App. 567.

A parish board of public education is a corporation within Const. 1898, art. 48, prohibiting local or special laws creating corporations, and hence Act No. 260 of 1910, creating a school board for ward 4, including the town of Tallulah, parish of Madison, is violative of such provision. Board of School Directors of Madison Parish v. Coltharp, 54 South. 299, 127 La. 956, 958.

State

Laws 1905, p. 370, c. 175, amending Code Civ. Proc. § 1391, authorizing an execution against wages, and requiring any person or corporation to whom presented to pay over to the officer the amount of the debt, does not authorize execution against the salary of a state officer, since the state is not a person or "corporation." Osterhoudt v. Stade, 117 N. Y. Supp. 809, 810, 133 App. Div. 83.

State board of health

Medical Practice Act, §§ 9, 10, providing for the recovery of a penalty for the use of the state board of health against persons practicing medicine without a license, are not in violation of Const. art. 4, § 22, prohibiting the General Assembly by local or special law from granting to any "corporation," "association," or "individual" any special or exclusive privilege, immunity, or franchise, for, as the state board of health is a branch of the state executive department and its members officers of the state, the board is neither a corporation, association, nor individual within such constitutional provision. People v. Dunn, 99 N. E. 577, 578, 255 Ill. 289.

State hospital

Const. art. 12, § 1, provides that corporations must be formed under general laws, and not by special act when considered in connection with section 4, declaring that the term "corporation," as used in the article, shall include all corporations having any powers or privileges as corporations not possessed by individuals or partnerships, etc., and when considered in relation to the entire article, refers to private corporations, and has no relation to corporations like state hospitals for the insane, which are public corporations under the control of the state, and created and acting merely as state agencies for the protection of society and the betterment of the condition of the insane. Napa State Hospital v. Dasso, 96 Pac. 355, 357, 153 Cal. 698, 18 L. R. A. (N. S.) 643, 15 Ann. Cas. 910.

Town

A town is a "corporation." Street v. Varney Electrical Supply Co., 66 N. E. 895, 896, 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. Rep. 325.

CORPORATION CREDITOR

The holder of preferred stock is a shareholder in the corporation. He is not a "cor-

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poration creditor" and has no rights as such. Grover v. Cavanagh, 82 N. E. 104, 107, 40 Ind. App. 340.

CORPORATION FEE

As tax, see Tax—Taxation.

CORPORATION FOR MUNICIPAL PURPOSES

The "Sacramento Drainage District," created by the act of 1905 (St. 1905, p. 443, c. 368), for the reclamation of land in certain counties, is not a "corporation for municipal purposes" within Const. art. 11, § 6, forbidding the creation of such corporations by special laws. People ex rel. Chapman v. Sacramento Drainage Dist., 103 Pac. 207, 212, 155 Cal. 373.

CORPORATION FOR PECUNIARY PROFIT

See Pecuniary Profit.

CORPORATORS

A "corporator" is one who is a member of a corporation, one of the stockholders or constituents of the body corporate. Policy holders in a mutual insurance company who were, by its charter, entitled to vote for trustees and to share in its profits were corporators within Rev. St. § 5122, relating to meeting and voting by the corporators in considering bankruptcy proceedings. In re Atlantic Mut. Life Ins. Co., 9 Ben. 272, 2 Fed. Cas. 168, 169.

CORPOREAL

See Incorporeal.

CORPSE

The dictum of Lord Coke that a "corpse" is "caro data vermibus" (flesh given to the worms) and is "nullius in bonis" does not authorize the conclusion that those who are entitled to its possession for purposes of decent burial have no rights to and in it which the law recognizes and will protect. Medical College of Georgia v. Rushing, 57 S. E. 1083, 1084, 1 Ga. App. 468.

As person

See Person.

As property

See Property.

CORPUS

Testatrix was a majority stockholder and controlled the corporation for nine years preceding her will and her death. The corporation retained from its earnings a surplus to meet any unusual demand and to provide for improvements and paid a 15 per cent. dividend, shortly after testatrix died, for the preceding six months, leaving a large surplus. Testatrix created five separate, but identical, trusts for the benefit of her grandchildren; the income and profits to be applied to the use of each grandchild in semiannual payments until he should become 30 years old, when the body of the trust was to be transferred to such grandchildren in equal shares. The executors were relieved from liability for depreciation in the value of the stock, and were authorized to sell whenever it seemed necessary. Between testatrix's death and the sale of the business of the corporation, all betterments were paid out of the earnings, and the surplus earnings were paid to the trustees and by them to the beneficiaries as income. Held, that the "corpus" of the trust estate was to be determined by the proportionate value of the plant and materials of the corporation, represented by shares of stock, together with the proportionate amount of working cash capital necessary to carry on its business. The corporation having gone out of business and assets having been sold, the proportional part of the work in cash capital represented by the trust estate should be retained as part of the "corpus" of the estate. In re Stevens, 95 N. Y. Supp. 297, 302, 46 Misc. Rep. 623.

Twenty shares of bank stock, of the par value of $100, had been inventoried by an executor as trustee as of uncertain value. The executor was also a life tenant in part of the estate and disposed of the entire interest in such stock for $3,500; 20 shares at $100 and $1,500 surplus and undivided profits. On an intermediate accounting it appeared that no part of the $1,500 represented a premium on the bank stock nor any increase in its market value, and was not a part of its working capital. Held, that it belonged to the life tenants, and not to the remaindermen, and was properly credited to "income" and not "corpus." In re Stevens, 95 N. Y. Supp. 1084, 1086, 47 Misc. Rep. 560.

CORPUS DELICTI

"Corpus delicti" means the existence of a criminal fact. State v. Nordall, 99 Pac. 960, 964, 38 Mont. 327.

"The 'corpus delicti' is the element of crime." People v. Fallon, 86 Pac. 689, 149 Cal. 287.

"Corpus delicti" means the substance of a crime, and in a murder trial proof of the manner and means by which the crime was committed is not a part of the corpus delicti. State v. Knapp, 71 N. E. 705, 707, 70 Ohio St. 380, 1 Ann. Cas. 819.

The "corpus delicti" means, when applied to any particular offense, the actual commission by some one of the particular offense charged. Green v. State, 122 Pac. 1108, 1110, 7 Okl. Cr. 194.

The "corpus delicti" in a case of arson consists not only in the proof of the burning of the house burned, but of criminal agency in causing the burning. Spears v. State, 46

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South. 166, 167, 92 Misc. Rep. 613, 16 L. R. A. (N. S.) 285.

Proof that a building has been burned is not proof of the "corpus delicti" of arson, but it must be shown that it was burned by the willful act of some person criminally responsible and not as the result of natural or accidental causes. State v. Pienick, 90 Pac. 645, 646, 46 Wash. 523, 11 L. R. A. (N. S.) 987, 13 Ann. Cas. 800.

In a prosecution for larceny, the "corpus delicti" is that a larceny has been committed. Crockford v. State, 102 N. W. 70, 71, 73 Neb. 1, 119 Am. St. Rep. 876.

"The 'corpus delicti' involves the elements of crime, and, in order to prove it, all the elements of crime must be made to appear before defendant's confessions, admissions, or statements are admissible for any purpose." People v. Grill, 86 Pac. 613, 614, 3 Cal. App. 514.

The "corpus delicti," in the logical sense of the term, signifies the fact of the specific injury or loss, and may also include the element of some one's criminality as the source of the injury or loss. People v. Ranney, 116 N. W. 999, 153 Mich. 293, 19 L. R. A. (N. S.) 443.

"The 'corpus delicti' is made up, * * *" says Mr. Best, "of two things: First, certain facts forming its basis; and, secondly, the existence of criminal agency as the cause of them." State v. Rogoway, 78 Pac. 987, 989, 45 Or. 601, 2 Ann. Cas. 431 (quoting Best [Ed. 1883] § 442).

In homicide

In felonious homicide, the "corpus delicti" consists of two elements: First, the fact of death as the result; second, facts and circumstances showing the criminal agency of the person charged with the crime, as the means. Edwards v. Territory, 76 Pac. 458, 460, 8 Ariz. 342 (citing Ruloff v. People, 18 N. Y. 192); Hoch v. People, 76 N. E. 356, 363, 219 Ill. 265, 109 Am. St. Rep. 327 (citing Campbell v. People, 42 N. E. 123, 159 Ill. 9, 50 Am. St. Rep. 134); People v. Frank, 83 Pac. 578, 579, 2 Cal. App. 283; State v. Henderson, 85 S. W. 576, 578, 186 Mo. 473; Clay v. State, 86 Pac. 17, 19, 15 Wyo. 42.

When it is shown that a human being has been deprived of life by a criminal agency, proof of the "corpus delicti" has been made. People v. Moran, 77 Pac. 777, 779, 144 Cal. 48.

The "corpus delicti" in homicide consists in the establishment by evidence of the death of a human being by some criminal act or agency of another. Under the statute providing that no person shall be convicted of homicide unless the body of decedent or portions of it are found and sufficiently identified to establish the death of the person charged to have been killed, evidence that decedent disappeared, accused's confession that he killed him, and testimony that witnesses saw accused take from the river a corpse upon which were shoes and trousers similar to those worn by accused failed to prove the "corpus delicti," though it may be proven by the testimony of an accomplice corroborated by the accused's confession and vice versa. Follis v. State, 101 S. W. 242, 244, 51 Tex. Cr. R. 186.

"'Corpus delicti' means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the corpus delicti; it would simply establish the corpus; and proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before a defendant's confession would be admissible for any purpose. * * * To be sure the appearance of the dead body, the nature of the wounds, the evidences of a struggle, the physical circumstances surrounding the affair may furnish evidence of the corpus delicti; they may indicate that a crime has been committed; but there must be proof of the fact from some source other than the defendant's admissions." In re Kelly, 83 Pac. 223, 225, 28 Nev. 491 (quoting and adopting People v. Simonsen, 40 Pac. 440, 107 Cal. 346).

To establish the "corpus delicti" in homicide cases, the evidence must show that the life of a human being had been taken, which involves the subordinate inquiry as to the identity of the person alleged to have been killed; and, second, that the death was unlawfully caused by the party accused thereof and by no other person. State v. Barnes, 85 Pac. 998, 1000, 47 Or. 592, 7 L. R. A. (N. S.) 181.

The "corpus delicti" in murder consists of two elements: First, the death of the person alleged to have been murdered; and second, the criminal agency of some one causing the death. Both elements must be proved. At common law it was necessary to prove the fact of the death by direct or positive evidence, but in this country it is sufficient to prove death, as well as criminal agency, by circumstantial evidence, where that is the best evidence obtainable, and it is sufficient to produce conviction in the minds of the jury beyond a reasonable doubt. State v. Barrington, 95 S. W. 235, 264, 198 Mo. 23.

The "corpus delicti" has two components: Death as the result and the criminal agency of another as the means. "The meaning of the phrase 'corpus delicti' has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts: First, the occurrence of the specific kind of injury or loss (as, in homicide, a per-

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son deceased; in arson, a house burnt; in larceny, property missing); secondly, somebody's criminality as the source of the loss, these two together involving the commission of a crime by somebody; and, thirdly, the accused's identity as the doer of this crime. Now the term 'corpus delicti' seems in its orthodox sense to signify merely the first of these elements, namely, the fact of the specific loss or injury sustained. * * * This, too, is a priori the more natural meaning, for the contrast between the first and the other elements is what is emphasized by the rule." By several judges the term has been said to include the second element also, and it has also sometimes been argued that the corpus delicti includes the third element, the identity of the accused as the criminal. By this view the term "corpus delicti" would be synonymous with the whole of the charge, and the rule would require that the whole be evidenced in all three elements independently of the confession, but, whether considered as containing one or all the elements so specified, the existence of the criminal fact, the corpus delicti, in homicide may be completely established before the question of identity of the slayer or slain is reached. Ausmus v. People, 107 Pac. 204, 209, 47 Colo. 167.

In one law dictionary we find the following: "Corpus Delicti. The body of the offense; the essence of the crime. It is general rule not to convict unless the corpus delicti can be established; that is, unless the fact that the crime has actually been perpetrated has first been proved. Hence, on a charge of homicide, the accused should not be convicted unless the death be first distinctly proved. In case of felonious homicide, the corpus delicti consists of two fundamental and necessary facts: First, the death; and, second, the existence of criminal agency as its cause." In another dictionary we find: "The body of the offense; the substance of the crime; the substantial and fundamental fact of the commission of the crime. The general rule is there can be no conviction for crime unless the fact that the crime has been actually perpetrated has been proved. Thus, one accused of homicide cannot be convicted unless the death be first distinctly proved." In another: "The body of a crime. The body (material substance) upon which a crime has been committed; e. g., the corpse of a murdered man; charred remains of a house burned down. In a derivative sense, the substance or foundation of a crime; the substantial fact that a crime has been committed." Another authority says: "The idea and the rule is that a person shall not be convicted of having killed a person until it is proved that the person is in fact dead. When that is made out, the corpus delicti is made out; that is, the subject-matter of the alleged crime, namely, a person, dead. The meaning of the phrase 'corpus delicti' has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear the analysis of every crime with reference to this element reveals three component parts: First, the occurrence of the specific kind of injury or loss (as, in homicide, a person deceased, in arson, a house burnt; in larceny, property missing); secondly, somebody's criminality as the cause of the loss (these two together involving the commission of a crime by somebody); and, third, the accused's identity as the doer of the crime. (1) Now the term 'corpus delicti' seems, in its orthodox sense to signify merely the first of these elements, namely, the fact of the specific loss or injury sustained. (2) But by several judges the term has been said to include the second element also. This broader form makes the rule (referring to the rule as to the uncorroborated confession) much more difficult for the jury to apply amid a complex mass of evidence and tends to reduce the rule to a juggling formula. (3) A third view indeed too absurd to be argued with, has occasionally been advanced, at least by counsel, namely, that the corpus delicti includes the third element also; i. e., the accused's identity as the criminal." State v. Gebbia, 47 South. 38, 39, 121 La. 1083 (quoting Black's Law Dict.; Abbott's Law Dict.; Bouvier's Law Dict.; 3 Wigmore, Evidence, p. 2782; Pitts v. State, 43 Miss. 472; State v. Potter, 52 Vt. 33-39).

CORRAL

Where a publication entitled "Bucket Shop Sharks" stated that plaintiff was "a tout, sleek enough to have corralled certain bankers," the word "corralled" was synonymous with induced or persuaded and did not imply improper or fraudulent methods. New York Bureau of Information v. Ridgway-Thayer Co., 104 N. Y. Supp. 202, 205, 119 App. Div. 339 (quoting and adopting definition in Cent. Dict.).

CORRECT

See True and Correct.
As just, see Just.

CORRECT COPY

See Full, True, and Correct Copy.

Under the Massachusetts Statutes (Acts 1894, c. 522, § 73), requiring every life policy to have attached thereto a "correct" copy of the application, and, unless so attached, that the same shall not be considered as a part of the policy or received in evidence, the copy attached to a policy is not "correct," and the application cannot be admitted in evidence where the copy attached omitted answers to questions which appeared in the original, and which, under certain circumstances, might affect the rights of the parties, though they have no bearing on the questions raised by

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the pleadings. Albro v. Manhattan Life Ins. Co., 119 Fed. 629, 632.

CORRECT DESCRIPTION

The term "correct description," as used in Mech. Lien Law Ill. § 4, as amended by Act May 31, 1887, requiring a statement for a lien to contain a "correct" description of the property to be charged with the lien, means only such description as identifies the individual object intended to be designated. Where the mechanics' lien statement describes the land as lots 10 and 11 in a certain block, and the true description was lots 10 and 11 and the south 7½ feet of lot 7 in such block, it was a sufficiently correct description as against a subsequent purchaser. Springer v. Kroeschell, 43 N. E. 1084, 1088, 161 Ill. 358.

CORRECTION

See House of Correction.

As used in N. Y. Laws 1888, c. 583, tit. 10, § 9, relative to the duty of assessors to attend examination of assessments and review and make "corrections," the word "corrections," whatever its literal import, did not give the assessors authority to increase an assessment. People ex rel. New York & N. J. Tel. Co. v. Neff, 44 N. Y. Supp. 46, 48, 15 App. Div. 8.

On November 2, 1911, in the Municipal Court, the judge rendered judgment for plaintiff for $75, and plaintiff on November 6th moved to set aside the judgment for insufficiency of the damages, under Municipal Court Act, § 254. On November 24th the court changed the judgment to $150, with a memorandum stating that the original judgment was rendered under the impression that plaintiff had withdrawn the cause of action for breach of contract; but, being convinced that the action was not withdrawn, the judgment would be corrected, and the amount of damages fixed at $150. Held not a "correction" of the judgment, within such section, but an unwarranted rendition of a new judgment. Friedlander v. Lachman, Hirsch & Co., 133 N. Y. Supp. 1097, 1098.

Motion for new trial was overruled in August, and appellant was given until December term to file a bill of exceptions. Bill was tendered at the December term, but the judge failed to dispose of it. No order was made at the December term directing as to the bill of exceptions. At the January term the court entered an order reciting that he had refused to sign the bill of exceptions at the December term for certain reasons named, and that on such refusal he had permitted it to be offered, and extended the time to the January term for defendant to correct the bill or present a bill of exceptions, and on the 10th day of the January term filed a bill of exceptions as a corrected bill, which order the court attempted to make an order of the preceding December term. Held, that it could not be treated as a nunc pro tunc order, as there was no memorandum entered at the December term on which such an order could be based, but that the bill was a mere correction of the original bill within Civ. Code Prac. § 337, subsec. 3, providing that, if a bill of exceptions be not approved, the court should correct it or suggest the correction, and was sufficient under Civ. Code Prac. § 334. Smalling v. Shaw, 139 S. W. 779, 780, 144 Ky. 458.

CORRECTION OF MALPOSITION OF THE JAW

The taking of an impression, the making of false teeth therefrom, and the fitting of such teeth in the mouth constitute a "correction of malposition of the jaws," within the meaning of the statute regulating the practice of dentistry. State v. Newton, 81 Pac. 1002, 1004, 39 Wash. 491.

CORRESPONDENCE

Contract by correspondence, see Contract.

CORRESPONDENCE SCHOOL

As doing business, see Doing Business.

CORRESPONDING HEIGHT

In a charter authorizing the owners of a dam to raise the water in their pond to a height mentioned and the dam structure to a "corresponding height" does not mean to the same height but to a height of the structure which will raise the water to the prescribed limit. Colwell v. May's Landing Water Power Co., 19 N. J. Eq. 245, 249.

CORRESPONDING THEORETICAL SECTIONS

A contract for the excavation of a bulkhead, the inner line of which was about 9 feet inshore from an established bulkhead line, and the base of which was to be 15 feet below mean low-water mark with allowance to the contractor for whatever he might excavate within an extra foot in each direction, specified that no payment should be made for excavation beyond those limits, "except where known loose rock is shown in the cross-sections above the top grade of the indicated rock, at a line ten feet westerly of and parallel to the bulkhead line, allowance will be made and paid for to a positive line which is forty-five degrees to the horizontal," and specified, as to "typical sections," that they were given as a guide only and to show approximately what the contractor might expect to encounter in the prosecution of the "work," and represented the "typical sections" as information upon (1) "the existing rock bottom which was the top of the loose rock; (2) the corresponding theoretical sections to be obtained, meaning the so-called nine-foot and fifteen-foot lines; and (3) the corresponding limiting lines to which pay-

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ment will be made when it is impossible to produce the theoretical sections; and that all material was to be measured by comparison of 'accurate cross-sections.'" The points at which the 45-degree lines should commence could not be ascertained before the work commenced. Held, that the "corresponding theoretical sections" meant the 10-foot and 16-foot lines; that the "typical" cross-section could not be regarded as the "accurate cross-sections"; that "work" had a double meaning, and, for the purpose of fixing the beginning points of the 45-degree lines, did not begin until the blasting began, when the junctions between the loose rock and the ledge rock became "known," so as to be "indicated" upon the cross-sections made by the city after the work was completed; and that work to such junctions was necessitated and contemplated by the contract. R. G. Packard Co. v. City of New York, 137 N. Y. Supp. 9, 13, 151 App. Div. 941.

CORROBORATE—CORROBORATION

Evidence "corroborative" of the testimony of an accomplice must of itself tend in some degree to connect defendant with the commission of the offense, but it need not be sufficient of itself to establish his guilt. Wright v. State, 84 S. W. 593, 47 Tex. Cr. R. 433.

An accomplice cannot "corroborate" himself by his declarations or statements, and the statement of one accomplice cannot "corroborate" another accomplice. McDaniel v. State, 87 S. W. 1044, 48 Tex. Cr. R. 342.

To "corroborate" means to strengthen and with reference to an accomplice's testimony means to make stronger the probative criminative force thereof. State v. Mungeon, 108 N. W. 552, 554, 20 S. D. 612.

A charge that accused in a murder case could be convicted on the uncorroborated testimony of an accomplice alone if the jury believed the accomplice's statements to be true and sufficient in proof to establish accused's guilt, but the testimony of an accomplice when not corroborated by some person not implicated in the crime as to matters material to the issue ought to be received with great caution, etc., sufficiently explains the meaning of the word "corroborate." State v. Sassaman, 114 S. W. 590, 601, 214 Mo. 695.

The word "corroborate," in the rule that the confession of accused, establishing the corpus delicti, must be corroborated, refers to facts which concern the corpus delicti, and does not mean merely tending to produce confidence in the truth of the confession. People v. Ranney, 116 N. W. 999, 1000, 153 Mich. 293, 19 L. R. A. (N. S.) 443.

In the prosecution of a member of a city and county board of supervisors for receiving a bribe for his vote, another supervisor testified that, acting for another, he approached the members of the board as to buying their votes and that he offered accused a certain sum for his vote on a certain proposition, and that accused said it would be all right. Held, that such witness' evidence was not "corroborated," within the rule as to corroborating an accomplice's testimony, by evidence which merely showed how accused voted on such proposition, or that immunity was offered to accused for "any and all crimes" he committed as supervisor without specifying any particular crime, or of the receiving of sufficient money by the alleged briber to enable him to make the bribe without a showing that accused received anything, nor was the fact that after accused was indicted such witness tried to induce the district attorney to abandon the prosecution available to corroborate his evidence. People v. Coffey, 119 Pac. 901, 909, 161 Cal. 433, 39 L. R. A. (N. S.) 704.

The testimony of a witness that accused admitted the doing of an act similar to that testified to by prosecutrix on a trial for statutory rape is sufficient to corroborate prosecutrix, within Rem. & Bal. Code, § 2443, requiring the testimony of prosecutrix to be supported by other evidence to justify a conviction; and the mere fact that the meaning of the language of the admission is disputed does not render the testimony insufficient; its meaning being for the jury. State v. Workman, 119 Pac. 751, 66 Wash. 292.

The "corroboration" of the testimony of an accomplice sufficient to justify a conviction need not prove the crime independent of the testimony of the accomplice, and the testimony of the accomplice need not be corroborated in every particular, but the "corroboration" must consist of circumstantial evidence or the testimony of some witness other than the accomplice tending to connect accused with the crime charged and to prove some of the material facts testified to by the accomplice. State v. Robinson, 93 N. E. 623, 624, 83 Ohio St. 136, 21 Ann. Cas. 1255.

The word "corroboration" means testimony of some substantial fact or circumstance independent of the statement of the prosecutrix. It may be either direct or circumstantial, but must tend to connect defendant with the crime. State v. Stewart, 100 Pac. 153, 154, 52 Wash. 61, 17 Ann. Cas. 411.

The word "corroboration" is not one of technical meaning but is in ordinary use, and its meaning is generally understood, and the court is not required to instruct the jury what the word means. Austin v. State, 101 S. W. 1162, 1163, 51 Tex. Cr. R. 327.

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The corroboration required under Rev. St. 1909, § 5235, of the testimony of the prosecutrix in a seduction case as to the promise of marriage need not be by a witness or witnesses who heard the promise, but may be such conduct of the parties as usually accompanies a contract of marriage, or by statements of the defendant to third parties. State v. Teeter, 144 S. W. 445, 448, 239 Mo. 475.

CORROBORATING EVIDENCE

Under the statute (St. 1893, § 5209 [Wilson's Rev. & Ann. St. 1903, § 5497]) providing that "corroborating evidence" is such as tends to connect accused with the commission of the offense charged, the evidence of an accomplice must be corroborated by other evidence tending to connect accused with the commission of the offense. Hill v. Territory, 79 Pac. 757, 759, 15 Okl. 212.

"Corroborating evidence" is such evidence as tends in some degree of its own strength and independently to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegations or issue, if unsupported, would be fatal to the case, and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue it supports. Radcliffe v. Chavez, 110 Pac. 699, 701, 15 N. M. 258.

There must be some substantial evidence corroborating the testimony of an accomplice and tending to connect the accused with the commission of the offense to constitute "corroborating evidence," and where the corroborating evidence is of such a slight, uncertain, and unsatisfactory character as not to warrant a reasonable inference of the guilt of accused, the court should not permit a verdict to stand. Cooper v. Territory, 91 Pac. 1032, 1034, 19 Okl. 496.

"Cumulative evidence," within the rule that courts will grant with great reluctance new trials on the ground of newly discovered evidence which is merely cumulative, is evidence of the same kind as that given to the same point on the trial; but evidence establishing the disputed fact by other circumstances than those shown on the trial is "corroborative evidence," and, when newly discovered, authorizes a new trial. Williams v. State, 54 South. 857, 858, 99 Miss. 274.

A statute, requiring for a conviction for rape that the testimony of the female be "corroborated by such other evidence as tends to convict defendant of the commission of the offense," is satisfied by testimony that defendant advised his wife to induce the prosecuting witness to leave the state, and by his admissions to having often taken liberties with the person of such witness, and to having committed acts which would, though evidently not so understood by him, constitute rape; the admissions, while not expressly referring to the particular act on which the state relied for a conviction, not having in terms excluded that act. State v. Jonas, 92 Pac. 899, 48 Wash. 133.

"Corroborative evidence" is additional evidence, of a different character, to the same point. Under Rev. St. 1887, § 2471, declaring that a divorce cannot be granted on the uncorroborated statement, admission, or testimony of the parties, the statement, admission, or testimony of either of the parties may be admitted in evidence but is not of itself sufficient corroboration of the testimony of the other of the facts introduced, but the statement, admission, or testimony of both of the parties must be corroborated by extrinsic evidence. Bell v. Bell, 96 Pac. 196, 202, 15 Idaho, 7.

Under a statute providing that no divorce can be granted on the uncorroborated testimony of the parties, and defining "corroborative evidence" as additional evidence of a different character on the same point, the plaintiff's testimony as to the contents of certain letters written by him to defendant to induce her to come and live with him is not corroborated by introducing the letters themselves. Kenniston v. Kenniston, 92 Pac. 1037, 1040, 6 Cal. App. 657.

Under St. 1893, § 5209 (Wilson's Rev. & Ann. St. 1903, § 5497), providing that a conviction cannot be had on the testimony of an accomplice, unless "he be corroborated by such other evidence as tends to connect the defendant with" the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, the "corroborating evidence" must connect accused with the commission of the offense. Fisher v. Territory, 87 Pac. 301, 302, 17 Okl. 455 (citing Taylor v. Commonwealth [Ky.] 8 S. W. 461; Stone v. State [Ga.] 98 Am. St. Rep. 145).

It is not corroboration within Laws 1907, p. 396, c. 170 § 1, providing that no conviction shall be had for rape on the testimony of the female, unless it is corroborated by such other evidence as tends to convict defendant, to show she was pregnant three or four months after the alleged statutory rape, especially where it is shown she associated with other men before, after, and about the time of the alleged rape. State v. McCool, 102 Pac. 422, 53 Wash. 486, 132 Am. St. Rep. 1089.

CORRUGATED

"Corrugated" is thus defined in the Century Dictionary: "Wrinkled, bent, or drawn into parallel furrows or ridges, as corrugated iron." A patent for a covering constructed of corrugated sheet metal pipe in sections, bolted or otherwise fastened together, is

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void on its face for lack of patentable invention. Stillwell v. McPherson, 172 Fed. 151, 153.

CORRUGATIONS

"Corrugations" called for in a patent do not necessarily possess the characteristics of regularity or symmetry. Long v. Noye Mfg. Co., 192 Fed. 566, 569.

CORRUPT

A contract of employment as soliciting agent for an insurance company stipulated that the agent should forfeit his rights under the contract in the event he increased the company's liabilities by any "corrupt" or false representation. The failure of the agent to keep within his control notes delivered to him, in payment of premiums, wrongfully increased the liabilities of the company, but the failure resulted from the agent reposing confidence in a third person which confidence had for its basis representations made by an agency manager of the company. Held that, since the word "corrupt" meant a consciously wrongful and fraudulent act, his failure did not operate to forfeit his rights. Armstrong v. National Life Ins. Co. (Tex.) 112 S. W. 327, 331.

CORRUPTION

"Corruption," within Gen. St. 1909, § 2309, providing that if any county commissioner shall corruptly perform any duty, he shall forfeit his office, involves the intention disregard of law from improper motives, and that the payment of excessive or illegal demands against the county may be corrupt, the commissioner must have purposed to violate his official duty, defraud the county by misappropriating its funds, and secure to himself, or to some one else, unlawful gain. State v. Kennedy, 108 Pac. 837, 838, 82 Kan. 373.

Occasional departures by the board of county commissioners from the statute relating to allowance of claims against the county occurring through mere inadvertence, without wrongful intent and under circumstances exposing the county to no imposition or injury, and the payment of claims sufficiently itemized, occurring through a misinterpretation of the statute, does not constitute corruption within Gen. St. 1909, § 2309, providing for the removal of a county commissioner who corruptly performs his duties. Id.

In a proceeding to remove a county commissioner it appeared that, if bridge bills of the county were not properly itemized, it was through mistaken advice of the county atttorney, and that because of failure to take note of an amendment of the statute, publication of the allowance of claims at two meetings of the county board in each quarter was delayed; that there was a failure to publish estimates of expenditures upon which tax levies were based, because defendant believed it was the county clerk's duty, and was under the impression that the estimates had been published; that the legal period of advertisement of bids for repairing bridges was shortened because of emergencies, the motive being to protect the property and promote the best interests of the county, though it appeared that all short-time advertisements produced competitive bids, and that the contracts thereunder were for the fair and reasonable value of the work, and that one bridge was rebuilt without advertisement, the work being well done, and the amount paid reasonable and just. Held, that there was no corruption of defendant within Gen. St. 1909, § 2309, making it ground for removal if a county commissioner shall corruptly perform any duty. Id.

CORRUPTION IN OFFICE

A tax collector, though a ministerial or executive officer, and not a judicial or quasi judicial officer, may commit such crimes as amount to "corruption in office," within the meaning of the exception of Rev. St. 1909, § 4945, fixing the limitation for a prosecution "for bribery or for corruption in office" at five years. The expression "corruption in office," as used in such statute, is not merely synonymous with the word "bribery," but includes such offenses as the embezzlement by a public officer of more than $30, in violation of Rev. St. 1909, § 4945. State v. Douglass, 144 S. W. 407, 408, 239 Mo. 674.

CORRUPTLY

The phrase "willfully and corruptly," as used in the statement of the requisites of the offense of perjury that the false testimony must have been given "willfully and corruptly," means knowingly and intentionally. State v. Hunter, 80 S. W. 955, 956, 181 Mo. 316.

Pen. Code, § 7, subd. 6, defines the word "bribe" as anything of value or advantage, etc., given with a corrupt intent to influence "unlawfully" the person to whom it is given in his action, vote, etc., in any public or official capacity. Section 165 punishes one giving a bribe to any member of any board of supervisors with intent to "corruptly" influence such member in his action on any matters, etc. Held, that the use of the word "unlawfully" as qualifying "to influence" in section 7, adds nothing to the meaning of section 165, and hence an indictment for bribery charging an intent to "corruptly" influence, etc., by giving money, etc., was sufficient, though the word "unlawfully" was not used. People v. Glass, 112 Pac. 281, 286, 158 Cal. 650.

According to lexicographers, "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the

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person guilty of the act or to some other person. One who addresses a communication to the judges of a court for the purpose of influencing their decision in a case pending therein by disparaging one of the parties or the relator in a suit brought by the state "'corruptly' endeavors to influence" officers of a court in the discharge of their duties within the meaning of section 6907, Rev. St. State v. Johnson, 83 N. E. 702, 703, 77 Ohio St. 461, 21 L. R. A. (N. S.) 905.

The word "corruptly," used to designate the nature of acts constituting bribery in an indictment and instructions, is properly defined as meaning "wrongfully"; that is, the doing of an act with intent to obtain an improper advantage inconsistent with official duty and the rights of others. State v. Lehman, 81 S. W. 1118, 1122, 182 Mo. 424, 66 L. R. A. 490, 103 Am. St. Rep. 670.

In an instruction that, if any witness had willfully and corruptly testified falsely to any material thing, the jury might disregard all his testimony, the word "corruptly," if it carried any meaning in addition to "willfully," suggested the idea of the witness having been suborned to testify falsely and should either have been omitted or preceded by "or" instead of "and." State v. Smith, 85 Pac. 1020, 1021, 74 Kan. 383.

The fact that a public officer acts corruptly or is guilty of "corruption" does not import that he has obtained any personal advantage from the act. Burkarth v. Stephens, 94 S. W. 720, 722, 117 Mo. App. 425.

CORUNDUM

"Corundum," as defined by the Century Dictionary, is alumina, or the oxide of the metal aluminum as found native in a crystalline state. "'Corundum' is similar to emery." In fact, it is almost the identical article; "corundum" and emery being used for the same purposes and emery being merely an imperfect grade of "corundum." Ground corundum ore is similar to emery and is dutiable by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 419, 30 Stat. 191 relating to "emery, emery * * * ground," etc. F. W. Myers & Co. v. United States, 163 Fed. 53, 89 C. C. A. 284.

COSERVANT

See Fellow Servants.

COST

See Actual Cost; At its own Cost; Original Cost; Shop Cost; Wholesale Cost.

An agreement between two parties, each threatened with suit for infringement of a patent, that they would join in the defense of any suit or suits brought against them for such infringement, "the cost and expense of such defenses to be equally borne by the parties thereto," did not entitle one party, against whom suit was brought and which made an unsuccessful defense, to recover from the other one-half the amount of the costs which were taxed against it in favor of the complainant as a part of the judgment recovered; the word "cost," as used in the agreement, having a different meaning from "costs," and the costs so taxed being no part of the "cost and expense" of the defense. Hygienic Chemical Co. v. Provident Chemical Works, 176 Fed. 525, 528, 100 C. C. A. 121.

In an employers' liability policy providing that the insured will defend against legal proceedings in the name and on behalf of the assured, or settle the same at its own cost, the interest is apparently included on the theory that it is part of the expense of the litigation after rendition of the verdict to the final determination. Even accepting the contention that "cost" applies not only to the word "settle" but also to the word "defend," "cost" does not include taxable costs. "Cost" and "costs" are not synonymous. The defendant did not obligate itself to defend the action and pay the costs. It agreed to defend the action at its cost. Munro v. Maryland Casualty Co., 96 N. Y. Supp. 705, 707, 48 Misc. Rep. 183.

Where there was an agreement to pay the "cost" of doing a job, and it appears from the situation and negotiations of the parties that actual cost was the meaning intended by the word "cost," the person doing the work is limited to the actual cost and is not entitled to any profit. Raisler Heating Co. v. Dowd, 102 N. Y. Supp. 504, 505, 52 Misc. Rep. 656.

Of improvement

A decision that interest to accrue on bonds issued for the cost of an improvement in an improvement district must be included as a part of the cost within Kirby's Dig. § 5683, limiting the cost of a single improvement to 20 per cent. of the assessed value of the real property of the district, is a rule of property and can only be changed by legislation. Bateman v. Board of Com'rs of Imp. Dist. No. 1 of City of Clarendon (Ark.) 143 S. W. 1062, 1063.

Municipal Code 1902, § 53, requiring a corporation to pay the costs of intersections when streets are improved includes all the manholes, catch-basins, and tiling at intersections. Municipal Code 1902, § 53, providing that municipalities shall pay such part of the cost and expenses for which special assessments are levied as the council may deem just, which part shall not be less than one-fiftieth of all such costs and expenses, held, that the item of serving and advertising the improvement is included within the "cost and expenses" of which the corporation is by the provision quoted, to pay not less than one-fiftieth of the whole. Ball v. City of Portsmouth, 92 N. E. 24, 82 Ohio St. 151.

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Of inland transportation

Immigration Act March 3, 1903, c. 1012, § 20, 32 Stat. 1218, provides that any alien who shall be found a public charge in the United States from causes existing prior to landing shall be deported at any time within two years after arrival, at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing the alien into the United States. Held, that the term "transportation," as so used, should be given its ordinary meaning, viz., carriage from one place to another, and that the phrase "cost of inland transportation" therefore only included the cost of carrying the alien from the inland place where he was found to the port of deportation, and that the government was therefore not entitled to recover under such section from the steamship company bringing the deported alien into the United States any part of the traveling expenses of an officer sent to bring the alien to the port of deportation. United States v. Hamburg American Line, 159 Fed. 104, 105, 86 C. C. A. 294.

Of paving

The words "cost of paving," as used in a franchise ordinance providing that in case the company or its assigns shall, at any time, lay tracks on any street after it has been paved by special taxation on abutting property, it shall pay to such property owners as have paid such special tax, an amount equal to the cost of paving between the rails of such track, contemplates reimbursement of the property owners and not merely the actual cost of paving the strip in question exclusive of the expense of excavating, grading, and graveling preparatory to laying the pavement. Danville St. Ry. & Light Co. v. Mater, 116 Ill. App. 519, 523.

Of redemption

The expression "cost of redemption," as used in Gen. St. 1901, § 7649, means the amount the land sold for, with interest added, and does not include the fee of the county treasurer for the certificate of assignment nor his fee for a certificate of redemption. Phares v. Cortright, 90 Pac. 784, 76 Kan. 63.

Of road

Section 8 of the supplement to the charter of the Somerville and Easton Railroad Company (Act March 17, 1854), requiring payment of a tax on the "cost of the road," does not require any payment of taxes on the equipment. State Treasurer v. Somerville & E. R. Co., 28 N. J. Law, 21, 22.

Of work

Where a contract for the excavation of a waterway and the elevation of tide lands merely provided that the cost of the work should not exceed 16 cents per cubic yard for each yard of earth placed upon each tract of land, the contractor was entitled, under Rem. & Bal. Code, § 8103, providing for the issuance of certificates by the commissioner of public lands showing the actual cost of the filling of the land, and that the same shall be a lien for the amount specified in such certificate, plus 15 per cent. thereon and with interest, provided that such lien shall not be operative for an amount exceeding the cost of the work as stated in the contract, to the 15 per cent. additional, the word "cost" used in the proviso meaning the entire cost of the work as made up of the cost to the contractor and his fifteen per cent. additional, and not the mere expense of doing the work, which is designated in the contract as cost and as actual cost in the body of the section. Richards v. Bussell, 127 Pac. 198, 205, 70 Wash. 554.

COST MARK

See Invoiced as Per Cost Mark.

COST PRICE

"'Cost price' is a relative term, necessarily depending for its meaning on the situation of the parties and the circumstances under which used. Thus the 'cost price' to the importer is one thing, to the jobber another, to a retailer another, and to the purchaser from the retailer still another. It is said to be what is actually paid or promised to be paid for an article. As applied to a retail stock of goods, it usually has reference to the cost at wholesale." Sylvester v. Ammons, 101 N. W. 782, 785, 126 Iowa, 140.

COSTS

See Clerk's Costs; Double Costs; Eventual Costs; Insolvent Criminal Costs; Uncollected Costs; With Costs.

All costs herein expended, see All.

Apportionment of Costs, see Apportionment.

Award for costs as judgment, see Judgment.

Exclusive of costs, see Exclusive.

Taxation of costs as proceeding, see Proceeding.

Costs are the statutory allowance to a party for his expenses in conducting the suit. Forbes v. Chicago, R. I. & P. R. Co., 129 N. W. 810, 811, 150 Iowa, 177, Ann. Cas. 1912D, 311.

Costs are sums allowed to a successful litigant as compensation for his expenses incurred in the litigation. In re Board of Water Supply of City of New York, 116 N. Y. Supp. 640, 642, 62 Misc. Rep. 324.

"'Costs' are those expenses incurred by parties in prosecuting or defending suits or proceedings in law or in equity which are recognized and are allowed by law." Aronson v. Levison, 83 Pac. 154, 155, 148 Cal. 364.

The term "costs," as used in statutes authorizing the prevailing party to recover his costs, means only such costs as have been incurred by such party in substantial conformity to the provisions of pertinent stat-

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utes. Lucas v. Brown, 106 S. W. 1089, 1090, 127 Mo. App. 645.

"Costs" are certain sums of money granted by law to the prevailing party by way of indemnity for maintaining an action, or for vindicating a defense. Sommer v. Compton, 100 Pac. 289, 53 Or. 341.

Costs are part of the judgment, as interest is to the principal, and the costs are to be paid by the party cast to the judgment creditor, who has paid them, without reference to any right which the clerk may originally have had, and without being subject to the plea of prescription which may be pleaded against the clerk. State v. New Orleans Debenture Redemption Co., 36 South. 205, 206, 112 La. 1.

Under Gen. St. 1909, § 6071, providing that the defendant owner may redeem any real property sold under execution, special execution, or order of sale at the amount sold for, together with the interest, costs, and taxes, the word "costs" means the costs of redemption, and does not include costs which accrued in an action to foreclose a mortgage. Kueker v. Murphy, 120 Pac. 362, 363, 86 Kan. 332.

Under a city charter relative to tax sales and authorizing the inclusion of "costs to date of sale" and "costs as advertised," and providing for the issuance of a certificate of sale, without referring to any charge for its issuance, a charge for a certificate of sale cannot be regarded as "costs," especially where a notice of tax sale states that the sale will be made to satisfy delinquent taxes, with interest, penalty, and costs, and setting out the gross sum before each description; the sum not including any charge for certificate of sale. Gove v. Tacoma, 76 Pac. 73, 76, 34 Wash. 434.

An absolute pardon will not excuse one convicted of crime from the payment of "costs," for they are neither fines nor forfeitures, and are not imposed by way of punishment, and hence a complete pardon granted one convicted of crime cannot be interposed to defeat a nunc pro tunc order amending the judgment, so as to impose on accused the burden of paying the costs. Villines v. State (Ark.) 151 S. W. 1023, 1025, 43 L. R. A. (N. S.) 207.

Attorney's fees

Rev. Laws, c. 165, § 44, provides that an attorney may be removed for malpractice, and that the expenses and costs of the proceedings shall be paid as in criminal prosecutions in the superior court. Held, that the words "expenses and costs" of the inquiry included attorney's fees to the attorney conducting the disbarment proceedings. Burrage v. Bristol County, 96 N. E. 719, 720, 210 Mass. 299.

"The expression 'costs, allowances, and compensation' is a familiar term, commonly used to describe the charge of an attorney, both as fixed by statute and also by agreement or by proof upon a quantum meruit." An order of discontinuance, providing it was made without prejudice to any claims of plaintiff's attorney for 'costs, allowance, and compensation' for services in respect to the subject-matter, did not assure nor purport to assure to the plaintiff that he was entitled to costs, or allowance, or compensation. Valentine v. Stevens, 96 N. Y. Supp. 299, 301, 109 App. Div. 284.

In an equitable action under Rev. Codes 1905, § 7179, authorizing allowance of certain items termed "costs" by way of indemnity for expenses, it is error to tax an attorney's fee. Power v. King, 120 N. W. 543, 544, 18 N. D. 600, 138 Am. St. Rep. 784, 21 Ann. Cas. 1108.

Attorneys' fees stipulated for in a promissory note stipulating for 10 per cent. attorneys' fees, if sued on, are not "costs" but are calculable in determining the amount in controversy, and where the principal of the note, with the attorneys' fees, exceeds $200, a justice of the peace has no jurisdiction of an action on the note. Parks v. Granger, 51 South. 716, 717, 96 Miss. 503, 27 L. R. A. (N. S.) 157, Ann. Cas. 1912B, 232.

The "costs" of a suit do not, in the absence of statutory direction, include the counsel fees. Hamilton v. Trundle, 59 Atl. 719, 720, 100 Md. 276 (citing Singer v. Fidelity & Deposit Co., 54 Atl. 63, 96 Md. 221).

Attorney's fees cannot be taxed as "costs" under Ballinger's Ann. Codes & St. § 5604, authorizing taxation of costs in partition suits, including fees of referee and other disbursements. Legg v. Legg, 75 Pac. 130, 132, 34 Wash. 132.

Civ. Code Ga. 1895, § 2140, provides that, when an insurance company refuses to pay a loss within 60 days after demand, it shall be liable to the policy holder, in addition to the loss, for not more than 25 per cent. on the company's liability, and also for all reasonable attorney's fees for the prosecution of the case, provided it shall appear that the insurer's refusal to pay the loss was in bad faith. Held, that the amount recoverable for attorney's fees under such section should be regarded as "costs," defined by the state court to include all charges fixed by statute as compensation for services rendered by officers of the court in the progress of the cause; and hence, where a reasonable amount for attorney's fees under such statute was necessary to bring the amount in controversy up to $2,000, the action, though between citizens of different states, was not within the jurisdiction of the federal Circuit Court. Peters v. Queen Ins. Co. of America, 182 Fed. 113, 115.

The word "costs" has a fixed legal significance to wit, sum allowed by statute to be taxed in the action against the losing par-

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ty. As used in an injunction bond securing costs, it did not bind the bondsman to pay counsel fees of the adversary. Jones v. Rountree, 74 S. E. 1096, 1097, 11 Ga. App. 181.

"The term 'costs' has a well-defined legal meaning and means those expenses incurred by parties in prosecuting or defending a suit, action, or other proceeding at law or in equity, recognized and allowed by law and taxed against the losing party." Counsel fees incurred by a covenantee in defense of the suit for her eviction cannot be recovered in an action for breach of the covenant of warranty. Morgan v. Haley, 58 S. E. 564–566, 107 Va. 331, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846, 13 Ann. Cas. 204 (citing Click v. Green, 77 Va. 827, 835; Conrad v. Effinger, 12 S. E. 2, 87 Va. 59, 24 Am. St. Rep. 646).

The term "costs," in Comp. Laws, §§ 539, 4806, charging costs in criminal cases against a county, does not include attorneys' fees. Pardee v. Salt Lake County, 118 Pac. 122, 124, 39 Utah, 482, 36 L. R. A. (N. S.) 377 (citing 7 Words and Phrases, p. 13).

Comp. Laws 1907, § 538, subd. 3, makes the necessary expenses incurred in the support of persons charged with or convicted of crime and committed to the county jail charges against the county. Section 4806 provides that the cost of trial shall be paid by the county wherein the offense was committed, and section 539 provides that costs accruing before removal shall be charged against the county in which the prosecution originated. Held, that the statutes did not raise an implied liability by a county to pay for services of an attorney appointed by the district court to defend an indigent accused, the term "support" used in section 538 not including such charges, and the word "costs" as used in the other sections not including attorney's fees in a criminal case. Pardee v. Salt Lake County, 118 Pac. 122, 124, 39 Utah, 482, 36 L. R. A. (N. S.) 377 (citing 2 Words and Phrases, pp. 1634–1638).

Costs are awarded by each court in the proceeding before it, and are legal fees allowed by law computable from the record, whereas attorney's fees are extrinsic to the record, not to be found from it, but dependent on facts dehors the record. State ex rel. Citizens' Nat. Bank v. Graham, 69 S. E. 301, 303, 68 W. Va. 1.

A judgment for counsel fees recovered by attorneys for a receiver appointed in a suit by the state to wind up the affairs of a corporation is not an award for "costs," within a Code provision that where the state is a party, and costs are awarded against it, they must be paid out of the state treasury so as to take from the state board of examiners all discretion in the allowance of it as a claim against the state. Sullivan v. Gage, 79 Pac. 537, 540, 145 Cal. 759.

As costs accruing at trial

An order in bastardy proceedings that defendant pay a certain sum for costs and expenses of the confinement is justified by the statute, in which "costs" means, not the costs of the action, but the cost of sustenance during confinement. Sadler v. Jappson, 82 Atl. 316, 317, 82 N. J. Law, 20.

As costs of prosecution

Costs in criminal proceedings are those charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense as compensation to the officers for their services. City of Carterville v. Cardwell, 132 S. W. 745, 746, 152 Mo. App. 32.

Costs on appeal and new trial

Where the Appellate Term, in reversing an order of the City Court of the city of New York, in granting a new trial to plaintiff, awarded "costs and disbursements" to defendants, such award had reference to $10 allowed by statute for costs on appeal, and not to the costs allowed by Code Civ. Proc. § 3251, subd. 3, to the prevailing party on a motion for a new trial. Brennan v. Joline, 127 N. Y. Supp. 676, 679, 70 Misc. Rep. 537.

"Costs," within the Code provision authorizing the Supreme Court to allow costs incurred during a will contest, refers only to costs incurred in such court, or by reason of an appeal, and does not authorize the Supreme Court in its discretion to allow costs that the superior court had discretion to disallow. In re Scott's Estate, 83 Pac. 85, 87, 1 Cal. App. 740.

As debt

See Debt.

Disbursements

In analogy to the provision of Code Civ. Proc. § 3256, entitling one to whom costs are awarded to include necessary disbursements, an award of "costs" on appeal from a surrogate's decree included disbursements; a judgment, "with costs," always including disbursements, except on appeals from orders. In re Perry, 115 N. Y. Supp. 744, 745, 131 App. Div. 284.

In general use, the term "costs" embraces both disbursements and specific sums allowed by statute as indemnity to the prevailing party for his expenses. In a narrower sense, the term excludes disbursements. Giving the term its liberal signification, it would embrace only the taxable costs and disbursements. Bond v. United Railroads of San Francisco (Cal.) 128 Pac. 786, 788.

In Rev. St. § 982, which provides that if any attorney in a federal court "appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required by order of the court to satisfy any excess of costs so increased," the word "costs" includes expenses and taxable dis-

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bursements. Motion Picture Patents Co. v. Yankee Film Co., 192 Fed. 134, 135.

Expenses

Mills' Ann. St. § 4805, authorizing an allowance to executors or administrators in addition to compensation based on a per cent. on the amount of the estate for "costs and charges" in collecting and defending claims of the estate and disposing of the same, to be allowed and paid as other expenses of administration, covers cases where the administrator or executor makes advances from his own funds for expenses referred to, or where he makes himself individually liable therefor, and does not include claims for services that may be rendered to the estate on employment by the administrator purely in his official capacity, and which he has not personally secured or discharged; the words "costs and charges" in their natural and ordinary purport only embracing witness fees, court costs, and such other expenses as must generally be advanced promptly from time to time as they accrue. United States Fidelity & Guaranty Co. v. People, 98 Pac. 828, 832, 44 Colo. 557.

The word "costs," as used in Highway Law, § 92, Laws 1890, p. 1195, c. 568, providing that, in all cases of assessment of damages by commissioners appointed by the court, the costs thereof shall be paid by the town, has a well-defined significance, and is not used as synonymous with "expense," but must be taken to mean costs which are recoverable under the statute requiring the amount to be paid by the unsuccessful party to the successful party. In re Peterson, 87 N. Y. Supp. 1014, 1015, 94 App. Div. 143.

Allowances for necessary expense of a receiver constitute costs incurred in the administration of the trust, chargeable against the property in the hands of the receiver as provided by Rev. St. 1899, § 3101. In re Bank of Newcastle, 89 Pac. 1035, 1036, 15 Wyo. 501.

"Costs" are defined as expenses which are incurred either at law or in equity, consisting of fees of attorneys, solicitors, or other officers of court, and such disbursements are allowed by law. And hence a bond which uses the word "costs" rather than the word "expenses," as used in the statute in pursuance of which the bond is given, is sufficient. Chambers v. Cline, 55 S. E. 999, 1002, 60 W. Va. 588 (citing 2 Words and Phrases, p. 1634).

The term "costs" refers to and includes only those fees and charges the amounts of which are fixed and regulated by statute. The term "expenses," as used in a statute providing that, if actual loss to a party in an action is caused by contempt, the court, in addition to fine or imprisonment, may order payment to the party agreed of a sum sufficient to indemnify him and to satisfy his "costs and expenses," is intended to include something more than the costs and disbursements allowed by statute to the prevailing party in ordinary civil actions and may include such reasonable attorney's fees as the relator may have paid or obligated himself to pay counsel in order to obtain the benefit of the order which the defendant has violated. Davidson v. Munsey, 80 Pac. 743, 745, 29 Utah, 181.

In Rev. St. § 982, which provides that if any attorney in a federal court "appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required by order of the court to satisfy any excess of costs so increased," the word "costs" includes expenses and taxable disbursements. The continuation of a pending suit for infringement of a patent, and the taking of testimony therein by complainant after it has filed a petition for a reissue on the ground of the invalidity of the patent in suit, constitutes a "multiplication of proceedings," so as to unreasonably and vexatiously increase the costs, within the meaning of Rev. St. § 982, and on a dismissal of the suit after the granting of a reissue defendant is entitled thereunder to a special allowance commensurate with the expense occasioned thereby. Motion Picture Patents Co. v. Yankee Film Co., 192 Fed. 134.

Under a city charter relative to tax sales, and authorizing the inclusion of costs to date of sale and costs as advertised, and providing for the issuance of a certificate of sale without referring to any charge for its issuance, a charge for a certificate of sale cannot be regarded as costs, especially where a notice of tax sale states that the sale will be made to satisfy delinquent taxes, with interest, penalty, and costs, and setting out the gross sum before each description; the sum not including any charge for certificate of sale. Gove v. Tacoma, 76 Pac. 73, 76, 34 Wash. 434.

Fees distinguished

The terms "fees" and "costs" are often used interchangeably as having the same application; but accurately speaking the term "fees" is applicable to the items chargeable between an officer and a person whom he serves, while the term "costs" has reference to the expenses of litigation as between litigants. Bohart v. Anderson, 103 Pac. 742, 744, 24 Okl. 82, 20 Ann. Cas. 142.

Loc. Acts 1901, p. 671, No. 468, § 37, provides that all moneys paid to the justice of the city of Sault Ste. Marie, except jury, officer, and witness fees, and fines and costs recovered for violation of laws, shall be for the use of the city, and shall be paid weekly to the city treasurer; also that expenses of prosecutions for violation of penal laws of the state shall be paid by the county. Held, that the justice was not entitled to retain the fees authorized by the general laws of the state to be collected in criminal cases by jus-

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tices of the peace; they not being "costs," nor "expenses," within the statute, in view of section 38, providing that the justice shall receive an annual salary of $1,500 in full compensation for all services performed by him. Harrison v. Board of Sup'rs of Chippewa County, 114 N. W. 851, 852, 151 Mich. 91.

"Costs" are the expenses incurred by the parties in the prosecution or defense of a suit, whereas "fees" are compensation to an officer for services rendered in the progress of the cause. In re Terry, 123 N. Y. Supp. 258, 260, 67 Misc. Rep. 514.

As between a party to a suit and the officer or witness, the charges allowed are usually denominated fees, but, as between the parties to the suit, these charges are usually called costs; and the word "cost," when used in relation to the expenses of legal proceedings, means a sum prescribed by law as charges for the services enumerated in the fee bill. City of Carterville v. Cardwell, 132 S. W. 745, 746, 152 Mo. App. 32.

As fine

See Fine.

As forfeiture

See Forfeit—Forfeiture.

Guardian's fees

The compensation of a guardian ad litem of an infant defendant appointed on the application of plaintiff suing to quiet title is in the nature of "costs" and is an incident to the action and forms no part of the cause of action or defense thereto, and the part of the judgment for plaintiff which requires him to pay $200 to the guardian ad litem requires him to pay "costs" taxable against him. Aronson v. Levison, 83 Pac. 154, 155, 148 Cal. 364.

Jurors' fees and mileage

The provision that the whole "costs" so taxed shall be adjudged against and paid by the corporation, found in Rev. St. § 6451, which directs how costs shall be taxed and paid in appropriation cases, requires that the fees and mileage of jurors shall be so taxed and paid. Detroit Southern R. Co. v. Commissioners of Lawrence County, 73 N. E. 510, 511, 71 Ohio St. 454.

As liability

See Liability.

As included in practice

See Practice (In Law).

Receiver's costs

Where a complainant procures the appointment of a receiver and then dismisses his bill, the court must, under Hurd's Rev. St. 1908, c. 33, § 18, providing that on complainant dismissing his bill the defendant shall recover full costs, tax the compensation of the receiver, including his solicitor's fees, against complainant as costs. Burrows v. Merrifield, 90 N. E. 750, 751, 243 Ill. 362.

As taxable costs

The term "costs and disbursements" has a settled and technical meaning, and signifies the statutory costs and the disbursements taxable in favor of the prevailing party in a civil action. Brown v. Fitcher, 97 N. W. 416, 417, 91 Minn. 41.

The word "costs," within Rev. St. § 974, providing for taxation of costs against a defendant on judgment against him for a fine or forfeiture, means taxable costs of the trial, within section 983 (page 706), which provides how bills of costs shall be taxed, excluding fees of trial jurors, fees and mileage of persons not examined as witnesses, and fees for service of subpœnas upon persons who did not testify, unless in the latter cases the adverse party is in default. United States v. Wilson, 193 Fed. 1007.

The "costs" the court may award under Code Civ. Proc. § 3230, as amended in 1900 (Laws 1900, p. 402, c. 181), authorizing the court in its discretion to award costs not "exceeding the total amount authorized by statute," are the regular taxable costs allowed in ordinary actions and the extra allowance not exceeding $2,000 as authorized by sections 3253, 3254. Senter v. Petheram, 118 N. Y. Supp. 347, 348, 64 Misc. Rep. 294.

The word "costs," as used in Rev. St. 1898, § 3181, authorizing plaintiff to dismiss an action on the payment of costs; in section 3190, providing that, on the dismissal of an action within the jurisdiction of the court, judgment for costs must be rendered; and in section 3605, declaring that in condemnation suits costs may be allowed, etc., in the discretion of the court—includes only the costs that are taxable under the statute in an action or proceedings. McCready v. Rio Grande Western Ry. Co., 83 Pac. 331, 332, 30 Utah, 1, 8 Ann. Cas. 732.

Under Code, §§ 3662, 3671, authorizing a continuance at the cost of the party applying therefor, unless otherwise ordered, the costs which may be imposed, are only taxable costs, and attorney's fees and expenses of travel of a party, save on a subpœna, may not be included. Keller v. Harrison, 131 N. W. 53, 54, 151 Iowa, 320, Ann. Cas. 1913A, 300.

Witnesses' and officers' fees

"Costs" are the fees allowed officers of courts for their services in a judicial proceeding. Wellmaker v. Terrell, 60 S. E. 464, 467, 3 Ga. App. 791 (citing Davis v. State, 33 Ga. 531, 533; Markham v. Ross, 73 Ga. 105).

"Costs," in the sense the word is generally used in Ohio, may be defined as being the statutory fees to which officers, witnesses, jurors, and others are entitled for their services in an action or prosecution, and which the statutes authorize to be taxed and included in the judgment or sentence. The word does not have a fixed legal signification. The compensation of expert witnesses for

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their services in a criminal prosecution is not costs that the statutes authorize to be paid out of the state treasury. State ex rel. Franklin County Com'rs v. Guilbert, 83 N. E. 80, 81, 77 Ohio St. 333.

Clerk's fees and fees for mileage and attendance of expert witnesses, included in the judgment, constituted costs; and where the amount in controversy, exclusive thereof, was less than $100, the judgment was not appealable to the Supreme Court. Jenkins v. Missouri, K. & T. Ry. Co., 111 Pac. 463, 83 Kan. 807.

COSTS AND EXPENSES

In the title to Act June 23, 1911 (P. L. 1123), establishing in each county a board of viewers, the phrase "costs and expenses" properly includes daily compensation to members of the boards of viewers. In re Reber's Petition, 84 Atl. 587, 590, 235 Pa. 622.

"Costs and expenses," as used in the contract of insurance involved in this case, is the amount paid counsel and witnesses, and court costs, and all costs, including the taxable costs recovered by the plaintiff in such suit. Coast Lumber Co. v. Ætna Life Ins. Co., 125 Pac. 185, 187, 22 Idaho, 264.

COSTS AS OF COURSE

Where a defendant who obtained judgment in his favor appeared in the action by the attorney represented by the codefendant, and united in the answer with him, and he was not personally put to any expense in the defense of the action resulting in a judgment for plaintiff against the codefendant, defendant was not entitled to costs as of course within Code Civ. Proc. §§ 3228–3230. Kelly v. St. Michael's Roman Catholic Church in City of Brooklyn, 133 N. Y. Supp. 328, 336, 148 App. Div. 767.

COSTS IN ALL COURTS

A judgment for plaintiff was reversed by the Appellate Division, and defendants then moved at Special Term for judgment on the pleadings. This motion was denied, but was granted on defendants' appeal to the Appellate Division. Judgment of dismissal was thereupon entered and was affirmed by the Appellate Division, but was reversed by the Court of Appeals, and a new trial ordered "with costs to the appellant (plaintiff) in all courts," and defendants' motion to amend the remittitur was denied. Held, that the phrase quoted meant the costs in every court to which he was compelled to resort to uphold his complaint, including the costs of the first trial and the appeal from the judgment rendered thereon, as well as the costs of the subsequent application to the Special Term, and the appeals to the Appellate Division and the Court of Appeals. Jones v. Gould, 128 N. Y. Supp. 280, 282, 143 App. Div. 244.

A decision of the Court of Appeals on appeal from the Appellate Division reversing a judgment dismissing the complaint on the second trial of the action on the ground that the case presented a question for the jury, and ordering a new trial, rendered pursuant to a stipulation for judgment absolute in case of affirmance, which affirms the order of the Appellate Division, and which directs judgment against defendant on the stipulation "with costs in all courts," awards to plaintiff the costs of the first trial, resulting in a directed verdict in his favor, reversed on exceptions by the Appellate Division, granting a new trial, with costs to defendant to abide the event. Merkel v. Lazard, 124 N. Y. Supp. 140, 141, 139 App. Div. 624.

COSTS OF ADMINISTRATION

Whether fees claimed by the attorney for the bankrupt are allowable depends upon whether the services rendered were for "cost of administration"; that is, whether as rendered they conduced to the benefit of the estate and its prompt administration. In re Duran Mercantile Co., 199 Fed. 961, 964.

Allowances for compensation constituted costs incurred in the administration of the trust, chargeable against the property in the hands of the receiver, as provided by Rev. St. 1899, § 3101. In re Bank of Newcastle, 89 Pac. 1035, 1036, 15 Wyo. 501.

Expenditures made by a receiver and trustee of a bankrupt's estate for the sole benefit of general creditors, in carrying out contracts of the bankrupt which were thought to be profitable, are not "costs of administration," within Bankr. Act July 1, 1898, c. 541, §§ 62, 64, 30 Stat. 562, 563, requiring such costs to be paid out of the estate in which they are incurred as preferred claims. In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 963.

An involuntary bankrupt is not entitled to an allowance for counsel fees and disbursements expended on a contested application to confirm a composition, such expenditures not being a part of the "costs of administration," nor for services rendered to the bankrupt while performing duties prescribed by the act, within Bankr. Act July 1, 1898, c. 541, § 64(b)3, 30 Stat. 563. In re Fogarty, 187 Fed. 773, 774, 109 C. C. A. 621.

COSTS OF APPEAL

Fees paid to the clerk of the Circuit Court for a citation, writ of error, and for certifying the transcript are none the less "costs of the appeal," and taxable as such, because taxable in the Circuit Court after determination of the appeal. Berthold v. Burton, 169 Fed. 495.

COSTS OF PROCEEDINGS

"'Costs of proceedings' include the proceedings in court in the case, and not the fee or salary of the court, unless the law so direct." The plaintiff in an expropriation proceeding is not taxable, in the absence of

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special statute, with the cost of the per diem and mileage of the jurors serving in the case. Opelousas, Gulf & N. E. Ry. Co. v. St. Landry Cotton Oil Co., 46 South. 810, 813, 121 La. 796.

COSTS OF SUIT

Where a claimant of property in the hands of a bankrupt's trustee filed a reclamation petition which was subsequently dismissed as fraudulent and unsustainable, the trustee was entitled to an allowance against the petitioner as part of the costs, though it is doubtful if such expense falls within the usual meaning of the term "costs of suit." In re Schocket, 177 Fed. 583.

COSTS TO ABIDE EVENT

Where, on appeal from an order dismissing a writ of certiorari to review proceedings before the police commissioner of New York City, resulting in the dismissal of relator from the police force, the order of dismissal was reversed, and a new trial granted relator, "with costs to 'abide the event,'" the event referred to was the final event of the writ of certiorari, evidenced by some order of the court; the police commissioner having no power to award costs. People ex rel. Shiels v. Greene, 99 N. Y. Supp. 679, 680, 114 App. Div. 168 (citing Snyder v. Collins [N. Y.] 12 Hun, 383).

Where the Supreme Court reversed a judgment, with "costs to abide the event," default by plaintiffs and dismissal of their complaint was the "event," and entitled defendant to costs. Goldstein v. Godfrey Co., 126 N. Y. Supp. 620, 621, 70 Misc. Rep. 225.

COSURETY

One who signed as surety a note signed by two other persons, without knowledge of the fact that one of the signers was a surety, could not be held a "cosurety" with such signer. Citizens' Nat. Bank of Durham v. Burch, 59 S. E. 71, 72, 145 N. C. 316.

The Dramshop Act, § 5, provides that no person shall be licensed as a dramshop keeper unless he shall give bond conditional that he will pay to all persons all damages that they may sustain, either in person or property or means of support by the licensee selling or giving away intoxicating liquor. Section 9 provides that every husband, wife or child who shall be injured in person or property or means of support in consequence of the intoxication of any person shall have a right of action in his or her own name severally or jointly against any person who, by selling or giving away liquors, shall have caused the intoxication, and that any person owning, renting, leasing, or permitting the occupation of any building, and having knowledge that liquors are to be sold therein, shall be liable severally or jointly with the person selling or giving intoxicating liquors for all damages. Held, that the owner of premises leased to a dramshop keeper, who is sued for injuries, under section 9, jointly with the keeper, and against whom a joint judgment is recovered, is not thereby made a surety of the keeper, and cannot therefore be a "cosurety" with the sureties on the keeper's bond required by section 5, so as to entitle a surety on the keeper's bond, on payment of judgment, to contribution from such owner. Wanack v. Michels, 74 N. E. 84–87, 215 Ill. 87.

COTEMPORANEOUS

The term "cotemporaneous" does not always of necessity refer to any single or ultimate fact, however important to any precise or definite time, for a transaction may, and not infrequently does, include a series of occurrences extending over a great length of time, and a relevant fact in any one of them, and, until the close of the matter, may come within the term "cotemporaneous" and constitute a part of the res gestæ. Fraley v. Fraley, 64 S. E. 381, 383, 150 N. C. 501 (citing Greenl. Ev. § 108; Tayl. Ev. 391 [1]; Brander, Ev. 325; Knox County v. Ninth Nat. Bank, 13 Sup. Ct. 267, 147 U. S. 91, 37 L. Ed. 93; Ahern v. Goodspeed, 72 N. Y. 108).

COTENANT

"Cotenants" are not partners; neither does the relation of principal and agent exist between them, except upon an express agreement or one necessarily implied. Wright v. Kayner, 113 N. W. 779, 782, 150 Mich. 7.

COTTON

See Bale of Cotton; Booking Cotton; Dog Tail Cotton; Grabbot Cotton; Gun Cotton; Lint Cotton; Seed Cotton.

Baling cotton as manufacture, see Manufacture.

Embroidery cotton, see Embroidery.

Manufactures of, see Manufactures—Manufactured Articles.

"Cotton" is susceptible to many meanings. It ranges in grade and quality from long staple, which brings a premium frequently many cents above the average, to dog tail, which is a poor grade and of little value. A person sold two plantations for $100,000, to be paid for in 10 equal payments; but, instead of the consideration being paid in cash, it was agreed that the purchasers should pay it in cotton, to be delivered at certain dates. Held that, there being no ambiguity in the terms or meaning of the contract, parol evidence was inadmissible to show that the parties intended that the cotton in which payment for the land was to be made was cotton grown on the land sold under the contract. Soudan Planting Co. v. Stevenson, 102 S. W. 1114, 1116, 83 Ark. 163.

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Acts 1896, p. 172, c. 156, § 16, imposes a tax on all "lint cotton" annually grown in a levee district, etc., and Acts 1904, p. 126, c. 90, § 5, makes it unlawful for any person to remove from the district any "cotton" grown therein without first paying the levee tax thereon and declares that the levee board may recover from the person wrongfully removing such cotton a certain penalty tax on each bale or hundredweight of "seed cotton" so removed. Held, that the words "lint cotton" in the first act and "cotton" and "seed cotton" in the second act were limited to "lint cotton" ginned by ordinary gins, and did not include "linter" or "Grabbot" cotton, obtained by reginning cotton seed and hard locks of cotton and cotton mixed with hulls, bolls, and other substances which could not be removed by ordinary ginning. Mississippi Levee Com'rs v. Refuge Cotton Oil Co., 44 South. 828, 829, 91 Miss. 480.

"Labels of cotton and silk," cotton the chief component, are not to be excluded from the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179, for labels "composed of cotton," because not composed wholly of cotton. United States v. Herzog, 145 Fed. 622, 76 C. C. A. 373.

COTTON CLOTH

A fabric containing 37 per cent of jute is not within the definition of "cotton cloth," in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 310, 30 Stat. 178, as including "all woven fabrics of cotton." Lord & Taylor v. United States, 178 Fed. 270, 101 C. C. A. 575; Id., 172 Fed. 282.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 310, 30 Stat. 178, the definition of "cotton cloth" as being "all woven fabrics of cotton" refers to goods composed entirely of cotton, or containing at most but a small percentage of some other fiber; and cloth which, though composed chiefly of cotton, yet contains a large minority of jute, is not within the definition. Lord & Taylor v. United States, 172 Fed. 282.

"Cotton cloth," as used in paragraph 310 of the Tariff Act of 1897 (Act July 24, 1897, 30 Stat. 178, c. 11), which provides that the expression "cotton cloth" shall be held "to include all woven fabrics of cotton in the piece or otherwise," includes cotton portieres and table covers woven with a border and selvedge and cut to the size and form of the article as intended for sale and use but needing to be trimmed and fringed before they can be used. Stern v. United States, 123 Fed. 192.

To come within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 305, for all "cotton cloth" not exceeding 100 threads to the square inch, counting the warp and filling, it is not necessary that the goods should be uniform or homogeneous throughout, and the provision includes open-work fabrics containing nowhere more than 100 threads to the square inch, and of which substantial portions have no warp and other substantial portions no filling. Quaintance v. United States, 147 Fed. 753, 754.

Held, that the definition of cotton cloth in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 310, 30 Stat. 178, as being "all woven fabrics of cotton in the piece or otherwise," includes cotton blankets with whipped or hemmed edges and in a finished condition. United States v. Bernhard, 150 Fed. 375, 376.

COTTON GIN

Where defendant subscribed for the stock of a corporation, to be formed for the purpose of operating "a cotton seed oil mill," and the charter of the corporation authorized it, not only to maintain and operate such mill, but to erect, own, and operate whatever cotton gins might be necessary and proper as feeders for the oil mill, the variance between the charter and the subscription contract was such as to release defendant, from her subscription; the terms "cotton seed oil mill" and "cotton gin" importing different and distinct enterprises. Comanche Cotton Oil Co. v. Browne (Tex.) 90 S. W. 528, 529.

COTTON LACES

The provision for "cotton laces" in Tariff Act March 3, 1883, c. 121, § 1, Schedule I, 22 Stat. 506, would, in its ordinary significance, no contrary trade understanding being proved, include not only laces dealt in by the yard but made-up articles which are produced originally as lace only in the process of making the completed article. Mills v. Robertson, 147 Fed. 634, 635.

COTTON NETTING

Cotton net, cut into narrow strips or small pieces, and known to the trade as "cotton net," "cotton net cut," "hat tips," "hat crowns," or "hat sides," are dutiable as "cotton netting" under Tariff Act 1894, par. 276, fixing an ad valorem duty of 50 per cent. on such netting, and not as manufactures of cotton dutiable, under paragraph 264, at 35 per cent. Tilge v. United States, 115 Fed. 254, 255.

COTTON SEED OIL MILL

See Cotton Gin.

COTTON SILVER

"Ramie silver" is dutiable as "cotton silver" by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 302. Within the meaning of the similitude clause of such statute, "ramie silver" resembles "cotton silver" (1) in material, because it is a vegetable fiber; (2) in quality, because it has reached the same degree of purity, or freedom from objectionable substances; (3) in texture, because the fibers are in the same form; and (4) in use, because, like "cotton

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silver," it is spun into yarn and thread, so as to be manufactured into fabrics. F. B. Vandegrift & Co. v. United States, 173 Fed. 609, 610, 97 C. C. A. 469.

COTTON TABLE DAMASK

The term "cotton table damask," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 321, is the trade-name for cotton damask in the piece, or cotton damask cloth, and does not include completed articles made out of such material and advanced by manufacture beyond the condition of mere cloth. Cotton damask doilies, napkins, and table covers or cloths, in a completed condition, ready for use, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 322, 30 Stat. 179, as "manufactures of cotton not specially provided for," and not under paragraph 321 of said act (page 1661), as "cotton table damask." Douglass & Berry v. United States, 123 Fed. 993.

The expression "cotton table damask," in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 321, 30 Stat. 180, was not used by Congress according to any trade meaning it might have, but according to its denominative, or common, popular sense, which includes completed articles as well as goods in the piece from which such articles are made. James H. Dunham & Co. v. United States, 150 Fed. 562, 563, 80 C. C. A. 364.

Articles of cotton table damask, woven in the piece, are included within the expression "cotton table damask" in paragraph 321, Tariff Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 179, and are dutiable under that paragraph rather than under the provisions of Schedule I, for "cotton cloth" because it is more specific than such provisions. Wilson v. United States, 146 Fed. 64, 65, 76 C. C. A. 515.

COTTON WASTE

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 537, for "cotton waste," includes a mixture of cotton waste and jute threads in about equal proportions, which is commercially known as "cotton waste." Wood v. United States, 160 Fed. 990, 991.

COTTON YARN

Artificial horsehair, not being a yarn, cannot be classified as "cotton yarn" by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 302, 30 Stat. 175, but is dutiable under section 6, 30 Stat. 205, as an unenumerated manufactured article. Eckstein v. United States, 160 Fed. 287, 288.

COUGHING BLOOD

See Spitting or Coughing Blood.

COULD

A charge requiring a master to know the condition of a defective step on a railroad locomotive, if it "could have known its condition by the exercise of ordinary care," was not objectionable as imposing a higher degree of care than was imposed by law by using the word "could" instead of "would." Galveston, H. & S. A. R. Co. v. Stevens (Tex.) 94 S. W. 395, 397.

"The word 'might,' as defined by Webster, denotes not alone possibility but also ability and capability. 'Could' denotes ability and capability." Hence instructions, which used "might" and "could" interchangeably, held not erroneous as allowing the jury to enter the realm of conjecture. Nelson v. Boston & M. Consol. Copper & Silver Min. Co., 88 Pac. 785, 786, 35 Mont. 223.

A warning given by an officer to one in his custody, which was in the usual form, with the exception of the use of the word "might" instead of "would or could," the officer telling the one in custody that any statement he might make "might" be used against him, was sufficient. Garrett v. State, 91 S. W. 577, 49 Tex. Cr. R. 235.

COUNCIL

See City Council; Village Council; Whole Council.

The "council" is the governing body of the municipality. City of Bowling Green v. Gaines, 96 S. W. 852, 853, 123 Ky. 562.

"The 'council' is the legislative body of the city." Commonwealth v. Williams, 86 S. W. 553, 555, 120 Ky. 314.

Rev. St. Ohio, §§ 4364—20a, 4364—20b, providing for an election in any municipal corporation, to determine whether or not the sale of intoxicating liquors shall be prohibited, applied to hamlets, since, by statutes then in force, hamlets were municipal corporations; and, though the statute uses the term "council" as the governing body and the term "mayor" as the executive, yet in hamlets there were trustees who stood to the hamlet as the council stands to the village or city, and the president of the board of trustees stood to the hamlet as the mayor stands to the village or city. The statute being a police regulation enacted in the interests of good order in municipalities, and should receive a reasonable construction, and no reason exists for such a regulation in a village which would not equally apply to a hamlet, and the terms of the statute, except in the particulars named, are broad and clearly include all municipalities. Carey v. State, 70 N. E. 955, 956, 70 Ohio St. 121.

Where the word "council," used in an ordinance, obviously refers to the governing board of the city, it will be construed to mean the board of mayor and aldermen, where the charter provides for such board, and does not mention the word "council." Cooke v. Loper, 44 South. 78, 151 Ala. 546.

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In the Austin city charter, providing that the city council shall consist of a mayor and board of aldermen, and that a majority of the members of the "whole council" shall be necessary to pass any ordinance in any wise increasing or diminishing the city revenues, the term "council" is used synonymously with the "board of aldermen," and the "whole council" referred to means the whole board of aldermen, as distinct from a quorum thereof, so that one of the aldermen having died prior to the passage of a tax levy ordinance passed by the vote of seven, such ordinance should be considered as having received a majority of the whole board or council. Nalle v. City of Austin, 93 S. W. 141, 145, 41 Tex. Civ. App. 423.

The word "council," in Rev. St. 1898, § 214, providing that the mayor, by and with the advice and consent of the council, may appoint all such officers or agents as may be provided for by law or ordinance, etc., was used in the same sense as in section 215, providing that an appointive officer may be removed by the mayor, with a concurrence of a majority of the members of the city council, and it was intended that the concurrence of the same number of the councilmen necessary in a removal by the mayor is also necessary to both a removal by the council and an appointment by the mayor. State ex rel. Breeden v. Sheets, 72 Pac. 334, 335, 26 Utah, 105.

COUNCILMEN

As civil officer, see Civil Officer.
As officer, see Officer.

Under section 4, c. 147, p. 356, Acts of Leg. 1901, providing that the municipal authorities shall consist of a mayor, recorder, and six "councilmen," two of which councilmen shall be elected in and for each of the wards of said city, who together shall form the common council, the recorder should not be included in the term "councilmen." Riggs v. Carroll, 66 S. E. 633, 635, 66 W. Va. 499.

COUNSEL

See Chief Counsel; Of Counsel; Right to be Heard by Counsel.

The meaning of "counsel," as used in the oath of a grand juror, is not confined alone to the advice which the prosecuting attorney may give to the grand jury. It has a broader significance in this connection and comprehends the plan, the purpose, of the government, as represented by its officer. In re Atwell, 140 Fed. 368, 373.

As an attorney

While "counsel" authorized to appear for a defendant in a municipal court means a person duly admitted to practice as an attorney, yet, where the real "counsel" for defendant sent a person not so admitted to appear for his client, he could not thereafter avail himself of the imposture and claim that there had been no appearance. Kerr v. Walter, 93 N. Y. Supp. 311, 312, 104 App. Div. 45.

The word "counsel," as used in Const. art. 1, § 10, providing that an accused has the right of being heard by himself or counsel, or both, has a well-established meaning, and as there used it means an advocate, counselor, or pleader, one who assists his client with advice, and pleads for him in open court; and it does not mean one not admitted to practice law. Harkins v. Murphy & Bolanz, 112 S. W. 136, 138, 51 Tex. Civ. App. 568.

COUNSEL FEE

As debt, see Debt.
See, also, Attorney's Fees.

The term "counsel fee" describes the compensation of a lawyer. If a lawyer is called on to perform the duties of an assignee of an insolvent, and the deed under which he acts promises to recompense him by a counsel fee, the employment becomes professional, and he would have a right to claim such a measure of compensation as would be paid a lawyer for like occupation of his time and attention. Nichols v. McEwen, 17 N. Y. 22, 26.

COUNSEL FOR COMMONWEALTH

Under the Constitution, providing for commonwealth's attorneys and for county attorneys, and Ky. St. § 127, making the county attorney the assistant of the commonwealth's attorney in felony prosecutions, and Cr. Code Prac. § 227, authorizing the "counsel for the commonwealth" to conclude the argument to the jury, counsel employed by relatives of decedent to assist the county attorney conducting the trial for murder may make the closing argument for the commonwealth; the quoted words meaning any counsel appearing in the case for the commonwealth. Catron v. Commonwealth, 130 S. W. 951, 952, 140 Ky. 61.

COUNSEL OF RECORD

Affidavits of prejudice to disqualify a judge, certified to have been made in good faith by nonresident counsel who had never been admitted as attorneys of the court and who had never been recognized as counselors at law in any proceeding had in the court, were not certified by "counsel of record," as required by Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090). Ex parte N. K. Fairbank Co., 194 Fed. 978, 985.

COUNSELOR

Attorney at law distinguished, see Attorney at Law.
Attorney synonymous, see Attorney at Law.

COUNT

See Common Counts; Recount.

That accused as an election officer made marks on a tally sheet as another officer call-

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ed off the votes warranted a finding that accused "counted" and "canvassed" the votes; it being unnecessary that he handle each ballot. Commonwealth v. Edgarton, 86 N. E. 768, 771, 200 Mass. 318.

A "count" in a civil procedure in common law is sometimes synonymous with the "declaration," its original signification; but it is now generally considered as a part of a declaration wherein the plaintiff sets forth a distinct cause of action. Ryan v. Riddle, 82 S. W. 1117, 1118, 109 Mo. App. 115.

"All of the Codes require that the different causes of action should be separately stated; in other words, each must be set forth in a separate and distinct division of the complaint or petition in such a manner that each of these divisions might, if taken alone, be the substance of an independent action. In fact, the whole proceeding is the combining of several actions into one. At common law these separate divisions of the declaration were termed 'counts,' and that word is still used by text-writers and judges, although, with one or two exceptions, it is not authorized by the Codes; and it tends to produce confusion and misapprehension, since the common-law 'count' was substantially a very different thing from the 'cause of action' of the new procedure." First Nat. Bank v. D. S. B. Johnson Land Mortg. Co., 97 N. W. 748, 749, 17 S. D. 522 (quoting Pom. Rem. & Rem. § 442).

COUNTER

COUNTER WILLS

Wills by two parties each in favor of the other are sometimes called "counter" or "reciprocal" wills. Deseumeur v. Rondel, 74 Atl. 703, 705, 76 N. J. Eq. 394 (citing Duvale v. Duvale, 35 Atl. 750, 54 N. J. Eq. 581, 588; Id. 39 Atl. 687, 40 Atl. 440, 56 N. J. Eq. 375).

COUNTERCLAIM

See Matter of Counterclaim.
See, also, Recoupment; Set-Off.

A "counterclaim" is "a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action." Where plaintiff sued to have the affairs of certain corporations placed in the hands of a receiver, and part of the assets consisted of claims against plaintiff and other stockholders to enforce a statutory double liability, a pleading filed by such defendant corporations to enforce plaintiff's double liability constituted a counterclaim. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 76 S. W. 862, 867, 116 Ky. 759 (quoting definition in Civ. Code Prac. § 96).

A "counterclaim" is an independent action, and every allegation necessary to constitute such an action is necessary to constitute a good counterclaim. The right to set up a counterclaim is not concluded by the judgment but may be brought against its enforcement. A person sued by the state may interpose a counterclaim, though he could not have set up such matter as an original cause of action, for the reason that a citizen cannot sue the state without its consent. A failure to set up matter in counterclaim before the second trial of a cause does not conclude the right of the party to do so. Commonwealth v. Barker, 103 S. W. 303, 305, 126 Ky. 200 (citing Emmerson's Adm'r v. Herriford, 8 Bush [71 Ky.] 229; Chinn v. Mitchell, 2 Metc. [59 Ky.] 92; Ross v. Ross, 3 Metc. [60 Ky.] 274; Moss v. Rowland's Ex'r, 1 Duv. [62 Ky.] 322).

"A 'counterclaim' is a new and independent cause injected into the action by a defendant, and, under the well-settled rule that the verdict must respond to the issues presented by the pleadings, a verdict which fails to dispose of the counterclaim when properly attacked should be set aside as not responsive to the issues. * * * But the rule is not to be construed as requiring the verdict in all cases to contain mention of the counterclaim." Nowell v. Mode, 111 S. W. 641, 644, 132 Mo. App. 232 (citing and adopting Winkelman v. Maddox, 95 S. W. 308, 119 Mo. App. loc. cit. 661; Marshall v. Armstrong, 79 S. W. 1161, 105 Mo. App. 234; Henderson v. Davis, 74 Mo. App. 1).

"A 'counterclaim' must be a claim either arising out of the contract or transaction sued upon or connected with the subject-matter of the action, or, in actions upon contract, it may be some other contract. It must consist in a set-off, or a claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint." "The 'counterclaim' is founded upon a cause of action which the defendant may, at his option, prosecute independently. This is the general rule, but in some states that right is qualified." There are three classes of counterclaim, viz.: "First, a demand existing in favor of the defendant and against the plaintiff, which arises out of the contract upon which the plaintiff has based his action; second, a demand so existing which arises out of the transaction (a broader term than 'contract') upon which the plaintiff has based his action; and, third, a demand so existing which need not necessarily arise out of either the contract or transaction involved in the action, but it is sufficient if it is connected with the subject of the action." Where plaintiff, on purchase of a half interest in land, allowed defendant, who owned the other half interest, to continue to collect the rents for benefit of both, in an action for plaintiff's share of the rents collected, a claim by defendant for damages because plaintiff had driven off the tenants, and thereby deprived defendant

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of rents that would otherwise have accrued, was sufficiently connected with the subject of the action to be a proper counterclaim. Dale v. Hall, 41 S. W. 761, 64 Ark. 223 (citing Bliss, Code Pl. § 307).

A counterclaim must state facts showing a cause of action in favor of the defendant, and against the plaintiff, and, where a number are set up in the same pleading, while it is not necessary to repeat in each all of the facts necessary to make it complete, such facts must be contained in the pleading and be intelligibly referred to. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 Fed. 871, 879.

A counterclaim, when established, must in some way qualify or defeat the judgment to which a plaintiff is otherwise entitled. In a foreclosure suit a defendant who is personally liable for the debt, or whose land is bound by the lien, may probably introduce an offset to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises he cannot demand a judgment against the plaintiff on a note, bond, or covenant. Meyer v. Quiggle, 74 Pac. 40, 41, 140 Cal. 495 (citing National Fire Ins. Co. v. McKay, 21 N. Y. 191).

The word "counterclaim" is not synonymous with "discount." "Discount" is any deduction, while "counterclaim" is ordinarily used to signify some claim against the debt. An affidavit to a claim against a decedent, averring that there is "no legal offset or counterclaim" against the demand, does not comply with Ky. St. 1903, § 3870, requiring demands to be verified by an affidavit stating that there is no "offset or discount" against the same. Spradlin v. Stanley's Adm'r, 99 S. W. 965, 966, 124 Ky. 701.

When an action is upon contract, unless the "counterclaim" arises out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or be connected with the subject of the action, it must be a legal or equitable cause of action against the plaintiff arising upon contract and existing at the commencement of the action. Every cause of action existing in favor of defendant against the plaintiff arising upon contract cannot be the subject of the "counterclaim." It must be a cause of action upon which something is due to the defendant which cannot be applied in diminution of plaintiff's claim. A cause of action arising out of a contract independent of the contract sued on by plaintiff and seeking independent relief is not a proper counterclaim under Mills' Ann. Code, § 57, subd. 2, providing that a "counterclaim" in an action arising upon a contract may be upon any other cause of action arising also upon contract, since it does not diminish or defeat plaintiff's claim and is not antagonistic to it. Bannerot v. McClure, 90 Pac. 70, 73, 39 Colo. 472, 12 L. R. A. (N. S.) 126 (quoting and adopting definition in Waddell v. Darling, 51 N. Y. 327, 330).

Where, in a suit between heirs for the partition of land, two acres of the tract described in the petition were improperly included, as they had been conveyed by the ancestor in his lifetime, the petition may be amended to omit them, although their owner had filed an answer requesting the court to quiet his title, since the purpose of the amendment was not to withdraw the two acres from the partition, but to show that they were included unintentionally, and therefore defendant's answer was not a counterclaim arising out of the transaction set forth in the petition, within Revisal 1908, § 481, so that he could prevent the amendment and force the settlement of the question of the title to the two acres. Webster v. Williams, 69 S. E. 233, 234, 153 N. C. 309.

In an action by an executrix to compel the execution of a mortgage to secure the deferred payment of the purchase price of land, a minor heir to a part of the estate distinct from the land sold was not interested in the result, and the court had no jurisdiction to quiet title against him on defendant's cross-bill; cross-bills being abolished in equity actions by L. O. L. § 390, and such relief against the minor not being a counterclaim against the plaintiff within the meaning of L. O. L. § 401, authorizing counterclaims. Howe v. Kern, 125 Pac. 834, 837, 63 Or. 487.

Allegations of the answer and purported counterclaim that the note sued on was given for the price of a horse purchased from the original payee, and that the latter made fraudulent representations as to the horse, to defendants' damage, did not constitute a "counterclaim" as against plaintiff, the assignee of the note, whatever it might be as against the original payee, within Civ. Code Prac. § 372, giving defendant a right to a trial on a counterclaim after dismissal by plaintiff. Howard v. Jones, 143 S. W. 1058, 1059, 147 Ky. 303.

Where a "counterclaim" under the Code grows out of or is connected with the transaction on which plaintiff sues, defendant may recover any balance plaintiff owes him over and above plaintiff's claim. State v. Arkansas Brick & Mfg. Co., 135 S. W. 843, 844, 98 Ark. 125, 33 L. R. A. (N. S.) 376.

An answer, in a suit to confirm a tax title, which alleges that the sale was void because the purchaser at the tax sale was the clerk who made the sale and executed the deed, is not a "counterclaim" or "setoff" within Kirby's Dig. § 6108, and a reply is unnecessary to require defendant to prove the allegations thereof. Senter v. Greer (Ark.) 142 S. W. 178.

A claim existing in favor of a defendant and against a plaintiff, between whom

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a several judgment might be had in the action and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim and connected with the subject of the action, falls directly under the provision of Code, § 101, relating to "counterclaims." Ross P. Curtice Co. v. Kent, 131 N. W. 944, 945, 89 Neb. 496.

Statutory definitions

Civ. Code Prac. Ky. § 96, defines a "counterclaim" to be a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of plaintiff's claim, or which is connected with the subject of the action. Where plaintiff and defendant entered into a written contract by which defendant was to purchase for plaintiff a large amount of tobacco, and later plaintiff engaged defendant to sell a consignment of tobacco for him, and plaintiff brought action to recover the proceeds of the sale, and counterclaimed for his commission on tobacco bargained for by him under the contract, which plaintiff refused to accept from defendant, and afterwards purchased directly from the owner, held that the claim for commission did not arise out of the contract or transaction stated in the petition, nor was it connected with the subject of the action so as to be a counterclaim. Allen v. Hodge (Ky.) 106 S. W. 255, 256.

A contractor for a government work in Ohio canceled the contract of subcontractors for an alleged breach, and took possession of the tools and materials of the subcontractors on the premises under a provision of the contract, and used the same in completing the work. The subcontractors, who were citizens of another state, having brought an action in replevin for such tools and materials in a federal court, the defendant therein filed a "counterclaim" for damages growing out of the breach of contract by the plaintiffs. Held, that such claim for damages was one "arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action," in such sense as to make it a proper counterclaim under Rev. St. Ohio 1906, § 5069, defining "counterclaim" as a cause of action existing in favor of a defendant and against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action, and therefore that the court had authority under section 5089 to order it docketed as a separate action and had jurisdiction over the subject-matter and the persons of the defendants therein. Baer v. Sleicher, 153 Fed. 129, 131, 82 C. C. A. 281.

"A 'counterclaim' is that which might have arisen out of or could have some connection with the original transaction, in view of the parties, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or noncompliance with its provisions." The statutory definition is that "a counterclaim is any matter arising out of or connected with the cause of action," etc. Rev. St. 1894, § 353 (Rev. St. 1881, § 350). Again it is referred to in the statute as "a counterclaim arising out of the contract or transaction set forth in the complaint as the ground of the plaintiff's claims." Rev. St. 1894, § 354 (Rev. St. 1881, § 351). "Under these statutory definitions it is very clear, as it seems to us, that any matter which is pleaded as a counterclaim must either rise out of or be connected with the contract or transaction set forth in the complaint as the ground of the plaintiff's claims." Where affirmative pleas of set-off and counterclaim do not state a cause of action, they will not be upheld on appeal because the demurrer on which they were held bad was informal. Slander cannot be the subject of counterclaim in an action on a note for money loaned. Blue v. Capitol Nat. Bank, 43 N. E. 655, 658, 145 Ind. App. 518 (quoting and adopting definition in Standley v. Northwestern Mut. Life Ins. Co., 95 Ind. 254; Miller v. Roberts, 5 N. E. 707, 106 Ind. 63).

Kirby's Dig. § 6099, declares that a counterclaim must be a cause of action in favor of defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract sued on, or connected with the subject of the action. Section 6869 provides that in replevin, to recover mortgaged property, the owner may prove payments or set-offs against the debt. Held that, where defendant bought two pool tables under separate contracts, and was in default in his payments for both, damages sustained by a breach of warranty of fitness as to one of the tables only was available as a counterclaim in replevin by the seller only as against the debt secured by mortgage on the defective table. B. A. Stevens Co. v. Whalen, 129 S. W. 1081, 1083, 95 Ark. 488.

"In defining a 'counterclaim' the Code provides that it 'is in any matter arising out of or connected with the cause of action,' and, if a strict construction were adopted, the office of a counterclaim would be very much restricted, for the defendant would be confined to such matters as were connected with or grew out of the statement of the facts pleaded as constituting the grounds of the plaintiff's right to recover. A liberal construction has, however, been given to the Code, and the counterclaim is good, if it alleges matters connected with the subject of the original action. Our cases do, indeed, go further, for they hold that a counterclaim

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may be maintained where it reaches the object of the action. * * * We do not say that the doctrine is expressed in direct terms, but it is the result and gives fair and beneficial effect to the spirit of the Code and is in accordance with the views of two of the leading authors on Code Pleading." Excelsior Clay Works v. De Camp, 80 N. E. 981, 984, 40 Ind. App. 26 (quoting from the opinion of Stanley v. Northwestern Mut. Life Ins. Co., 95 Ind. 254, 264).

The loss of profits by a seller as a result of the failure of the buyer to take the property as required by the contract of sale is a proper "counterclaim" in an action against the seller for the value of merchandise which constituted the consideration for the sale, under Civ. Code Prac. § 96, defining counterclaims. Bowman v. Jones-Hughes Coal Co., 145 S. W. 373, 375, 147 Ky. 672.

Code Civ. Proc. § 501, defines a counterclaim as a claim tending to diminish or defeat plaintiff's recovery in favor of defendant or defendants between whom and plaintiff a separate judgment may be had in the action and which must be in an action which arises out of the contract or transaction set out in the complaint or connected with it. In an action by plaintiff individually as executor of his deceased father, and as devisee under the will of his deceased mother of one-half the shares of a corporation of which his father had been president, claiming that his mother was the beneficial owner of such shares, and that such ownership carried with it a half interest in bank notes and securities of his deceased father as a part of the assets of the company, and asking for a dissolution of the company, a determination of the ownership of its shares, an accounting and distribution of its assets, and an account by the respective executors of his deceased father and mother. Defendants pleaded as a counterclaim a cause of action for an accounting by the executors of plaintiff's deceased mother, a cause of action for an accounting by the plaintiff as executor of his father for moneys belonging to the plaintiff's sisters and intrusted to the father for investment and a representative action on behalf of the corporation organized, after the death of plaintiff's mother, to compel plaintiff, as president, to account to it for certain alleged wrongful acts. Held, that the first cause of action pleaded as a counterclaim was not a proper counterclaim, since it was for the same relief as that sought by the plaintiff. Fliess v. Hoy, 135 N. Y. Supp. 44, 46, 150 App. Div. 555.

Under Code Civ. Proc. § 57, providing that a "counterclaim" may consist of a cause of action arising out of the transaction pleaded in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, in an action for conversion of goods, the possession of which was acquired by defendant in an attachment suit against plaintiff, which suit defendant dismissed, defendant may not plead a counterclaim based on the debt on which the attachment suit was brought. Goldberger v. Leibowitz, 93 Pac. 1108, 1109, 42 Colo. 99.

Where the complaint alleged that the grantor of defendant held the premises sued for as security for a debt, that the conveyance to defendant was void, and prayed for judgment declaring the conveyance to defendant void and that plaintiff be adjudged the owner of the premises, an affirmative answer, alleging that defendant had been the owner in fee simple of the premises since the conveyance, and had been in the actual, open, and notorious possession thereof, that the value of the property had been paid by him to his grantor, that he had no knowledge or information of any claim of plaintiff, and that the land was purchased in good faith, sufficiently showed an adverse claim so as to constitute a counterclaim within Ballinger's Ann. Codes & St. §§ 4912, 4913, defining a "counterclaim" as a cause of action arising out of the transaction sued on, etc. Gray v. Granger, 93 Pac. 912, 913, 48 Wash. 442.

Rev. Codes, § 6540, permits an answer to state matter constituting counterclaim. Section 6541 defines "counterclaim" as a cause of action arising out of the contract sued on or connected with the subject of the action, and section 6547 provides that omission to set up the counterclaim bars an action thereon. Held, that for the bar to operate it must appear affirmatively from the pleadings that the cause falls within the class mentioned in section 6541. Kaufman v. Cooper, 101 Pac. 969, 972, 39 Mont. 146.

In an action for partition sale, an answer setting up a mortgage lien constituted a "counterclaim," within Civ. Code Prac. § 97, subsec. 2, which provides that no summons is required on a counterclaim. Louisville Title Co. v. Darnell's Committee, 148 S. W. 369, 372, 149 Ky. 312.

Plaintiff and defendant, tenants in common of land occupied by plaintiff under a lease from defendant, providing that plaintiff should keep up the improvements and surrender the premises at the end of the term, partitioned the land; defendant by a collateral contract agreeing to pay plaintiff $280 as the estimated difference in value of their shares, and it being stipulated in the partition that the division should not affect the lease contract. Held, in an action for the $280, that defendant could not "counterclaim" for damages because of plaintiff's leaving the premises out of repair; Kirby's Dig. § 6099, requiring a counterclaim to be a cause of action either arising out of the contract or transaction set forth in the complaint or connected with the subject of the action. Mitchell v. Moore, 112 S. W. 216, 217, 87 Ark. 166.

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Code Civ. Proc. § 101, defines a counterclaim as one arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. In an action to recover a sum subscribed by defendant to aid plaintiff in holding a street fair in a city, defendant answered, and alleged that he paid to plaintiff a certain sum for the privilege of operating his usual place of business in the city, and for the purpose of feet frontage, which plaintiff unlawfully forced him to pay, under threats of prosecution; that, when defendant paid said amount to plaintiff, plaintiff expressly agreed that no further saloons or other places for the sale of intoxicating liquors, other than those established, would be allowed to do business in such neighborhood; that the midway of said street fair was situated near the place of business of defendant, which fact was held out as an inducement for him to pay said amount to the plaintiff, as plaintiff then told him no intoxicating liquors would be sold therein; that plaintiff breached his agreement, thereby damaging defendant in a specified sum, for which amount he asked judgment. The contract or transaction set forth in the answer was wholly different from that set forth in the petition, and was in no way connected therewith, and hence not a counterclaim. Mullins v. South Omaha Street Fair Ass'n, 99 N. W. 521, 522, 5 Neb. (Unof.) 572.

An equitable lien based on an agreement to give one possession of a horse as security for money advanced is a good "counterclaim" in replevin for the horse, though replevin sounds in tort, and such a counterclaim is connected with the cause of action within the meaning of Burns' Ann. St. 1901, § 353, defining a "counterclaim" as "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant or which would tend to reduce the plaintiff's claim or demand for damages." In discussing the meaning of the statute, the court says: "The cause of action, as it appears from the complaint, when properly pleaded, will be the facts from which the plaintiff's primary right and the court's corresponding primary duty have arisen together with the facts which constitute defendant's delict or act of wrong." Reardon v. Higgins, 79 N. E. 208, 210, 39 Ind. App. 363 (quoting with approval Pom. Rem. & Rem. Rights, § 453).

Revisal 1905, § 481, provides that a "counterclaim" must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action arising (1) out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, or (2) in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. Held that, subject to the limitations in such section, a counterclaim includes nearly every kind of cross-demand existing in favor of defendant and against plaintiff in the same right, whether legal or equitable. R. L. Smith & Co. v. French, 53 S. E. 435, 437, 141 N. C. 1.

An answer by one of three defendants in an action on the case for trespass and a conspiracy to carry out the same and prosecute plaintiff, which alleges title in the answering defendant to the locus in quo, does not constitute a "counterclaim," as the claim pleaded is not within Rev. St. 1898, § 2656, subd. 1, providing that a counterclaim must arise out of the transaction set forth as the foundation of plaintiff's claim or be connected with the subject of the action. Stolze v. Torrison, 95 N. W. 114, 115, 118 Wis. 315.

Answer distinguished

See Answer.

As complaint

See Complaint.

As cross-action

A "counterclaim" must be a complete cause of action existing in favor of the defendant asserting it, and must be set forth with the same particularity as is required in a complaint for a like cause. Pease Oil Co. v. Monroe County Oil Co., 138 N. Y. Supp. 177, 179, 78 Misc. Rep. 285.

It is held that a "counterclaim or plea in reconvention" is in effect a suit against the plaintiff, and that where the amount of a counterclaim or plea in reconvention exceeds the jurisdiction of the court in which the suit is pending the court is without jurisdiction to hear or determine the same. Dixon v. Watson, 115 S. W. 100, 102, 52 Tex. Civ. App. 412.

A "counterclaim" is in the nature, and has all the characteristics, of a separate and independent action. In a suit in which defendant set up a counterclaim and went to expense in taking depositions, the trial court in its discretion could refuse to permit a discontinuance, where plaintiff's attorneys refused to agree to accept service upon summons and complaint in a new action if defendant decided to bring an action on the cause set up in the counterclaim, and where defendant would be prejudiced by a discontinuance. Inman v. Hodges, 61 S. E. 958, 960, 80 S. C. 455.

Cross-bill in equity included

A "counterclaim," which was unknown at common law, and is defined by Burns' Ann. St. 1908, § 355, as any matter arising out of or connected with the cause of action which might be the subject of a cause of action for defendant, embraces both the chancery cross-bill and the common-law recoupment, and must arise out of or be connected with plaintiff's cause of action, but a counterclaim is not an answer in its ordinary

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meaning as a statement of a defense to plaintiff's cause of action. Duffy v. England, 96 N. E. 704, 707, 176 Ind. 575.

It has been the rule from an early date that the "counterclaim" contemplated by the Code "must be something which resists or modifies the plaintiff's claim. It is in the nature of a cross-bill in equity. * * * To be available to a party it must afford to him protection in some way against plaintiff's demand for judgment." White v. Smith, 114 N. W. 106, 107, 133 Wis. 641.

Defense distinguished

Rev. St. Utah, 2969, defines a "counterclaim" as one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and constituting a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. In an action on a written contract, the answer, after denying the allegations of the complaint, alleged that a mutual mistake had been made in the contract and prayed to have it corrected, to which no reply was filed. Held, that the answer constituted a "counterclaim," not merely matter alleged in defense, and under Rev. St. § 2981, providing that, if the plaintiff fails to reply to the counterclaim, the same shall be deemed admitted, was to be taken as true. Dunham v. Travis (Utah) 69 Pac. 468, 470.

Failure of the payees of a note, on being sued thereon by their indorsee and on the maker's bankruptcy, to assert misrepresentations by the indorsee as to maker's solvency, which induced the payees to take the note, precludes subsequent suit by the payees to recover, on that ground, the amount they paid on judgment against them; the matter being defensive and not available as a "counterclaim," within Civ. Code Prac. § 17, permitting independent suit on matter which might have been used as a counterclaim. Jefferson, Noyes, & Brown v. Western Nat. Bank, 138 S. W. 308, 310, 144 Ky. 62.

Plaintiffs contracted to cut the timber on defendants' land within two years for a certain price per thousand, part payable on receipt of bill of lading and invoice, and the balance when the cars were unloaded. A year later plaintiffs sued for the amount agreed on for a shipment of two cars. Defendants answered that plaintiffs had wholly failed to perform whereby they were indebted to defendants in a specified sum (liquidated damages stipulated in the contract), less a credit for the two cars shipped. Held, that the answer did not state a defense, a "defense" going to defeat the right of action, plaintiffs not being bound by the contract to complete performance before being entitled to any payments thereunder, and the time for performance having still some time to run, but only stated a "counterclaim," which is a demand in favor of defendant against the plaintiff, and one which he might have prosecuted, though the plaintiff had brought no action. Kilgore Lumber Co. v. Thomas, 128 S. W. 62, 64, 95 Ark. 43.

A "counterclaim" presupposes affirmative relief, and, while it may be a full defense to the action, it is not so necessarily. A "counterclaim" may also contain facts sufficient to constitute a defense to a cause of action and yet not be sufficient to warrant affirmative relief. Therefore the rule is that such substantive facts must be averred as will show a liability on the part of the plaintiff to the defendant disclosing a complete right of action in his favor against the plaintiff growing out of the subject-matter alleged in the complaint. Where, in an action to cancel a note and mortgage on real estate on the ground of an alleged breach of warranty in the deed of the land from defendant to complainant, a paragraph of defendant's pleading sought a reformation of the deed and mortgage and a foreclosure of the latter, it was to be treated as a "counterclaim," notwithstanding that it was designated by defendant as an "answer by way of counterclaim." Johnson v. Sherwood, 73 N. E. 180, 186, 34 Ind. App. 490.

Where plaintiff agreed to sell all its lumber to a foreign corporation and brought suit against the corporation for the price of lumber sold, an answer, alleging that plaintiff had not delivered all the lumber manufactured by it but had wrongfully disposed of a large part of it, was a defense operating to defeat plaintiff's recovery, and therefore not a "counterclaim" or "cross-complaint," within St. § 3656, declaring that the statutory counterclaim embraced both recoupment and set-off, must be applied in the sense in which it is employed in the statute, namely, a cross-demand of the defendant against the award in which the plaintiff is entitled upon the cause of action alleged by him, and the term "counterclaim" must be used, as referring to a cause of action of the defendant constituting a defense for affirmative relief, and not as a defense which goes only to defeat plaintiff's cause of action. Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co., 129 N. W. 595, 597, 144 Wis. 362.

The word "defenses," as used in the rule that statutes of limitation effect remedies, not defenses, is limited to matters purely of defense, and does not embrace matters which may be used as the basis of a "counterclaim" or a cross-petition. Louisville Banking Co. v. Buchanan, 80 S. W. 193, 194, 117 Ky. 975, 4 Ann. Cas. 929.

Denial

"Facts pleaded, which controvert the plaintiff's claim and serve to defeat it as a cause of action, are inconsistent with the legal idea of a 'counterclaim,' which is a sep-

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arate and distinct cause of action, balancing in whole or in part that asserted by the plaintiff. It meets the latter, not by a denial of it, or an attack upon its existence, but by opposing to it an equal or balancing demand on the part of the defendant." In an action on a second fire insurance policy, issued by defendant on the same property, the answer alleged that such policy was intended as a renewal of the first policy which had been paid; and that the risk of a second insurance for $1,000, for which the action was brought was never in fact taken or assumed by defendant. Held, that such answer did not constitute a counterclaim which would be taken as true in the absence of a denial. Walker v. American Cent. Ins. Co., 38 N. E. 106, 107, 143 N. Y. 167 (citing Prouty v. Eaton [N. Y.] 41 Barb. 409).

As pleading

See Pleading.

Recoupment and set-off

The "counterclaim" authorized by L. O. L. § 74, is an enlargement of the scope of set-off and recoupment. Krausse v. Greenfield, 123 Pac. 392, 394, 61 Or. 502.

Subject to the limitation expressed in Revisal 1905, § 481, a "counterclaim" includes well-nigh every kind of cross-demand existing in favor of defendant against plaintiff in the same right, whether said demand be of a legal or equitable nature. It is said to be broader in meaning than "set-off," "recoupment," or "cross-action," and includes them all and secures to defendant the full relief which a separate action at law or a bill in chancery or a cross-bill would have secured to him on the same state of facts. R. L. Smith & Co. v. French, 53 S. E. 435, 437, 141 N. C. 1 (citing Green, Code Plead. & Prac. § 815).

The word "counterclaim," as used in Court Rules, div. 5, § 3 (26 Atl. viii), which provides that the withdrawal of an action after a cross-complaint or counterclaim has been filed therein shall not impair defendant's right to prosecute such counterclaim as fully as if the action had not been withdrawn, includes defenses pleaded by way of set-off, and defendant is entitled to a trial thereof notwithstanding plaintiff's withdrawal of his cause of action. Boothe v. Armstrong, 57 Atl. 173, 174, 76 Conn. 530.

"Counterclaim," employed in section 55, chapter 50, Code 1906, by proper construction includes recoupment when such counterclaim arises out of the same contract sued on by plaintiff; and if defendant having such counterclaim neglects or refuses to produce it with his evidence in support thereof, as provided in said section he will be forever precluded from maintaining any action for the recovery thereof, unless, as provided by section 56, his claim exceeds plaintiff's demand more than three hundred dollars. Bowdish & Degarmo Bros. v. Groscup, 74 S. E. 950, 951, 70 W. Va. 758.

Under Gen. St. 1902, § 612, the term "counterclaim" refers to all manner of permissible counter demands, more particularly those so connected with the matter in controversy under the original complaint that its consideration is necessary for the full determination of the rights of the parties, or, if it is of a wholly independent character, is a claim upon the plaintiff by way of set-off, and not a claim against a codefendant; and the term "set-off" embraces equitable set-off. Downing v. Wilcox, 80 Atl. 288, 289, 84 Conn. 437.

"A 'counterclaim' eo nomine was unknown in the former system of pleading; but the subject-matter of such a plea was, in actions ex contractu, often available under a plea which might be styled 'recoupment.' * * * The defense termed 'counterclaim' under the Code is but the plea of recoupment under the old practice, and, in general, is to be governed by the same practice, except that under the provisions of sections 418 and 419 of the Civil Code, if the defendant's demand exceeds that of the plaintiff, he may be entitled to a judgment for the excess. This defense only applies, however, to breaches of stipulations, fraudulent or otherwise, growing out of the contract sued upon, and not upon entirely separate and distinct transactions." In an action by heirs for specific performance of a contract to convey land, defendant could not set up as a counterclaim the execution of a deed of trust of the same land, allege a mistake in the description of the premises, and pray that the deed be reformed and foreclosed. Hays v. McLain, 50 S. W. 1006, 1008, 66 Ark. 400.

COUNTERFEIT

The word "counterfeit" has been defined as a likeness or resemblance, intended to deceive and to be taken for that which is original and genuine; to make in imitation something else with a view to defraud by passing the false copy for genuine or original with intent to defraud; an instrument falsely made in similitude of a genuine instrument. As used in Pen. Code 1895, § 247, punishing any person who shall, by color of any counterfeit letter or writing made in any other person's name or fictitious name, obtain any money or any other valuable things, etc., the word has a broader meaning, and evidently refers not only to an imitation of a genuine instrument, but to any paper which purports to be a genuine original, whether made in a person's real name or in a fictitious name. To constitute the offense charged under this section it is essential to prove that the writing alleged to be false was made in some other person's name or in a fictitious name. Sessions v. State, 59 S. E. 196, 197, 3 Ga. App. 13.

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The expressions "shall counterfeit, or procure to be counterfeited, or assist in counterfeiting," mean the making or procuring to be made, or assisting to make, a false and counterfeit bill, in imitation of a true bill. State v. Randall (Vt.) 2 Aikens, 89, 101.

COUNTERFEITING

Larceny synonymous

Under statutes making punishable the "counterfeiting" or "larceny" of bank bills or bank notes, the two terms are held synonymous. State v. Hays, 21 Ind. 176, 177.

COUNTERMAND

While a party may in his contract to purchase make a valid agreement not to countermand the order, a rescission because of a breach by the other party is not a "countermand" within the meaning of such a provision. Robert M. Green & Sons v. Lineville Drug Co., 52 South. 433, 436, 167 Ala. 372.

COUNTERPART

In a statutory provision that prohibition was the counterpart of mandamus, "counterpart" was not used as meaning the "exact reverse" or "opposite," and thus justifying prohibition to prevent every unauthorized act of an officer or person clothed with authority, but in its more general sense as being the opposite, in that it arrests, while mandamus commands acts. Stein v. Morrison, 75 Pac. 246, 256, 9 Idaho, 426 (quoting and adopting definition in Maurer v. Mitchell, 53 Cal. 289).

COUNTERSHAFT

As shafting, see Shaft.

Where plaintiff was injured by a stick thrown from an unguarded pulley on a ripsaw, a reference by the court in its instructions to plaintiff's injury as having been caused by a stick thrown from the countershaft, and as having been caused by failure of defendant to guard the countershaft was not erroneous, though the evidence showed that the stick was thrown from the pulley, since the pulley was a part of the countershaft. Hohenstein-Harmetz Furniture Co. v. Matthews, 92 N. E. 196, 198, 46 Ind. App. 616.

COUNTERSIGN

To "countersign" an instrument is to sign what has already been signed by a superior, to authenticate by an additional signature, and usually has reference to the signature of a subordinate in addition to that of his superior by way of authentication of the execution of the writing, and denotes the complete execution of the paper. Eliot Nat. Bank v. Woonsocket Electric Machine & Power Co., 76 Atl. 782, 787, 31 R. I. 57.

A petition, alleging that a certain person executed and delivered to plaintiff a promissory note for a certain sum payable on demand, and that the defendants countersigned such note as further and additional sureties thereon, is bad on demurrer for failure to allege any promise or anything showing the instrument sued on to be in fact a note, since the word "countersigned" means "to sign in addition to the signature of a principal or superior in order to attest the authenticity of a writing," and is not sufficient to show the assumption of any liability. Bank of Anderson County v. Foster, 142 S. W. 225, 226, 146 Ky. 179.

A land grant sealed with the seal of the state, signed by the Governor, and countersigned on the opposite side of the sheet by the Secretary of State is sufficient, within Const. art. 3, § 16, providing that grants shall be sealed with the seal of the state, signed by the Governor, and countersigned by the Secretary of State; the word "countersign" meaning the signature of an officer to a writing, signed by a superior, to attest its authenticity. Richards v. W. M. Ritter Lumber Co., 73 S. E. 485, 158 N. C. 54, Ann. Cas. 1913D, 313.

COUNTRY

See Another Country; Foreign Country; Indian Country; Laws of the Country; Wild and Uncivilized Country.
Other country, see Other.

In the revenue laws the word "country" has always been construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control. The Philippine Islands are not "another country" within the meaning of article 8 of the Cuban Treaty, providing that the rates therein granted shall continue preferential in respect to like imports from "other countries." Faber v. United States, 31 Sup. Ct. 659, 660, 221 U. S. 649, 55 L. Ed. 897.

"Country," as used in Civ. Code Ga. 1895, § 2180, providing that, in case any street railroad incorporated under such division shall be partly located in an incorporated town or city and partly located in the country, then the provisions of the preceding division which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned, includes suburbs, as distinguished from territory within the corporate limits of a town or city. Piedmont Cotton Mills v. Georgia R. & Electric Co., 62 S. E. 52, 61, 131 Ga. 129.

COUNTRY DAMAGE

See Wet and Country Damage.

COUNTRY OR DEPENDENCY

The British North America Act (St. 30-31 Vict. c. 3, §§ 91, 92) gives the Dominion of

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Canada exclusive power to impose export and import duties, but distributes along the provinces of Canada certain legislative powers, including that of taxation by way of license; and under this authority the province of Quebec imposes what is in point of fact and in effect an export duty. Held, that such duty is imposed by a "country or dependency," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 187. Myers v. United States, 140 Fed. 648, 649.

COUNTRY ROAD

Under the Colonial Laws, a "country road" was one which belonged to the country and was under the direct charge of the country, as distinguished from the owners of the towns and manors, and it was a necessary line of communication between sparsely settled communities, and it was for the better laying out, repairing, and preserving the public and general highways within the colony that legislation as to such roads was adopted. Townsend v. Trustees of Freeholders & Commonalty of Town of Brookhaven, 89 N. Y. Supp. 982, 988, 97 App. Div. 316.

"Country roads" are roads that have been made by common travel, and accepted and used by a municipality. Where there were two ways about nine feet apart, one of which was 18 inches to 2 feet higher than the other, each formed by common travel and not laid out by the city, though within the city limits, and each safe within its own limits, the city is not liable for injuries caused by attempting to turn from the higher to the lower road. Nelson v. City of Spokane, 87 Pac. 1048, 1049, 45 Wash. 31, 8 L. R. A. (N. S.) 636, 122 Am. St. Rep. 881, 13 Ann. Cas. 280.

COUNTRY RUN OATS

Evidence considered, and held to sustain a finding that "country run" oats, according to the usage and understanding of the grain trade, means the grain as it comes from country stations in car load lots, with the identity of the contents of the several cars preserved, and that a contract for the sale of such oats was not complied with by furnishing oats which had been in a terminal elevator. Updike Grain Co. v. P. P. Williams Grain Co., 198 Fed. 828, 829, 117 C. C. A. 470.

COUNTRY WHENCE HE CAME

A Chinese alien entering the United States from Canada surreptitiously in the night, avoiding inspection and examination at a designated place of entry, enters in violation of Immigration Act Feb. 20, 1907, c. 1134, § 36, and, like any other alien so entering, is subject to arrest on a warrant issued by the Commissioner of Commerce and Labor and to be deported to Canada, or to China, the "country whence he came," under the provisions of sections 20 and 21 of the act, without regard to the provisions of the Chinese exclusion acts. Ex parte Li Dick, 174 Fed. 674, 684.

The provisions of Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905, authorizing the Secretary of Commerce and Labor to deport any alien entering or found in the United States in violation of the act "to the country whence he came," were intended to refer to the place of his nativity or citizenship, and not to the country from which he may have immediately entered the United States. Frick v. Lewis, 195 F. 693, 700, 115 C. C. A. 493.

COUNTY

See Between Two Counties; Division Less Than a County; If Residing in the County; Jury of the County; Liability of County; New County; Proper County; Property of the County; Water Course Dividing Counties; Within any County or Precinct; Within Said County.

Any county, see Any.

Establish county, see Establish.

Presentation of claim against, see Present—Presented—Presentation.

Resident of county, see Resident.

Said county, see Said.

A "county" is a mere political subdivision of the territory of a state. City of Edwardsville v. Madison County, 96 N. E. 238, 251 Ill. 265, 37 L. R. A. (N. S.) 101; Penick v. Foster, 58 S. E. 773, 775, 129 Ga. 217, 12 L. R. A. (N. S.) 1159, 12 Ann. Cas. 346; Butts County v. Jackson Banking Co., 60 S. E. 149, 151, 129 Ga. 801, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244; Caudle v. Commissioners' Court of Talladega County, 39 South. 307, 308, 144 Ala. 502.

A "county" is a corporation as well as a political and governmental subdivision and agency. Street v. Varney Electrical Supply Co., 66 N. E. 895, 896, 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. Rep. 325.

A "county" is a political subdivision of the state created for the purpose of acting for the state in local matters, whose powers are exercised by a board of supervisors. Jefferson Davis County v. Simrall Lumber Co., 49 South. 611, 612, 94 Miss. 530.

"Counties" are involuntary political and civil divisions of the territory of a state created to aid in the administration of governmental affairs. They are, in fact, quasi corporations or subordinate agencies for orderly government within the scope of their authority, having well-known duties to perform through officers provided for that purpose. Dixon v. People, 127 Pac. 930, 932, 53 Colo. 527.

A "county," while a body corporate, is a subdivision of the state, created for administrative and other public purposes, and is

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subject at all times to legislative control and change. McSurely v. McGrew, 118 N. W. 415, 418, 140 Iowa, 163, 132 Am. St. Rep. 248.

"Counties" are subdivisions of the state, created by the Legislature for political and civil purposes as agencies of the state government, and they are subject to legislative control; so that the Legislature may impose, as a duty, anything it can empower them to do. Burgin v. Smith, 66 S. E. 607, 610, 151 N. C. 561.

A "county" is a mere subdivision of a state with bodies executing functions assigned to them by the sovereign in process of government, but not itself sovereign. Devanney v. Hanson, 53 S. E. 603, 60 W. Va. 3.

"Counties" are territorial subdivisions bounded and organized by the Legislature for political purposes and the administration of government. City of Boston v. City of Chelsea, 98 N. E. 620, 212 Mass. 127.

A "county" is but a political subdivision of the state, and, except as restricted by the state Constitution, is subject to legislative regulation and control. Yellowstone County v. First Trust & Savings Bank of Billings, 128 Pac. 596, 598, 46 Mont. 439; Dillman v. State (Wyo.) 125 Pac. 367, 376.

A "county" is one of the territorial divisions of the state created for public and political purposes connected with the administration of the state government. Frantz v. Autry, 91 Pac. 193, 211, 18 Okl. 561; Walck v. Murray, 91 Pac. 238, 18 Okl. 712; McCollister v. Same, 91 Pac. 239, 18 Okl. 710; Board of Com'rs of Greer County v. Constitutional Delegate Convention of Oklahoma Territory, 91 Pac. 239, 18 Okl. 707; Haines v. Murray, 91 Pac. 240, 18 Okl. 711.

The word "county" signifies the same as "shire"; county being derived from the French, and shire from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided for the better government thereof and the more easy administration of justice. State v. Dickenson, 33 South. 514, 519, 44 Fla. 623, 60 L. R. A. 539, 1 Ann. Cas. 122 (dissenting opinion, citing 1 Bouv. Law Dict. [Rawle's Revision] p. 450).

The term "county," as used in Const. art. 2, § 14, prescribing the method for passing laws authorizing counties, etc., to issue bonds, includes all political or legislative subdivisions of counties, such as townships, etc. Wittkowsky v. Board of Com'rs of Jackson County, 63 S. E. 275, 277, 150 N. C. 90.

The word "counties," as used in Const. art. 4, § 7, par. 11, providing that the Legislature shall not pass private, local, or special laws regulating the external affairs of towns and counties, embraces no other governmental creations except such as are known as "counties," hence there can be no classification of counties for legislative purposes on the basis of population or otherwise, in matters relating to their machinery, structure, or powers, unless it is apparent that the basis used for classification has some reasonable relation to the necessities of the counties so classified, as contradistinguished from the other counties of the state. Dickinson v. Board of Chosen Freeholders, 60 Atl. 220, 221, 71 N. J. Law, 589.

"A 'county' is one of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is vested with certain functions of corporate existence." People ex rel. Rodgers v. Coler, 59 N. E. 716, 727, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605.

The "counties" of a state are but divisions for governmental purposes. The county governments are but arms of the state, and what the Legislature cannot do directly it cannot do indirectly through the agency of a county. Const. 235, providing that the salary of public officers shall not be changed during the terms for which they are elected, secures to public officers a fixed compensation, and prevents official power and position from being used by the officers to increase the emoluments of the office after he has secured the office, and the provision will be rendered entirely nugatory, if the Legislature, instead of increasing the salaries of public officials after their election, could authorize the municipal court or other municipal authorities to make such increase, and Acts 1906, c. 126, which provides that, when any county in which a city of a certain class may be located may have a specified population, and no court of continuous session is authorized therein by its board of magistrates, fiscal court, or commissioners, and the city by its council may pay to the judge of the circuit court district in which the county is located such additional compensation to that paid by the state, not exceeding a certain amount, is inoperative as to circuit judges elected before its enactment or before the annual additional compensation provided by the county or city authorities, but an allowance may be made to a judge for an annual additional compensation to be operative after the term of the then incumbent. McCracken County v. Reed, 101 S. W. 348, 349, 125 Ky. 420.

The "county," as a unit of government, is older in point of time than either the state or the town. The matter of local self-government has always found its most consistent application through the medium of the county. The habit of treating the county as the unit of local government is one that dates back beyond the colonies. The county necessarily embraces within its territory every town, city, and precinct organized within it. Under Const. § 61, providing that the general

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assembly shall by general law provide a means whereby the sense of the people of any county, city, town, district, or precinct may be taken as to whether or not intoxicating liquors shall be sold therein, the local units named will control within their own territory the question of prohibition and each should have the privilege of saying conclusively that prohibition shall prevail, but not conclusively that it shall not. Board of Trustees of Town of New Castle v. Scott, 101 S. W. 944, 947, 125 Ky. 545.

"A 'county' is one of the territorial divisions of the state, created for public and political purposes connected with the administration of the state government." The constitutional convention or the people of the state of Oklahoma, either through the Constitution or by legislative enactment, have full authority to provide for the location, relocation, or removal of any of the county seats of the state and to provide the procedure therefor. City of Pond Creek v. Haskell, 97 Pac. 338, 346, 21 Okl. 711 (quoting and adopting definition in Frantz v. Autry, 91 Pac. 193, 18 Okl. 561).

The "county" is a municipal body, and as such is an arm or instrument of the state to carry out purposes of government; but it is not so highly organized as the municipal corporation proper (town or city), which is also an arm of the state government. Grainger County v. State ex rel. Mynatt, 80 S. W. 750, 754, 111 Tenn. 234.

A "county" is one of the civil divisions of a state for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, assent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is invested with certain functions of corporate existence. Hammond v. Clark, 71 S. E. 479, 486, 136 Ga. 313, 38 L. R. A. (N. S.) 77.

The word "County" in Rev. St. 1899, § 3516, which provides that a summons against a domestic corporation may be served on its chief officer, or, if he be not found in the "county," on subordinate officers, or, if none of these can be found, by a copy left at the office of the corporation, means the "county" in which the corporation has its principal office, and not the county in which it may be sued as a joint defendant; and when so sued, the summons must issue to and be served in the county of its residence, unless service is made as provided by Sess. Laws 1903, p. 62, c. 53, requiring every domestic corporation to appoint an agent on whom service of process may be made. Harrison v. Carbon Timber Co., 88 Pac. 215, 216, 14 Wyo. 246.

City as

The word "counties" in Const. art. 11, § 8, providing that the proceeds of penalties and forfeitures shall belong to the several counties as a public school fund, includes the city of St. Louis, and forfeitures therein by whomsoever guilty are held in trust for the school fund of the city. Chicago, B. & Q. R. Co. v. Gildersleeve, 147 S. W. 836, 840, 165 Mo. App. 370.

Rev. St. 1899, § 2595, provides for the selection of a special judge when the judge of a criminal court is disqualified, and section 2597 provides that a special judge shall receive a certain sum per day for the time engaged in a trial and a certain sum while coming to and returning from the place of trial, if he resides out of the "county" where the cause is tried. The St. Louis court of criminal correction has by 2 Rev. St. 1899, p. 2544, § 13, exclusive original jurisdiction of misdemeanors. The court was established in the county of St. Louis by Laws 1865–66, p. 78, while the city was within the limits of the county, and Rev. St. 1899, art. 18, § 13, declares such court to be a court of record and makes all provisions concerning costs in criminal cases applicable to such court. The Constitution of 1875 provided that all criminal courts existing in the state should continue to exist unless otherwise provided. Rev. St. 1899, § 2723, makes the provisions of the Code applicable to the circuit court and judges thereof applicable to any court of record exercising criminal jurisdiction. Section 4 of the act establishing the St. Louis court of criminal correction provides that, in the event of sickness or absence of the judge of said court, the circuit court of St. Louis City may appoint a provisional judge. Section 4160 provides that, whenever the word "county" is in any law general in its character to the whole state, it shall be construed to include the city of St. Louis. Held, that sections 2595 and 2597 are applicable to the St. Louis court of criminal correction. State ex rel. Claiborne v. Wilder, 95 S. W. 910, 912, 198 Mo. 166.

Gen. St. 1902, § 2674, provides that no intoxicating liquors shall be sold in any building belonging to or under the control of the state or of any "county or town" in the state. Held, that the words "county or town" did not include a city, and hence the statute did not prohibit the sale of liquor in a building constructed on land belonging to a city, which the city had leased for a term of years. Appeal of Camp, 68 Atl. 444, 80 Conn. 272.

As district

The word "district," as used in the Constitution providing that the accused in all criminal prosecutions shall have the right to a trial by jury of the county or district in which the offense is alleged to have been committed, means "county." City of Chicago v. Knobel, 83 N. E. 459, 460, 232 Ill. 112.

The term "district" as employed in Const. art. 1, § 10, guaranteeing to accused a speedy public trial by an impartial jury of

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the "county" or district in which the offense is alleged to have been committed, is not synonymous with "county"; but it was intended to designate and include a place or jurisdiction other and distinct from that of the county in which the offense was committed. State ex rel. Hornbeck v. Durflinger, 76 N. E. 291, 292, 73 Ohio St. 154.

A "county" is an involuntary, civil, or political division of the state, created in the administration of government, and is not synonymous with the word "district." The word "county," in Const. 1901, § 215, providing that no county shall be authorized to levy a greater rate of taxation in any one year on the value of taxable property therein than one-half of one per cent., except an additional rate of one-quarter of one per cent. may be levied and collected exclusively to the payment of debts, etc., means a unit of political authority, and the area, the unit of taxation, is the county as a political or civil division of the state, created to aid in the administration of government. Adams v. Southern Ry. Co., 52 South. 439, 441, 167 Ala. 383.

The word "district," as used in a constitutional provision, providing that in criminal prosecutions the accused shall have a trial by jury of the county or district in which the offense is alleged to have been committed, is synonymous with the term "county." State v. O'Brien, 90 Pac. 514, 518, 35 Mont. 482, 10 Ann. Cas. 1006.

A "county" is within Const. art. 4, § 1a, reserving the initiative and referendum powers to the voters of every municipality and district, and the people of the several counties are authorized, by article 9, § 1a, to regulate taxation and exemptions within their several counties, as provided by article 4, § 1a, in a manner subservient to any general law which may be enacted, though the word "district," as used in article 4, § 1a, has a broader signification than "county," and may designate a territory comprising more than a county, or containing less area. Schubel v. Olcott, 120 Pac. 375, 379, 60 Or. 503.

"County," as used in Const. art. 1, § 10, guaranteeing to an accused party a "speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed," is not synonymous with "district," but the latter term is used to designate and include a place or jurisdiction other and distinct from that of the county wherein the offense was committed, and therefore Rev. St. 1906, § 7263, which permits the court to direct that the person accused be tried in some adjoining county, where it appears that a fair and impartial trial cannot be had in the county in which the offense is committed, is not unconstitutional as allowing the trial to be held in a county other than that in which the offense was committed, on motion of the state properly supported by affidavits. State ex rel. Hornbeck v. Durflinger, 76 N. E. 291, 292, 73 Ohio St. 154.

As a municipal corporation

A "county" is a "municipal corporation." Wadsworth v. Board of Sup'rs of Livingston County, 115 N. Y. Supp. 8, 16 (citing County Law [Laws 1892, p. 1744, c. 686] § 2; General Corporation Law [Laws 1890, p. 1061, c. 563] § 3, subd. 1).

A "county," properly speaking, is not a "municipal corporation." Knowles v. Board of Education of City of Topeka, 7 Pac. 561, 564, 33 Kan. 692 (citing Dill. Mun. Corp. § 22).

A "county" is a "municipal corporation" within the rule that a municipal corporation cannot be estopped by the unauthorized or illegal agreements or acts of their agents. People ex rel. Sweet v. Board of Sup'rs of St. Lawrence County, 91 N. Y. Supp. 948, 949, 101 App. Div. 327.

While a "county" is not strictly a municipal corporation, yet, in the sense that it is a body corporate with only such powers as are expressly conferred by statute, it is within the rules applicable to such corporation. Morse v. Granite County, 119 Pac. 286, 289, 44 Mont. 78.

"Municipal corporations" are subordinate parts of the state, and invested with limited powers. In Montana counties are at most only quasi municipal corporations, with no legislative authority vested in the several boards of county commissioners in the sense that they may adopt ordinances and prescribe penalties for a violation thereof, or define nuisances and provide for their abatement. In re O'Brien, 75 Pac. 196, 199, 29 Mont. 530, 1 Ann. Cas. 373 (citing Wilcox v. Deer Lodge County, 2 Mont. 574).

A "municipal corporation" proper is created mainly for the interest, advantage, and convenience of the locality and its people, as distinguished from a county organization which is created almost exclusively with a view to the policy of the state at large. People ex rel. Attorney General v. Johnson, 86 Pac. 233, 235, 34 Colo. 143 (citing 1 Dill. Mun. Corp. § 23).

A "county" is a governmental agency of the state, and in a sense a municipal corporation. Kumpe v. Bynum, 48 South. 55, 158 Ala. 311, 313.

A "county" is a municipal or quasi municipal corporation invested with legislative powers to be exercised for local purposes, subject to the control of the state, but is not, in a strict sense, a "municipal corporation." Schubel v. Olcott, 120 Pac. 375, 378, 60 Or. 503.

A special school district is not within the constitutional provision declaring that no county, city, town, or municipality shall issue any interest-bearing evidence of indebtedness. All corporations intended as agencies

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in the administration of civil government are public, as distinguished from private, corporations. Schmutz v. Special School Dist. of Little Rock, 95 S. W. 438, 439, 78 Ark. 118 (citing Memphis Trust Co. v. Board of Directors of St. Francis Levee Dist., 62 S. W. 902, 69 Ark. 284; 1 Dill. Mun. Corp. § 22).

The "county" is a political subdivision of the state, though for many purposes it is deemed a municipality. Its power of contracting indebtedness is limited to the matters expressly conferred by the Legislature, or which are conferred by necessary implication as an incident of powers expressly conferred. Not only is it limited as to the things for which, but it is limited as to the manner in which, it may become bound by contract. McDonald's Adm'x v. Franklin County, 100 S. W. 861, 862, 125 Ky. 205.

A "county" is a local subdivision of the state, created by the state of its own will, and is not a municipal corporation proper, which is called into existence either at the direct solicitation or by the consent of the persons composing it, for the promotion of their private advantage, and a county cannot be sued except on an express contract. Marion County v. Rives & McChord, 118 S. W. 309, 311, 133 Ky. 477.

Act March 30, 1892 (P. L. p. 369; 2 Gen. St. p. 2078), provides that any person who, pursuant to the terms of a contract for any public improvement in any city, town, township, or other "municipality" within the state, authorized by law to contract for such improvement, shall perform labor or furnish materials for the completion of such contract, shall have a lien on the moneys due under the contract. Held that, where a county let a contract for the construction of a county courthouse, the county was a "municipality" within such act. Hermann & Grace v. Board of Chosen Freeholders of Essex County, 75 Atl. 1101, 73 N. J. Eq. 415.

Under Const. art. 20, relating to the powers, etc., of the city and county of Denver, that municipality has no power to legislate upon matters solely affecting county affairs; the name "the city and county of Denver" being merely used as synonymous with "the municipality of Denver," and the word "county" therein being merely a part of the name, and having no significance in connection with county affairs. Hilts v. Markey, 122 Pac. 394, 396, 52 Colo. 382.

As person

See Person.

Powers and liabilities

A "county" is a governmental agency with limited powers prescribed by statute. Rock County v. Weirick, 128 N. W. 94, 96, 143 Wis. 500.

A "county" is organized for the convenient exercise, locally, of such powers of government as may be delegated to it, having no powers except such as are derived from statutes constitutionally enacted. City of Edwardsville v. Madison County, 96 N. E. 238, 251 Ill. 265, 37 L. R. A. (N. S.) 101.

"A 'county' is mainly a mere agency of the state government, a function through which the state administers the governmental affairs, and it has but little option in the creation of debts and liabilities against it." In re Opinion of the Justices, 60 Atl. 85, 92, 99 Me. 515 (quoting and adopting the definition in Grant County v. Lake County, 21 Pac. 447, 17 Or. 463).

"Counties," in the performance of governmental and political powers and duties, are mere agents of the state and component parts of it; and they may not sue the state or state officers expressly charged with the performance of a sovereign power. Albany County v. Hooker, 97 N. E. 403, 405, 204 N. Y. 1, Ann. Cas. 1913C, 663.

A "county" is merely a political agent of the state created by a law for governmental purposes, charged with the performance of certain duties for and on behalf of the state, among which is the duty to levy and collect state taxes apportioned against it. Yamhill County v. Foster, 99 Pac. 286, 290, 53 Or. 124.

A "county" is an involuntary corporation organized as a political subdivision of the state by the Legislature solely for governmental purposes. Such subdivisions are instrumentalities of government, and exercise the powers delegated by the state, and act for the state. State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County, 85 N. E. 513, 517, 170 Ind. 595; State v. Board of Com'rs of Marion County (Ind.) 82 N. E. 482, 486.

"A 'county' is a civil or political division of the state created by general laws to aid in the administration of government." Hence a county was not liable for the tortious acts of its officers or agents in the absence of a statute creating such liability. Talbott v. Board of Com'rs of St. Joseph County, 85 N. E. 376, 377, 42 Ind. App. 198 (quoting and adopting definition in Smith v. Board of Com'rs of Allen County, 30 N. E. 949, 131 Ind. 116; citing to the holding, Board of Com'rs of Greene County v. Boswell, 30 N. E. 534, 4 Ind. App. 133; Board of Com'rs of Johnson County v. Reiner, 47 N. E. 642, 18 Ind. App. 119; Schnurr v. Board of Com'rs of Huntington County, 53 N. E. 425, 22 Ind. App. 188; Summers v. Board of Com'rs of Daviess County, 2 N. E. 725, 103 Ind. 263, 53 Am. Rep. 512; White v. Board of Com'rs of Sullivan County, 28 N. E. 846, 129 Ind. 396; Morris v. Board of Com'rs of Switzerland County, 31 N. E. 77, 131 Ind. 285; Board of Com'rs of Vigo County v. Dailey, 31 N. E. 531, 132 Ind. 73; Cones v. Board of Com'rs of Benton County, 37 N. E. 272, 137 Ind. 404; Freel v. School City of Crawfordsville, 41 N.

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E. 312, 142 Ind. 27, 37 L. R. A. 301; Board of Com'rs of Jasper County v. Allman, 42 N. E. 206, 142 Ind. 573, 39 L. R. A. 58).

A "county" is created almost exclusively with a view to the policy of the state at large for the purpose of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state and are, in fact, but a branch of the general administration of that policy. People ex rel. Attorney General v. Johnson, 86 Pac. 233, 235, 34 Colo. 143 (citing 1 Dill. Mun. Corp. § 23); People ex rel. Elder v. Sours, 74 Pac. 167, 172, 31 Colo. 369, 102 Am. St. Rep. 34 (citing 1 Dill. Mun. Corp. § 23).

"Counties" are provided for by the Constitution but their creation and powers with which they, for the most part, may be vested, are left to the discretion of the Legislature. They have been created corporations, and the justices in the county court assembled are their representatives and authorized to act for them. "Counties do not hold and operate under charters, as do cities and other municipal corporations. They have no franchises. They make, and can make, no by-laws. They have the same powers and duties throughout the state. They do not have to provide waterworks and fire departments and lights and the 101 necessaries for cities and towns. Their ordinary expenses are met by issuance of county warrants payable out of a general fund collected for all purposes. The occasions for extraordinary expenditures are few, such as the building of jails, courthouses, bridges, and hospitals, and, if it becomes necessary to incur a debt for these purposes which cannot be at once met out of the usual revenues, they must get their authority to create such debts from an enabling act of the Legislature which at the same time gives them power to provide for its payment by a special act which must be strictly construed and exactly followed." Southern R. Co. v. Hamblen County, 92 S. W. 238, 239, 115 Tenn. 526 (quoting and adopting definition in Burnett v. Maloney, 37 S. W. 693, 97 Tenn. 714, 34 L. R. A. 541).

A "county" is merely a subdivision of the state for the purposes of state government. It is nothing more than an agency of the state in the general administration of the state policy. Its powers are solely governmental, and it does not, like a municipal corporation, possess a complete local government of its own, executive, legislative, and judicial, and, while it is clothed with certain executive powers, such powers are only those which are specially granted to it by the state. Colburn v. Board of Com'rs of El Paso County, 61 Pac. 241, 243, 15 Colo. App. 90 (citing Stermer v. Board of Com'rs of La Plata County, 38 Pac. 839, 5 Colo. App. 388).

"A county is one of the territorial divisions of a state, created for public political purposes connected with the administration of the state government, and, being in its nature and objects a municipal corporation, the Legislature may exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organizations." A county may be required to contribute towards the repair of a bridge abutting in such county, although it is located mainly within the statutory jurisdiction of the adjoining county. Dodge County v. Saunders County, 100 N. W. 934, 70 Neb. 451.

It has been said that: "A 'county' is one of the civil divisions of the state or territory for judicial and political purposes, and at the same time a district of a quasi corporate character for purposes of local civil administration. By constitution or statute, counties are usually created bodies politic or corporate. This has been said to mean that they have both political and business functions, and the two terms at least mark an important legal distinction in their powers and duties. As corporations their powers are limited, and less than those of a full municipal corporation. They may bring suits, and be sued, and make contracts for authorized purposes, and they may acquire and hold real estate and personal property; but these powers are for the most part incidental and secondary to the governmental functions of counties. The latter are so prominent that it has been said in a judicial opinion that counties exist only for the purposes of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed on them are the duties of the state, and the county organization is created almost exclusively with a view to the policy of the state at large." Ex parte Corliss, 114 N. W. 962, 981, 16 N. D. 470.

As quasi corporations

"Counties" are quasi corporations formed to exercise purely governmental powers and, in the absence of an express statute to that effect, are not liable for damages either for the nonexercise of their powers or for their improper exercise by those charged with their execution. Cassidy v. City of St. Joseph, 152 S. W. 306, 309, 247 Mo. 197.

"The 'counties' of this state, like townships, are quasi corporations, created solely for governmental purposes, and hold their property, not as private owners, but for the

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performance of their duties as public agencies." State ex rel. Skyllingstad v. Gunn, 100 N. W. 97, 99, 92 Minn. 436.

"Counties" may be distinguished from cities and towns by terming the former "quasi municipal corporations," and the latter "municipal corporations." Southern Ry. Co. v. Board of Com'rs, of Mecklenburg, 61 S. E. 690, 696, 148 N. C. 220.

A "county" is a quasi municipal corporation and as such can exercise powers expressly conferred and only such others as are expressly and fairly implied in and incidental to powers expressly granted. Brown v. State, 84 Pac. 549, 550, 73 Kan. 69.

"Counties" are quasi corporations having such powers as have been delegated to them by the General Assembly, which they hold at its pleasure, chief of which is the power of legislating upon certain local matters lodged in a body created by the Legislature, composed of the justices of the county. "Counties" are public corporations created by the government for political purposes. They are political aggregate corporations capable of exercising such powers as they may be vested with by the Legislature. Maxey v. Powers, 101 S. W. 181, 185, 117 Tenn. 381.

A "county" is a mere local subdivision of a state created by it without the request or consent of the people residing therein. They do not receive any special favors, privileges, or benefits, but the law imposes upon them burdens which they are required to carry out in the interests of the state which created them. Counties are not corporations in the fullest sense of that term. They are commonly called quasi corporations. They are created by the state for the purpose of government. Their functions are political and administrative, and the powers conferred on them are rather duties imposed than privileges granted. Cities, on the other hand, are deemed voluntary corporations, and, while they exercise political functions, it is considered that their charters are granted not so much with a view to the interests of the public as for the private advantage of their citizens. James v. Trustees of Wellston Tp., 90 Pac. 100, 101, 105, 18 Okl. 56, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938.

As venue

See Venue.

COUNTY AFFAIRS

Congress in enacting Act July 30, 1896, c. 818, 24 Stat. 170, known as the Springer Act, providing that the Legislatures of the territories shall not pass any laws regulating county and township affairs, seems to have intended to use the word "affairs" in the broadest sense, as applied to counties. By Laws 1903, p. 38, c. 27, § 3, in effect April 14th, a new county was created from B. county, and an election ordered to be held on that day for the election of county officers of B. county; but by an amendment passed March 12, 1903 (Laws 1903, p. 80, c. 49), two persons named were appointed county commissioners of B. county. They were directed to qualify on or before April 5, 1903, and to hold a meeting not later than April 10th, and appoint an assessor and a probate judge. Held, that such provision, which in effect ousted the existing officers of B. county before their terms of office expired and appointed new officers in their place, was a local and a special law regulating county "affairs," within the prohibition of Act Cong. July 30, 1886, c. 818, 24 Stat. 170, prohibiting territorial Legislatures from passing local and special laws regulating county and township "affairs." Territory ex rel. Curran v. Gutierrez, 78 Pac. 139, 142, 12 N. M. 254.

The primary election law provides in general terms for the holding of primary elections in the state at large, outside of Cook county, and contains special provisions for a primary election in Cook county. Held, that the act is in conflict with Const. art. 4, § 22, prohibiting the Legislature from passing special laws regulating "county affairs." People v. Board of Election Com'rs of Chicago, 77 N. E. 321-325, 221 Ill. 9, 5 Ann. Cas. 562.

COUNTY ATTORNEY

The "county attorney" is the legal representative and agent of the county in all matters in litigation wherein the county is a party, in the management and conduct of which he is under no legal obligation to receive orders or directions from the board of county commissioners. Board of Com'rs of Logan County v. State Capital Co., 86 Pac. 518, 520, 16 Okl. 625.

COUNTY BOARD

See Proceeding of County Board.

As court, see Court (Of Justice).

The words "county board," as used in Hurd's Rev. St. 1899, p. 741, c. 46, § 29, providing that in counties not under township organization the election precincts shall remain as established until changed by the board of county commissioners, but said county board may, from time to time, change the boundaries of election precincts and establish new ones, and section 30, as amended by Act April 24, 1899 (Laws 1899, p. 209), and by Act 1901 (Laws 1901, pp. 166, 167, 170), providing that the county board in each county shall divide a certain election precinct, refer to the governing body of all counties of the state, whether such bodies are composed of supervisors or of county commissioners. Rexroth v. Schein, 69 N. E. 240, 244, 206 Ill. 80 (citing Starr & C. Ann. St. 1896, p. 3835, c. 131, cl. 7, par. 1).

COUNTY BONDS

See Negotiable Instruments.

COUNTY BOULEVARD

As street in city, see Street.

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COUNTY BRIDGES

When a bridge is erected across a river by a city on a public road of the county, it becomes a "county bridge," and the duty is imposed upon the county authorities to keep it in repair. Town of Montezuma v. Law, 57 S. E. 1025, 1026, 1 Ga. App. 530.

COUNTY BUILDING

Other county buildings, see Other.

COUNTY BUSINESS

The building of a county courthouse is "county business," within the meaning of the Constitution forbidding the passage of local or special laws regulating county business. Kraus v. Lehman, 83 N. E. 714, 716, 170 Ind. 408, 15 Ann. Cas. 849; Macy v. Board of Com'rs of Miami County, 83 N. E. 718, 719, 170 Ind. 707; Board of Com'rs of Newton County v. State ex rel. Bringham, 69 N. E. 442, 443, 161 Ind. 616.

A drainage district organized under Acts 30th Leg. c. 40, amended by Acts 31st Leg. c. 13, enacted under express authority of Const. Amend. art. 3, § 52, belongs to a class different from a city or town and is a part of the county, and hence such statute, by imposing upon the commissioners' court certain powers and duties with reference to drainage districts, is not unconstitutional under Const. art. 5, § 18, providing that the commissioners' court shall exercise such powers and jurisdiction over all "county business" as is or may be conferred by law; the business of the drainage district being county business. Wharton County Drainage Dist. No. 1 v. Higbee (Tex.) 149 S. W. 381, 388.

COUNTY CLERKS

Under Revenue Law, § 186, requiring the certificate of the publication of a delinquent tax list to be filed as part of the record of the county court, a filing thereof by the county clerk is not a sufficient compliance with the law, though the offices of county clerk and clerk of the county court are filled by the same person, and, notwithstanding Hurd's Rev. St. 1905, p. 1946, c. 131, § 1, providing that the words "county clerk" shall be held to include "clerk of the county court," and the words "clerk of the county court" to include "county clerk," unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute. McCraney v. Glos, 78 N. E. 921, 922, 222 Ill. 628 (citing McChesney v. People ex rel. Kockersperger, 50 N. E. 1110, 174 Ill. 46).

The offices of county clerk and clerk of the county court are separate and distinct, although by the statute they are filled by the same person. In the different offices he has charge of two different and separate sets of records pertaining to different jurisdictions. Records in the office of the county clerk are not records of the county court, and filing a paper in that office does not make it part of the records of that court. Therefore the filing of the published list of delinquent lands, with the certificate of the publisher, in the "office of the county clerk and ex officio clerk of the county court of said county," is not a compliance with the statute requiring it to be filed as part of the records of the county court. Drennen v. People, 78 N. E. 937, 222 Ill. 592 (citing McChesney v. People ex rel. Kockersperger, 50 N. E. 1110, 174 Ill. 46).

As judicial officer

See Judicial Officer.

As ministerial officer

See Ministerial Office—Officer.

COUNTY COMMISSIONER

As county officer, see County Officer.
Decision, see Decision.

COUNTY COMPLETELY ORGANIZED

"A 'county completely organized' has been held to signify a county having within itself the necessary means of performing its functions independent of any other county, with its lawful officers and machinery for carrying out the powers and performing the duties belonging to that class of corporate bodies. When a new county is created from part of the territory of an old county, and provision is made for its organization at a future time, it remains attached to and under the government and control of the old county until its organization. But upon the organization of the new county the authority of the officers of the old county over the territory of the new ceases, and the administration of the affairs of the new county should be conducted only by its own officers." Bealmear v. Hutchins, 148 Fed. 545, 560, 78 C. C. A. 231.

COUNTY COURT

Const. art. 6, vests the judicial power of the state as to matters of law and equity in a Supreme Court, district court, county court, justices of the peace, and such other courts as may be provided by law. It then provides the jurisdiction of various courts designated, "district court," "county court," and "criminal court," and for the election of judges thereof. Article 14 treats of counties and county officers, not including the judge of the county court, and article 20, creating the city and county of Denver, and providing for the termination of the terms of office of county officers, declares that district and county judges and the district attorneys should serve their full term, respectively, for which they had been elected. Held, that the words "district," "county," and "criminal" in Const. art. 6, as prefixed to the word "court," had no other significance than to give appropriate names to the tribunals of government, and that a judge of the county court in the city and county of Denver was not a county officer

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within Const. art. 20, and hence, after the adoption of such article and the charter of the city and county of Denver, he continued to hold his office under Const. art. 6, and not under the charter, and this, notwithstanding the charter, provided additional duties for such office and also for two incumbents. Dixon v. People, 127 Pac. 930, 932, 53 Colo. 527.

In Act March 16, 1894, amending charters of towns of the sixth class to provide that the "county court" shall fill a vacancy in the board of trustees, and amendment of March 19, 1894, providing that the "county judge" may fill a vacancy in the board, the terms "county court" and "county judge" are synonymous and mean the county judge when sitting as judge of the county court. Lewis v. Town of Brandenburg (Ky.) 48 S. W. 978, 979.

The "county court" is a court composed of the justices of the county and known as the quarterly court and has no inherent power of taxation. It is the legislative council of the county created by the General Assembly to act for it in such matters as it may be authorized and has only such jurisdiction and powers as are expressly conferred on it by statute. Southern R. Co. v. Hamblen County, 92 S. W. 238, 239, 115 Tenn. 526.

Const. art. 7, § 11, provides that the county court shall be held by the county judge. Section 12 provides that the Legislature may provide for the election of two commissioners to sit with the judge while transacting county business. By B. & C. Comp. § 2533, the Legislature provided for the two commissioners to sit with the judge while county business was being transacted. Held, that the judge and commissioners do not constitute a separate tribunal, but they, as well as the judge alone, constitute the county court charged by the statute with the performance of certain specified duties. It is immaterial whether the duties imposed by the local option law be discharged by the county court when presided over by the county judge alone, or when the county commissioners are sitting with him, since in either case it is the act of the county court. State v. MacElrath, 89 Pac. 803, 49 Or. 294.

The superior courts created by Act March 6, 1909 (Laws 1909, c. 14, art. 7), are not "county courts," even when exercising jurisdiction concurrent with the county courts, within Const. art. 2, § 19, providing that a jury for the trial of civil and criminal cases in courts of record other than county courts shall consist of 12 men, but in county courts and courts not of record shall consist of 6 men, the term as used referring to the county courts created by Const. art. 7, § 11. Hill v. State, 109 Pac. 291, 292, 3 Okl. Cr. 686; Antonelli v. State, 117 Pac. 654, 655, 6 Okl. Cr. 157.

Under a statute providing that a writ of certiorari to a justice of the peace shall not issue unless the applicant file a bond conditioned that he will perform the judgment of the county or district court, the expression "county or district court" merely means that the applicant shall perform the judgment of the particular court applied to to issue the proceedings; the county and district courts having concurrent jurisdiction in the premises. Webb v. Texas Christian University, 107 S. W. 86, 88, 48 Tex. Civ. App. 264.

COUNTY DEPOSITARIES

Rev. St. 1909, § 1226, under the heading "official bonds," providing that no official bond shall be approved until after the sureties swear to a statement, duly attested, stating names, residences, worth, etc., does not require the sureties for county depositaries to file an affidavit of their realty holding; county depositaries not being "public officers," but debtors of the county. Barrett v. Stoddard County, 152 S. W. 43, 46, 246 Mo. 501.

COUNTY FUNDS

The term "public money," as used in Sess. Laws Kan. 1889, c. 189, § 1, relating to county depositaries, and which requires the county treasurer to deposit daily in the designated bank all public money, and that the bond of the depositary should be conditioned that such deposit be promptly paid on the check or draft of said treasurer, and the term "county fund" as employed in a bond of a bank designated as a depository, conditioned for the payment by the bank of county funds only, are convertible terms; the funds of the county being the money and securities in the possession of the county treasurer. Myers v. Board of Com'rs of Kiowa County, 56 Pac. 11, 12, 60 Kan. 189.

COUNTY JAIL

As public work, see Public Work.

A judgment of a justice of the peace sentencing a person convicted in his court to imprisonment in the "county jail" is sufficient, on habeas corpus, to warrant the sheriff in holding such person, notwithstanding it does not specify in the jail of what county he is to be imprisoned, and especially where the uncontroverted facts in the return to the writ show that such person is confined in the county jail, which is the only jail wherein the justice is authorized to imprison persons. Ex parte Bargagliotti, 92 Pac. 96, 97, 6 Cal. App. 333.

COUNTY JUDGE

In Act March 16, 1894, amending charters of towns of the sixth class to provide that the "county court" shall fill a vacancy in the board of trustees, and amendment of March 19, 1894, providing that the "county judge" may fill a vacancy in the board, the terms "county court" and "county judge" are

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synonymous and mean the county judge when sitting as judge of the county court. Lewis v. Town of Brandenburg (Ky.) 48 S. W. 978, 979.

Cities and Villages Act, art. 11, § 5, provides that any 30 legal voters residing within a proposed village may petition the county judge to submit to the legal voters whether they will organize as a village under the act, and if the territory described shall be situated in more than one county, the petition shall be addressed to the judge of the county court of the county where a greater part of such territory is situated, and such petition shall be addressed to the county judge. Section 6 declares that, on the filing of the petition in the office of the county clerk, it shall be the duty of the judge to perform the same duties as are required to be performed by the president and trustees in towns already incorporated; the returns of the election to be made to the county judge who shall cause the result to be entered on the records of the county court. Section 7 provides that, if a majority of the votes cast at such election are for organization, such proposed village shall be deemed an organized village, and the county judge shall fix a time and place for the election of officers. Held, that the terms "county judge" and "judge of the county court" were used interchangeably and synonymously, and that a petition to organize a village should be addressed to the judge of the county court and be filed with the clerk of that court. People v. Shaw, 97 N. E. 1090, 1091, 253 Ill. 597.

COUNTY MATTERS

The sheriff is entitled to mileage under that part of Kirby's Dig. § 3502, allowing five cents for each mile traveled in serving each writ, process, notice, subpœna, or rule, except county matters, for county matters are confined to orders or rules of the county court. Ouachita County v. Chidester, 137 S. W. 811, 812, 99 Ark. 206.

COUNTY OFFICER

See, also, State's Attorney.

"An officer of the county is one by whom the county performs its usual political functions, its functions of government." State ex rel. Long v. Rexford, 109 N. W. 216, 217, 21 S. D. 86 (citing Sheboygan County v. Parker, 3 Wall. [70 U. S.] 93, 18 L. Ed. 33; State v. Brennan, 29 N. E. 593, 49 Ohio St. 33; In re Carpenter [N. Y.] 7 Barb. 30; In re Whiting [N. Y.] 2 Barb. 513).

The term "county officer," strictly speaking, "is one by whom the county performs its usual political functions; its functions of government." One who "exercises continuously, and as a part of the regular and permanent administration of government, its public powers, trusts, or duties." State ex rel. Williams v. Samuelson, 111 N. W. 712–715, 131 Wis. 499 (quoting and adopting definition in Sheboygan County v. Parker, 3 Wall. [70 U. S.] 93, 18 L. Ed. 33).

The words "county officers" in the most general sense apply to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed, and in a more precise and restricted sense mean officers by whom the county performs its usual governmental functions. State ex rel. Buchanan County v. Imel, 146 S. W. 783, 784, 242 Mo. 293.

In general, a "state officer" is one whose duties and powers are coextensive with the state, while a "county officer" is one whose duties and powers are coextensive only with the county, and the fact that the official acts of an officer are so far extraterritorial that they are binding throughout the state does not make the officer who performs such acts necessarily a state officer. People v. Evans, 93 N. E. 388, 391, 247 Ill. 547.

Where a county engaged in litigation in relation to bridges, in order to check up claims pending thereon for the preceding four years, called in one who had been county surveyor, who filed a claim for services, the transaction was not within Cobbey's Ann. St. 1907, § 4469, providing that no county officer shall be pecuniarily interested in or receive the benefit of any contracts executed by the county; he not being a "county officer" within the statute. Pethoud v. Gage County, 120 N. W. 154, 83 Neb. 497.

"County officers," in Acts 1907, p. 523, § 4, declaring it the duty of the county officers, charged with assessment and collection of taxes, to levy and collect from the property within a school district a sum to pay interest on bonds issued by the district, and to create a sinking fund to pay the bonds, has reference to those officers in the county who are authorized to levy and collect the taxes in such cases, and so does not contravene Const. art. 10, § 5, if vesting in the board of trustees of the district the power to levy and collect such taxes. Dove v. Kirkland, 75 S. E. 503, 506, 92 S. C. 313.

Board of education

The office of member of the board of education of the city of Dallas provided for by the city charter (Sp. Laws 1907, c. 71) is a municipal office, and the incumbent is not a county officer within Const. art. 5, § 24, providing that enumerated officers and "other county officers" may be removed by the judges of the district courts for incompetency, and one elected to the office under the charter, containing a recall provision, may not complain of the provision on the ground that it provides for the removal from office in a manner not prescribed by the Constitution. Bonner v. Belsterling, 137 S. W. 1154, 1158.

Board of supervisors

The members of a board of supervisors are "county officers" within Code Supp. §

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1373, which authorizes such officers to appeal from a tax assessment made by the board of review. In re Assessment of Farmers' Loan & Trust Co. of Sioux City (Iowa) 136 N. W. 543, 544.

County commissioner

County commissioners are "county officers" in the ordinary and legal sense of the term. State ex rel. Long v. Rexford, 109 N. W. 216, 217, 21 S. D. 86.

A commissioner is a "county officer" within the meaning of Const. art. 11, § 6, providing that the board of county commissioners in each county shall fill all vacancies in county offices, and Ballinger's Ann. Codes & St. § 327, providing that when a vacancy occurs in the board of county commissioners the remaining commissioners and the judge of the superior court of the county shall appoint some qualified elector to fill the vacancy, is therefore unconstitutional and void. State ex rel. Pendergast v. Fulton, 79 Pac. 779, 780, 37 Wash. 271.

County tax commissioner

Under Const. 1901, § 175, which provides that certain officers mentioned, and all other county officers, may be removed from office by impeachment for any cause specified in section 173, provided the rights of trial by jury and of appeal shall be preserved, a county tax commissioner is a "county officer," but the section is not limited to county officers created or even mentioned in the Constitution, nor is it limited to those county officers who are elected by vote of the people or by the Legislature, but extends as well to those who are appointed; the provision is intended to protect county officers from removal except as authorized, during the term for which they were appointed or elected, and was not intended to apply to those officers, though county officers, the terms of whose incumbency is fixed or determined by the appointing power. Touart v. State ex rel. Callaghan, 56 South. 211, 214, 173 Ala. 453 (citing 2 Words and Phrases, pp. 1662–1666).

Director of poor

"The Directors of the Poor and of the House of Employment of the County of Lancaster," created by Act Feb. 27, 1798 (3 Smith's Laws, p. 306), are not county officers, and their compensation, as fixed by Act April 14, 1864 (P. L. 422), is not affected or changed by Act July 2, 1895 (P. L. 424), which fixes the salaries of county directors of the poor in counties containing over 150,000 inhabitants. Nissley v. Lancaster County, 27 Pa. Super. Ct. 405, 409.

Jail physician

Priv. Acts 1911, c. 237, § 8, authorizing the county commission thereby created to appoint a jail physician, superintendent of the county morgue, etc., does not violate Const. art. 11, § 17, providing that no county office created by the Legislature shall be filled otherwise than by the people or the county court, since the appointees specified in that section are not county officers but mere employés. Prescott v. Duncan (Tenn.) 148 S. W. 229, 238.

Justice of the peace

Under Rev. St. 1899, § 202, justices of the peace hold their offices by election in their several precincts, except when appointed to fill a vacancy, and are required to be elected at the general election held on the Tuesday next following the first Monday in November of even years. Const. art. 6, subd. "Elections," § 5, provides that all state and county officers elected at a general election shall enter upon their duties on the first Monday in January next following their election, or as soon thereafter as may be possible. Rev. St. 1899, § 4323, provides that the jurisdiction of justices of the peace extends throughout the county. Section 1246 provides that the salaries prescribed for county and precinct officers shall be paid by the county, and under the express provisions of section 4319 the fees collected by justices of the peace receiving salaries are required to be paid into the county treasury. Section 4317 prescribes for justices of the peace the oath required of other county officers. Section 1224 provides that all county officers shall qualify and enter upon the discharge of their duties on the first Monday in January immediately following the general election at which they were elected. Held, that justices of the peace are county officers within section 1224, and their terms of office when elected at a general election commence on the first Monday of the following January. Ballantyne v. Bower, 99 Pac. 869, 870, 17 Wyo. 356, 17 Ann. Cas. 82.

A justice of the peace is not a "county officer" within Enabling Act (Act June 20, 1910, c. 310), § 5, providing that the county and territorial officers shall hold over until the admission of the territory, for though Comp. Laws 1897, §§ 3230, 3232, 3243, 3337, recognize the jurisdiction of the justices of the peace to be coextensive with the limits of the county in which they have been elected, section 3224 provides that the justice shall be elected in odd-numbered years, while section 1698 provides for the election of county officers in even-numbered years. Territory v. Witt (N. M.) 117 Pac. 861, 862.

Const. art. 14, §§ 6–12, is entitled "county officers," and includes county commissioners, county clerk, sheriff, coroner, treasurer, superintendent of schools, surveyor, assessor, and county attorney, and justices of the peace. Section 11 provides for the election of two justices of the peace and two constables in each precinct in each county who shall hold office for two years. Held, that justices of the peace were county officers within article 20, relating to the city and county of

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Denver, section 3 of which provides that certain county officers, including justices of the peace within such city and county, should become respectively officers of such city and county until certain things should thereafter transpire. Thrush v. People, 127 Pac. 937, 938, 53 Colo. 544.

Levee district director

A "county officer" is one whose duties are limited by law to a single county; one by whom the county performs its usual functions. A director of a levee district embracing all the parts of several counties is not a county officer within the statute requiring prosecuting attorneys to institute proceedings against persons usurping a county office. State ex rel. Going v. Higginbotham, 106 S. W. 484, 485, 84 Ark. 537 (citing Massenburg v. Commissioners of Bibb County, 23 S. E. 998, 96 Ga. 614; Sheboygan County v. Parker, 3 Wall. [70 U. S.] 93, 18 L. Ed. 33).

Public administrator

A public administrator is a "county officer," and, in acting under a statute requiring him to take charge of the estates upon which letters of administration have been issued to him by the court, is a public officer acting by virtue of his office and not merely by virtue of the letters issued to him by the court. Los Angeles County v. Kellogg, 80 Pac. 861, 862, 146 Cal. 590.

Road supervisor

A road supervisor appointed by the county commissioners is not a "county officer" within a constitutional provision requiring the Legislature to provide for the election of county officers by general and uniform laws. State ex rel. Griffith v. Newland, 79 Pac. 983, 984, 37 Wash. 428.

State attorney

"The state's attorney is a 'county officer,' and his status as such is fixed by the Constitution which creates his office. He is elected for and within a county to perform his duties therein and is not distinguished in any manner from the clerks of the courts, sheriff, coroner, and other officers connected with the administration of justice within the county." Cook County v. Healy, 78 N. E. 623, 625, 222 Ill. 310.

State officer

See State Officer.

Supervisor of assessment

Const. art. 6, § 4, declares that "sheriffs, coroners, registers of deeds, district attorneys, and all other county officers, except judicial officers, shall be chosen by the electors of the respective counties once in every two years." Article 13, § 9, declares that all "county officers" whose election or appointment is not provided for by the Constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, "as the Legislature shall direct." Laws 1901, p. 649, c. 445, creates the office of county supervisor of assessment, in substance making it the duty of the supervisor to see that the various assessors perform their duties, and the supervisor is to be elected by the board of supervisors for a term of three years. Revision 1849, c. 10, was devoted to counties and county officers, including members of the board of supervisors, district attorney, etc., which system was continued in Revision 1858, c. 13, and again in Revision 1878, c. 37; all those dealt with being elected by the people. In 1882 article 6, § 4, was so amended as to add the words "all other county officers." Held, that in view of article 13 and the condition of the statutes at the time of the amendment of article 6, § 4, and in view of a course of legislation, St. 1898, § 1077 (Laws 1899, p. 554, c. 312, § 2), and St. 1898, § 1520 (Laws 1905, p. 157, c. 94), providing for the appointment of officers whose duties pertain to counties, a county supervisor of assessment is not a county officer, within the meaning of article 6, § 4, and hence such section is not violated by Laws 1901, p. 649, c. 445. State ex rel. Williams v. Samuelson, 111 N. W. 712, 713, 131 Wis. 499.

COUNTY PHYSICIAN

Neither the person appointed to care for the hospital and poorhouse of a county nor a graduate in medicine appointed to attend to the indigent sick is a "county physician," and the term has no proper application to the superintendent of a hospital and poorhouse. An indictment charging defendant with embezzlement of money coming into his possession by virtue of his trust as county physician is bad, since there is no such public office. People v. Shearer, 76 Pac. 813, 814, 143 Cal. 66.

COUNTY PRINTING

A newspaper publication of a list of nominations for state and county officers as required by statute is "county printing," for the work must be paid by the county. Board of Com'rs of Montezuma County v. Frederick, 115 Pac. 514, 516, 50 Colo. 464.

COUNTY PROPERTY

The term "county property," as used in Act March 10, 1903 (Laws 1903, p. 204), annexing a portion of Shoshone county to Nez Perce county, includes property acquired by tax deeds and the value of tax certificates owned by the county, but does not include delinquent taxes; and the value of such property, in determining the rights of the counties, must be ascertained as directed by provisions of the act. Shoshone County v. Thompson, 81 Pac. 73, 76, 11 Idaho, 130.

COUNTY PURPOSE

The words "for county purposes" in Const. art. 10, § 11, limiting taxation for county purposes to 40 cents on the $100,

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mean all subdivisions of the county for the use of which taxes may be imposed. State ex rel. Conrad v. Piper, 114 S. W. 1, 2, 214 Mo. 439.

As used in Const. N. C. art. 5, § 6, providing that the taxes levied by the commissioners of the several counties for "county purposes" shall be levied in like manner with the state taxes, and shall never exceed the total of the state taxes, except for a special purpose, and with the approval of the Legislature should be construed to mean ordinary current expenses of the county government, otherwise no significance is given to the words special purposes, the distinction being between ordinary, usual county purposes, which cannot exceed double the state tax, and special county purposes, which may, with the special approval of the General Assembly do so. Southern R. Co. v. Board of Com'rs of Mecklenburg County, 61 S. E. 690, 697, 148 N. C. 220.

Drainage

Drainage Law (Acts 1909, c. 185) § 39, providing that the preliminary expenses for the organization of a levee or drainage district may be paid out of the general county funds, to be refunded to the county out of assessments on the lands benefited, and, if not repaid, then to be adjudged against and collected out of the bonds of the petitioners for the district, was not a lending of the county's credit, in violation of Const. art. 2, § 29, but, even if construed as a lending of the county's credit, was not for that reason invalid; the organization of such district being a "county purpose," within the rule that a county's credit may be loaned for county purposes by the action of the quarterly court, without an election. State ex rel. Bigham v. Powers, 137 S. W. 1110, 1114, 124 Tenn. 553.

Roads

Under Rem. & Bal. Code, § 5087, which provides that three-fifths of the voters of a county may authorize the issuance of bonds to procure money for "strictly county purposes," counties may issue bonds when authorized by the voters, for the construction and improvement of roads, but not for their general repair; it not being a strictly county purpose, within the meaning of the statute. Shea v. Skagit County, 122 Pac. 1061, 1062, 68 Wash. 233.

Ship canal

Laws 1889-90, p. 37, § 2, provides that counties may contract indebtedness for "strictly county purposes" on a vote of the people, and section 3 provides that on the consent of three-fifths of the voters money may be raised and bonds issued therefor. Held, that such act did not give the county power to issue bonds for the construction of a ship canal for the benefit of the federal government. State ex rel. Potter v. King County, 88 Pac. 935, 937, 45 Wash. 519.

COUNTY ROAD

See Legal County Road.

If a highway has been traveled, used, improved, and worked by the public as a county road for a period of 10 years or more, it is a legal county road. Ridings v. Marion County, 91 Pac. 22, 23, 50 Or. 30.

Code, § 422, subd. 16, empowers the board of supervisors to discontinue any state or territorial highway, and subdivision 17 empowers them to establish or discontinue any county highway through or within the county. Section 751 empowers cities and towns to establish or vacate streets and alleys. Section 48, subd. 5, provides that the words "highway" and "road" include public bridges, and may be held equivalent to the words "county road," "county way," "common road," and "state road." Section 1507 provides that all public streets of villages are a part of the road. Held that, where a plat was made of land dividing it into lots, streets, and alleys prior to the incorporation of a town embracing the land platted, the streets and alleys became county roads subject to the jurisdiction of the board of supervisors, and though after the incorporation of the town the control may have passed to the city council, yet the incorporation of the town having been vacated, the control of the streets and alleys reverted to the board of supervisors. Chrisman v. Brandes, 112 N. W. 833, 835, 137 Iowa, 433.

The terms "street," "avenue," "road," "public road," and "county road" are used loosely and indiscriminately in legislation and judicial decisions relating to public highways, and little reliance can be placed on the particular term used to describe any given way. While the term "street" or "avenue" commonly applies to a public highway in a village, town, or city, and the term "road" to suburban highways, there may be roads in a city or town and street and avenues in the country. The words "country road," as used in the statute providing that any county road remaining unopened for public use for the space of five years after the order granted for opening it shall be vacated and the authority for building it barred, means those roads and highways under the control and supervision of the board of county commissioners of the respective counties, and does not include streets and alleys in incorporated cities and towns. Murphy v. King County, 88 Pac. 1115, 1116, 45 Wash. 587.

"The terms 'state road' and 'county road' seem to have no precise technical meaning, and it might be permissible to suppose that * * * they were used merely to distinguish highways created directly by the Legislature and those created by the county authorities under general laws. * * * But a better supported view is that any public road lying wholly within one county is a

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'county road,' while a 'state road' extends through or into several counties. 'What is known in some sections as a state road is a highway laid out by the direct authority of the state, generally between distant places and through different counties, to supply a want felt by a large district of country, which, because of the diversity of interests, the local authorities are not willing to supply.' * * * 'A "state road" is a road running into two or more counties, and is distinguished by this from a "county road," which lies wholly within one county. The first was formerly established by acts of special legislation; the latter by county commissioners, under general laws.'" Where an act of the Legislature declares all section lines in a certain county to be public highways, and provides that they shall be opened by the board of county commissioners, such section lines thereby become county roads within the meaning of that term as used in an act providing that any part of a state or county road not opened for travel within a stated time shall be vacated. Board of Com'rs of Cowley County v. Johnson, 90 Pac. 805, 807, 76 Kan. 65 (quoting and adopting definition in State ex rel. Stebbins v. Treasurer of Wood County, 17 Ohio, 184).

COUNTY SCRIPT

Acts 1901, p. 374, c. 242, authorizing the commissioners of a county to issue coupon bonds, or "county script," not in excess of $5,000, to improve and enlarge the courthouse, limits the cost of the improvement to $5,000, and authorizes the issuance of coupon bonds or county script to that amount, and the commissioners may not issue bonds to the amount of $5,000 and notes for an additional sum to pay for the improvement; the phrase "county script" meaning notes or evidences of debt other than coupon bonds. Burgin v. Smith, 66 S. E. 607, 611, 151 N. C. 561.

COUNTY SEAL

"There is no law authorizing seals for clerks of counties. The county should have a seal for the authentication of its official acts, and the board of county commissioners is at liberty to adopt one bearing any legend or device it may choose. Under section 138 of the tax law the matter of affixing the seal (to tax deeds) is a part of the execution of the deed," and where a tax deed states that it is executed pursuant to statutory authority, and that the official seal of the county is affixed, and the acknowledgment shows that the act of the clerk in executing the instrument was an official act performed by virtue of his office, but the seal bears the words "Seal of county clerk of Decatur county, Kansas," the presence of the words "county clerk of," are not sufficient to overthrow all other indications of due execution, and the deed is valid on its face, for no evidence was introduced to show that the seal was not in fact the seal of the county, and hence the deed was not void for want of a seal. Clarke v. Tilden, 84 Pac. 139, 140, 72 Kan. 574.

COUNTY SEAT

The name "county seat" indicates the seat of government of a county, the town in which the county and other courts are held, and where the county officers discharge their duties. Graham v. Nix, 144 S. W. 214, 216.

Under Sayles' Ann. Civ. St. 1897, art. 811, providing that no county seat situated within five miles of the geographical center of the county shall be removed, except by a two-thirds vote of the electors of the county voting thereon, article 819, providing that the county commissioners' court of each county, as soon as practicable after the establishment of the county seat, or its removal from one place to another, shall provide a courthouse and jail and offices for the county officers at the county seat, and article 1140, providing that clerks of the county courts shall have their offices at the county seat, and, when they do not reside there, shall have a deputy residing there, the "county seat" does not consist merely of the courthouse, jail, and other public buildings, but consists of the town plot of the town designated as the county seat at the time it is so designated. Ralls v. Parish (Tex.) 149 S. W. 810, 811.

The term "county seat," as used in a constitutional provision prohibiting the creation of a new county, so that its boundaries will approach nearer than 12 miles to the county seat of the county from which such new county may be taken, has reference to the legal county seat, and not a mere de facto one, resorted to as such by common consent and usage. Presidio County v. Jeff Davis County (Tex.) 77 S. W. 278, 279.

A "county seat" is the building where a court of record is held, and is designated in the manner provided by Code Civ. Proc. § 31, etc., and is not required to be located in a building or upon a site owned by the county. Smith v. Roberts, 113 N. Y. Supp. 672, 673, 60 Misc. Rep. 427.

The term "county seat," in Const. § 187, providing that no railroad shall pass within three miles of a county seat without passing through it and establishing a depot therein, means the municipality at which the county site is located according to its boundaries when the road is constructed. State v. Mobile, J. & K. C. R. Co., 38 South. 732, 735, 86 Miss. 172, 122 Am. St. Rep. 277.

An act providing for the holding of certain terms of the circuit court at a place other than the county seat was not contrary to the provision of the Constitution forbidding removal of a county seat without an election, as the terms "county seat," "county site," and "courthouse," in Const. §§ 41, 104, do not embrace the seat of justice. Merchants' Nat.

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Bank of La Fayette v. McNaron, 55 South. 242, 172 Ala. 469.

Under Gen. St. 1906, § 1805, requiring the regular terms of circuit courts to be held at the county seats of the respective counties, a county seat is the chief town of a county, where the county buildings and courts are located and county business transacted, and the particular building in which the court is held is not a factor as to the validity of the court proceedings, so long as the building is located at the county seat. Beville v. State, 55 South. 854, 855, 61 Fla. 8.

The words "county seat," in Act 1906, c. 71, providing for holding sessions of the circuit court in any county having a town not larger than the fourth class, but larger than the county seat, and not less than 12 miles by the most convenient route usually traveled from the county seat, are used to designate the town in which the courthouse is situated, and not the public buildings in the town, though the words are often used to designate the courthouse, jail, and other public buildings belonging to the county, and are used in this sense in the Constitution providing for the removal of the county seat, and are also so used in some statutes. City of Middlesborough v. Pineville (Ky.) 98 S. W. 298, 299.

Acts 1908, p. 594, c. 336, approved March 14th, which in its title provides for submitting the question of the removal of the "courthouse" of any county, is not unconstitutional because providing for the removal of the "courthouse," and not the "county seat," as those terms in this state are synonymous. Conek v. Skeen, 63 S. E. 11, 13, 109 Va. 6 (citing 2 Words and Phrases, p. 1683).

COUNTY SITE

See County Seat.

A "county site" is the place where the county business is transacted, the courthouse located, and the superior court held. De Kalb County v. City of Atlanta, 65 S. E. 72, 74, 132 Ga. 727.

COUNTY TAX

"County taxes" include all amounts levied by taxation, and which are to be used in the counties where they are collected and where they are paid to the county treasurer, and taxes levied for school purposes under Acts 1903, c. 247, §§ 2, 3, and collected by the sheriffs of each county and paid to the treasurers thereof, are "county taxes" for the collection of which the sheriff is entitled to a commission under Acts 1903, c. 251, § 92. Board of Education of Iredell County v. Board of Com'rs of Iredell County, 49 S. E. 47, 48, 137 N. C. 63.

COUNTY TREASURER

The provision of Laws 1909, p. 17, c. 12, providing that the terms "county treasurer" and "county treasury," as used in all provisions of law relating to school funds, shall be construed to mean the county depository, is not subject to the objection that it is not within the title of the act entitled, "An act putting into effect the constitutional amendment adopted by the people at the last general election, relating to public schools, by amending sections 50, 57, 58, 60, 61, 63, 65, 66, 76, 77, 78, 80, 81, and 154, and adding 154a, of chapter 124 of the Acts of the Regular Session of the Twenty-Ninth Legislature relating to school districts and school funds." Charlton v. Cousins, 124 S. W. 422, 103 Tex. 116.

COUNTY TREASURY

See County Treasurer.

COUNTY WARRANT

A "county warrant," under the statute of Washington, is a promise by the county to pay it when money applicable thereto comes into the treasury, its maturity by analogy to a note being the time when the county treasurer gives notice of his readiness to pay it and stop the running of interest. Pauly Jail Bldg. & Mfg. Co. v. Jefferson County, 160 Fed. 866, 870, 88 C. C. A. 48.

COUNTY WAYS

Code, § 422, subd. 16, empowers the board of supervisors to discontinue any state or territorial highway, and subdivision 17 empowers them to establish or discontinue any county highway through or within the county. Section 751 empowers cities and towns to establish or vacate streets and alleys. Section 48, subd. 5, provides that the words "highway" and "road" include public bridges, and may be held equivalent to the words "county road," "county way," "common road," and "state road." Section 1507 provides that all public streets of villages are a part of the road. Held that, where a plat was made of land dividing it into lots, streets, and alleys prior to the incorporation of a town embracing the land platted, the streets and alleys became county roads subject to the jurisdiction of the board of supervisors, and though after the incorporation of the town the control may have passed to the city council yet the incorporation of the town having been vacated, the control of the streets and alleys reverted to the board of supervisors. Chrisman v. Brandes, 112 N. W. 833, 835, 137 Iowa, 433.

COUNTY WHERE CRIME WAS COMMITTED

"The 'county where a crime is committed,' within the meaning of a constitutional provision fixing the place of trial, means that political subdivision of the state, styled 'county,' which embraces the place where the crime was committed, and a General Assembly can no more deprive a defendant of this right by the creation of a new county than it can by the change of a county line. The

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fact that the case is pending against him at the time the new county is created does not deprive him of the right to demand that he be tried in the county in which the crime was committed, although the county as such was not in existence at the time the offense was perpetrated. What the Constitution guarantees is a trial in the county where the offense was committed, not the beginning of a prosecution in that county." Pope v. State, 53 S. E. 384, 387, 124 Ga. 801, 110 Am. St. Rep. 197, 4 Ann. Cas. 551.

Act 1880 (17 St. at Large, p. 336; Cr. Code 1902, § 119) provides that if a person is wounded in one county and die in another the person guilty may be indicted and prosecuted in either county. Const. 1895, art. 6, § 2, provides that, unless a change of venue be had under the provisions thereof, the defendant shall be tried in the county where the offense was committed. Held, that the constitutional provision must be construed in the light of the act of 1880, and the provision entitling a defendant to trial in the "county where the offense was committed" would be construed to mean where the offense was deemed committed under existing laws; and hence, where a person was wounded in C. county, but died in S. county, defendant was properly indicted and convicted for the crime in the latter county. State v. McCoomer, 60 S. E. 237, 239, 79 S. C. 63.

COUNTY WORK

Acts 1899, p. 171, c. 110, § 4, provides that no bid for any county work shall be received unless the bids are accompanied by an affidavit of noncollusion, the statute being a substantial re-enactment of Sp. Acts 1877, p. 29, c. 9 (Rev. St. 1881, § 4246). Held that, the Supreme Court having held, prior to the enactment of the act of 1899, that a board of county commissioners in constructing a free gravel road were engaged in a "county work" within the meaning of the act of 1877, such construction applies to the act of 1899. State v. Dorsey, 78 N. E. 843, 844, 167 Ind. 199.

COUPLE OF MINUTES

The expression, a "couple of minutes," used by a plaintiff in an action against a carrier in her testimony that, after getting on the car, she waited a "couple of minutes" before attempting to reach her seat, is not necessarily a statement that she desisted for 120 seconds in the act of seeking a seat, but it should be construed to mean a brief space of time, as a second or a few seconds, and the Century Dictionary is authority for the statement that a minute is loosely speaking but a "short space of time." McGlynn v. Nassau Electric R. Co., 113 N. Y. Supp. 119, 120, 128 App. Div. 866.

COUPLED WITH ABILITY TO COMMIT

Under Pen. Code 1895, art. 592, providing that the term "coupled with an ability to commit" a battery means that the person making the assault must be in such a position that, if not prevented, he may inflict a battery, and that he must be within such distance of the person assailed as to make it within his power to commit battery, etc., to constitute an assault by alarming a person, the thing done must first be unlawful, and must be done in an angry or threatening manner, and with intent to alarm; but there may be an intent to alarm which is not unlawful, and one may compel trespassers on his premises to leave them, and the means used to accomplish that purpose, if not intended to bring about injury, cannot become an assault. Trimble v. State, 125 S. W. 40, 42, 57 Tex. Cr. R. 439.

COUPLER

See Automatic Couplers; Buckeye Automatic Coupler; Janney Coupler.

COUPLING

One connecting and disconnecting the air hose between cars is "coupling or uncoupling" cars within safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531. United States v. Boston & M. R. Co., 168 Fed. 148, 152.

COUPLING AUTOMATICALLY

Automatic couplers which will both couple and can be uncoupled without the necessity of men going between the cars are what are meant by the provision of Act March 2, 1893, c. 196, § 2, 27 Stat. 531, prohibiting common carriers from using any car in moving interstate commerce not equipped with "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Johnson v. Southern Pac. Co., 25 Sup. Ct. 158–162, 196 U. S. 1, 49 L. Ed. 363.

COURSE

See Lawful Course; Of Course; Water Course.

"A vessel which voluntarily becomes motionless cannot properly be said to keep her course. The word 'course,' both from its etymology and the primary meaning given to it by lexicographers, signifies a running or moving forward—a continuous progression or advance." The Britannia, 14 Sup. Ct. 795, 801, 153 U. S. 130, 38 L. Ed. 660.

COURSE OF BUSINESS

See Due Course of Business; Ordinary Course of Business; Regular Course of Business; Usual Course of Business.

COURSE OF EMPLOYMENT

The expression, "in the course of his employment," as affecting the liability of a master for the negligence of his servants, means

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"while engaged in the service of the master," and is not synonymous with "during the period covered by his employment." Slater v. Advance Thesher Co., 107 N. W. 133, 136, 97 Minn. 305, 5 L. R. A. (N. S.) 598, 114 Am. St. Rep. 711; Riley v. Roach, 134 N. W. 14, 19, 168 Mich. 294, 37 L. R. A. (N. S.) 834.

A master is responsible for the tort of his servant, done in the scope of his authority with the view to the furtherance of the master's business, and not for a purpose personal to himself, though done willfully or negligently and in excess of his authority, or contrary to express instructions, or where the act of a servant is within the course of his employment. Penas v. Chicago, M. & St. P. Ry. Co., 127 N. W. 926, 929, 112 Minn. 203, 30 L. R. A. (N. S.) 627, 140 Am. St. Rep. 470.

The term "scope of employment," as used with reference to an employer's liability for his employé's wrongful acts, is sometimes called "course of employment." Stewart v. Cary Lumber Co., 59 S. E. 545, 562, 146 N. C. 47.

The terms "course of employment" and "scope of authority," as applied to a servant's acts, are not susceptible of accurate definition, since what acts are within the scope of the servant's employment so as to render the master liable therefor must be gathered from the surrounding circumstances, the master's liability depending upon his consent, express or implied, to the servant's acts. Robards v. P. Bannon Sewer Pipe Co., 113 S. W. 429, 431, 130 Ky. 380, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394.

Within the rule that the master is liable for the torts of his servant, committed in the course of his servant's employment, the language "in the course of his servant's employment" is not synonymous with "whilst the servant was employed by him," but refers to any act of the servant, however ill judged, done in connection with, or in furtherance of, the purposes of his employment. Gann v. Great Southern Lumber Co., 59 South. 830, 832, 131 La. 400.

COURSE OF LAW

See Due Course of Law; Ordinary Course of Law.

COURT

See Inner Court.

In Tenement House Act, Laws 1901, c. 334, § 2, providing that a court is an open, unoccupied space, other than a yard, on the same lot with a tenement house, the word "court" refers to open, unoccupied spaces which are wholly or partially inclosed at the end, rather than to spaces which are open to free access from both the street and yard of the premises, and which, if regarded as courts within the meaning of the law, are to be considered as in reality two or double courts. Gutting v. Brennan, 89 N. Y. Supp. 574, 575, 97 App. Div. 23.

Tenement House Act, Laws 1901, p. 889, c. 334, § 2, provides that "a court is an open, unoccupied space, other than a yard, on the same lot with a tenement house"; that "a court not extending to the street or yard is an inner court. A court extending to the street or yard is an outer court. If it extends to the street it is a street court. If it extends to the yard it is a yard court." No mention, however, is made in the definition either of "yard" or "court" of a court extending from the street to the yard. Section 58, as amended by chapter 179, p. 408, Laws 1903, provides that, when one side of the outer court is situated on the lot line, the width of the court, measured from the lot line to the opposite wall of the building for tenement houses 60 feet in height, shall not be less than 6 feet in any part, and for every 12 feet of increase, or fraction thereof, in height of the building, such width shall be increased 6 inches throughout the entire height of the court, and that wherever the outer court exceeds 65 feet in length, "and does not extend from the street to the yard," the entire court shall be increased, etc., except that in tenement houses not exceeding four stories and cellar, and not occupied by more than eight families in all, in which each apartment extends through from the street to the yard, the width of an outer court situated on the lot line shall not be less than 4 feet in any part, "provided that the length of such outer court does not exceed thirty-six feet." Relator contemplated erecting four three-story and cellar tenement houses, each to be occupied by three families, one on each floor; the buildings to be each 55 feet in depth, with an open space or passageway 4 feet wide, extending the entire depth of the building. Held, that courts extending from the street to the yard were excepted from such section, and hence such way extending from street to yard, whether regarded as a mere passage, and hence not within the section, or as two courts, each an outer court—one leading to the street, and the other to the yard—was not within the prohibition of the section. Gutting v. Brennan, 89 N. Y. Supp. 574, 97 App. Div. 23.

Under Tenement House Act N. Y. (Laws 1901, p. 889, c. 334) § 2, subd. 3, defining a "court" as an open unoccupied space other than a yard on the same lot with a tenement house, the spaces on either side of each house upon which the windows open are within the designation. People ex rel. Cohen v. Butler, 109 N. Y. Supp. 900, 905, 125 App. Div. 384.

COURT (Of Justice)

See Additional Courts; Appellate Court; Breast of the Court; By Order of Court; By the Court; By the

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Written Direction of the Court; Circuit Court; City Court; Civil Court; Clerk of Court; Commissioners' Court; Competent Court; County Court; Criminal Courts; Day in Court; District Court; Entertained by the Court; Examining Court; Fiscal Court; Foreign Court; Holding Court; Inferior Court of Record; Inferior Local Courts; Into Court; Judgment of a Court; Judicial Court; Justice Court; Legally Constituted Court; May Hold Court; Municipal Courts; Open Court; Opening of the Court; Opinion (of Court); Order of Court; Out of Court; Paid Into Court; Payment Into Court; Pertaining to Probate Courts; Police Court; Present in Court; Probate Court; Proper Court; Satisfaction of the Court; State Court; Superior Court; Term of Court; Trial Court.

Any court, see Any.
Expenses of court, see Expenses.
Jurisdiction of court, see Jurisdiction (Of Courts).
Other court, see Other.
Session of court, see Session.
Such court, see Such.
Vacation of court, see Vacation.

"Courts" in a constitutional sense are the tribunals established to administer justice. Dixon v. People, 127 Pac. 930, 932, 53 Colo. 527.

A "court" is a "tribunal established for the public administration of justice, composed of one or more judges who sit for that purpose at fixed times and places, attended by proper officers." Butts v. Armor, 30 Atl. 357, 360, 164 Pa. 73, 26 L. R. A. 213 (quoting Burr. Law Dict.; Mason v. Woerner, 18 Mo. 570).

"A 'court' is not a person, but an organized body, meeting at fixed times and places for the hearing and decision of cases, having attorneys to present and manage its business, clerks to record and attest its acts, and ministerial officers to execute its commands." In re Lance, 106 N. Y. Supp. 211, 216, 55 Misc. Rep. 13 (citing 11 Cyc. pp. 652-654).

"A 'court' may be defined as the body in the government organized for the public administration of justice, at the time and place prescribed by law." Marsden v. Harlocker, 85 Pac. 328, 329, 48 Or. 90, 120 Am. St. Rep. 786.

A "court" is a judicial assembly. Circuit courts, while they are courts of general jurisdiction, are courts not for an entire circuit, but for each county in which a circuit court sits. The judge, however, is for the circuit. The sitting of the circuit court in one county in the circuit does not interfere with the circuit court sitting in another county. State v. Pope, 85 S. W. 633, 634, 110 Mo. App. 520 (citing Bouv. Law Dict.).

"The word 'court' originally meant only a yard, palace, or garden, and according to Cowell it meant 'the house where the king remained with his retinue; also, the place where justice was administered. Anderson's Law Dictionary. So, in early history, the court meant the place where the king was domiciled, because the king was actually the fountain and dispenser of justice. The earlier courts were merely assemblages in the courtyard of the baron or of the king himself by those whose duty it was to appear at stated times or upon summons. This idea of the place predominating as the designation of a court caused Blackstone to adopt Coke's definition that 'a court is a place where justice is judicially administered.' 3 Blackstone's Commentaries, 24. Indeed, the Supreme Court of Alabama, in Ex parte Branch & Co., 63 Ala. 384, adopted the definition that a court is 'a place where justice is administered.' This definition has been held to be too narrow, and the definition given by a majority of judicial decisions is that: 'A court is a tribunal duly constituted, and present at the time and place fixed by law for judicial investigation and determination of controversies.'" In re Steele, 156 Fed. 853, 856 (citing 2 Cent. Dict. p. 1312).

"A 'court' has been defined to be an incorporeal being, and as that body in the government to which the public administration of justice is delegated." It is in this sense that the word "courts" in the Constitution must be understood, and consistently with the general plan of our government and the judicial history of our country the courts ordained and established by Congress, pursuant to the Constitution, should be organized tribunals, their existence should be perpetual, and they should have the administrative and judicial powers pertaining to courts of judicature, and adequate to the efficient administration of justice within the scope and range of national responsibility. A law which only makes provision for terms of court to be held at specified times and places is inadequate to constitute a court having the attributes of continuity and permanence of existence necessary to be possessed by every court designed to perform the judicial functions of the government within a district. The creation of a judicial district with defined boundaries does not of itself establish any description of tribunal, and a fortiori does not establish a Circuit Court of the United States. Act March 2, 1905, c. 1305, pt. 1, 33 Stat. 824, dividing Washington into two judicial districts, interpreted consistently with the practice of Congress and the judicial history of the country and the general laws in force relating to the federal judiciary and the jurisdiction and powers of the federal courts and judges, lacks none of the essentials of a sufficient organic law, and the Circuit and District Courts of the Western district of Washington as thereby created are the same courts as those previously ex-

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isting in the district of Washington, having the same judges and officers and the same powers and jurisdiction within that part of the original district remaining after the Eastern district had been carved therefrom, and being still within the boundaries are constituent parts of the Ninth judicial circuit. While the act does not "ordain and establish" courts in said Western district as required by Const. art. 3, § 1, in express words, nor define their jurisdiction and powers further than to fix their terms, nor assign the district to either of the nine judicial circuits, nor provide for the appointment of judges and officers therein, otherwise than by providing that the district judge and officers of the district of Washington then in office shall be the district judge and officers of the Western district, the intention of Congress in respect to all such matters is clear from the act, and the provisions necessary to carry out such intention, which are not expressed, are to be implied. Geiger v. Tacoma Ry. & Power Co., 141 Fed. 169, 170.

The word "court" in Chinese Exclusion Act 1892, § 6, providing that a Chinese laborer without a certificate of residence shall be arrested and taken before a United States judge and deported, unless he shows to the satisfaction of the court that he was a resident at the passage of the act, and that the cost of arrest and trial shall be in the discretion of the court, etc., refers to the tribunal authorized to deal with the subject, whether composed of a justice, a judge, or commissioner. Chin Bak Kan v. United States, 22 Sup. Ct. 891, 894, 186 U. S. 193, 46 L. Ed. 1121.

A "court" is defined to be a place wherein justice is judicially administered, and in every court there must be three constituent parts—the actor, reus, and judex: The actor, or plaintiff, who complains of injury done; the reus, or defendant, who is called on to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact, to determine the law arising upon the fact, and, if an injury appears to have been done, to ascertain and by its officers to apply the remedy. Accousi v. G. A. Stowers Furniture Co. (Tex.) 83 S. W. 1104, 1105 (citing Chase's Blackstone, 626, 627).

Auditor

An "auditor" appointed by a court is not the "court," but an officer of the court. An auditor is improperly appointed in a proceeding under a statute requiring that "all hearings shall be in open court." McArthur Bros. Co. v. Commonwealth, 83 N. E. 334, 335, 197 Mass. 137.

Board of arbitrators

The statutory arbitration provided for and regulated by the Code of Civil Procedure is a "judicial proceeding," and hence, in view of section 6, forbidding a "court" to be open or transact any business on Sunday, to proceed with the hearing of arbitration on Sunday, in the face of objections and protest of parties, is illegal and constituted misconduct violating the award. In re Picker, 114 N. Y. Supp. 289, 292, 130 App. Div. 88.

Board of awards

102 Ohio Laws, p. 524, creating a state insurance fund for the benefit of injured and the dependents of killed employés, and providing for the creation of a state liability board of awards to establish the fund from premiums paid by employers and employés, is not invalid as a delegation of judicial power to the board of awards. State ex rel. Yaple v. Creamer, 97 N. E. 602, 607, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694.

Board of immigration inspectors

Boards of immigration inspectors are not "courts of justice" within the treaty between Italy and the United States, giving citizens of either party free access to the courts of justice of the other with the right to employ counsel in all trials at law, and, on the examination of an alien Italian immigrant by the board of inspectors relative to his qualifications for admission, he is not entitled to be represented by counsel. United States v. Williams, 190 Fed. 897, 900.

Board of police commissioners

Act Aug. 26, 1879 (Acts 1878–79, p. 311), creating the board of police commissioners of Augusta, gave the board power to elect, discharge, suspend, or fine policemen. Act Sept. 14, 1881 (Acts 1880–81, p. 369), provides that when any person resident of the city shall be required to attend as a witness at the trial of any officer or private of the police force before such board, the secretary of the board upon application must issue a summons directed to such person, and if such person fail to appear he may be attached by the commissioners for contempt. Act Dec. 6, 1902 (Acts 1902, p. 342), gives the president of such board power to administer an oath or affirmation to any witness appearing at the trial of a policeman, and makes violation of such oath perjury. Held, that the board, when sitting for trial of charges preferred against a police officer, is a "court," within Civ. Code 1910, § 4644, giving every court power to preserve order in its immediate presence, and as near thereto as necessary to prevent interruption of its proceedings, and to compel obedience to its judgments, under which any court has power to punish for contempt committed in its immediate presence. Plunkett v. Hamilton, 70 S. E. 781, 782, 136 Ga. 72, Ann. Cas. 1912B, 1259.

Clerk of Court

Revisal 1905, § 352, provides that when power is conferred or duties imposed upon the superior court the words "superior court" or "court" mean the clerk of the superior court, unless otherwise stated, or reference is made to a regular term of the court. Section 2842 provides that a surety on paying

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money, upon producing to the superior court a receipt showing that he has satisfied an execution and expended money as surety, the court shall award execution against the estate of the principal. Held, that the clerk of the superior court has authority to enter a judgment for the recovery of money paid by the surety for the principal. Bank of North Wilkesboro v. Wilkesboro Hotel Co., 61 S. E. 570, 573, 147 N. C. 594.

Under section 25, Act No. 49, p. 77, of 1906, a candidate who feels aggrieved by the decision of the committee as to the result of the primary election has 24 hours within which to apply to a court of competent jurisdiction for relief, and such application, in the form of a petition, may be delivered to the clerk (whose duty it is to receive and file it), and, when so delivered, is an application "to said court" within the meaning of the law, whether the judge be absent or present. Vial v. Elfer, 45 South. 545, 547, 120 Ga. 673.

Under Rev. Laws, c. 128, §§ 13, 15, authorizing appeals from the land court to the superior court, and providing that the appeal shall be entered within 30 days, and on the "entry of appeal" the appellant shall file in the superior court copies of all material papers in the case, certified by the recorder, etc., an entry of an appeal in the superior court is an entry with a proper officer of the court at the place where its records are kept and where the clerk does his work, and the mere receipt of the papers on appeal by the clerk or an assistant clerk at his residence is not an entry in court, since chapter 159, § 18, providing that for entering orders and issuing writs the "court shall always be open," does not mean that there is a court which is open wherever a clerk or assistant is found, without the presence of any justice. Old Colony St. Ry. v. Thomas, 91 N. E. 1006, 1009, 205 Mass. 529, 18 Ann. Cas. 247.

As commission

The commission appointed under Sess. Laws 1907, p. 480, § 47, and page 835, §§ 1, 3, 5, is not a "court," within Rev. St. § 720, prohibiting the granting of injunctions by federal courts to stay proceedings in a state court. Murray v. Wilson Distilling Co., 164 Fed. 1, 23, 24, 92 C. C. A. 1.

The commission provided for by Acts 1893, p. 386, c. 231, § 13, providing that if a municipal corporation, after deciding to establish a municipal lighting plant, refuses to purchase a private plant operated by a corporation incorporated by the General Assembly, it may be compelled to do so; and a commission appointed by the superior court to adjudicate whether the plant should be purchased, and what the price and conditions of sale should be, is not a court, nor its members judges, within the meaning of the constitutional provision prescribing the mode by which judges are to be appointed. The functions of the commission are but quasi judicial. Norwich Gas & Electric Co. v. City of Norwich, 57 Atl. 746, 749, 76 Conn. 565 (citing State v. New Haven & Northampton Co., 43 Conn. 351; New Milford Water Co. v. Watson, 52 Atl. 947, 53 Atl. 57, 75 Conn. 237).

Committee on appeal

Pub. Acts 1909, p. 687, No. 292, providing for a committee on appeal to pass on the action of the board of supervisors in equalizing the valuation of the property of the county for taxation, with power to summon witnesses, hear evidence, and determine whether the equalization made by the board is just, confers quasi judicial power on the committee on appeal, but it is not a "court" within Const. art. 7, § 1, providing that the judicial power shall be vested in enumerated courts, and such inferior courts as the Legislature, by a two-thirds vote of the members elected to each house, may establish. Zimmer v. Board of Sup'rs of Bay County, 123 N. W. 899, 901, 159 Mich. 213; Robinson v. Westover, 123 N. W. 904, 159 Mich. 225.

County board

A board of county commissioners, duly organized, constitutes a "court," clothed with judicial functions and ministerial duties conferred by statute, and its final decrees, until set aside, are to be given the same effect and degree of conclusiveness which generally attach to judgments of judicial tribunals. Bartlett v. New York Cent. & H. R. R. Co., 81 N. E. 204, 205, 195 Mass. 299 (citing Smith v. Mayor, etc., of City of Boston, 1 Gray [67 Mass.] 72; Brewer v. Boston C. & F. R. Co., 113 Mass. 52; Plummer v. Inhabitants of Waterville, 32 Me. 566; Homer v. Fish, 1 Pick. [18 Mass.] 435, 439, 11 Am. Dec. 218; Cooper v. Reynolds, 10 Wall. [77 U. S.] 308, 19 L. Ed. 931).

Court-martial

A court-martial is not a "court" within the meaning of sections 85 and 86, Const., nor within the meaning of section 7810, Rev. Codes 1905, but it is a "tribunal" within the meaning of section 7810, Rev. Codes 1905, and its acts may be inquired into by certiorari. State ex rel. Poole v. Peake, 135 N. W. 197, 199, 22 N. D. 457, 40 L. R. A. (N. S.) 354.

Grand jury as component part

Though a grand jury is an adjunct of the court, it is not such part thereof as, under Comp. Laws, § 3556, authorizing summary punishment for a contempt in the immediate presence of the court, permits the judge to summarily punish offenders for any act before the grand jury, without proceeding on affidavit and citing the offender to show cause why he should not be punished. Ex parte Hedden, 90 Pac. 737, 744, 29 Nev. 352, 13 Ann. Cas. 1173.

A "court" is an organized body, with definite powers, meeting at certain times and places for the hearing of cases and other

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matters and aided by its proper officers; and, when properly summoned and organized, the grand jury are a constituent part thereof. People v. Rotole, 115 N. Y. Supp. 854, 61 Misc. Rep. 579.

As judge

Court as judge, see Judge.

"The judge does not alone constitute the 'court.' It takes not only the judge but also the subordinate officials and all the machinery to make a court. The courts are county, not district, affairs." State v. Ely, 113 N. W. 711, 716, 16 N. D. 569, 14 L. R. A. (N. S.) 638.

"The judge is an essential constituent of a 'court,' and there can be no court in the absence of the judge, or judges." State v. Jackson, 113 N. W. 880, 881, 21 S. D. 494, 16 Ann. Cas. 87.

The term "judge," as distinguished from "court," denotes the individual; the latter denoting the judicial tribunal. A judge has no judicial power outside of the court in which he officiates and when discharging the functions of his office he is the court in concrete form, and in this sense is often called the "court," but, strictly and technically speaking, the judge and the court are wholly distinct, and a condemnation proceeding, whether instituted in vacation or term time, is a proceeding in court. Hartshorn v. Illinois Valley Ry. Co., 75 N. E. 122, 126, 216 Ill. 392.

A "court" is a well-recognized immaterial entity which continues though the judge may die. A proceeding before a justice of the Supreme Court on the death of the justice abates unless some provision of law exists for its continuance before some other justice. A city magistrate is not a justice of any court, but is a person merely invested with judicial powers. City magistrates are not district courts within Const. 1894, art. 6, § 17, providing that justices of the peace and district court justices may be elected in the different cities as shall be prescribed by law, and the manner of their election cannot be provided for by law, but they must be elected by the electors of the city or appointed by the municipal authorities thereof. People ex rel. Joyce v. Guden, 75 N. Y. Supp. 347, 348.

Copyright Act March 4, 1909, c. 320, § 25, 35 Stat. 1081, provides that an infringer of the copyright laws shall be liable to pay the proprietor such damages as he suffered by the infringement, as well as all profits which the infringer shall have made from such infringement, and in proving profits plaintiff shall be required to prove sales only, and the defendant every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court in its discretion may allow the amount thereinafter stated, but, in the case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200, nor be less than $50, and such damages in no other case shall exceed $5,000, nor be less than $250, and shall not be regarded as a penalty. Held, that the statute, by using the word "court," did not require that the judge acting by himself should assess the damages when a case was presented calling for an award under the minimum damage clause, and that the court, under such circumstances, properly directed the jury that, if they found for plaintiff, they must award at least $250 for each infringement. Mail & Express Co. v. Life Pub. Co., 192 Fed. 899, 901, 113 C. C. A. 377.

Under Code, § 4110, requiring a certificate of importance as a condition precedent to an appeal in an action involving less than $100 issued by the trial judge, the statute does not require that the certificate be made by the trial court, though it may be properly so made, since, though a judge is not necessarily a court, a "court" necessarily includes the judge, and, as the statute required the act to be performed by the judge, it could also be lawfully performed by the judge while sitting as a "court." Salinger v. Western Union Telegraph Co., 126 N. W. 362, 365, 147 Iowa, 484.

The word "court," as used in Const. 1885, § 1, art. 5, providing that the judicial power of the state shall be vested in a Supreme Court, circuit court, city court, county judges, and justices of the peace, is of broad meaning, and, as applied to the circuit courts, means that a circuit judge is under certain circumstances a court; for, if he were not a court, he could not exercise judicial power under the Constitution and statutes of the state. Atlantic Coast Line R. Co. v. Mallard, 43 South. 755, 764, 53 Fla. 515 (citing 11 Cyc. p. 655; McGee v. Ancrum, 15 South. 231, 33 Fla. 499; State ex rel. Florida Pub. Co. v. Hocker, 16 South. 614, 35 Fla. 194; Stockton v. State ex rel. Turman, 31 South. 821, 44 Fla. 289; State v. Johnson, 13 Fla. 33, text 42; Carper v. Cook, 19 S. E. 379, 39 W. Va. 346–348; Porter v. Flick, 84 N. W. 262, 60 Neb. 773; Michigan Cent. R. Co. v. Northern Indiana R. Co., 3 Ind. 239, 245).

Rev. St. 1895, art. 1293, provides that the parties may submit the matter in controversy between them to the court upon an agreed statement of facts made out and signed by counsel and filed with the clerk, and in such case the statement so agreed to and assigned and certified by the "court" to be correct and the judgment rendered thereon shall constitute the record of the case. Held, construing the section in view of the prior statutes on the subject (Acts 7th Leg. c. 92, § 12, Rev. St. 1879, arts. 1293, 1379, and

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Rev. St. 1895, art. 1381), and in view of article 3268, requiring the court to look for the legislative intention, keeping in view the old law, the evil and the remedy, that article 1293 did not authorize a statement of facts to be authenticated by the "judge," the term "court" as used therein not being equivalent to "judge," so that a certificate, by the trial judge attached to a purported agreed statement of facts long after the term and after the "court" had ceased by the expiration of the term, was not a compliance with the statute. Chickasha Mill. Co. v. Crutcher (Tex.) 141 S. W. 355, 357.

"A 'court' is not a judge, nor is a judge a 'court.' A judge is a public officer who, by virtue of his office, is clothed with judicial authority. A 'court' is defined to be a place in which justice is judicially administered; it is the exercise of judicial power by the proper officer or officers at a time and place appointed by law. The officers exist independent of the exercise of such appointed jurisdiction, though the 'court' may not, in general, be holden independent of its officers." Under Chinese Exclusion Act Sept. 13, 1888, § 13, 25 Stat. 476, providing that any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district, the right of appeal is to the judge as a special tribunal, and not to the District "Court." Chow Loy v. United States, 112 Fed. 354, 359, 50 C. C. A. 279.

The Legislature often uses the words "court" and "judge," "district court" and "district judge," without discrimination. "Court" will be construed to mean "judge," and "judge" will be construed to mean "court," wherever either construction is necessary to carry into effect the obvious intent of the Legislature. It is held, therefore, that by the words "district court," as used in section 1 of the act in question (Gen. Stat. 1909, § 2282), the Legislature meant to confer upon the judge of the district court, in certain counties, authority to appoint a county auditor. Sartin v. Snell, 125 Pac. 47, 49, 87 Kan. 485.

A "court" is "a tribunal established for the public administration of justice and composed of one or more judges who sit for that purpose at fixed times and places." The term "court" may mean the judge or judges of the court or the judge and the jury, according to the connection and the object of its use. (A. L. D.) Act Pa. April 14, 1903, entitled an act to fix the salaries of the judges of the Supreme Court, the judges of the superior court, the judges of the court of common pleas, and the judges of the orphans' court, is an act relating to courts. Commonwealth v. Mathues, 59 Atl. 961, 976, 210 Pa. 372.

The term "court" is not infrequently used as the equivalent of "judge." It has been said to be an organized body with defined powers, meeting at certain times and places for the hearing and decision of causes and of other matters brought before it, and aided in this, its proper business, by its proper officers, viz., attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure order in its proceedings. It is quite certain, however, that the mere absence of any one of the officers mentioned, save the judge, does not suspend the existence or functions of the court. After acquiescing during the trial in the discharge, by another person, not sworn as a deputy, of the function of the clerk, it is too late to raise the objection in a motion for new trial that the court was not properly organized. State v. Baudoin, 40 South. 42, 43, 115 La. 773 (quoting and adopting definition in Burrill).

Congress at times interchanges the words "court" and "judge." The word "courts" in Act March 3, 1899, c. 424, 30 Stat. 1116, providing for pay of bailiffs and criers, and that persons employed under Rev. St. § 715 (U. S. Comp. St. 1901, p. 579), shall be deemed to be in actual attendance when they attend on the order of the courts, etc., was intended to cover not only courts in session but absent judges. United States v. McCabe, 129 Fed. 708, 711, 64 C. C. A. 236.

The word "court," as used in a statute authorizing an appellate court, upon reversal, to render such judgment as the court below should have rendered, means the body organized to administer justice, and includes judge and jury. Henne & Meyer v. Moultrie, 77 S. W. 607, 608, 97 Tex. 216.

Though the police judge of a city of the second class exercises judicial functions, he is not a repository of judicial power within Const. art. 3, § 1, vesting the judicial power in certain courts where the Legislature can require him to notify the county attorney of violations of the prohibitory liquor law which come to his knowledge, and to furnish the county attorney the names of the witnesses by whom such violations may be proven under penalty of fine and forfeiture of his office. Gen. St. 1901, § 2462. State v. Keener, 97 Pac. 860, 861, 78 Kan. 649, 19 L. R. A. (N. S.) 615.

As judge at chambers or presiding

The word "court," in the statute providing that a judgment or final order of the district court may be reversed or modified for errors appearing on the record, means not only the tribunal over which a judge presides, but also the judge himself, when exercising, at chambers, judicial power conferred by statute. Porter v. Flick, 84 N. W. 262, 60 Neb. 773.

Where a minute entry, reciting the drawing of a jury in a capital case, stated that

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the "court" proceeded to publicly draw from the jury box as provided by law, etc., and it appeared that the court consisted of two judges, the word "court," as there used, must be held to mean the presiding judge. Rogers v. State, 52 South. 33, 166 Ala. 10, 11.

As judge in vacation

The word "court" having a well-defined meaning, it cannot be supposed that the Legislature when using it without defining or qualifying it in granting certain powers to courts meant the judge or chancellor, and so, while certain courts are given authority to decree temporary alimony, the chancellor in vacation is without jurisdiction to order alimony pendente lite, and his order committing a defendant because of failure to give bonds for compliance therewith is a mere nullity. Ex parte Helmert (Ark.) 147 S. W. 1143, 1144.

A motion under Rev. St. 1903, c. 84, § 53, to set aside a verdict for newly discovered evidence, must be made in court, and the term "court," as applied to actions at law, means the court in session, and a justice in vacation is not the court. Mitchell v. Emmons, 71 Atl. 321, 323, 104 Me. 76.

As prescribed time and place

A "court" is a place where justice is judicially administered, and to constitute a court, it must meet at the place appointed by law, and its judicial power can only be exercised at such place. Belford v. State, 131 S. W. 953, 954, 96 Ark. 274.

"A 'court' consists of persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice; * * * the place of meeting is an important element in the definition." Board of Com'rs of Day County v. State of Kansas, 91 Pac. 699, 709, 19 Okl. 375 (quoting and adopting the definition in Re Allison, 22 Pac. 820, 13 Colo. 525, 10 L. R. A. 790, 16 Am. St. Rep. 224).

"A 'court' constitutes the persons officially assembled under authority of law at the appropriate time and place for the administering of justice." Where the law prescribes the time and place for the holding of court, then the time and place are as essential limitations of jurisdiction as are subject-matter and parties. Hanley v. City of Medford, 108 Pac. 188, 190, 56 Or. 171 (quoting Marsden v. Harlocker, 85 Pac. 328, 331, 48 Or. 90, 97, 120 Am. St. Rep. 786).

Public service commission

The public service commission of Vermont is not a "court." Central Vermont Ry. Co. v. Redmond, 189 Fed. 683, 684.

The Mississippi railroad commission is not a "court" within the meaning of Rev. St. U. S. § 720, forbidding the federal courts to enjoin proceedings in a state court. Mississippi R. Commission v. Illinois Cent. R. Co., 27 Sup. Ct. 90, 93, 203 U. S. 335, 51 L. Ed. 209.

Injunctive relief against railway passenger rates as fixed by the Virginia State Corporation Commission may be granted by a federal court if such rates are confiscatory, although, for some purposes, the commission is a court, since proceedings to establish rates are legislative, and therefore are not comprehended by the provision of Rev. St. § 720, forbidding federal courts from enjoining proceedings in state courts, which provision looks to the character of the proceedings, not the character of the body. Prentis v. Atlantic Coast Line Co., 29 Sup. Ct. 67, 74, 211 U. S. 210, 53 L. Ed. 150.

Referee

Under the Bankruptcy Act, the word "court" may include the referee, but does not of necessity. When it does must be gathered from the context. In re Cobb, 112 Fed. 655, 656.

The definition of "court" in Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544, that "'court' shall mean the court of bankruptcy in which the preceedings are pending and may include the referee," supports the power of a referee, in the first instance, to enter an order to show cause why a person should not be required to pay over to the trustee in bankruptcy money in his hands belonging to the estate, and on the hearing to enter an order directing payment by a certain date. Mueller v. Nugent, 22 Sup. Ct. 269, 273, 184 U. S. 1, 46 L. Ed. 405.

Bankr. Act July 1, 1898, c. 541, § 1, cl. 7, 30 Stat. 544, provides that the term "court" shall include a referee, and clause 19 declares that the word "persons" includes corporations and officers. By section 2, cl. 7, bankruptcy courts are invested with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, except as otherwise provided, and section 23, par. "a," confers jurisdiction on the United States Circuit Courts in certain circumstances over controversies between trustees and adverse claimants concerning property claimed by the trustee, except as to proceedings in bankruptcy, jurisdiction over which rests exclusively in bankruptcy courts, and by paragraph "b" suits brought by the trustee, except those to recover property under certain specified sections of the act, can be brought in the bankruptcy court only by consent of the proposed defendant. Held, that a referee in bankruptcy had jurisdiction of a proceeding to compel the officers of a corporation to pay over the proceeds of stock sales alleged to belong to the corporation, and also to pay an amount assessed against them for unpaid shares. In re Kornit Mfg. Co., 192 Fed. 392, 394.

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Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552, authorizes the court of bankruptcy to require any designated person to appear before a referee for examination, etc., and section 1a, cl. 7, 30 Stat. 544, defines "court" to mean a court of bankruptcy in which the proceedings are pending, and may include the referee. Section 38, cls. 2, 4, 30 Stat. 555, authorize referees in bankruptcy to exercise the powers vested in courts of bankruptcy for the examination of persons as witnesses, etc., and to perform such duties, except as to questions arising out of applications of bankrupts for compositions or discharges, as are conferred on courts of bankruptcy, and as shall be prescribed by the rules and orders thereof; and general bankruptcy order No. 12, subd. 1 (89 Fed. vii, 32 C. C. A. xvi), provides that all the proceedings except such as are required by the act or by the general orders to be before the judge, shall be had before the referee. Held, that where a bankruptcy proceeding had been referred generally to the referee, as authorized by Bankr. Act July 1, 1898, c. 541, § 22, 30 Stat. 552, the referee had jurisdiction to order a secured creditor to appear before him for examination. In re Abbey Press, 134 Fed. 51, 54, 67 C. C. A. 161.

Under subdivision 7, § 1, Bankr. Act, the word "court," as used in the act, is defined to mean the court of bankruptcy in which the proceedings are pending, and may include the referee. Bouton v. Wheeler, 104 N. Y. Supp. 33, 35, 118 App. Div. 426.

The term "court" is expressly defined by Bankr. Act July 1, 1898, c. 541, § 1 (7), 30 Stat. 544, to mean "the court of bankruptcy in which the proceedings are pending, and may include the referee." United States v. Liberman, 176 Fed. 161, 163.

As term of court

The term "court," as used in Act March 3, 1887, 24 Stat. 541, which provides that no part of any money appropriated to payment of a per diem compensation to any clerk for attendance in "court," except for days when the court is open by the judge for business, or business is actually transacted in court, means something more than a court that is opened by a judge for business at the beginning of a regular term and continued by adjournment until the close thereof, and thereunder a court may exist without being opened by the judge, or without the transaction of business and under the broader meaning given the word by Rev. St. §§ 574, 638, 4793, providing that courts shall be always open, and Act Feb. 4, 1887, in force when the act was passed, providing that they shall be always in session for certain purposes, is open as a "court" whenever business is transacted by the judge between its regular terms; and thereunder the clerk is entitled to attendance fees for days between regular terms on which he is required to attend and days when opened for the transaction of business by the judge. Butler v. United States, 87 Fed. 655, 658, 659, 664.

A "court" is defined as "the persons officially assembled under authority of law at the appropriate time and place for the administration of justice," while the word "term," when used with reference to a court, signifies the space of time during which the court holds a session. A "session" signifies the time during the term when the court sits for the transaction of business, therefore there is a clear distinction between "the adjournment of court" and the "adjournment of the term." Parrott v. Wolcott, 106 N. W. 607, 608, 75 Neb. 530 (citing Webst. Dict.; Black, Law Dict.).

COURT AND JUDGES THEREOF

The well-settled construction of such a phrase as "said court and the judges thereof," as used in a statute conferring certain powers on the court, is that it means the court when in session, and the judges acting in vacation. Thompson v. State ex rel. Cooksey, 108 Pac. 398, 400, 25 Okl. 741.

The phrase "said court and the judges thereof," as used in Const. Tex. art. 5, § 8, defining the power and jurisdiction of the district court and judges thereof and providing that said court and judges thereof shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all writs necessary to enforce their jurisdiction, means the court when in session, and the judges acting in vacation. The language therefore equally empowers the court when in session, and the judge when the court is not in session, to issue the writs. The power is conferred on the judge in the same language as confers it on the court. Thorne v. Moore, 105 S. W. 985, 986, 101 Tex. 205.

COURT AUTHORIZED BY LAW

See Authorized by Law.

COURT BELOW

An assignment of error naming no particular court, but using the term "the court below," is sufficient to present for consideration errors made by the ruling of any lower court through which the case had passed. Holliday & Wyon Co. v. O'Donnell, 90 N. E. 24, 25, 44 Ind. App. 647.

COURT DOCKET

The court or bench docket is not a record of the court in which its official entries are kept, but is merely a docket for the convenience of the court, and the notes of the judge are not the record entries to be incorporated in a transcript for the appeal of the case, and in determining what the record discloses the entries on such docket may not be considered. Pittsburgh, C., C. & St. L. Ry.

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Co. v. Johnson, 93 N. E. 683, 686, 49 Ind. App. 126.

COURT HAVING JURISDICTION

Act Aug. 1, 1888, c. 728, 25 Stat. 357, provides that in every case in which the Secretary of the Treasury or any other officer of the government has been or shall be authorized to procure real estate for the erection of a public building or other public uses he shall be authorized to acquire the same by condemnation by proceedings in the federal Circuit or District Court in the district, in which the practice, pleadings, forms, and modes of proceedings shall conform, "as near as may be," to those existing at the time in like causes in the courts of the state. Act Aug. 18, 1890, c. 797, 26 Stat. 315, 316, provides that "hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land or right pertaining thereto needed for the site * * * for fortifications and coast defences, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." Held, that by virtue of the earlier statute a Circuit Court of the United States is a "court having jurisdiction" of proceedings under the later act; that the provision of the latter that the proceedings shall be prosecuted in accordance with the laws of the state cannot be construed literally so as to oust the federal court of jurisdiction, where the state statute designates a special tribunal for such proceedings, but only requires a general conformity to the state practice as a whole. United States v. Certain Land in Town of New Castle, Rockingham County, 165 Fed. 783, 784.

A court of common-law jurisdiction authorized by Rev. St. § 2165, to admit aliens as citizens, need not possess a general common-law jurisdiction, but if any part of its jurisdiction answers that designation it is sufficient. Courts with this jurisdiction are those which have the power to punish offenses, enforce rights, or redress wrongs recognized by the common law, or which, in the determination of the causes they decide, are governed by the principles, rules, and usages of that law. The term "having common-law jurisdiction" is used to distinguish these courts from those which have no jurisdiction save in equity, admiralty, or in matters not involving offenses or rights under the common law. Within this meaning and under the decisions of the state of Tennessee the county courts of that state are not "courts of common-law jurisdiction," having authority to admit aliens to citizenship. In re Wolf, 188 Fed. 519, 520.

A "court having common-law jurisdiction" is one whose powers are exercised according to the course of the common law. It is not necessary that the court, to possess common-law jurisdiction, should be unlimited in power and authority. State ex rel. Engelhard v. Webber, 105 N. W. 490, 492, 96 Minn. 422, 113 Am. St. Rep. 630.

COURT HEARING THE EVIDENCE

Under Comp. Laws 1897, § 8623, as amended by Pub. Acts 1907, No. 324, providing that no divorce shall be granted, unless the court hearing the evidence shall deem it for the best interests of the parties to grant a divorce from the bonds of matrimony, on appeal from a decree of separation for life and ordering separate maintenance, the Supreme Court is "the court hearing the evidence," and can exercise its judicial discretion and grant a divorce from the bonds of matrimony, since all chancery causes are heard de novo in the Supreme Court. Horning v. Horning, 127 N. W. 275, 276, 162 Mich. 130.

COURTHOUSE

See At the Court House.

Ky. St. § 3948, as amended in 1908, providing that the jailer of each county of a population of less than 75,000 shall be superintendent of public square, courthouse, clerks' offices, jail, stray pen, and other public buildings at the seat of justice, and that the fiscal court shall annually appropriate a sum sufficient to purchase the labor and material necessary to keep such public property in a clean, comfortable, and presentable condition, and heat and light the same, the term "courthouse" is not confined to the courtrooms used in holding court, and the appropriation should provide for the care of rooms in the courthouse set aside for the use of county officials, and which are used by them, in the discharge of their official duties, including the halls leading thereto. Adair Fiscal Court v. Conover, 133 S. W. 761, 762, 141 Ky. 743.

Where the courthouse of a county is unsafe and cannot longer be used as such because of the deterioration of the building by age, the county has no courthouse within the law, and the fiscal court must provide one. Bonta v. Fiscal Court of Mercer County, 137 S. W. 1084, 1086, 144 Ky. 241.

An act providing for the holding of certain terms of the circuit court at a place other than the county seat was not contrary to the provision of the Constitution forbidding removal of a county seat without an election, as the terms "county seat," "site," and "courthouse," in Constitution do not embrace the seat providing that Courts shall appoint Commissioners having duties as were performed by the Circuit courts, a commissioner is an "officer" within the

Code Cr. Proc. ment must be g chants' Nat. Bank of La 55 South. 242, 172 A gard to techni trict

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stantial rights. A Trial Term of the Supreme Court was appointed to be held in the county courthouse, and during the trial of a criminal case, the accommodations in the criminal court building being inadequate, the trial was continued in one of the courtrooms of the county courthouse, in which it had been the custom to hold the terms of the Supreme Court in which civil cases were tried. Held, that under the statute, and as both the criminal court building and county courthouse constituted the "courthouse" in the county of New York, such change was no ground for the reversal of a conviction. People ex rel. Weick v. Warden of City Prison of City of New York, 80 N. E. 1118, 188 N. Y. 549.

COURT MERCHANT

There existed in the colony of Georgia a court known as the "court merchant," which was recognized as existing by the Constitution of 1777 and continued by that of 1789, subject to such regulations as the General Assembly might direct. It seems to have been for the trial of controversies between merchants, dealers, and others, and shipmasters, supercargoes, and other transient persons. It was held by the chief justice, or, in his absence, one of the justices of the general court of pleas, within seven days after a petition was presented showing a controversy of this character. The jurisdiction was limited as to amount and the cases were tried by a jury of merchants or other fit persons. De Lamar v. Dollar, 57 S. E. 85, 86, 128 Ga. 57.

COURT NOT OF RECORD

"A 'court not of record' is the court of a private man, whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects. Such courts are the courts-baron incident to every manor and other inferior jurisdictions where the proceedings are not enrolled or recorded." Hudson Trust Co. v. Boyd, 84 Atl. 715, 717, 80 N. J. Eq. 267 (quoting 3 Black. Com. 24).

COURT OF ARBITRATION

The appraisers appointed under Rev. St. § 3084, made applicable by section 2915 in proceedings by a city to condemn land for waterworks, providing that compensation to be paid the owner shall be ascertained by three disinterested appraisers appointed by the district court or the judge thereof, are not a court of arbitration or a compulsory board of arbitration within the meaning of either and Act Art. 5, § 1, vesting the judicial power was passed, prvts, including courts of arbiways in session for 28, authorizing appeals to as a "court" whenever m decisions of compulby the judge between its n; the tribunals rethereunder the clerk is entheing those contemfees for days between regulaprovision authorhe is required to attend and dblish courts of arbitration to hear controversies between labor organizations and their employers. Edwards v. City of Cheyenne, 114 Pac. 677, 684, 19 Wyo. 110.

COURT OF BANKRUPTCY

The term "courts of bankruptcy" is included in the term "court" as defined in Bankr. Act July 1, 1898, c. 541, § 1(7), 30 Stat. 544, and by section 1(8) is expressly declared to include the District Courts of the United States. United States v. Liberman, 176 Fed. 161, 163.

COURT OF CHANCERY

See Jurisdiction Originally Exercised by Chancery Court.

A "court of chancery" is a court of original jurisdiction and has jurisdiction only in those cases where the courts of law cannot afford an adequate remedy, and the specific enforcement of contracts, reformation of written instruments, the setting aside of deeds and other instruments obtained by fraud, regular upon their face, must find their remedy therein. As the relief can be granted only by such court, the cause must originate there. Bridge Street & Allendale Gravel-Road Co. v. Hogadone, 114 N. W. 917, 921, 150 Mich. 638.

COURT OF COMMON PLEAS

A "court of common pleas" is one having general jurisdiction in civil actions. State v. Bacon, 61 Atl. 653, 656, 27 R. I. 252.

COURT OF COMPETENT JURISDICTION

See Competent Jurisdiction.

COURT OF EQUITY

"The most general description of a 'court of equity' is that it is a court having jurisdiction in cases where a plain, adequate and complete remedy cannot be had at law." Minturn v. Farmers' Loan & Trust Co., 3 N. Y. 498, 499.

"A court that makes a just and equitable disposition of the property of parties litigant in an action is a 'court of equity.'" Fall v. Fall, 106 N. W. 412, 413, 75 Neb. 104, 121 Am. St. Rep. 767.

COURT OF INQUIRY

Under Code Cr. Proc. art. 941, providing that when a justice has good cause to believe that an offense has been, or is about to be committed, he may summon and examine witnesses in relation thereto, and if it shall appear from the statement of any witness that an offense has been committed, shall reduce the statement to writing and cause the same to be sworn to and issue a warrant for the arrest of the offender, a justice who was summoning before himself, as justice of the peace, witnesses solely for the purpose of ascertaining if any crime or violation of the law had been committed in the neighboring

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precinct to which he had gone, and presumably with the further view, if the witnesses summoned before him developed any violations of the law, of having them to make affidavits for the arrest of such violators or offenders, was not sitting as a magistrate in an examining trial, but was carrying on what may be termed a "court of inquiry" in his capacity as justice of the peace. Brown v. State, 118 S. W. 139, 142, 55 Tex. Cr. R. 572.

COURT OF LAW

"Probate courts are courts of record, being declared to be such by the Constitution, but are not 'courts of law' according to the ordinary use of that term. They derive their origin and their jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties cannot litigate questions of fact in them, except in instances of probate of wills, or when the power of appointment is to be exercised." The probate courts have no jurisdiction over a cause of action against an executor for a devastavit. Michigan Trust Co. v. Ferry, 175 Fed. 667, 675, 99 C. C. A. 221 (quoting and adopting definition in Holbrook v. Cook, 5 Mich. 225, 228).

COURT OF RECORD

See Inferior Court of Record.

A seal is not necessary to a "court of record," but the term "court of record" implies that it has a seal because it is so uniformly the case as to raise a presumption to that effect. Houston Oil Co. of Texas v. Kimball (Tex.) 122 S. W. 535, 541 (citing Ingoldsby v. Juan, 12 Cal. 580; 11 Cyc. p. 658; Blethen v. Bonner, 53 S. W. 1016, 93 Tex. 141).

"A 'court of record' is one where the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony, which rolls are called the records of the court and are of such high supereminent authority that their truth is not to be called in question." Hudson Trust Co. v. Boyd, 84 Atl. 715, 717, 80 N. J. Eq. 267 (quoting 3 Black. Com. 24).

Probate court

The "probate courts" of Idaho are courts of record only in all matters of probate settlement of estates of deceased persons and appointment of guardians. It is not a court of record in the trial of civil and criminal cases, but its records and judgments in those matters are placed on the same footing with the records and judgments with justices of the peace. Dewey v. Schreiber Implement Co., 85 Pac. 921, 923, 12 Idaho, 280.

Judges of probate presiding in county courts for trial or misdemeanors are not judges of courts of record, within Const. 1901, § 150, providing that judges of courts of record, except probate courts, shall receive a fixed compensation, and no fees; so that Act March 1, 1901 (Loc. Laws 1900-01, p. 1342) § 11, providing fees for them, is not unconstitutional. Cooke v. Burke (Ala.) 58 South. 984, 986.

COURT OFFICER

Assignee for benefit of creditors

The assignee for the benefit of creditors is an "officer of the court," and may apply thereto for any order which he may desire made in the administration of the trust. Cuddy v. Becker, Mayer & Co., 124 N. W. 1071, 1072, 146 Iowa, 250.

Assistant district attorneys

Assistant district attorneys appointed by a United States district judge, as authorized by Act Cong. May 28, 1896, c. 252, § 8, 29 Stat. 181 are officers of the United States courts for their respective districts. In re Leaken, 137 Fed. 680, 682.

Attorney at law

See Attorney at Law.

Bailiffs and criers

Bailiffs and criers of the federal courts, appointed to attend the same, as authorized by Rev. St. § 715, though not constitutional officers, are "officers of the court." United States v. McCabe, 129 Fed. 708, 709, 64 C. C. A. 236.

The second clause of section 2, Tucker Act, as amended, which withholds from the jurisdiction conferred on the Circuit and District Courts by said section suits brought against the United States to recover fees, salary, or compensation for official services of "officers of the United States," does not apply to a suit to recover disbursements made by a marshal in paying for the services of court bailiffs. Bailiffs are never sworn in accordance with the statute, and are not "officers of the United States," but come within the expression "officers of the court." United States v. Swift, 139 Fed. 225, 227, 71 C. C. A. 351 (citing United States v. McCabe, 129 Fed. 708, 64 C. C. A. 236).

Clerk of court

See Clerk of Court.

District attorney

The district attorney is not only an officer of the state, but also, in common with other attorneys, an "officer of the court." Taylor v. State, 38 South. 380, 384, 49 Fla. 69.

As public officer

See Officer.

Receiver

See Receiver.

United States district commissioner

Under an act of Congress providing that the United States District Courts shall appoint United States commissioners having the same powers and duties as were performed by commissioners of the Circuit courts, a United States district commissioner is an "of-

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ficer of court," within a statute providing that no officer of any court is qualified to be bail, so that such officer is disqualified to act as surety on appeal bond under a statute providing that qualifications of sureties on appeal shall be the same as in bail. Paxton v. Lively, 85 Pac. 501, 48 Or. 135.

COURT PROCEDURE

A Governor's proclamation convening a special legislative session provided that it was to enact adequate laws simplifying the procedure in both civil and criminal courts of the state, and amending and changing the existing laws governing "court procedure." Held, that the words "court procedure" should be held to apply generally to all laws governing the operation of courts, including those regulating the times within which sessions of courts may be held, and hence Acts 31st Leg. 1st Ex. Sess. c. 13, changing, extending, and rearranging the terms of the criminal district court for Harris and Galveston counties, was within such proclamation. Long v. State, 127 S. W. 208, 58 Tex. Cr. R. 209, 21 Ann. Cas. 405.

COURT RECORD

Where all the records relating to overdue tax proceedings are in existence, and all those covering the time in question are produced, and the clerk in charge of the records testifies that he has examined them to see whether there was any order confirming a certain overdue tax sale, and that he had examined the papers on file in his office, and had failed to find either the complaint, or the commissioner's report of the sale, and that he found no confirmation of sales under the overdue tax proceedings relating to the land in question, and that confirmation of sales containing no numbers of lands, which were found, seemed to refer to reports of commissioners which did not include the particular tract, it was sufficient to show that there had been no confirmation of the overdue tax sale in question, for no other evidence could be adduced, showing that the sale was not confirmed, and the purpose of a "court record" is to preserve a memorial; and be the evidence of the proceedings had by the court. Allen v. Phillips, 112 S. W. 403, 404, 87 Ark. 185 (citing 4 Words and Phrases, p. 3866).

COURTS-MARTIAL

As court, see Court (Of Justice).
As inferior court, see Inferior Court.
As tribunal, see Tribunal.

A "court-martial" has no inherent power to hold or punish. It has neither original nor general jurisdiction, and whatever authority it may have when called into being is derived solely from the lawmaking power as expressed in the Military Code. People v. Wendel, 112 N. Y. Supp. 301, 302, 59 Misc. Rep. 354.

COURTS OF CONSCIENCE

"Courts of conscience" are the courts of equity. Harris v. Powers, 58 S. E. 1038, 1039, 129 Ga. 74, 12 Ann. Cas. 475.

COURTS OF THE STATE

Proceeding in state court, see Proceeding.

The South Carolina Dispensary Commission created by Sess. Laws 1907, p. 835, No. 402, for the purpose of winding up the South Carolina State Dispensary, disposing of its property, and paying its debts, is not a "court of a state" within Rev. St. § 720, providing that an injunction shall not be granted by any court of the United States to stay proceedings in any "court of a state" except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Fleischman Co. v. Murray, 161 Fed. 152, 157, 158.

A municipal court of Kansas City is a "court of the state" of Missouri within the purview of Rev. St. U. S. § 720, providing that the writ of injunction shall not be granted by a court of the United States to stay proceedings in a state court except in cases where such injunction may be authorized by a law relating to procedure in bankruptcy. Kansas City Gas Co. v. Kansas City, 198 Fed. 500, 525.

COURTS OF THE UNITED STATES

Under Rev. St. Wis. 1858, c. 133, § 16, subd. 1, providing that an action upon a judgment or decree of any court of record of any state or territory within the United States, or of any "court of the United States," shall be brought "within 10 years," a judgment of the Circuit Court of the United States for the District of Wisconsin, rendered September 13, 1866, is barred by the lapse of 10 years; judgments and decrees of the federal courts sitting in the state not having been put upon the same footing with those of the domestic courts, which are barred by 20 years, until Revision of 1878, § 4220. This cause of action was on a judgment of the court of the United States and therefore within the very language of the statute. Similar language in the state insolvent laws of Minnesota was held to include the Circuit Court of the United States, but only "in view of the scope and practice of the insolvent law." That the Circuit Courts of the United States are properly called domestic courts of the states wherein they are held could not change the meaning of this language "or any court of the United States" without destroying it. Waterman v. Town of Waterloo, 34 N. W. 137, 139, 69 Wis. 260.

A preliminary hearing before a commission does not take place before a "court of the United States." United States v. Stern, 177 Fed. 479, 480 (following Todd v. United States, 15 Sup. Ct. 889, 158 U. S. 278, 39 L. Ed. 982).

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Courts of District of Columbia

The Supreme Court of the District of Columbia must be deemed a "court of the United States" within the meaning of Rev. St. § 1014, authorizing the removal of a person charged with an offense against the United States cognizable by a court of the United States to the federal district where the trial is to be had, in view of Act June 22, 1874, c. 396, 18 Stat. 193, making applicable to the courts of the District the sections of the original judiciary act from which section 1014 was taken, and of the powers given to that court as a court of the United States by Code D. C. § 61 (31 Stat. 1199, c. 854), and of the provision of section 1 of that Code (31 Stat. 1189, c. 854), making applicable to the District all general acts of Congress "not locally inapplicable." Benson v. Henkel, 25 Sup. Ct. 569–572, 198 U. S. 1, 49 L. Ed. 919.

The Supreme Court of the District of Columbia is a "court of the United States," within the meaning of Rev. St. § 714, providing that, when any judge of any court of the United States resigns his office after having held his commission as such at least ten years, and having attained the age of 70 years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation. James v. United States, 26 Sup. Ct. 685, 688, 202 U. S. 401, 50 L. Ed. 1079.

COURTS OF THIS COMMONWEALTH

Ky. St. 1903, §§ 126, 127, requiring each county attorney to attend all county and fiscal courts in his county, etc., and providing that he shall conduct actions before "any of the courts of this commonwealth" in which the county is interested, etc., do not require a county attorney to perform services in a federal court or in a court outside of the commonwealth; the words "courts of this commonwealth" meaning only courts organized under the Constitution and laws of the commonwealth. Slayton v. Rogers, 107 S. W. 696, 697, 128 Ky. 106.

COVE

See Head of Cove.

COVENANT

See Breach of Covenant; Collateral Covenant; Concurrent Covenants; Continuing Covenant; Implied Covenant; Independent Covenant; Mutual and Dependent Covenants; Restrictive Covenant.

A recital in a deed that the land conveyed contains a certain number of acres is not a "covenant" or warranty, but a mere representation. Corrough v. Hamill, 84 S. W. 96, 97, 110 Mo. App. 53 (citing Hobein v. Frick, 69 Mo. App. 263; Wood v. Murphy, 47 Mo. App. 539; distinguishing McGhee v. Bell, 70 S. W. 493, 170 Mo. 121, 59 L. R. A. 761).

Under a lease which, after a covenant of the lessee to pay rent monthly in advance and the usual "covenants" of a lease, provided that the lessee shall make a deposit, to be held "during the continuance of" the lease, as security for the payment of the rents and the performance of the "covenants" contained in the lease, and then provided that in case of default in any of the "covenants" the landlord may resume possession of the premises and relet, the lessee to make good any deficiency, the lessor having recovered possession by summary proceeding, and thus terminated the lease, is not entitled to retain the deposit as security for any deficiency under the reletting, as the word "covenants" does not include the agreement of reletting, but refers only to the other provisions of the lease. Yannuzzi v. Grape, 92 N. Y. Supp. 819, 820, 46 Misc. Rep. 559.

Kinds

"All 'covenants' are either real or personal. Those so closely connected with the realty that their benefit or burden passes with the realty are construed to be covenants real; all others are personal." Atlanta, K. & N. Ry. Co. v. McKinney, 53 S. E. 701, 702, 124 Ga. 929, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215 (quoting and adopting 11 Cyc. p. 1052).

Condition distinguished

See Condition; Condition Subsequent.

As contract

See Contract.

As liability

See Liability.

COVENANT AGAINST INCUMBRANCES

A "covenant against incumbrances" is one in præsenti, which is broken when made, if there be an outstanding incumbrance diminishing the value, use, or enjoyment of the land conveyed. Brodie v. New England Mortg. Sec. Co., 51 South. 861, 862, 166 Ala. 170; Coleman v. Lucksinger, 123 S. W. 441, 447, 224 Mo. 1, 26 L. R. A. (N. S.) 934.

Under Sayles' Ann. Civ. St. 1897, art. 633, providing that, from the use of the word "granted" or "conveyed" in any conveyance by which an estate of inheritance or fee simple is to be passed, a covenant against incumbrances shall be implied, a conveyance of land in fee, containing such words, impliedly warranted that the property was free from tax liens. Bullitt v. Coryell, 85 S. W. 482, 483, 38 Tex. Civ. App. 42.

COVENANT FOR QUIET ENJOYMENT

A "covenant for quiet enjoyment" is the same as a covenant of warranty in all its practical effects. It is an assurance to the

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grantee that his enjoyment of the land conveyed shall not be disturbed by legal means, but does not attempt to protect him against mere disturbances by trespassers. Fishel v. Browning, 58 S. E. 759, 761, 145 N. C. 71 (quoting and adopting Hopkins, Real Prop. 448; Underwood v. Birchard, 47 Vt. 305).

A "covenant for quiet enjoyment" is broken by the commencement of an action against the grantee by the holder of a better title. Where a grantee under a deed with a general warranty and covenant for quiet enjoyment took the land incumbered by a mortgage for part of the price payable after the death of certain persons, who subsequently asserted a life estate in the premises, and recovered damages of the grantee for mining coal thereon, the damages exceeding the amount of the mortgage, the grantee could sue the grantor to cancel the mortgage. New York & Cleveland Gas Co. v. Graham, 75 Atl. 657, 660, 226 Pa. 348.

COVENANT OF GENERAL WARRANTY

See, also, Covenant of Warranty.

A "covenant of general warranty," whatever else it may or may not be, is a covenant against eviction running with the land. Williams v. O'Donnell, 74 Atl. 205, 206, 225 Pa. 321, 26 L. R. A. (N. S.) 1094.

COVENANT OF INDEMNITY

See Covenant to Pay.

COVENANT OF SEISIN

A "covenant of seisin" is a covenant of indemnity which does not run with the land. Eames v. Armstrong, 59 S. E. 165, 168, 146 N. C. 1, 125 Am. St. Rep. 436.

A "covenant of seisin" implies that the covenantor is possessed of the whole legal title, and where the covenantor has no title and the covenantee has not been placed in possession, the covenant is broken as soon as made. Falk v. Organ, 141 S. W. 1, 2, 160 Mo. App. 218.

"Covenants of seisin" and good right to convey are synonymous, and, if broken at all, are broken when made, and an actual eviction is unnecessary to consummate the breach. Faller v. Davis, 118 Pac. 382, 385, 30 Okl. 56, Ann. Cas. 1913B, 1181.

"Covenant of seisin" is a covenant of title and is broken upon delivery of the deed if the covenantor did not then have title or lawful right to convey irrespective of the question of eviction. Seyfried v. Knoblauck, 96 Pac. 993, 994, 44 Colo. 86.

COVENANT OF WARRANTY

See, also, Covenant of General Warranty.

A "covenant of warranty" is never implied from a mere recital, but any words in a deed which show an agreement to do a thing constitute a covenant, and where an agreement is contained in a deed an action will lie for its breach, whether it is contained in a recital or elsewhere. O'Sullivan v. Griffith, 95 Pac. 873, 875, 153 Cal. 502.

As engagement

See Engagement.

COVENANT RUNNING WITH THE LAND

A "covenant which runs with the land" is a promise, the effect of which is to bind the promisor and his lawful successors to the burdened land for the benefit of the promisee and his lawful successors to the benefited land. According to this, the covenant binds the person of the owner of the burdened land, provided he comes by his title legally, and benefits the owner of the benefited land, provided he comes by his title legally. A covenant running with an easement in favor of land, whereby the owners of a ditch are obligated to furnish water for the owners of the land, is personal and a burden upon the owners of the ditch. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co., 92 Pac. 290, 294, 40 Colo. 467 (quoting Sims, Cov. p. 23).

"Whether a covenant runs with the land does not so much depend on whether it is to be performed on the land itself, as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned and occupied. To run with the land, however, they must relate to the interest or estate, so that their performance or nonperformance will effect the quality, value, or mode of enjoyment of the estate. The covenant must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed." Atlanta, K. & N. Ry. Co. v. McKinney, 53 S. E. 701, 702, 124 Ga. 929, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215 (citing and approving 11 Cyc. p. 1081; Atlanta Consol. St. Ry. v. Jackson, 34 S. E. 184, 108 Ga. 638).

A deed conveying land to a canal company, in consideration and on condition that it shall construct thereon a basin connected with a canal to be constructed through land, but not signed by the grantee, does not bind it by any covenant, nor is there any "covenant running with the land" binding it and its assigns in favor of the grantor and his assigns. Dawson v. Western M. R. Co., 68 Atl. 301, 303, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

Where owners of adjacent lots entered into a written agreement whereby one of them was to build a party wall on the boundary line between their respective lots and the other was to pay the party building the same one-half of the cost thereof when used, the agreement constituted a "covenant running with the land," and the right to recover and the liability to pay followed the ownership

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of the respective lots. Ferguson v. Worrall, 101 S. W. 966, 968, 125 Ky. 618, 9 L. R. A. (N. S.) 1261.

Covenants for quiet enjoyment, for further assurance, for renewal of warranty, to repair, and to convey, are "covenants that run with the land." Knowles v. Knowles, 59 Atl. 854, 855, 26 R. I. 534.

A condition in a deed of a homestead by parents to their son, the consideration being that the father should have support and a home as long as he lived, is a "covenant running with the land," and upon breach of the condition a court of equity will rescind the conveyance. Martin v. Martin, 24 Pac. 418, 419, 44 Kan. 295.

A covenant, to run with the land, must be in respect to the thing granted, and the act covenanted must concern the land or estate conveyed; a "covenant running with the land" being annexed to the freehold and enhancing its value or benefiting it in some way. Munro v. Syracuse, L. S. & N. R. Co., 112 N. Y. Supp. 938, 940, 128 App. Div. 388.

To constitute a "covenant running with the land," the covenant must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed. A covenant running with the land relates directly to the land and follows it into the hands of assignees, while a personal covenant does not do so. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 54 S. E. 1028, 1030, 126 Ga. 210, 7 L. R. A. (N. S.) 1139.

Where an adjoining landowner erected a party wall on the line on an understanding with the other owner that whenever he should use the wall he should pay the one constructing it one-half the price thereof, the agreement was a "covenant running with the land," and the right to recover the agreed sum passed to the grantee of the builder, and not to his assignee or personal representative. Rugg v. Lemly, 93 S. W. 570, 572, 78 Ark. 65, 115 Am. St. Rep. 17, 8 Ann. Cas. 291.

An agreement for the purchase of a mining claim from patentee, reciting the patentee may have exclusive right to work the mine till he is paid the price, and for further security the purchaser transfers shares in a mining company on consideration that patentee will convey the property to purchaser, and signed by the purchaser alone, is a personal covenant of purchaser, and is not one running with the land, under Civ. Code, §§ 1460–1462, defining "covenants running with the land." San Domingo Gold Min. Co. v. Grand Pacific Gold Min. Co., 102 Pac. 548, 550, 10 Cal. App. 415.

An agreement by an owner of land with an adjoining owner that for the period of 10 years he will not sell or permit to be sold upon the premises any intoxicating liquor is not a "covenant running with the land." Sjoblom v. Mark, 114 N. W. 746, 748, 103 Minn. 193, 15 L. R. A. (N. S.) 1129, 14 Ann. Cas. 125.

An instrument giving a person the right to construct a drainage ditch through the land of a person executing the instrument, without consideration and not acknowledged and recorded, was a mere "license," revocable at the will of the licensor and his grantee, and not a "covenant running with the land." Williams v. Beatty, 122 S. W. 323, 326, 139 Mo. App. 167.

COVENANT TO PAY

Where land is sold "under and subject" to a mortgage, it constitutes a "covenant" of indemnity for the protection of the grantor, and the vendee's liability is coextensive with the original obligation of the vendor. Appeal of May's Estate, 67 Atl. 120, 122, 218 Pa. 64.

COVENANT TO RENEW

A bare "covenant to renew" a lease means a renewal on the terms of the original lease. Hoft v. Royal Metal Furniture Co., 103 N. Y. Supp. 371, 372, 117 App. Div. 884 (citing Tracy v. Albany Exchange Bank, 7 N. Y. 472, 57 Am. Dec. 538; Western New York & P. R. Co. v. Rew, 81 N. Y. Supp. 1093, 83 App. Div. 576).

COVER

See Properly Covered.

A planer, the shaft of which turned 3,500 revolutions a minute, protected only by a guard extending over to about the center of the knives, so that the feeder of the machine could not see them, was not "properly covered" as required by Code Supp. 1907, § 4999—a2, the words "properly covered" as so used meaning that the machinery should be protected by such device, made of such material and construction, as would shield those operating the machine or moving near it from contact therewith when in motion, when practicable, without unreasonably interfering with the efficiency of the machine; the word "proper" meaning "fit, suitable, and appropriate," and the word "cover" to "overspread the surface, to shelter, protect, lay, or set over." Kirchoff v. Hohnsbehn Creamery Supply Co., 123 N. W. 210, 212, 148 Iowa, 508.

COVERING

"Webster defines a 'covering' as 'anything which covers or conceals, as a roof, a screen, a wrapper, clothing, etc.'" United States v. Nicholls, 22 Sup. Ct. 918, 919, 186 U. S. 300, 46 L. Ed. 1173.

So-called "furnished needlecases" consisting of books or cases for holding needles during transportation and while needles in them are being used, are not "coverings," within Customs Administrative Act June 10, 1890, c. 407, § 19, relative to coverings consisting of any unusual article, or form designed for use otherwise than in the bona fide

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transportation of merchandise to the United States. Guthman, Solomons & Co. v. United States, 148 Fed. 332, 333.

Bottles filled with ad valorem goods (ink) are not to be added to the dutiable value of the contents as "coverings," within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 19. Kimpton v. United States, 171 Fed. 78, 79, 96 C. C. A. 182.

Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, providing that the dutiable value of imports shall include "the value of all cartons, cases, crates, boxes, sacks and coverings of any kind," is not limited to encasements similar to "cartons, cases," etc.; and the term "coverings" extends to containers of liquids and similar substances, such as tins, kegs, jars, and terrines. Kimpton v. United States, 165 Fed. 236, 240.

Gelatin capsules containing a medicine are not "coverings," within the meaning of the tariff laws, not being for transportation, but an essential part of the article. United States v. Lehn & Fink, 172 Fed. 171, 172.

Paper articles, resembling pocketbooks in outward appearance, contained pockets filled with needles, and they were completed structures before the needles were added. Held, that they were not dutiable as coverings of the needles, under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, nor dutiable as entireties composed of paper and metal (needles), but that they and the needles they contained should be classified separately, as though imported independently. United States v. Dieckerhoff, Raffloer & Co., 160 Fed. 449, 450, 87 C. C. A. 410.

Coverings for chocolate, consisting of small boxes, some in the form of a trunk having hinged tops and lined with fancy paper, are "coverings other than plain wooden," as used in paragraph 281, Schedule G, § 1, c. 11, Tariff Act 1897, 30 Stat. 172, providing that the weight and value of all "coverings other than wooden" shall be included in the dutiable weight and value of chocolate and cocoa contained therein. Cure v. United States, 123 Fed. 994, 995.

COVERTURE

See During Coverture.

"Coverture" is the legal condition of a married woman. Perkins v. Blethem, 78 Atl. 574, 575, 107 Me. 443, 31 L. R. A. (N. S.) 1148.

COW

See Milch Cow.

An indictment for cattle stealing need not allege the sex, as the word "cow," when used in such an indictment, denotes such sex. Gibson v. State, 67 S. E. 838, 839, 2 Ga. App. 692.

A person indicted for larceny of a cow under Code 1907, § 7324, providing that theft of a "cow or animal of the cow kind" is grand larceny, cannot be convicted of a larceny of a steer calf, since by common understanding the word "cow" includes only the female of the species, and a person cannot be convicted of the larceny of articles other than those named in the indictment, and hence on a trial under an indictment for the theft of three cows, where the proof was of the taking of a cow and two steer calves, there was evidence on which it might have been found that the cow and one calf had been given to accused by his mother, who owned them, a refusal to charge that proof of larceny of a steer calf was not proof of larceny of a cow was reversible error. Marsh v. State, 57 South. 387, 3 Ala. App. 80.

The distinction between a "cow" and a "steer" must be recognized in construing the statute relating to larceny; the one being a full grown female of the bovine genus, and the other being a castrated male of the same genus. An information charging larceny of a "cow" was not sustained by proof of larceny of a "steer." Mobley v. State, 49 South. 941, 942, 57 Fla. 22, 17 Ann. Cas. 735.

Heifer

An indictment charging larceny of a "cow" covers larceny of a "heifer." State v. Minnick, 102 Pac. 605, 607, 54 Or. 86.

The word "cow," as used in Acts 1900-01, p. 1242, making it unlawful to permit any horse, cow, etc., to run at large, was used in the general sense to include the female of the bovine genus of animals, and includes a yearling heifer or calf. Flowers v. State, 56 South. 36, 37, 1 Ala. App. 262.

COWHIDE WHIP OR STICK

An indictment charging that defendant assaulted and beat C. with "leather bridle reins," while armed with a pistol, with intent to intimidate C., and prevent him from defending himself, while not good as one for the offense denounced by Code 1906, § 1044, declaring a penalty for one who, under such circumstances, assaults and beats another with a "cowhide, whip, or stick," is good as one for common assault and battery. State v. Spigener, 50 South. 977, 978, 96 Miss. 597.

CR.

"The abbreviations 'Cr.' and 'Dr.,' when used in bookkeeping, mean to enter upon the credit and debit sides of the account respectively. They are generally used as adjectives, descriptive of the side of the account. They may also be used as nouns, the first as designating a person to whom an obligation accrues, and the latter, the person on whom the obligation rests, as creditor and debtor, and they may be used as words to designate the act of crediting or debiting an item on an account, but in none of these senses are they

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used to denote a present matured indebtedness. When a statement of account is made out using the term 'Dr.,' without more, it simply indicates that the person owes the various items. It does not indicate a matured indebtedness. The usual and ordinary method of keeping books of account is to enter the items chargeable as they are made, although they may not be due or may not mature until a future time, so the abbreviation 'Dr.,' as used in the heading of an account, does not indicate an indebtedness matured or due and unpaid." Jaqua v. Shewalter, 37 N. E. 1072, 1073, 10 Ind. App. 238.

CRACKED CORN

In the manufacture of corn meal for culinary purposes, the corn is first kiln-dried, then cracked or ground between rollers, and afterwards bolted. A product made by the same rollers, but set farther apart so as not to crush the grain so finely and with the corn not kiln-dried and the product not bolted, but merely passed between the rollers and then loaded in the cars and variously known as "cracked corn," "chop," "coarse meal," was not in the ordinary acceptation of the term "meal" and was properly distinguished from meal in apportioning cars among shippers. State ex rel. Crandall v. Chicago, B. & Q. R. Co., 101 N. W. 23, 24, 72 Neb. 542.

CRACKER

See Safe Cracker.

CRAFT

See Water Craft.

As a vessel

A bill of lading provided that, unless the bill by express written agreement was to bear the cost of lighterage, it was agreed that the lighterage was for account and risk of the cargo, custom of the port notwithstanding. The bills contained a written clause that the freight was to be delivered by steamer or lighter at the steamer's option at a certain railroad in Rio de Janeiro, provided there was enough water and length to get alongside dock. The freight contract was indorsed, "These rates include delivery * * * providing there is water enough for craft to get alongside dock, and also include all derrick costs in discharging." Held, that the bill of lading did not provide that the cost of lighterage should not be at the expense of the cargo, but should be construed to mean that, if there was water and length enough to get the steamer alongside the dock, it was then at the steamer's option to discharge at the dock, or deliver by lighter at her own expense; the word "craft" meaning the steamer in question. Herr v. Tweedie Trading Co., 181 Fed. 483, 485, 104 C. C. A. 231.

CRAFTSMAN

The differences in meaning of the words "workman," "laborer," "artisan," "artificer," "mechanic," and "craftsman" are as follows: "Workman" is the general term which frequently applies to one who does relatively skilled work, as contrasted with a "laborer," whose work demands strength or exertion rather than skill. An "artisan" is one who is employed in an industrial or mechanic art or trade. "Mechanic," once synonymous with "artisan," is now commonly restricted to a workman who is skilled in constructing, repairing, or using machinery. A "craftsman" is one who practices a handicraft. "Artificer" commonly implies power of contrivance or adaptation in the exercise of one's craft. State v. City of Ottawa, 113 Pac. 891, 893, 84 Kan. 100.

CRANE

See Traveling Crane.
As machine, see Machine.
As machinery, see Machinery.

A crane used to lift molten metal in a manufacturing establishment, and operated by hand, is a machine within the factory act (Acts 1899, p. 234, c. 142, § 9), requiring the operator of a manufacturing establishment to guard vats, cogs, belting, etc., or machinery; the word "machine" including every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. Crawford & McCrimmon Co. v. Gose (Ind.) 82 N. E. 984, 985.

CRANEMAN

As laborer, see Laborer.

CRAPS

See Shooting Craps.
As banking game, see Banking Game.
As gambling device, see Gambling Device.

"Craps" is a game played with dice. Nicholson v. State, 71 S. W. 969, 970, 44 Tex. Cr. R. 410, 434.

"Craps" is a gambling game consisting of throwing dice for certain numbers. People v. McDermott, 97 N. Y. Supp. 901, 111 App. Div. 380.

"Craps" is a well-known game of chance played with dice, and is defined as "a game of chance in which the object is to guess the number thrown on two dice." Sims v. State, 57 S. E. 1029, 1 Ga. App. 776 (quoting and adopting the definition in Stand. Dict.).

"Craps" is a game played with dice for money. The method of play is that each player puts up his bet and rolls the dice to make seven or eleven. If he wins, each of the other players pay him the amount of his bet. If he loses, he passes the dice to the next player and the latter rolls. Morton v.

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Provident Nat. Bank of Waco, 93 S. W. 189, 191, 42 Tex. Civ. App. 154.

A game of dice, in which one person sits behind the table and takes all the bets of the persons playing on the outside, the dice being thrown by the parties alternately, is not an ordinary game of "craps," or what is termed as "head to head game," but is a "banking game," punishable under Pen. Code 1895, art. 388, providing that any person who shall bet at any gaming table or bank shall be punished. Faucett v. State, 79 S. W. 548, 46 Tex. Cr. R. 113.

"Craps," played with dice upon a table, is a gambling device and prohibited under that clause of the statute prohibiting any kind of a gambling table, or gambling device adapted, devised, or designed for the purpose of playing games of chance for money. White v. State, 76 N. E. 554, 555, 37 Ind. App. 95.

CRATES

"By * * * 'crates,' * * * we understand those encasements which are not usually of permanent value, and such as are ordinarily used for the convenient transportation of their contents." United States v. Nicholls, 22 Sup. Ct. 918, 919, 186 U. S. 300, 46 L. Ed. 1173.

CRAVENETTE CLOTH

Certain woolen goods known as "cravenette cloths," which have been subjected to a process intended to make them rain-repellent, which are chiefly used for outer garments to be worn in rainy weather, and which, for all ordinary purposes, are waterproof, are dutiable as "waterproof cloth," under Tariff Act 1890, c. 1244, par. 369, § 1, Schedule J, 26 Stat. 593. Cravenette is not absolutely waterproof. In this respect it resembles gossamer and other materials universally recognized as waterproof. United States v. Brown & Eadie, 136 Fed. 550, 551, 69 C. C. A. 260.

Woolen or worsted fabrics known as "cravenette," which have been subjected to a process to render them nonabsorbent, are dutiable under Tariff Act October 1, 1890, c. 1244, § 1, Schedule J, par. 369, 26 Stat. 593, as water-proof cloth, and not under paragraph 392, Schedule K, as woolen or worsted cloths, or paragraph 395, Schedule K, as dress goods of wool, worsted, etc. Brown & Eadie v. United States, 126 Fed. 446, 447.

CREAM OF CODFISH

As fish skinned or boned, see Fish Skinned or Boned.

CREAM SEPARATOR

As tool, see Tool—Tools of Trade.

CREATE

The general lien of a landlord for rent, given by Code Ga. § 2795, to "date from the time of the levy of a distress warrant to enforce the same," is not created by judgment, nor obtained through legal proceedings, within the meaning of the bankrupt act of July 1, 1898, 30 Stat. 565, c. 541, § 67f, and is therefore not defeated by the provisions of that section, although the levy was made within four months of the filing of the petition in bankruptcy against the tenant. Henderson v. Mayer, 32 Sup. Ct. 699, 701, 225 U. S. 631, 56 L. Ed. 1233.

To create an office means to cause it to exist, and the act which provides for the organization and government of highway districts, etc. (approved March 8, 1911, Sess. Laws, c. 55, p. 121), does not create the office of commissioner of highway districts, but makes it possible for the people to organize highway districts and thereby bring into existence the office of highway commissioner. State v. Gooding, 124 Pac. 791, 792, 22 Idaho, 128.

In Const. art. 7, § 8, providing for the appointment of officers whose offices "shall be created by law," the word "create" means to bring into existence that which did not exist, and gives to the Legislature power to originate an office. Blue v. Tetrick, 72 S. E. 1033, 1035, 69 W. Va. 742.

The limitation on municipal indebtedness prescribed by Act April 29, 1902 (95 Ohio Laws, p. 321), being "that no municipal corporation shall hereafter 'create' or assume an aggregate indebtedness of outstanding and unpaid bonds under the authority of this act in excess of eight per cent. of the total value of all the property in it as listed and assessed for taxation," has only a prospective operation, and indebtedness "created" or assumed prior to the passage of the act may not be considered in ascertaining whether the prescribed limit of indebtedness has been reached. City of Tiffin v. Griffith, 77 N. E. 1075, 1076, 74 Ohio St. 219.

The words "created" and "formed," as used in Sess. Laws Wyo. 1909, c. 19, by which a new county of a designated name was created and formed out of described territory forming part of an existing county, and which provided that after the county should have organized it should constitute a portion of a judicial district and be attached to the existing county for the purposes of legislative representation, are limited in their meaning by the other provisions of the act, and do not effect an immediate division of the existing county, but the act is in the nature of an enabling act under which a new county may be constitutionally formed. Board of Com'rs of Big Horn County v. Woods, 106 Pac. 923, 926, 18 Wyo. 316.

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Amend distinguished

See Amend—Amendment.

As applied to corporations

The General Corporation Act (P. L. 1898, p. 408) permits any provision which the incorporators may choose to insert for the regulation of the business, conduct of the affairs of the corporation, and any provision "creating," defining, limiting, and regulating the powers of the corporation, provided such provisions be not inconsistent with the statute. Held, that such clause did not grant the right not only of creating, defining, limiting, and regulating the powers of the corporation, but also the right to authorize the directors to exercise the powers thus established according to any method the incorporators might see fit to adopt, the right to "create" being limited to the establishing of or regulating a power to be exercised by the corporation through its directors, which power shall not be inconsistent with the general act; and hence a provision in a certificate of incorporation that any resolution in writing, signed by all the board of directors, should constitute action by the board as if duly passed at a duly called meeting of the board, was unauthorized. Audenried v. East Coast Milling Co., 59 Atl. 577, 584, 68 N. J. Eq. 450.

The term "create," as used in Const. art. 11, § 13, prohibiting the Legislature from "creating" other than banking corporations, by special act, should not be given a literal interpretation, but should be so construed as to prohibit such a change in a corporation organized under a valid law as would materially extend its powers and privileges. Marion Trust Co. v. Bennett, 82 N. E. 782, 783, 169 Ind. 346, 124 Am. St. Rep. 228.

Designate distinguished

See Designate.

CREATED BY FRAUD

Only such debts created by the fraud of a bankrupt as were so created while he was acting as an officer or in a fiduciary capacity are excepted from the operation of a discharge in bankruptcy by Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 550, since to hold that the language of this subdivision, making an exception in favor of debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer, or in any fiduciary capacity," includes all debts fraudulently contracted, would render meaningless the exception in subdivision 2, in favor of such claims for fraud as have been reduced to judgment. Crawford v. Burke, 25 Sup. Ct. 9–11, 195 U. S. 176, 49 L. Ed. 147.

CREATION OF NEW DEBT

The increase of a town debt due to accretions of unpaid interest on existing indebtedness is not a "creation of a new debt" within Const. art. 22, limiting municipal indebtedness. Leavitt v. Town of Somerville, 75 Atl. 54, 56, 105 Me. 517.

The issuance of refunding bonds by a municipality is not the creation of a new indebtedness within Const. art. 8, § 3, providing that no municipality shall incur indebtedness exceeding in that year the income and revenue provided for it for such year without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. Veatch v. City of Moscow, 109 Pac. 722, 724, 18 Idaho, 313, 21 Ann. Cas. 1332.

CREATIVE FRANCHISE

"A 'creative' or corporate franchise confers upon the aggregation of individuals composing a corporation no greater measure of inherent right than is enjoyed by each individual citizen. In fact, the rights it may enjoy, in common with natural persons, are limited by express powers conferred upon it. The enumeration of powers in its charter is a limitation on corporate capacity, and not an enlargement of inherent rights, attaching to the legal person thus created. * * * A corporation may have power to acquire realty, and yet never own such property. Its corporate franchise, its charter, may grant the power to acquire and exercise separate, distinct, and varied franchises, but none may ever be acquired or owned. This distinction between the power to own, and ownership, is very important when we come to consider the difference between the creative franchise, vesting the power to acquire, and other franchises which it may subsequently acquire by purchase or acceptance. * * * It points the difference between the general, creative franchise to be, and the special franchises which, when accepted or purchased, vest privileges or franchises resting in special grant from governmental sources. Above all things, it eliminates the heresy that all special franchises, enjoyed and exercised by a corporation, whether acquired by acceptance or purchase, are merged in the general franchise which creates the corporation, and endows it with enumerated powers. The mere fact that a corporation is organized for the specific purpose of acquiring, and is given power to acquire, public uses or franchises, does not carry with it the idea that such franchises, when acquired, be they many or few, are merged in, and must be assessed as part and parcel of, the general corporate franchise." Where a corporation was authorized to acquire property, appropriate and distribute water, construct canals, and establish, collect, and receive rates, water rents, and tolls, and was authorized to exercise the right of eminent domain, the actual exercise of such powers by the construction of canals in a county other than that in which the corporation's principal place of business was located, constituted the use of a franchise by the corporation in such coun-

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ty which was there subject to taxation. San Joaquin & K. R. Canal & Irrigation Co. v. Merced County, 84 Pac. 285–288, 2 Cal. App. 593.

CREDIBLE—CREDIBILITY

See Goes to His Credibility; Incredible; Personal Credibility.

The word "credibility" is an ordinary English word, and when used in an instruction needs no explanation or definition. Barber v. State, 142 S. W. 577, 581, 64 Tex. Cr. R. 96.

A question as to the exercise of due care must be determined by the jury by considering the personnel of the witnesses, their apparent interest in the controversy, their qualifications to give expert or opinion evidence, all of which matters are properly cognizable under the term "credibility." Melzner v. Northern Pac. Ry. Co., 127 Pac. 146, 151, 46 Mont. 162.

CREDIBLE PERSON

The statute requiring that an affidavit upon which an information is based be made by a "credible person" contemplates a person competent to give evidence and worthy of belief, and the mere fact that a person's reputation for truth and veracity is attacked does not render him incompetent to make the affidavit. Jones v. State, 125 S. W. 914, 58 Tex. Cr. R. 313.

Where persons making affidavits in support of an application for a change of venue in a criminal case are examined in open court in regard to the truth of such application, and it appears that their means of knowledge are not sufficient to support the statements made in their affidavits, they are not "credible persons" within the statute requiring the application of an accused for a change of venue to be supported by the affidavits of at least three credible persons. Turner v. State, 111 Pac. 988, 992, 4 Okl. Cr. 164.

CREDIBLE WITNESS

A "credible witness" is one who is not disqualified to testify by mental incapacity, crime, or other cause. Historical Soc. of Dauphin County v. Kelker, 74 Atl. 619, 226 Pa. 16, 134 Am. St. Rep. 1010.

A "credible witness," within the rule that no person can be convicted of perjury except on the testimony of two credible witnesses or of one credible witness corroborated strongly by other evidence, is one who, being competent to give evidence, is worthy of belief, and all witnesses permitted to testify on the trial are competent, and the jury are the exclusive judges as to whether a witness is worthy of belief. Where the state's witnesses were impeached by proof that their reputation for truth was bad and that they were self-confessed criminals and gamblers, an instruction that to justify a conviction the falsity of the testimony of accused must be established by two credible witnesses or of one credible witness corroborated strongly by other evidence, and defining a credible witness as one who, being competent to give evidence, is worthy of belief, was sufficient. Anderson v. State, 120 S. W. 462, 466, 56 Tex. Cr. R. 360.

When the "credibility" of a witness is spoken of, it refers only to his integrity and to the fact that he is worthy of belief. The term does not imply that he has intelligence, or knowledge, or opportunity for knowledge of the particular facts in the case. Madden v. Saylor Coal Co., 111 N. W. 57, 59, 133 Iowa, 699.

"The word 'credible' means worthy of credit. When applied to the person of a witness, it bespeaks him to be a person of capacity to deserve credit; I say of capacity to deserve credit because no man can be sure of obtaining credit, let him be ever so credible." State v. Spivey, 90 S. W. 81, 87, 191 Mo. 87 (quoting and adopting definition in Hindson v. Kersey, 1 Day's Cases in Error, 41).

In instructions that the jury were the judges of the credibility of witnesses and that if they believed that any witness had sworn falsely, or that his testimony was inconsistent with other testimony which they believed to be true, or consistent with circumstances proven on the trial, then the testimony of one credible witness would be of more value than the evidence of such other witness, the term "credible" meant nothing more than such witness, as the jury gave credit for telling the truth and was used in the abstract without reference to any particular witness. Territory v. Garcia, 75 Pac. 34, 35, 12 N. M. 87.

One of the subscribing witnesses to a will containing a charitable bequest, after having been told by the other subscribing witness outside testator's office that testator desired him to be a witness to his will, went into the office, where testator was seated at a desk, with the will already signed by him in his hand. Testator's signature was in plain view of the witness, who, at testator's request, signed his name below that of the other subscribing witness, and opposite that of testator. Held, that such subscribing witness was a credible witness, within Act April 26, 1855 (P. L. 332) § 11, requiring such a will to be attested by two credible, and at the time disinterested, witnesses, it not being necessary that the witness see testator sign the will, testator's subsequent acknowledgment of his signature being sufficient. In re Kessler's Estate, 70 Atl. 770, 772, 221 Pa. 314, 128 Am. St. Rep. 741, 15 Ann. Cas. 791.

One who was an accomplice to a conspiracy to commit a perjury, and who admitted that he did in fact commit perjury for a monetary consideration, is not a "credible

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witness," within Code Cr. Proc. 1895, art. 786, requiring the evidence of two credible witnesses, or of one credible witness strongly corroborated, to convict of perjury. Conant v. State, 103 S. W. 897, 899, 51 Tex. Cr. R. 610.

As competent

The term "credible," as applied to subscribing witnesses of a will, means "competent." Gump v. Gowans, 80 N. E. 1086, 1087, 226 Ill. 635, 117 Am. St. Rep. 275 (citing Harp v. Parr, 48 N. E. 113, 168 Ill. 459); Smalley v. Smalley, 70 Me. 545, 548, 35 Am. Rep. 353; Swanzy v. Kolb (Miss.) 46 South. 549; In re Klein, 88 Pac. 798, 804, 35 Mont. 185.

As relating to the attesting witnesses to wills, the words "credible," "disinterested," and "competent," are treated as synonymous. Hiatt v. McColley, 85 N. E. 772, 774, 171 Ind. 91.

A "credible" witness to a will is a "competent" witness; one legally competent to testify to the facts which he attests by subscribing his name to the will. Jones v. Grieser, 87 N. E. 295, 238 Ill. 183, 15 Ann. Cas. 787.

"The word 'credible,' as used in a statute in reference to the attesting witness to a will, means competent; that is to say, the requirement of the statute is that the attesting witnesses to a will must be such persons as are not disqualified by mental imbecility, interest, or crime from giving testimony in a court of justice." Savage v. Bulger (Ky.) 77 S. W. 717 (quoting Fuller v. Fuller, 83 Ky. 345).

The statute of wills requires a will to be attested by two or more credible witnesses, and, in case of the death of a witness, proof of his handwriting is admissible with the same effect as if he had appeared and testified in his own person. The word "credible," as used in the statute, means "competent." It means a witness who, at the time of attesting a will, would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will. There can be no doubt that a witness would be competent to testify against an heir on an issue involving the execution of a will and the mental capacity of the testator, although his grandson might be interested in the result of the litigation. The interest which disqualifies a witness in such a case must be a present, certain, legal interest of a pecuniary nature. The test is whether he will either gain or lose financially, as the direct result of the suit, or whether the judgment or decree will be evidence for or against him in another action. O'Brien v. Bonfield, 72 N. E. 1090, 1091, 213 Ill. 428 (citing Boyd v. McConnel, 70 N. E. 649, 209 Ill. 396).

The word "credible," as used in Hurd's Rev. St. c. 148, § 2, requiring that all wills, testaments, and codicils shall be attested by two or more "credible" witnesses, means competent. Fearn v. Postlethwaite, 88 N. E. 1057, 1058, 240 Ill. 626.

The word "credible," in a statute requiring a will to be attested by credible witnesses, is used in the sense of "competent." An instruction which erroneously requires the jury to find that the instrument was subscribed by testator "in the presence of two credible witnesses" is without prejudice to contestants. Bramel v. Bramel, 39 S. W. 520, 521, 101 Ky. 64.

"Credible," as used in 29 Car. II, c. 23, § 5, providing that a will must be proved by two "credible" witnesses, meant no more and no less than competent. Lord Camden was of opinion that it was when he attested the will (Hindon v. Kersey [1765] 1 Bro. Adm'y & Civ. L. 284, note [24]; 4 Burn's Ecc. Law, 88; Bac. Abr. Wills [D], III), or to the period when he was called to prove it, as Lord Mansfield held (Windham v. Chetwynd, 1 Burr. 414; Lowe v. Joliffe, 1 W. Bl. 366; Goodtitle v. Welford, 1 Dougl. 141). Bruce v. Shuler, 62 S. E. 973, 974, 108 Va. 670, 35 L. R. A. (N. S.) 686, 15 Ann. Cas. 887.

A "credible witness," within 3 Starr & C. Ann. St. p. 4026, c. 148, § 2, requiring wills to be attested in the presence of the testator by "two or more credible witnesses," is a witness who is not for any legal reason disqualified from giving testimony generally or, by reason of interest or other disqualifying statutory cause, incompetent to testify in respect to the particular subject-matter under investigation. Boyd v. McConnell, 70 N. E. 649, 209 Ill. 396.

CREDIT

See For Collection and Credit; For Credit; Full Faith and Credit; General Credit; Letters of Credit; Personal Credit; Taxable Credit.
Credit or otherwise, see Otherwise.
Representation as to credit, see Representation.
Sale on credit, as sale, see Sale.
See, also, Credits.

"Debts" and "credits" are correlative. Wilde v. Mahaney, 67 N. E. 337, 338, 183 Mass. 455, 62 L. R. A. 813.

Any difference between the word "credit," as used in an instruction that any statement contradictory of a witness could be considered only in determining the weight and "credit" the jury would give the witness, and the word "credibility," was not of sufficient importance to require a reversal. Dooley v. State, 108 S. W. 676, 52 Tex. Cr. R. 491.

In an action to hold defendant as surety, a statement in the decision of the appellate court, that the question whether defendant's undertaking was original or collateral de-

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pended upon whether the "credit" was given to defendant or the purchaser of the goods, will be construed to mean whether the sole credit was given to defendant or the purchaser. East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Congregation, 62 Atl. 575, 576, 100 Md. 689.

The word "credit," as appearing in section 10427, Cobbey's Ann. St. 1903, has been construed to mean net credits, and the indebtedness of the taxpayer may be deducted from the gross credits to ascertain the net credits to find the true value for assessment; but a taxpayer is not permitted to deduct from his gross credits an alleged item of indebtedness that exists merely as a matter of convenience in bookkeeping, and of which he is both payer and payee. It is only a bona fide indebtedness to another that he may deduct. Hoagland v. Merrick County, 115 N. W. 537, 81 Neb. 83.

A contract for the display of an advertisement on a theater curtain for such time as the theater would be open during specified seasons provided that it was not subject to cancellation, and that credit would be given for each entire week the advertisement was not shown. Held, that the word "credit" was used as the opposit of "debit" and as a correlative of "debt," and that, since there could be no debt where the contract was unexecuted, if the display of the advertisement was optional, it should not be construed as providing for its display at the option of the curtain company, but as requiring its display at all times when the theater was open with a set-off for any time that the theater was not open, and hence that a recovery for the display of the advertisement after the advertiser had directed its discontinuance was not precluded on the ground that the contract lacked mutuality of obligation. Imperial Curtain Co. v. Strauss, 135 N. Y. Supp. 577, 579, 76 Misc. Rep. 533.

As property

See Property.

CREDIT SALE

"A cash sale of cotton delivered on Saturday is not converted into a 'credit sale' because, on the Monday following, the commission merchant receives a check for the purchase money, deposits the same in bank, draws against the account thus increased, and marks the bill 'paid.'" Charleston & W. C. Ry. Co. v. Pope & Fleming, 50 S. E. 374, 375, 122 Ga. 577.

CREDITABLE WITNESS

See Credible Witness.

CREDITOR

See Assignee for Benefit of Creditors; Assignment for Benefit of Creditors; Assignment in Fraud of Creditors; Bona Fide Creditor; Corporation Creditor; Debtor and Creditor; Dilatory Creditor; Diligent Creditor; Existing Creditor; First Meeting of Creditors; Judgment Creditor; Petitioning Creditor; Preferred Creditors; Secured Creditor; Subsequent Creditor.

All other creditors, see All Other.

Any creditor, see Any.

Composition with creditors, see Composition.

Privileged creditor, see Privilege.

Stockholder as creditor of corporation, see Stockholder.

"Creditor," however defined, is the correlative of "debtor." Hebert v. Handy, 72 Atl. 1102, 1104, 29 R. I. 543.

A "creditor" is a person to whom any obligation is due; one who has the right to require the fulfillment of an obligation. Morgan's Louisiana & T. R. & S. S. Co. v. Stewart, 44 South. 138, 143, 119 La. 392 (Civ. Code, arts. 2132, 3556); In re Putman, 193 Fed. 464, 473.

"A 'creditor of an estate' is one who has a definite demand against the estate or a cause of action capable of adjustment and liquidation upon a trial." In re Chestnut St. Trust & Saving Fund Co.'s Assigned Estate, 66 Atl. 332, 333, 217 Pa. 151, 118 Am. St. Rep. 909.

A "creditor" within the meaning of Bankr. Act, § 1 (Act July 1, 1898, c. 541, 30 Stat. 544), is one who owns a claim, and the owner of a beneficial interest in a claim does not own the claim itself. In re E. T. Kenney Co., 136 Fed. 451, 456.

The word "creditor" may mean one having any character of claim against another, or one having a liquidated demand based on an agreement. Henley v. Myers, 93 Pac. 168, 170, 76 Kan. 723, 17 L. R. A. (N. S.) 779 (citing 2 Words & Phrases, pp. 1713, 1714, 1718, 1721).

"As to exempt property, there are, within the meaning of the statute of frauds, no 'creditors.'" Gibson v. Barrett, 87 S. W. 435, 75 Ark. 205.

The term "creditor" is defined by Civ. Code, § 2686, as follows: "Whenever one person by contract or by law is liable and bound to pay to another an amount of money certain or uncertain, the relation of debtor and creditor exists between them." This definition is much broader than is generally supposed, and would seem to include a liability for a wrongful conversion of property, for which trover would lie. "In a multitude of cases it has been repeatedly adjudicated that a party bound by a contract upon which he may become liable for the payment of money, although his liability be contingent, is a debtor, within the meaning of a statute avoiding all grants made to hinder or

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delay creditors. A surety is a creditor from the time the application is entered into or the bond signed, and the person whose claim arises from a tort, such as libel or slander, is a creditor." A plaintiff in a trover case is a creditor within the protection of a statute against fraudulent conveyances, even before judgment, and a surety on the defendant's bail bond in a trover case, who pays the judgment recovered by plaintiff, is also a creditor. Banks v. McCandless, 47 S. E. 332, 335, 119 Ga. 793.

A petitioner for condemnation is not in any sense a purchaser or creditor within the purview of the registration statutes. Atlanta, K. & N. R. Co. v. Southern R. Co., 131 Fed. 657, 666, 66 C. C. A. 601.

Where claimant against an estate and the executors have consented that the surrogate determine the claim upon the judicial settlement of the executors' accounts the claimant is a creditor of the estate within the statute authorizing creditors, etc., to petition to compel executors to account in the Surrogate's Court. Clark v. Scovill, 83 N. E. 659, 660, 191 N. Y. 8.

Under Burns' Ann. St. 1908, § 2742, which provides that administration in case of intestate shall be granted to the widow or widower, next of kin, or the largest creditor, in that order of preference a representative of a bank, not authorized by law to act as administrator, is not a creditor within the meaning of the statute. Reed v. Bishop (Ind.) 97 N. E. 1023, 1026.

By the use of the word "creditors" in a statute giving a right to intervene at the hearing of an application for the judicial settlement of an administrator's account to "creditors" and persons interested in the estate, the Legislature did not mean "creditors," but meant instead "persons claiming to be creditors." It does not follow, however, that by the expression "persons interested in the estate" they meant "persons claiming to be interested in the estate." In re Thompson, 83 N. Y. Supp. 983, 984, 41 Misc. Rep. 223.

"Creditors," within Bankr. Act, § 67a, 30 Stat. 564, which provides that claims which for want of record or other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate, contemplates the invalidity of a claim against some of the bankrupt's creditors. In re Thorp, 130 Fed. 371, 375.

The word "creditor," in Bankruptcy Act authorizing creditors to file a petition in bankruptcy, declaring that the word "creditor" shall include any one who owns a demand provable in bankruptcy, authorizing creditors other than the petitioners to be heard in opposition to the prayer of the petition, and allowing the bankrupt or any creditor to appear and plead to the petition, does not include a creditor who has a voidable preference, and he may not be counted against the petitioner in computing the number of creditors that must join in a petition for an adjudication in bankruptcy unless he surrenders his preference, and where he surrenders before adjudication he may be counted. Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 74, 80 C. C. A. 25.

Under Revisal 1905, § 1203, providing that a receiver of the property and effects of a corporation may be appointed on application of a creditor or stockholder, where defendant, an insolvent corporation, failed to pay for certain machinery delivered to it by plaintiff, under an agreement that it should issue certain stock as such payment, and thereby became also liable for the use of the machinery and for injury to it, plaintiff was a creditor within the meaning of the statute; one who has a right to require the fulfillment of an obligation or contract for the payment of money being a creditor. Summit Silk Co. v. Kinston Spinning Co., 70 S. E. 820, 822, 154 N. C. 421, Ann. Cas. 1912A, 897.

Under Gen. Laws 1909 c. 215, § 21, providing that, if a "creditor" of an estate shall not prove his claim before the commissioners within the time fixed, he shall be barred of his action therefor, one who claims of the estate more than he owes it is a "creditor" and must prove his claim or be barred of any action for the recovery of it, and one who owes the estate more than the estate owes him is a "debtor." A bank in which intestate had deposited $700, and which had discounted his note of intestate for $400, which was not due until two months after intestate's decease, was a debtor entitled to set off the note against the deposit, though it did not prove the debt before the commissioners. Troup v. Mechanics' Nat. Bank, 53 Atl. 122, 123, 24 R. I. 377.

The word "creditors," as used in Civ. Code 1895, § 2634, declaring that the dissolution of a partnership by the retiring of an ostensible partner must be made known to the creditors and to the world, is not limited to persons who were creditors at the time of the dissolution, but a person who had previously sold goods and given credit to the firm during its continuance was within its meaning. Bush & Hattaway v. McCarty Co., 56 S. E. 430, 431, 127 Ga. 308, 9 Ann. Cas. 240 (citing Prentiss v. Sinclair, 5 Vt. 149, 26 Am. Dec. 288, 290; Bates, Partn. § 613; Parsons Partn. [4th Ed.] § 319; Askew v. Silman, 22 S. E. 573, 95 Ga. 678).

Where creditors petitioning for a revision of an order denying an involuntary petition in bankruptcy declared that a third person was a creditor of the alleged bankrupt, and the third person in his verified answer to the petition averred that he was a creditor in a specified sum above the value

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of the security held by him, and the answer was not denied, and the special master treated the third person as a creditor, the third person was a creditor within Bankr. Act July 1, 1898, c. 541, § 57, c, h, 30 Stat. 560, and he could plead to a petition in involuntary bankruptcy. Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 277. 116 C. C. A. 636.

As aggrieved party

See Aggrieved Party.

As all creditors

The term "creditors" of a bankrupt does not mean all creditors. In re Armstrong, 145 Fed. 202, 210.

Under Lien Law N. Y. 1897, c. 418, § 90, providing that an unfiled chattel mortgage is absolutely void as against the creditors of the mortgagor, the word "creditors" included all creditors, and not those only who were prejudiced by the mortgagee's failure to file. In re Schmidt, 181 Fed. 73, 75, 104 C. C. A. 107.

"Creditors," within Code Iowa 1897, § 2905, making invalid unrecorded conditional sales or liens on property sold to bankrupts as against purchasers without notice from or creditors of such bankrupts, means, not only attaching or execution creditors, but all creditors of the bankrupt. In re Smith & Shuck, 132 Fed. 301, 303.

Rev. St. Ohio 1908, § 4155—2, provides that all conditional sale contracts shall be void as to all subsequent purchasers and mortgagees, in good faith and "creditors" unless evidence by a writing, signed, etc., and also unless a statement under oath by the seller, of the amount of the claim, deposited with the county recorder of the county where the person signing the instrument resides at the time of its execution, if a resident of the state, and, if not, with the county recorder of the county in which the property sold is situated. Section 4150 provides that a chattel mortgage not accompanied by immediate delivery, and followed by actual and continued change of possession of the things mortgaged, shall be void as against the creditors of the mortgagor, unless a true copy is filed, etc. Held, that the word "creditors," as used in section 4155—2, included the same persons as were included by the same word used in section 4150, and, the latter having been construed by the Ohio court of last resort to include all creditors of the mortgagor represented by a duly appointed receiver, section 4155—2 should be construed to invalidate an unfiled conditional sale contract as against all creditors of the buyer represented by a receiver appointed by the federal court, under the rule that the construction of state statutes by the highest court of the state is conclusive on federal courts. Hamilton v. David C. Beggs Co., 179 Fed. 949, 951.

As assignee of claim

Since a "creditor" within the bankruptcy act includes every one who owns a provable demand or claim, a creditor within such definition is not disqualified as a petitioner because he acquired the claim by assignment after commission of an act of bankruptcy. In re Lewis F. Perry & Whitney Co., 172 Fed. 744, 745.

As attachment, judgment, or lien creditors

In Rev. Codes 1899, § 5048, relating to attachment and defining a "creditor" as one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money, the word "creditor" has its usual signification; that is, one to whom a debt is due, using the word "debt" according to its common meaning. Sonnesyn v. Akin, 97 N. W. 557, 560, 12 N. D. 227.

In the commercial and ordinary sense, the designation of "creditor" means one to whom a debt is due from another person, but in a more comprehensive sense, and as used in our statutes governing procedure and relief, the term includes those who have acquired a lien either by a legal or equitable attachment or by seizure and levy on execution. Under Rev. Laws, c. 152, §§ 10–12, 29, 31, authorizing the attachment of a husband's property on a libel by the wife for a divorce, etc., and chapter 147, § 3, providing that no trust concerning land shall prevent a "creditor" who has no notice thereof from attaching the land, a divorced wife, having no notice of a trust affecting land title to which is in her husband's name, may attach the same in proceedings to enforce a decree requiring the husband to pay for the support of a child of the parties; the word "creditor" including those who have a lien either by a legal or equitable attachment. Hill v. Hill, 82 N. E. 690, 691, 196 Mass. 509 (citing Sewall v. Sewall, 130 Mass. 201; Bailey v. Bailey, 44 N. E. 143, 166 Mass. 226; Purdon v. Blinn, 78 N. E. 462, 192 Mass. 387, 389; Snyder v. Smith, 69 N. E. 1089, 185 Mass. 58, 61; Gay v. Ray, 80 N. E. 693, 195 Mass. 8).

Creditors of an insolvent corporation sued it and its stockholders to enforce their liability, and judgment was entered determining who the creditors were and the liability of the stockholders, and appointing a receiver to enforce the adjudged liability. Thereafter a stockholder was discharged in bankruptcy, and in his schedule he named the creditors for whose benefit judgment was rendered, and not the receiver. Held, that his actual creditors were named in the schedule, in compliance with Bankr. Act July 1, 1898, c. 541, § 17, and his discharge released him from liability on the judgment. Longfield v. Minnesota Sav. Bank, 103 N. W. 706, 707, 95 Minn. 54.

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Comp. Laws 1897, § 9757, confers on the circuit court jurisdiction over directors and other officers of corporations, to compel them to account for their official conduct, to suspend or remove them from office, to set aside unlawful alienations of property, and to restrain and prevent such alienations. Section 9759 provides that such jurisdiction shall be exercised on bill or petition at the instance of the Attorney General, or at the instance of any creditor of the corporation. Held, that the word "creditor," in section 9759, is limited in its scope to a judgment creditor, and such section does not authorize an ordinary creditor to invoke the jurisdiction conferred by section 9757. McKee v. City Garbage Co., 103 N. W. 906, 908, 140 Mich. 497.

As used in Bankr. Act July 1, 1898, § 67, subds. "a" and "b" and section 70, relating to liens and the rights of creditors and to property transferred in fraud of creditors, the word "creditors" refers to such creditors as have secured some specific claim against, or lien on, the property involved. Skilton v. Codington, 83 N. Y. Supp. 351, 355, 86 App. Div. 166 (citing In re Economical Printing Co., 6 Am. Bankr. Rep. 615, 110 Fed. 514, 49 C. C. A. 133; In re Garcewich, 115 Fed. 87, 53 C. C. A. 510).

Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563, provides that debts owing to any person who by the laws of the states or the United States is entitled to priority shall be entitled to priority under the bankrupt law, and Code W. Va. 1906, c. 74, § 3103, declares that a deed of trust shall be void as to creditors until and except from the time it is duly admitted to record. Held, that since the word "creditors," as used in section 3103, has been construed by the Supreme Court of Appeals of the state to mean creditors who have secured a lien on the property, and not general creditors, bondholders of the bankrupt were not precluded from claiming their debts as secured by the bonds, as against general creditors, because the deed of trust was withheld from record. In re Charles Town Light & Power Co., 199 Fed. 846, 850.

Where a creditor bought from his debtor a crop upon which there was an unfiled chattel mortgage of which he had knowledge, without having established his right as a creditor by legal proceedings, he was not a creditor within the meaning of the law relating to the filing of chattel mortgages, nor a purchaser in good faith against an unfiled mortgage; and the rights of the mortgagee were superior to any which he acquired. Davidson v. Osborne, 136 N. Y. Supp. 247, 248, 151 App. Div. 747.

Same—In recording acts

Under the rule that an oral chattel mortgage is invalid only as to "creditors" and subsequent purchasers in good faith, the word "creditor" means judgment, execution, or attachment creditor. A subsequent mortgagee with notice is not so regarded. Reiss v. Argubright, 92 N. W. 988, 989, 3 Neb. (Unof.) 756.

The term "creditor" as defined by the bankruptcy act includes any one who owns a demand or claim provable in bankruptcy. Brake v. Callison, 129 Fed. 201, 203, 63 C. C. A. 359; Clarke v. Rogers, 183 Fed. 518, 521, 106 C. C. A. 64; In re Crafts-Riordon Shoe Co., 185 Fed. 931, 934.

The word "creditor," as used in a statute declaring unrecorded chattel mortgages to be void as against creditors and bona fide purchasers for value, means creditors having some sort of lien fixed by law or legal proceedings upon the particular property, and does not include a mere general creditor. Eason v. Garrison, 82 S. W. 800, 801, 36 Tex. Civ. App. 574.

The word "creditors," as used in Code Iowa 1897, §§ 2905, 2906, declaring that a conditional sale contract not acknowledged or recorded shall be invalid as to creditors of the buyer, according to the decisions of the Supreme Court of Iowa, means lien creditors and that knowledge of the unrecorded instrument before the lien is obtained defeats their preferential right; the contract being good as between the parties. Nauman Co. v. Bradshaw, 193 Fed. 350, 353, 113 C. C. A. 274.

The term "creditors," within a statute making an unrecorded chattel mortgage or conveyance intended to operate as a mortgage where there is no change in possession void as against creditors of the mortgagor only while withheld from record, includes all those having some specific lien upon or right to mortgaged property and does not embrace mere general creditors. Youngberg v. Walsh, 83 Pac. 972, 975, 72 Kan. 220.

Under Sayles' Ann. Civ. St. 1897, arts. 3327, 3328, providing that chattel mortgages shall be void as to creditors and subsequent purchasers and lienors in good faith unless registered, the term "creditors" applies to those persons whose claims are upon certain conditions charged by law as specific liens upon the property, such as holders of attachments, executions, judgments, landlords' and mechanics' liens, and as to subsequent purchasers and lienors in good faith, and so such a mortgage is not void as to a prior trust deed on land which did not include the personalty embraced in the chattel mortgage. Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co. (Tex.) 144 S. W. 343, 346.

Under Gen. St. Kan. 1905, § 4523, making certain contracts which are not filed void as against "creditors" of the vendees, the term "creditors" means those having a specified lien upon or right to the property involved, and not mere general creditors. In re Fish Bros. Wagon Co., 164 Fed. 553, 554, 90 C. C. A. 427, 26 L. R. A. (N. S.) 433.

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Ky. St. § 496, provides that no mortgage shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until the deed shall be acknowledged or proved according to law and lodged for record. Held, that the term "creditors," as used in such section, did not include general creditors having no liens, and hence an unrecorded chattel mortgage on a computing scale, valid as between the parties, was valid against the mortgagors' estate in bankruptcy; no creditor of the bankrupt having fastened a lien thereon prior to bankruptcy, whether other debts of the bankrupt were created before or after such mortgage was made. In re Lausman, 183 Fed. 647, 649.

In Ky. St. 1903, § 496, providing that, until recorded, chattel mortgages shall not be valid against a purchaser for a valuable consideration without notice thereof, or against "creditors," and which applies also to contracts of conditional sale, the word "creditors," as construed by the state Court of Appeals, does not include general creditors, but only such as have acquired a lien. Crucible Steel Co. of America v. Holt, 174 Fed. 127, 128, 98 C. C. A. 101; Holt v. Crucible Steel Co. of America, 32 Sup. Ct. 414, 224 U. S. 262, 56 L. Ed. 756.

Attorney, agent, or proxy

Bankr. Act, § 1, cl. 9, providing that the word "creditor" shall include any one who owns a demand or claim provable in bankruptcy and may include his duly authorized agent or attorney or proxy, authorizes the signing of the names of the creditors to an involuntary petition by an attorney or agent. In re Hunt, 118 Fed. 282, 283.

The word "creditor" is defined in 30 Stat. 544, § 1, as including any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy. Rogers v. De Soto Placer Min. Co., 136 Fed. 407, 408, 69 C. C. A. 251 (quoting In re Herzikopf, 118 Fed. 101).

Claimant ex contractu

"Creditor" is ordinarily used as the antonym of "debtor," and involves a debt and a credit, and commonly signifies one who holds some contractual obligation against another. A common-law assignment for the benefit of creditors, reciting that it was executed by the assignors as copartners and the assignee, and both the firm and individual creditors of the assignors, does not require a city or its tax collector to assent in writing to the assignment to become entitled to the benefits in the collection of a tax, since the word "creditor" signifies a contractual obligation, and since a tax is not a debt. Boston v. Turner, 87 N. E. 634, 635, 201 Mass. 100 (citing In re Nicolin, 56 N. W. 587, 55 Minn. 130; New Jersey Ins. Co. v. Meeker, 37 N. J. Law, 282; Walsh v. Miller, 38 N. E. 381, 51 Ohio St. 462; State v. Georgia Co., 17 S. E. 10, 112 Ga. 34, 19 L. R. A. 485).

A "creditor," in a strict legal sense, is one who voluntarily trusts or gives credit to another for money or other property, but, in its more general and extensive sense, is one who has a right by law to demand and recover of another a sum of money on any account whatever. Under Sand. & H. Dig. § 4835, providing that, if any debtor fraudulently absconds from another state to this state without the knowledge of his creditor, the latter may commence suit against him, one who has a right of action against another to recover damages is a "creditor" of such person. Keith v. Hiner, 38 S. W. 13, 14, 63 Ark. 244.

Claimant ex delicto

A person having a claim for damages for slander is a "creditor" within the protection of the statutes against fraudulent conveyances. Papan v. Nahay (Ark.) 152 S. W. 107, 109.

A person having a claim growing out of a tort independent of contract is a "creditor," within Wilson's Rev. & Ann. St. 1903, § 906, so as to entitle him to have canceled and set aside a conveyance of real estate made to defraud creditors. Shelby v. Ziegler, 98 Pac. 989, 991, 22 Okl. 799.

The word "creditor," as used in Shannon's Code, § 5212, providing that, when a debtor and "creditor" are both nonresidents of the state and residents of the same state, the "creditor" shall not have attachment against the property of his debtor, unless he swear that the property has been fraudulently moved to the state to evade the process of law in the state of their domicile, is not to be understood in the limited sense of a person to whom a sum of money is due by agreement, but should be read in the light of the original act, and be interpreted in a more enlarged and comprehensive signification, and so includes nonresidents who are seeking redress in damages for a tort. Bryan v. Norfolk & W. R. Co., 104 S. W. 523, 525, 119 Tenn. 349.

One having a right of action for damages against another for tort is a "creditor" of the wrongdoer, within B. & C. Comp. § 5508 et seq., declaring conveyances of property made with intent to hinder, delay, and defraud creditors void as to such creditors. Seed v. Jennings, 83 Pac. 872, 874, 47 Or. 464.

Debtor and "creditor" are correlative terms implying correlative relations, simultaneous in their origin and inseparable in their existence. A person having a claim for damages arising out of a tort is not a "creditor" of the person liable on such claim within Rev. St. c. 148, § 49, making any person aiding any debtor to fraudulently dispose of his property liable to creditors, but after ob-

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taining a judgment on such claim he is a creditor. Craig v. Webber, 36 Me. 504, 507.

The word "creditor," in P. L. 1896, c. 185, providing that whenever any corporation shall become insolvent any creditor may place it in the hands of a receiver, etc., means one standing in such relation to the assets of the corporation that he has a right to a share or a dividend, but he must at that time be a creditor as distinguished from one merely entitled to become a creditor by proof of a claim for damages, and one who has a claim for damages for tort cannot meet this test. Hoopes v. Basic Co., 61 Atl. 979, 980, 981, 69 N. J. Eq. 679 (citing Lehigh & W. Coal Co. v. Stevens & Condit Transp. Co., 51 Atl. 446, 63 N. J. Eq. 107; Ft. Wayne Electric Corp. v. Franklin Electric Light Co., 41 Atl. 217, 57 N. J. Eq. 7; Gallagher v. Asphalt Co. of America, 55 Atl. 259, 65 N. J. Eq. 258).

Claimant of specific property

A claimant of property held by a decedent in trust is not a "creditor," within the provisions of the probate law requiring the filing of claims. Probate Court of City of Pawtucket v. Williams, 73 Atl. 382, 386, 387, 30 R. I. 144, 19 Ann. Cas. 554.

As creditor at time of decedent's death

One holding a claim for funeral expenses is a "creditor," within R. L. 1905, § 3696, subd. 2, and may apply for administration pursuant to the provisions thereof. In re Lis' Estate, 139 N. W. 300, 308, 120 Minn. 122.

The word "creditor," in Burns' Ann. St. 1908, § 2742, subd. 3, and section 2744, providing for the appointment as administrator of the largest creditor applying and residing in the state, is used in the usual sense as one whom the decedent owes, and hence, if one who had incurred the expense of the burial of a decedent could procure the appointment of an administrator, it would not be under the statute as a creditor, but under the equitable powers of the court in order to collect his charges. Hildebrand v. Kinney, 87 N. E. 832, 834, 172 Ind. 447, 19 Ann. Cas. 788.

The holder of a claim under a bond, to which a testator was a party, which arose during his lifetime, is a "creditor" within the meaning of Gen. Laws, c. 215, § 2, providing that claims of creditors against estates of deceased persons must be presented to the executor within the period of six months from the date of the first advertisement of the notice of the executor's qualification. Municipal Court v. Whaley, 57 Atl. 1061, 26 R. I. 25.

As creditor of fraudulent grantor

Any one who, but for a deed made to defraud creditors, would have the right to subject the property to his demand is a "creditor," entitled to sue in equity to set it aside under Code 1899, c. 74 (Code 1906, §§ 3099–3108). Carr v. Davis, 63 S. E. 326, 328, 64 W. Va. 522, 20 L. R. A. (N. S.) 58, 16 Ann. Cas. 1031.

Creditor of partnership

Under the Bankrupt Law, provision that a discharge shall release a bankrupt from all provable debts except such as have not been duly scheduled in time for proof and allowance, with the name of the "creditor," etc., the surviving partner of a firm creditor was correctly scheduled as a "creditor." Kaufman v. Schreier, 95 N. Y. Supp. 729, 730, 108 App. Div. 298.

The "creditors" of a partnership entitled to object to the assumption by the firm of a debt of the individual partner by the execution of notes are those creditors of the firm who held the claims against the partnership at the time of the execution of such notes. Merchants' Bank of Grenada v. Thomas, 121 Fed. 306, 311, 57 C. C. A. 374.

The word "creditors," within the meaning of a statute providing that the dissolution of a partnership by the retirement of an ostensible partner must be made known to creditors, is not limited to persons who were creditors at the time of the dissolution, but includes a person who had previously sold goods and given credit to the firm during its continuance. Mims v. Brook & Co., 59 S. E. 711, 712, 3 Ga. App. 247.

A "creditor of the partnership" is a person interested in the distribution of the assets thereof by the court through the medium of a receiver. Johnson v. Johnson, 107 N. W. 802, 804, 132 Iowa, 457.

As creditor while possession is in debtor

A New York statute provided that every chattel mortgage which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against the "creditors" of the mortgagor and purchasers in good faith, unless filed, etc. Held, that the term "creditors" included all persons who were such while the chattels remained in the mortgagor's possession, though they did not obtain judgment or a specific lien until after delivery of the property to the mortgagee. In re Beede, 126 Fed. 853, 857, 860, 862.

Where chattel mortgages were kept off the record until just before one of the mortgagees took possession, claimants, who had not secured a lien on the property before the mortgagee took possession, were not "creditors," entitled to have the mortgage set aside as fraudulent, because the mortgagor, after executing the mortgage, was permitted to retain possession and make sales from the mortgaged stock in the ordinary course of business without accounting to the mortgagees, who were aware of the sales, for the proceeds. Mattley v. Wolfe, 175 Fed. 619, 620.

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The term "creditors," within 1 Mills' Ann. St. § 2028, which provides that the term creditors, as used in the preceding section dealing with fraudulent transfers as against those who are creditors of the person making the assignment, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time while such goods and chattels remain in his possession or under his control, would not embrace the holder of an account contracted more than six months after a transfer. Jones v. Mackenzie Bros., 73 Pac. 847, 848, 19 Colo. App. 121.

Where the transaction by which one became a creditor of a bailee was distinct from that in which he purchased the chattels in possession of the bailee, and he was not a creditor within Civ. Code 1902, § 2655, providing that every agreement between bailor and bailee whereby the bailor reserves title to himself shall be void as to subsequent creditors, unless recorded, his claim was not such a consideration as could make him a purchaser for value without notice, within the statute. Armour & Co. v. Ross, 58 S. E. 941, 943, 78 S. C. 294; Id., 58 S. E. 1135.

Under the Ohio statute which provides that conditional sales of chattels, under which delivery has been made, shall be void unless recorded, as against "all subsequent purchasers and mortgagees in good faith and creditors," a reservation of title in such a contract which had not been filed at the time of the bankruptcy of the purchaser is void as against his "creditors" whether their claims arose before or after the contract was made. Dolle v. Cassell, 135 Fed. 52, 56, 57, 67 C. C. A. 526.

Ky. St. 1903, § 496, provides that no deed of trust or mortgage conveying a legal or equitable estate to real or personal property shall be valid against a purchaser for a valuable consideration, without notice thereof, or against "creditors," until such deed shall be acknowledged or proved according to law, and lodged of record. Held, that the "creditor" against whom the conveyance shall not be valid is one who becomes a "creditor" at a time when the appearance of ownership arising from the debtor's possession may have misled him into the giving of credit upon the faith of such ownership, and not one who became a "creditor" prior to the acquisition of the property by the debtor. In re Ducker, 134 Fed. 43, 46, 67 C. C. A. 117.

The term "creditors," as used in relation to mortgages fraudulent as to creditors, includes all persons who were such while the chattels remained in the possession of the mortgagor under the agreement, and their rights are not affected by the fact that they did not obtain judgment or a specific lien until after the delivery of the property to the mortgagee. Citizens' State Bank of Tracy v. Brown, 124 N. W. 990, 992, 110 Minn. 176.

As creditor with claim filed or proved in bankruptcy

Under Bankr. Act, § 1, defining "creditor" so as to include any one who owns a demand or claim provable in bankruptcy, where a bankrupt's schedules disclosed the claim of P., and that the bankrupt claimed the same was barred by limitations, P. was entitled to examine the bankrupt as to the extent of his estate at an adjourned meeting of creditors before P. had formally filed his claim with the referee, in order that P. might determine whether the size of any possible dividend was sufficient to justify the expense of proving the claim, notwithstanding the rule requiring a creditor to file a formal claim before any examination. In re Kuffler, 153 Fed. 667, 668.

Heir of estate

An heir entitled to exoneration by the personal estate from a mortgage, held by a third party, is a creditor within Orphans' Court Act (P. L. 1898, pp. 738, 740) §§ 67, 70, which provides for publication by an administrator or executor of notice to creditors to bring in their claims within nine months from the date of such order, and that, after the expiration of such time, the court may, by final decree, order that all creditors not presenting their claims within such time shall be barred. Smith v. Wilson, 81 Atl. 851, 853, 79 N. J. Eq. 310.

Holder of certificate of deposit

A holder of a bank's certificate of deposit, payable on a fixed date with interest, is a "creditor" of the bank on a loan made to it for a fixed period on which interest is stipulated for, and is not a "depositor," within the constitution giving depositors who have not stipulated for interest a preference in case of the bank's insolvency. Taylor v. Hutchinson, 40 South. 108, 110, 145 Ala. 202.

Indorsers, guarantors, or sureties

Code 1907, § 4295, provides that every general assignment by a debtor of substantially all his property subject to execution in payment of a prior debt by which a preference is given to one or more creditors shall inure to the benefit of all the grantor's creditors equally, and that a general assignment within the section shall include any disposition of property by which the debtor conveys substantially all his property subject to execution to pay a prior debt or charges such property with the payment thereof. Held, that the word "creditor" was so used in its broad and general sense, and included a surety who had not paid the debt; and hence a conveyance by a debtor of substantially all his property to such surety in consideration that the surety would pay the debt was a general assignment for the benefit of all creditors. Smith v. Young, 55 South. 425, 426, 173 Ala. 190.

A guarantor, an indorser, an accommodation maker, or a surety, on the obligation of

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a bankrupt, is a creditor within the meaning of section 60b of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 562. The fact that the guarantor or indorser did not pay or induce the payment of the debt, but the payment was made by the bankrupt, does not except the case from the operation of the rule. Paper v. Stern, 198 Fed. 642, 644, 117 C. C. A. 346.

A guarantor is a "creditor" within the meaning of section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562), relating to the giving of preferences to creditors. Stern v. Paper, 183 Fed. 228, 231.

A surety is a creditor from the inception of his contingent liability within Code 1907, § 4295, relating to preferential assignments, and, after he has paid the surety debt, he may maintain a creditor's bill against the principal and other creditors to set aside fraudulent conveyances made while the liability of the surety was contingent, or to have them declared general assignments. Smith v. Young, 55 South. 425, 427, 173 Ala. 190.

A surety on a note is a "creditor" of the maker, within Code 1896, § 2158, making a conveyance of substantially all of a debtor's property to one or more creditors equivalent to a general assignment. Smith v. McCadden & McElwee, 36 South. 376, 377, 138 Ala. 284.

A surety on the bond of a contractor for government work, who under the federal statute is directly liable to laborers to whom the contractor is indebted for labor performed under the contract, is a creditor of the contractor to the extent of such liability, within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, and the lending of money by the surety to the contractor to pay such claims, and the taking of security therefor, at a time when the contractor was insolvent and within four months prior to its bankruptcy, was the giving of a preference to a creditor and constituted an act of bankruptcy under section 3a (2) of the act. United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 58, 102 C. C. A. 623.

An indorser on a bankrupt's matured note which is without other security is a "creditor" within the meaning of Bankr. Act July 1, 1898, c. 541. Bank of Wayne v. Gold, 130 N. Y. Supp. 942, 943, 146 App. Div. 296.

A surety is a "creditor," within the meaning of the provision of the bankrupt act condemning preferential transfers to creditors. Horstman v. Little (Civ. App.) 88 S. W. 286, 288.

A surety is a "creditor" of the principal debtor from the inception of his contingent liability, and will be protected in an action for reimbursement against a fraudulent conveyance by his principal pending such liability. Smith v. Pitts, 52 South. 402, 404, 167 Ala. 461.

A brother of a voluntary bankrupt who during the six months preceding the bankruptcy proceeding, by express tacit understanding, set out to pay the creditors who held collateral their full amounts and secure to himself whatever equity there was in such collateral above the amounts due the secured creditors, but to whom the bankrupt himself owed no money, and whose rights with respect to the bankrupt and his property were in aid of securing himself because he was an indorser upon a secured note of the bankrupt, was not a "creditor." Horton v. Bamford, 81 Atl. 761, 769, 79 N. J. Eq. 356.

A surety or indorser for a bankrupt is a "creditor" within the meaning of the bankruptcy law. Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 620, 87 C. C. A. 521; Kobusch v. Hand, 156 Fed. 660, 662, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660.

A surety on an obligation of a bankrupt is a creditor, within Bankr. Act 1898 (Act July 1, 1898, c. 541); and, when he has received from the bankrupt, within four months next preceding the filing of his petition, while the bankrupt is insolvent, a preference on an open account due him by the bankrupt, the surety will not be allowed his claim for the amount paid after the adjudication by him as surety, unless he returns the preference received on the open account. M. Kahn & Bro. v. Bledsoe, 98 Pac. 921, 922, 22 Okl. 666.

Legatee or devisee

Rev. St. 1895, art. 1896, subd. 3, authorizes parties interested in an estate to prevent administration thereof on the application of a creditor by giving a bond to secure said creditor or creditors. Held that, while a legatee is not in the strict meaning of the word a "creditor" of the estate, he is in effect a creditor of a solvent estate when the will bequeathing the legacy is established, and if not within the letter, it is within the spirit, of the statute, for those interested in the estate when an application for administration on it is made, who do not desire an administration thereof to defeat such administration by executing such bond as provided. Hummel v. Del Greco, 90 S. W. 339, 341, 40 Tex. Civ. App. 510.

Under Rev. St. § 6098, authorizing any heir or creditor of a deceased person to request an administrator or executor to reject any claim presented for allowance, a widow may file a requisition on an executor to disallow a claim, as the words "any heir," or "creditor," include devisees and legatees or any person whomsoever whose property may be affected by the recovery of a judgment. Todd v. Todd, 27 Ohio Cir. Ct. R. 224, 227.

Mortgagee

As expressly defined by Civ. Code, § 3430, a "creditor" is one in whose favor an obligation exists through which he is or may

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become entitled to payment of money. The word is given very broad significance in determining the right to assail a fraudulent transfer of property. "A mortgagee is none the less a 'creditor' because the payment of the debt due him is secured by lien on specific property." Calkins v. Howard, 83 Pac. 280, 281, 2 Cal. App. 233.

Obligee in bond

The obligee in an appeal bond was a "creditor" of the surety thereon before the bond became absolute upon affirmance on appeal and the principal's failure to pay the judgment within the bulk sales act (Pub. Acts 1905, No. 223), making the sale in bulk of a stock of merchandise otherwise than in the ordinary course of trade void as to the seller's creditors unless he makes a detailed inventory showing the cost of each article sold, and unless the purchaser demands and receives from the seller a list of the names and addresses of seller's creditors with the amount of the indebtedness, etc., and notifies them of the terms of the proposed sale within five days before taking possession; a "creditor" being one having the right to require of another the fulfillment of an obligation. Hanna v. Hurley, 127 N. W. 710, 711, 162 Mich. 601.

Officer of corporation

An officer of a corporation which is a creditor of a decedent is not himself a "creditor" within a statute declaring that, if none of the relatives of a deceased person apply for letters of administration, a creditor will be entitled to letters. In re Owens' Estate, 85 Pac. 277, 280, 30 Utah, 351.

As owner

See Owner.

Pledgor

Where a broker buys stock for a customer on a margin, the title to such stock is in the customer, and not in the broker, who holds the same merely as pledgee to secure the advances made by him in the purchase. Hence the customer is not a creditor of the broker with respect to the transaction within the meaning of Bankr. Act July 1, 1898, c. 541, § 1, subd. 9, 30 Stat. 544, and the transfer of the stock to the customer on the settlement of his account cannot be considered the giving of a preference by the broker on his bankruptcy within four months thereafter. Richardson v. Shaw, 147 Fed. 659, 660, 77 C. C. A. 643.

As purchaser

See Purchaser.

Receiver

Bankr. Act, § 1, subd. 9, provides that the word "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy. A receiver for collection and enforcement of the liability of stockholders appointed pursuant to state statutes in a suit by creditors of an insolvent corporation to charge the stockholders with liability for its debts is covered by this definition, since, while he does not own a demand or claim, he is the duly authorized agent of those who do own a demand or claim. Dight v. Chapman, 75 Pac. 585, 587, 44 Or. 265, 65 L. R. A. 793.

Stockholder

Under Bankr. Act July 1, 1898, c. 541, § 18b, 30 Stat. 551, which provides that the bankrupt or any creditor may appear and plead to a petition in involuntary bankruptcy, stockholders of a corporation as such cannot appear and defend a proceeding against the corporation, unless such a showing is made as would entitle them to maintain or defend a suit in equity in its behalf. In re Eureka Anthracite Coal Co., 197 Fed. 216, 217.

Trustee in bankruptcy

General order in bankruptcy No. 17, authorizing "creditors" to except to the allowance of the bankrupt's exemption, does not exclude the trustee, who may except on behalf of all of the creditors to such allowance on the ground of the bankrupt's fraud. In re Rice, 164 Fed. 589, 591.

Wife

Frauds and Perjuries Act, § 4, provides that "every gift, grant, conveyance * * * made with the intent to disturb, delay, hinder or defraud creditors or other persons * * * shall be void as against such creditors, purchasers and other persons." Held, that the phrase "creditors and other persons" does not include the wife of the grantor with reference to her right under specified circumstances to take a one-half interest in his real estate in lieu of dower, under Dower Act, § 12. Blankenship v. Hall, 84 N. E. 192, 195, 233 Ill. 116, 122 Am. St. Rep. 149.

Of corporation

The vote of the stockholders of a corporation to add an amendment to the by-laws providing that no person should be allowed to hold more than $400 in stock of the corporation, together with the fact that from that time to the date the corporation was adjudged a bankrupt various persons, including defendant, held shares in excess of $400 with the knowledge and consent of the corporation, did not enlarge defendant's rights with reference to the withdrawal of his shares, nor make him a "creditor" of the corporation for the amount invested above $400. Richardson v. Devine, 79 N. E. 771, 772, 193 Mass. 336.

Persons were "stockholders" and not "creditors" of a corporation, where they received stock under a resolution in the handwriting of one of them, directing its issuance to them for advances, and retained it over four months, when they attached the

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certificates to their respective claims filed with the corporation's receiver; the papers in a suit by one of such persons in which the receiver was appointed reciting that they were stockholders, and not disclosing the amount of such advances as debts of the corporation, though a schedule of the corporation's debts was set out. Iserman v. International Stoker Co., 66 Atl. 605, 606, 72 N. J. Eq. 708.

CREDITOR SEEKING PREFERENCE

A factor's claim for reimbursement out of the proceeds of a consignment made by one adjudicated a bankrupt within four months thereafter for its advances and expenses incurred in his relation of factor and consignee does not constitute him a "creditor of the bankrupt, seeking a preference," within the meaning of the bankrupt act (Act July 1, 1898, c. 541, § 67f, 30 Stat. 565). Nisbet v. Sigel-Campion Live Stock Commission Co. (Colo. App.) 123 Pac. 110, 120, 53 Colo. 333.

CREDITORS' BILL

See, also, Creditors' Suit.

"A 'creditors' bill' is an action in equity," while a suit by judgment creditor of a corporation to enforce liability of stockholders is an action at law. Padros v. Swarzenbach, 119 N. Y. Supp. 589, 591, 134 App. Div. 811.

CREDITORS OF THE MORTGAGOR

"Creditors of the mortgagor" does not mean any more than is expressed. It does not mean creditors of a third party to whom the mortgagor afterwards conveys the property, even if the third party assumes and agrees to pay the mortgage debt. The words of the statute are not to be extended by implication to other classes of persons than those named. Talcott v. Hurlbert, 76 Pac. 647, 649, 143 Cal. 4.

Comp. Laws Mich. § 9523, as amended by Pub. Acts 1907, No. 332, provides that every chattel mortgage not accompanied by immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against "creditors of the mortgagor," or against subsequent creditors, unless the mortgage or a copy thereof be filed as directed in the statute. Held, that the words "creditors of the mortgagor," as determined by the Michigan Supreme Court, mean subsequent creditors in good faith and without notice of the mortgage, and that the statutory invalidity of an unfiled chattel mortgage extends to all creditors who become such after the giving and before the filing of the mortgage. Detroit Trust Co. v. Pontiac Sav. Bank, 196 Fed. 29, 33, 115 C. C. A. 663; In re Huxoll, 193 Fed. 851, 853, 113 C. C. A. 637.

CREDITORS' SUIT

A "class suit" is one in which one or more members of a numerous class, having a common interest, sue in behalf of themselves and all other members of that class. Such suits are sometimes called "creditors' suits" and sometimes "stockholders' suits." Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 96.

"A 'creditors' suit' may be maintained by judgment creditors on their own account and for their exclusive benefit, after a receiver of the debtor's property in supplementary proceedings has been appointed, to set aside as fraudulent and declare void a mortgage previously given by the judgment debtor upon his real estate, and to secure the proceeds of the debtor's property to the satisfaction of their judgments, where their judgments were recovered and became a lien on such real estate of the debtor prior to the appointment of the receiver." Ullman v. Cameron, 93 N. Y. Supp. 976, 979, 105 App. Div. 159 (quoting and adopting the definition in Gere v. Dibble [N. Y.] 17 How. Prac. 31).

CREDITS

See Moneys and Credits; Mutual Credits; Rule of Credits.
See, also, Credit.

"Credits" are in effect the mere legal right with which one is clothed to demand the delivery of money or other property in the future, and until such transfer of possession is made the property is taxed wherever it may be, and so far as credits are concerned, if it is demonstrable that the total wealth of the state can be once taxed without the taxation of credits in any form, the Constitution is satisfied without the taxation of credits. State ex rel. Wolfe v. Parmenter, 96 Pac. 1047, 1049, 50 Wash. 164, 19 L. R. A. (N. S.) 707.

As used in Laws 1901, p. 166, § 2, prohibiting the conducting of games of chance for money, checks, "credits," or any representative of value, or for any property or thing whatever, the word "credits" is a term of universal application to obligations due and to become due; and the expression "any representative of value" together with these words leave nothing of any of the classes of property enumerated. Hence a nickel in the slot machine, involving in its operation the element of chance as to whether the player obtained in cigars more or less than the value of his money, was prohibited by such statute. State v. Woodman, 67 Pac. 1118, 1120, 26 Mont. 348.

Complainant a New York life insurance corporation, made so-called "policy loans" to policy holders in Louisiana; the transactions being as follows: When sufficient premiums had been paid on a policy to give it a recognized reserve value, complainant on application would advance the amount of such reserve value to the holder, taking the policy in pledge, and requiring the insured to pay in addition to each future annual premium a sum equal to the interest on the amount of

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the advance. Such advance was never collected until the policy matured or lapsed, when it was deducted from the amount due from complainant thereon. Complainant also made to some policy holders what were called "premium lien note loans," which were essentially the same as the policy loans; the only difference being that, instead of making an advance, complainant extended credit for premiums when due, taking notes which were in like manner charged against the reserve value of the policy. Held, that the transactions were not loans in either case, but were merely advance payments on the earned value of the policies, and did not constitute "credits" in favor of complainant, which were taxable. New York Life Ins. Co. v. Board of Assessors for the Parish of Orleans, 158 Fed. 462, 472.

As debts

Const. art. 13, § 1, permits provision, except in case of credits secured, for a deduction from credits of debts due to bona fide residents. Pol. Code, § 3617, subd. 3, provides that a mortgage, or other obligation by which a debt is secured, when land is pledged, shall, for the purposes of taxation, be deemed an interest in the land so pledged, and by subdivision 6 the term "credits" means those solvent debts not secured owing to the person assessed, and the term "debt" means those unsecured liabilities owing by the person assessed to bona fide residents and section 3628, provides that, in assessing solvent credits not secured, a reduction shall be made of debts due bona fide residents, and section 3650, subd. 15, provides that in entering assessments containing solvent credits, subject to deduction, the assessor must enter in the proper column the value of debts and deduct them therefrom. Const. art. 13, § 4, provides that a mortgage, or other obligation by which a debt is secured, shall, for the purpose of taxation, be deemed an interest in the property affected. Pol. Code, § 3627, contains the same provision. Held, that a collateral security of credits by a loan on personalty was not a mortgage, etc., or "other obligation by which a debt is secured," within Const. art. 13, § 4, that section applying only to liens on land; nor was it a "mortgage or trust deed," within section 1, so that the person assessed on such credits was entitled to have his debts deducted therefrom; and Pol. Code, § 3629, subd. 6, directing the assessor to require each person assessed to show separately all solvent credits unsecured, is not applicable, not referring to the assessor's duty in making the assessment, but only prescribing the form of the taxpayer's return for the assessor's information. Bank of Willows v. Glenn County, 101 Pac. 13, 14, 155 Cal. 352.

Cash or money

"Money deposited in bank," as used in section 4, Revenue Act 1903 (Comp. St. 1903, p. 1283), is expressly discriminated from a "credit," which is defined by the following section (5) to include "every demand for money, labor, or other valuable thing, whether due or to become due." Critchfield v. Nance County, 110 N. W. 538, 77 Neb. 807.

Moneys due a bank from other banks are "credits" within Pol. Code, § 3680, defining "credits" as solvent debts, secured or unsecured, owing to a person. Clark v. Maher, 87 Pac. 272, 273, 34 Mont. 391.

Under Code, § 1308, defining taxable property as including "credits," and section 1309, defining "credits" as including money secured by deed, title bond, mortgage, or otherwise, the amount due to a vendor under a contract binding him to convey on payment of certain notes and the execution of other notes for the balance due, secured by mortgage, is taxable, though the contract was not signed by the vendee and contained no agreement in form of words on the vendee's part to make payment where it appeared that the parties intended the contract to be mutually obligatory. Cross v. Snakenberg, 102 N. W. 508, 509, 126 Iowa, 636.

Choses in action and notes

In Rev. St. § 5209, which makes it a criminal offense for any officer or agent of a national bank to embezzle, abstract, or willfully misapply "any of the moneys, funds, or credits of the association," the word "moneys" refers to the currency or circulating medium of the country, the word "funds" refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made, and the word "credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it. United States v. Smith, 152 Fed. 542, 544 (citing United States v. Greve, 65 Fed. 489).

"The term 'credit,'" as used in the revenue law, "includes every claim or demand for money, labor, merchandise, and other valuable things." Hence debts due on open account to a nonresident are taxable at the domicile of the debtor, when they have arisen out of a business carried on in the taxing state and form part of the capital of the business. National Fire Ins. Co. v. Board of Assessors, 46 South. 117, 118, 121 La. 108, 126 Am. St. Rep. 313 (quoting Louisiana Act of 1898, No. 170, § 91); General Electric Co. v. Board of Assessors, 46 South. 122, 123, 121 La. 116.

Pol. Code, Cal. § 3617, subd. 6, defines taxable "credits" as those solvent debts not secured by mortgage or deed of trust owing to a person, firm, corporation, or association assessed for taxes. Bank of Woodland v. Pierce, 77 Pac. 1012, 1014, 144 Cal. 434.

In determining what were "credits" within the meaning of the tax law, counsel

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argued that they were obligations which represent taxable things which have changed their form, such as notes or open accounts for money loaned or property purchased; but the court held that outstanding uncollected accounts were a rather common variety of "credits" liable to taxation. Standard Marine Ins. Co., Limited, of Liverpool, England, v. Board of Assessors, 49 South. 483, 484, 123 La. 717, 29 L. R. A. (N. S.) 59.

Pol. Code Cal. § 3617, defines taxable "credits" as solvent debts not secured by mortgage or trust deed owing to the person, firm, or corporation assessed. Where a foreign corporation maintained branch banks in San Francisco, Portland, Or., and Tacoma, Wash., credits on the books of the San Francisco office, consisting of sums paid to the other branches for their benefit, and charged to them as mere matter of bookkeeping, without any promise or obligation on the part of the debited agencies to return the money to the San Francisco bank, were not credits arising in the state of California within Const. Cal. art. 13, § 1, declaring that all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, and that the word "property" shall include all moneys, credits, etc., capable of private ownership. London & San Francisco Bank v. Block, 136 Fed. 138, 140, 69 C. C. A. 136.

A notice of attachment of "credits and effects" belonging to defendant creates no liability of the garnishee for a debt due defendant. Clyne v. Easton, Eldridge & Co., 83 Pac. 36, 38, 148 Cal. 287, 113 Am. St. Rep. 253.

Plaintiff executed an instrument purporting to be a lease for ten years, with privilege of extension for five years more at an annual rental, the tenant to pay taxes, keep the premises in repair, and the buildings insured. Plaintiff also agreed to sell the premises to the tenant for $15,200, provided payment thereof was made on the 1st day of March of any year during the lease, payment of rent on the day being of the essence of the contract, and that, on failure of the lessee to perform, the lease should be canceled, except for rent or taxes due, and the lessee's option lost, and that, on the termination of the lease, the plaintiff agreed to give the tenant a warranty deed on payment of $15,200. When the contract was made, the tenant paid plaintiff $3,000 in cash, which, with the $15,200, made the agreed purchase price of the property, and the rent stipulated for was fixed at 5 per cent. of the deferred payment; the only right of the tenant being to occupy the premises as tenant, unless he exercised his option, and, if he did not, the $3,000 paid should be lost. Held, that the right of the tenant in addition to those acquired as lessee was only an option to buy the property on making payment of $15,200 without interest, and that the contract was therefore a lease, and not a contract for sale, and plaintiff was therefore not required to pay taxes on such contracts as "moneys and credits." Bissell v. Board of Review of Town of Dunlap (Iowa) 138 N. W. 830, 831.

Insurance policy

A policy of insurance issued by a fraternal benefit society is, after the death of the insured, and before proofs thereof are made to the society, a "credit," within the meaning of 3 Starr & C. Ann. St. 1896 (2d Ed.) pp. 3398–3406, cl. 1, § 1, requiring all credits to be assessed and taxed, and Revenue Act 1898, cl. 6, § 292, defining "credits" to be every claim or demand for money due or to become due, and not including money on deposit, though the policy makes the furnishing of proofs of death a condition precedent to liability of the society thereon, and provides that the amount thereof shall not be due until 60 days after proof of death is filed. Cooper v. Board of Review of Montgomery County, 69 N. E. 878, 879, 207 Ill. 472, 64 L. R. A. 72.

As net credits

The word "credit," as used in Sess. Laws 1903, c. 73, providing that the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return, means "net credit." State ex rel. Palmer v. Fleming, 97 N. W. 1063, 1067, 70 Neb. 529.

The term "credit" in the revenue law has been construed to mean "net credit." The revenue law which permits, under this interpretation, a taxpayer to deduct his bona fide debts from his gross credits, is not in conflict with Const. art. 9, § 1, requiring taxes to be uniform. Scandinavian Mut. Aid Ass'n v. Kearney County, 118 N. W. 333, 81 Neb. 473.

The word "credits," as used in Cobbey's Ann. St. 1903, § 10,427, relating to taxation, means net credits, and the indebtedness of the taxpayer may be deducted from gross credits to find the true value of credits for assessment. Lancaster County v. McDonald, 103 N. W. 78, 79, 73 Neb. 453.

The word "credits," as used in Cobbey's Ann. St. 1903, § 10,427, providing for the listing of credits for taxation, means, "net credits," and the indebtedness of a taxpayer may be deducted from the gross credits to find their true value for assessment. Oleson v. Cuming County, 115 N. W. 783, 784, 81 Neb. 209.

The word "credits," as used in the Revenue Law, means "net credits"; that "the taxpayer may deduct from his gross credits the amount of his bona fide debts in order to determine the true value of his credits for assessment rolls." Royal Highlanders v. State, 108 N. W. 183, 186, 77 Neb. 18, 7 L. R. A. (N. S.) 380.

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Pensions or proceeds

Code, § 1309, defining the word "credit" as used in the chapter relating to taxation, which provides for the taxation of credits, provides that pensions of the United States are not included within such term. Code Supp. 1907, § 1304, enumerating property exempt from taxation, paragraph 7 of which relates exclusively to the property of soldiers and sailors, does not exempt from taxation property purchased with pension money. Held, that real estate purchased with pension money received from the United States government is not exempt from taxation. Beers v. Langenfeld, 128 N. W. 847, 149 Iowa, 581.

Under Rev. St. U. S. § 4747, providing that no pension money due to any pensioner shall be liable to seizure under process while in the course of transmission to the pensioner, and Code, §§ 1309, 4009, providing that the term "credit" in the chapter relating to assessment of taxes shall include every claim or demand due or to become due for money, and every annuity or sum of money receivable at stated periods, but United States pensions are not included, and declaring that all pension money shall be exempt from execution, interest received on pension money loaned out by a pensioner is not exempt from taxation. Bednar v. Carroll, 116 N. W. 315, 316, 138 Iowa, 338.

As personal property

See Personal Property.

Shares of stock

The stock of a building corporation was divided into classes, one of which consisted of prepaid stock, on which interest is payable out of the earnings at a rate not exceeding 6 per cent. per annum. The holders have the right to withdraw the amount paid in on stated conditions, and the association has the right to retire the stock on notice. The holders are members of the association, and eligible to vote and hold office. Held, that the stock is not a credit, within Gen. St. 1909, § 9222, providing that debts for purposes of taxation may be deducted from credits belonging to a person; the term "credits," as defined by Gen. St. 1901, § 7503, meaning demands for money or other valuable thing, whether due or not due. Abrahams v. Medlicott, 119 Pac. 375, 86 Kan. 106, 38 L. R. A. (N. S.) 137.

Code, § 1309, provides that the term "credit" as used in the chapter providing for the deduction of debts from credits listed for taxation shall include every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage, or otherwise. Code, § 1308, being a substantial re-enactment of previous provisions on the subject, declares that all other property is subject to taxation in the manner prescribed, and that the section is intended to embrace "credits," including bank bills, government currency, and corporate shares of stock; corporate shares of stock being in all instances classified entirely separate from credits. Code, § 1360, required an assessment roll which should show the moneys and credits, but did not mention corporate shares of stock which had been previously required to be classified separately, and Code Supp. 1907, § 1360, again included corporate stock in the roll in addition to moneys and credits; the omission in the Code of 1897 evidently being an oversight. Held, that there was a definite legislative recognition of a distinction between the term "credits," as used in section 1309, and corporate shares or stocks are not "credits" within such section. Morril v. Bentley, 130 N. W. 734, 738, 150 Iowa, 677.

CREED

Acts 1891, p. 340, c. 132, prohibiting the wearing of the badge of a secret society by a nonmember, prohibits that which at common law is indictable as a cheat effected by illegal symbols which may affect the public at large, and against which common prudence may not guard, to the injury of one in some pecuniary interest, independently by any statute as to false pretenses and false personation, and is a valid police regulation directed against false pretenses and false personation of that particular kind, and is not in conflict with Const. art. 1, § 4, providing that no preference shall be given by law to any creed; the word "creed" meaning a formal declaration of religious belief, and not applying to benevolent or fraternal organizations. Hammer v. State, 89 N. E. 850, 852, 173 Ind. 199, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034.

CREMATORY

In a "crematory" the ordinary garbage of a city, including half-decayed meat, dead animals, and the like, are subjected to a burning process, and the residue, as ashes, is used, in connection with the night-soil collections and ordinary stable waste, to make a fertilizer. Laird v. Atlantic Coast Sanitary Co., 67 Atl. 387, 388, 73 N. J. Eq. 49.

CREOLIN—PEARSON

As medicinal preparation, see Medicinal Preparation.

CREOSOTE

"Creosote" is wood tar oil. Halbert v. Texas Tie & Lumber Preserving Co. (Tex.) 107 S. W. 592.

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CREPE PAPER

The provision for "crepe paper" in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 397, 30 Stat. 188, was intended to apply to paper subjected to a creping process; and a paper made by that process and resembling crepe paper generally, but somewhat heavier, and treated with sizing for waterproofing purposes, is dutiable thereunder. Fiegel v. United States, 167 Fed. 537, 93 C. C. A. 215.

CREPITUS

"Crepitus" means a grating of the ends of broken bones. The Kenilworth, 137 Fed. 1003, 1005.

CRESCENDO RENTAL

By "crescendo rental" is meant a rental which, owing to certain well-known and universal laws, applicable to growing localities, provides for a gradual increase of the amount of rent at fixed periods during the term of the lease. Sohmer Co. v. C. H. Welling Inv. Co., 118 N. Y. Supp. 450, 452, 63 Misc. Rep. 439.

CREVICE

The words "crevice" or "range" are sometimes considered to be equivalent to the expression "lode" or "vein." St. Anthony Min. & Mill. Co. v. Shaffra, 120 N. W. 238, 239, 138 Wis. 507 (citing Beals v. Cone, 62 Pac. 948-958, 27 Colo. 473, 83 Am. St. Rep. 92; Van Zandt v. Argentine Min. Co., 8 Fed. 725; Terrible Min. Co. v. Argentine Min. Co., 89 Fed. 583).

CREW

See Train Crew.

Ship's crew as company, see Company.

A statement in the certificate of inspection of a steam vessel that her complement shall be a master, two mates, two engineers, and twelve "crew," does not necessarily mean that the twelve crew shall be sailors only, excluding firemen, and, in the absence of evidence that the vessel had not sufficient officers and crew at all times, she is not to be deemed unseaworthy in her crew because she had fewer than twelve sailors. In re Meyer, 74 Fed. 881, 892.

"When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board." The Bound Brook, 146 Fed. 160, 164.

CRIB

"Crib" is defined as a box or bin or similar, wooden structure for storing grain, salt, etc.; as a crib for corn or oats. And "corncrib" is defined as a crib for storing corn. A "barn" is defined as a covered building designed for the storage of grain, hay, flax, or other barn products. The word "corncrib," as used in a statute providing that "any person who willfully sets fire to or burns * * * any corncrib or corn pen containing corn, or any barn, * * * is guilty of arson in the second degree," means a building or structure in its entirety, and not a room or apartment in a building or structure. Therefore an indictment charging the burning of a corncrib is not sustained by proof that the building destroyed was a barn in which one room was partitioned off as a corncrib. Jackson v. State, 40 South. 979, 980, 145 Ala. 54 (quoting and adopting definition in Cent. Dict. & Webst. Int. Dict.).

CRIBS

Where a house of prostitution contains numerous small rooms, such rooms are designated as "cribs." Pon v. Wittman, 81 Pac. 984, 985, 147 Cal. 280, 2 L. R. A. (N. S.) 683.

CRIER

As court officer, see Court Officer.

CRIME

See Attempt to Commit Crime; Common-Law Crime; High Crimes and Misdemeanors; Infamous Crime; Quasi Crime; Sexual Crimes; Continuing Offense.

See, also, Offense; Public Offense; Sodomy.

A "crime" is an act committed or omitted in violation of a public law either forbidding or commanding it, and in a comprehensive sense it includes minor offenses. Commonwealth v. Shields, 50 Pa. Super. Ct. 194, 203.

A "crime" is an act committed or omitted in violation of a public law either forbidding or commanding it. Town of Neola v. Reichart, 109 N. W. 5, 8, 131 Iowa, 492 (citing 4 Bl. Comm. 5).

The common-law definition of "crime," as given by Blackstone, is "an act committed or omitted in violation of a public law." Costello v. Feagin, 50 South. 134, 135, 162 Ala. 191.

"It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.'" United States v. Eaton, 12 Sup. Ct. 764, 767, 144 U. S. 687, 36 L. Ed. 591.

"For nearly all crimes and misdemeanors the laws of the states, and not the enactments of Congress, must be looked to for the definition of the offense." Wright v.

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Henkel, 23 Sup. Ct. 781, 785, 190 U. S. 59, 47 L. Ed. 948.

"Crimes" and misdemeanors in this state are such wrongs of a public nature as are punished by criminal proceedings in the name of the state. Adams Exp. Co. v. State, 67 N. E. 1033, 1039, 161 Ind. 328.

Where the public deems an act of private wrong as of a nature requiring the public protection for the individual, it makes the act punishable at its own suit and thus makes the act a "crime." Jernigan v. Commonwealth, 52 S. E. 361, 362, 104 Va. 850.

A "crime" or misdemeanor is defined to be an act committed or omitted in violation of a public law either prohibiting it or commanding it, and a crime is also defined as any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name. Under Rev. St. 1898, defining a criminal action as one prosecuted by the state as a party against a person charged with a public offense, the words "criminal offense," in section 4073, providing that a witness' conviction of a "criminal offense" may be proved on his cross-examination, etc., include misdemeanors as well as felonies, but do not include an offense punishable by a municipal ordinance. Koch v. State, 106 N. W. 531, 533, 126 Wis. 470, 3 L. R. A. (N. S.) 1086, 5 Ann. Cas. 389.

Laws 1907, p. 196, c. 131, to define and prohibit unfair competition and discrimination, etc., provides (section 3) "that any person, firm or corporation violating the provisions of section 1, of the act shall upon conviction thereof be fined." Held, that it sufficiently prohibits the acts set out in section 1 to state an offense under Pen. Code, § 3, providing that a "crime" or "public offense" is an act or omission forbidden by law, and to which is annexed, upon conviction, a fine, though the law nowhere expressly "forbids" the act. State v. Central Lumber Co., 123 N. W. 504, 508, 24 S. D. 136, 42 L. R. A. (N. S.) 804.

Classification

"In most of the states and territories, by constitution or statute, * * * all crimes, or at least statutory crimes, not capital, are classed as felonies or as misdemeanors, accordingly as they are or are not punishable by imprisonment in the state prison or penitentiary." Mackin v. United States, 6 Sup. Ct. 777, 779, 117 U. S. 348, 29 L. Ed. 909.

Contempt

The constitutional provision protecting one against being put twice in jeopardy for the same offense applies only to charges of "crime," and does not include a contempt proceeding, which is only quasi criminal. Jones v. Mould, 132 N. W. 45, 49, 151 Iowa, 599.

Act and intention, or criminal negligence, necessary

"A crime consists in something more than the commission of an act; there must be a union of act and intention." Hence a statement which admits the commission of an act, but which also gives legal excuse or justification, is not a confession of the commission of a crime; for one may admit that he took a horse from a stable of another, and at the same time explain that he purchased the horse from a person named, claiming to own the horse, and that there was no criminal intent on his part. Owens v. State, 48 S. E. 21, 23, 120 Ga. 296.

To constitute a crime, there must be either the joint operation of act and intention or criminal negligence. Carbo v. State, 62 S. E. 140, 4 Ga. App. 583.

All grades of offenses included

The term "crime," as used in the federal and state Constitutions, forbidding involuntary servitude except as a punishment for "crime," includes misdemeanors and all offenses in violation of penal laws. Stone v. City of Paducah, 86 S. W. 531, 534, 120 Ky. 322.

According to Blackstone, "crime" and misdemeanor, properly speaking, are synonymous terms. United States v. Zarafonitis, 150 Fed. 97, 101, 80 C. C. A. 51, 10 Ann. Cas. 290 (quoting and adopting definition in 4 Steph. Comm. 57).

Const. art. 11, § 2, provides that the legal voters of every city and town shall have power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. B. & C. Comp. § 1228, defines "crime" to include both felonies and misdemeanors, and any offense defined and made punishable by general statute. Held, that Local Option Law (Laws 1905, p. 47) § 10, regulating the sale of intoxicating liquors within the state, is a general law, and defines a crime within Const. art. 11, § 2, and that a city within a precinct voting for prohibition could not so amend its charter as to avoid the prohibition order of the county court. Baxter v. State, 88 Pac. 677, 678, 49 Or. 353.

"The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character." Callan v. Wilson, 8 Sup. Ct. 1301, 1303, 127 U. S. 540, 549, 32 L. Ed. 223.

A misdemeanor is not a "crime" within Const. 1901, § 104, subd. 14, prohibiting local laws fixing the punishment of crime; so that such section is not contravened by section 10 of the local road law for Pike county (Loc. Acts 1907, p. 509), making it a misdemeanor for one warned to work on the public roads to fail to appear, and declaring the

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punishment therefor. Chancey v. State, 54 South. 522, 523, 171 Ala. 83.

Ky. St. § 2095, subsec. 19a, provides that any juvenile or first offender of the age of 21 years or under committing any crime whereby punishment in the state prison or reform school is contemplated shall be sentenced to the house of reform. Section 1127 provides that offenses are either felonies of misdemeanors, and such offenses as are punishable by confinement in the penitentiary or with death are felonies, and all other misdemeanors, and section 1308 makes shooting in a public highway a misdemeanor punishable by fine and imprisonment. Held, that a boy 16 years of age was a "first offender" though he had theretofore been convicted of shooting at random in a public highway; the statute only contemplating felonies within the term "crime," so that upon convicting him of manslaughter he should have been committed to the reform school. Henson v. Commonwealth, 147 S. W. 399, 400, 148 Ky. 631.

Under Rev. Code 1892, § 1502, defining "crime," as used in a statute, to mean any violation of law liable to punishment by criminal prosecution, and section 1746, authorizing the examination of any witness as to his conviction of crime, the examination may extend to misdemeanors as well as to infamous crimes. Lewis v. State, 37 South. 497, 85 Miss. 35.

The third article of the Oklahoma Constitution provides for a jury in the trial of "all crimes except in cases of impeachment." The word "crime" in its most extended sense comprehends every violation of public law. In a limited sense, it embraces offenses of a serious or atrocious character. "In our opinion, the provision is to be interpreted in the light of the principles which at common law determine whether accused in a given class of cases was entitled to be tried by a jury." It is not to be construed as relating to felonies or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime," within the meaning of the third article, or a "criminal prosecution," within the meaning of the sixth amendment. A person charged with having committed a misdemeanor prior to statehood has a constitutional right of trial by jury composed of 12 persons. Miller v. State, 106 Pac. 810, 812, 3 Okl. Cr. 457 (quoting and adopting definition in Callan v. Wilson, 8 Sup. Ct. 1301, 127 U. S. 540, 32 L. Ed. 223).

The word "crime," in Const. U. S. art. 4, § 2, providing that a person charged in any state with treason, felony, or other crime who shall flee from justice and be found in another state, on demand of the executive authority of the state from which he fled shall be delivered up to be removed to the state having jurisdiction of the crime, embraces not only misdemeanors, but treason and felony as well, and includes every crime committed within the borders of the United States. Ross v. Crofutt, 80 Atl. 90, 91, 84 Conn. 370, Ann. Cas. 1912C, 1295 (citing Hyatt v. New York ex rel. Corkran, 23 Sup. Ct. 456, 188 U. S. 697, 47 L. Ed. 657; In re Reggel, 5 Sup. Ct. 1148, 114 U. S. 642, 649, 29 L. Ed. 250; Knox v. State, 73 N. E. 255, 164 Ind. 226, 233, 108 Am. St. Rep. 291, 3 Ann. Cas. 539).

Expulsion or deportation of alien

Immigration Act March 3, 1903, c. 1012, § 9, 32 Stat. 1215, which makes it unlawful to bring into the United States any alien afflicted with a loathsome or with a dangerous contagious disease, and provides that if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought was afflicted with such disease at the time of foreign embarkation and that the existence of such disease might have been detected by means of a competent medical examination at such time, such transportation company shall pay to the collector of customs $100, for each and every violation of the provisions of this section, and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, does not create a "crime" so as to render it unconstitutional because it does not provide for a jury trial; the fine provided for being in fact a penalty, and, if suable at all, recoverable in debt, and not through criminal proceedings. International Mercantile Marine Co. v. Stranahan, 155 Fed. 428, 431.

Forgery

It is a "crime" to forge a fictitious name, if done with intent to defraud. People v. Browne, 103 N. Y. Supp. 903, 907, 118 App. Div. 793.

Fraud

Fraud is in its essential elements a crime. Prahar v. Tousey, 87 N. Y. Supp. 845, 847, 93 App. Div. 507.

Nuisance synonymous

While at common law every public nuisance was a "crime," and is under statute, the terms are not convertible and every crime is not a public nuisance. Hefferon v. New York Taxicab Co., 130 N. Y. Supp. 710, 712, 146 App. Div. 311.

Homicide

In a murder case, the court charged that it was contended by accused that he was elsewhere at the time of the commission of the homicide, and consequently that it was impossible for him to have committed it, that the contention constituted an alibi, which if established was a perfect refutation of any

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crime charged, and, being interposed by accused as proof that he was not guilty, it became the duty of the jury to pass upon the question whether accused was present at the scene of the homicide at the time of the commission thereof. Held, that the charge was not objectionable as assuming the proof of the crime charged against accused, on the hypothesis that "homicide" is synonymous with "crime," since the killing of a human being under any circumstances constitutes homicide, but whether a homicide is a crime depends on the circumstances under which it is committed. People v. Mar Gin Suie, 103 Pac. 951, 958, 11 Cal. App. 42.

Gen. St. 1901, § 1997, provides that a homicide without design to effect death, while accused is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor, not amounting to a felony, in cases when such homicide would be murder at common law, shall be deemed manslaughter in the first degree. Held, that "the crime or misdemeanor, not amounting to a felony" need not be necessarily independent of, and separate from, the homicide intended to be reduced from murder to manslaughter in the first degree, but may be involved in, and constitute a part of, such homicide. State v. Bassnett, 102 Pac. 461, 465, 80 Kan. 392.

Infamous offense

Const. U. S. Amend. 5, provides that for an infamous offense one shall not be required to answer unless on the presentment or indictment of a grand jury. Held, that an offense is "infamous" if it involves imprisonment for more than one year with or without hard labor, and that a "crime" within such provisions is not necessarily an infamous offense, but includes every offense of a serious or atrocious character, involving the possible infliction of long terms of imprisonment, which offenses must be tried by a jury. Low v. United States, 169 Fed. 86, 90, 94 C. C. A. 1.

Offense, criminal offense, and felonious offense synonymous

While the words "offense" and "crime" are in certain cases considered synonymous, the "offenses" specified by Military Code N. Y. § 95, for the most serious of which the punishment is dismissal from the service with a small fine, and no one of which is designated as a "crime," are not "crimes." People v. Wendel, 112 N. Y. Supp. 301, 302, 59 Misc. Rep. 354.

In Const. 1898, arts. 9, 12, the words "offense" and "crime" are used as synonymous. State v. Eubanks, 38 South. 407, 408, 114 La. 428.

"To say that 'crimes' means something different from 'criminal offenses' is something I cannot comprehend. A crime is a criminal offense, and a criminal offense is a crime." Schick v. United States, 24 Sup. Ct. 826, 827, 195 U. S. 65, 49 L. Ed. 99, 1 Ann. Cas. 585 (dissenting opinion).

Offenses by delinquent children

The purpose of the Ohio Juvenile Act, regulating the treatment and control of delinquent children, giving juvenile courts jurisdiction over delinquent children, defining a delinquent child as any child under 17 years of age who violates a law of the state, and providing for proceedings by affidavit and for commitment of delinquent children to the industrial school, the object of which is the reformation of its inmates as declared by sections 2083 and 2094, is to save children under the age of 17 years from conviction of crimes, and under it the state acts as a guardian of delinquent children, and the act is but an administrative police regulation, and an affidavit averring that a boy 14 years old is incorrigible, in that he shot another with intent to kill, does not charge a "crime," within Const. Ohio, art. 1, § 10, providing that no person shall be held to answer for an infamous crime except on indictment, and Const. U. S. Amend. 14, and the boy committed to the industrial school is not committed to prison, and is not entitled to a discharge on habeas corpus on the ground that his constitutional rights to prosecution by indictment have been invaded. Ex parte Januszewski, 196 Fed. 123, 126.

Punishment essential

Under the definition of a "crime" as "an act committed or omitted in violation of the public law, either forbidding or commanding it" (4 Bl. Com. 5), and Rev. Laws, c. 220, § 4, declaring that if no punishment for a crime is provided by statute the court shall impose such sentence as conforms to the common usage and practice, a violation of St. 1903, p. 155, c. 195, § 1, forbidding the use of the arms or the great seal of the commonwealth for advertising or commercial purposes, is a "crime," though the statute does not provide any punishment. Commonwealth v. R. I. Sherman Mfg. Co., 75 N. E. 71, 72, 189 Mass. 76, 4 Ann. Cas. 268.

Sexual intercourse

A charge on a trial for rape, that there was evidence tending to prove that defendant had been criminally intimate with prosecutrix prior to the alleged offense, was not prejudicial to defendant, though the court should not have used the word "criminally," as sexual intercourse between an unmarried man and an unmarried woman is not technically a crime. State v. Zempel, 115 N. W. 275, 276, 103 Minn. 428.

Suicide

The word "crime" signifies a public wrong which subjects the perpetrator to legal punishment. An attempt to commit suicide is not an indictable offense in the state of Maine. May v. Pennell, 64 Atl. 885, 887.

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101 Me. 516, 7 L. R. A. (N. S.) 286, 115 Am. St. Rep. 334, 8 Ann. Cas. 351.

Sunday baseball

The playing of baseball on Sunday is not in itself a "crime," but is only such when it interrupts the repose and religious liberty of the community. People ex rel. Poole v. Hesterberg, 89 N. Y. Supp. 498, 499, 43 Misc. Rep. 510.

Violation of license laws

The word "crimes," in Const. U. S. art. 3, § 2, providing that the trial of all "crimes," except in cases of impeachment, shall be by jury, etc., includes the offense of selling liquor without a license. The court said: "The word 'crime' in its more extended sense comprehends every violation of public law. In a limited sense it embraces offenses of a serious or atrocious character. In our opinion the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen." Bettge v. Territory, 87 Pac. 897, 898, 17 Okl. 85.

Violation of municipal ordinances

"Municipal offenses" are not "crimes," within the purview of the constitutional provision relating to the venue of actions. Moore v. City of Winder, 73 S. E. 529, 531, 10 Ga. App. 384.

A grand juror is not rendered incompetent because charged with a violation of a municipal sanitary ordinance; which is not a "crime or offense" within the intendment of section 1, Act No. 135, p. 216, of 1898. State v. Calhoun, 41 South. 360, 361, 117 La. 81, 82 (citing State v. Thibodeaux, 19 South. 680, 48 La. Ann. 600; State v. Nicholas, 33 South. 92, 109 La. 84).

The violation of a municipal ordinance is a "crime" within the meaning of Const. art. 1, § 1, par. 17, forbidding slavery or involuntary servitude save as a punishment for crime after legal conviction thereof, though the prosecution is had in a police court and the offender is not entitled to a trial by jury. The constitutional prohibition forbidding slavery or involuntary servitude was intended to prevent a re-establishment of slavery which at the time of the adoption of the constitutional provision had but recently been abolished. Pearson v. Wimbish, 52 S. E. 751, 754, 755, 124 Ga. 701, 4 Ann. Cas. 501 (citing Mayor, etc., of City of Monroe v. Meuer, 35 La. Ann. 1192).

"A 'crime' is an act committed in violation of a public law." The violation of a city ordinance was not a crime. City of St. Louis v. Tielkemeyer, 125 S. W. 1123, 1126, 226 Mo. 130 (quoting and adopting definition in City of Kansas v. Clark, 68 Mo. 588).

Though, under the Criminal Code, a violation of a municipal ordinance is not a "crime," a sentence to a municipal house of correction for violating an ordinance does not violate Const. U. S. Amend. 13, which prohibits involuntary servitude except as a punishment for crime; the word "crime" being used in the amendment in its most comprehensive sense, as prohibiting such involuntary servitude as is not inflicted as a punishment for an offense against the law, and not being intended to apply to such involuntary service as may be required by a parent or the state in maintaining discipline in its institutions, etc. City of Chicago v. Coleman, 98 N. E. 521, 523, 254 Ill. 338.

A violation of a city ordinance is not a "crime" or "misdemeanor," and a prosecution therefor is properly brought in the name of the city. City of Helena v. Kent, 80 Pac. 258, 261, 32 Mont. 279, 4 Ann. Cas. 235.

Violation of oleomargarine act

One who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law is not guilty of a "crime" under Act Aug. 2, 1886, 24 Stat. 209, c. 840, prescribing a penalty for such an act. Schick v. United States, 24 Sup. Ct. 826, 827, 195 U. S. 65, 49 L. Ed. 99, 1 Ann. Cas. 585.

CRIME AGAINST NATURE

Pen. Code, § 286, provides that every person who is guilty of "the infamous crime against nature" committed with mankind or with an animal is punishable by imprisonment, etc. Where an information under such section designated the offense as the "crime against nature," and alleged that defendant committed the same on one Frank Derby by then and there having "carnal knowledge" of the body of said Frank Derby, it was fatally defective for failure to allege that Frank Derby was a male person, since the words "carnal knowledge" refer to sexual connection. People v. Carroll, 81 Pac. 680, 681, 1 Cal. App. 2.

Though by many common-law writers sodomy is spoken of as the "infamous crime against nature," the terms, "sodomy," "buggery," and "crime against nature" being often used as synonymous, strictly speaking sodomy is the crime when committed between two human beings, or man and man; while buggery is the same offense committed by a man with a beast. Penetration of the mouth is not sufficient to constitute the crime. Commonwealth v. Poindexter, 118 S. W. 943, 944, 133 Ky. 720.

Every person of ordinary intelligence understands what the "crime against nature" with a human being is, and an information describing the crime as the crime against

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nature with and upon a male human being by then and there attempting to have carnal knowledge of the body of such person, sufficiently described the crime. People v. Erwin, 88 Pac. 371, 4 Cal. App. 394.

Pen. Code, § 351, relating to sodomy, provides that every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment, etc. Held, that the words "crime against nature," as used in such section, were not limited to the common-law crime of sodomy, which included only an act committed per anum, but covered unnatural carnal copulation by means of the mouth. State v. Whitmarsh, 128 N. W. 580, 583, 26 S. D. 426.

CRIMEN FALSI

"It is abundantly settled that, in order to fall within this designation [crimen falsi], a crime must be of such a character that it not only carries with it the element of falsehood, but it must be of such a nature as tends to obstruct the administration of public justice. Under the common law the conviction of the crime of embezzlement does not disqualify a witness because such offense is not embraced within the three disqualifying classes, treason, felony, and the crimen falsi. United States v. Sims, 161 Fed. 1008, 1014.

CRIMINAL

See Putative Criminal; Quasi Criminal.

A "penal statute" is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited. "Penal" is a much broader term than "criminal" and includes many statutory enforcements of police regulations the violations of which are in no sense crimes. Marter v. Repp, 77 Atl. 1030, 1031, 80 N. J. Law, 530.

A prisoner under sentence of death is a "criminal" in the eye of the law so long as the sentence remains in force, because he has been adjudged guilty of crime. Molineux v. Collins, 69 N. E. 727, 728, 177 N. Y. 395, 65 L. R. A. 104.

"Criminals" is a word of broad significance and includes those who may have committed the most trifling infraction of a penal statute as well as those guilty of the most heinous offenses. The term obviously describes a large number of persons whom a constable would have no right to arrest without a warrant, and, where a constable who had boarded a train at a station and was killed while alighting therefrom after it had started, an allegation in the declaration by his administratrix to recover for the death that decedent boarded the train for the purpose of "apprehending criminals" did not show that decedent was anything more than a mere licensee on the train. Creeden v. Boston & M. R. R., 79 N. E. 344, 346, 193 Mass. 280, 9 Ann. Cas. 1121.

CRIMINAL ABUSE

"Carnal abuse" or "criminal abuse" is an act of assault or debauchery of the female sexual organs by the genital organs of the male and falls short of knowledge with its accompanying penetration. Under a statute providing that any person having carnal knowledge of a woman forcibly against her will, or who being 16 years old shall carnally abuse a woman under that age, etc., it is not accurate as a general proposition to say that carnal knowledge is carnal abuse. State v. Hummer, 65 Atl. 249, 251, 73 N. J. Law, 714 (Bishop Stat. Crimes [2d Ed.] p. 361, § 489).

CRIMINAL ACTION

A criminal action is one prosecuted by the state against a person charged with a public offense committed in violation of a public law. State v. Hamley, 119 N. W. 114, 115, 137 Wis. 458.

The word "actions," as used in Gen. St. 1901, § 1261, relating to the consent to actions against foreign corporations precedent to doing business in the state, includes a "criminal action" as defined in the Code of Civil Procedure; that is, "one prosecuted by the state as a party against a person charged with a criminal offense, for the punishment thereof." State v. International Harvester Co., of America, 99 Pac. 603, 604, 79 Kan. 371.

Action for penalty

An action under Rev. St. 1899, § 1017, subjecting a corporation failing to make statutory reports to a "fine," providing that no suit shall be maintained for any offense unless brought within a specified time, and requiring proceedings in the name of the state, on relation of the county, to recover the fine, is an action for a penalty, and not a "criminal action" within section 2815, authorizing the parole of persons convicted of crime; the word "fine" meaning penalty. State ex rel. Howell County v. West Plains Telephone Co., 135 S. W. 20, 21, 232 Mo. 579.

Bastardy proceedings

Under Laws 1895, p. 66, c. 24, creating the municipal court for the city of Oshkosh and giving it concurrent jurisdiction with the circuit court in all cases of crimes and misdemeanors arising in the city, with certain exceptions, and vesting it with jurisdiction of all criminal or bastardy cases, a bastardy proceeding is not a "criminal action," within the meaning of the statute. Goyke v. State, 117 N. W. 1027, 1028, 136 Wis. 557.

Disbarment proceedings

"A 'criminal action' is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof. Under the statutes of this state, the remedy of disbarment is a special proceeding to deprive accused of his office of attorney and counselor at law, and is not

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a 'criminal proceeding.'" In re Burnette, 85 Pac. 575, 576, 73 Kan. 609.

Peddling without license

A conviction of peddling without a license, as required by Laws 1903, p. 250, c. 190, § 7, is a "criminal action" within Rev. Code Cr. Proc. § 479, providing that the mode of review in criminal actions shall be by writ of error. State v. Cram, 105 N. W. 99, 20 S. D. 159.

Proceeding to remove judge

A proceeding under the provisions of Wilson's Rev. & Ann. St. 1903, c. 68, art. 4, for the removal of a district judge, is not a "criminal action," but a special proceeding. Maben v. Rosser, 103 Pac. 674, 678, 24 Okl. 588.

CRIMINAL ASSAULT

"To constitute a 'criminal assault' there must be some evidence of an attempt or endeavor to do violence to the person." Haupt v. Swenson, 101 N. W. 520, 125 Iowa, 694.

CRIMINAL ATTEMPT

"An 'attempt' to commit a crime is an act done with intent to commit that crime and forming a part of a series of acts which would constitute its actual commission if it were not interrupted." The mere fact that a prisoner procured tools adapted to jail breaking, did not constitute an attempt to break jail. State v. Hurley, 64 Atl. 78, 79, 79 Vt. 28, 6 L. R. A. (N. S.) 804, 118 Am. St. Rep. 934.

CRIMINAL CAPACITY

"'Criminal capacity' involves primarily the ability to distinguish right from wrong; while 'testamentary capacity' involves the ability to understand the estate to be disposed of, the proper objects of bounty, and the nature of the testamentary act." Slaughter v. Heath, 57 S. E. 69, 71, 127 Ga. 747, 27 L. R. A. (N. S.) 1 (quoting and adopting the definition of Page, Wills, pp. 108–111, § 94 et seq.).

CRIMINAL CASE OR CAUSE

Any criminal case, see Any.
Stage of, see Stage of Case.

The rulings of the various courts have not been uniform on what constitutes a "criminal case" within the purview of the Constitution providing that no person shall be compelled to testify against himself in a criminal case. In New York it was held that the term "criminal case," used in the clause, must be allowed some meaning, and none can be conceived, other than a prosecution for a criminal offense. But it must be a prosecution against him, for what is forbidden is that he should be compelled to be a witness against himself. Now, if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot therefore be said that in such criminal case he has been made a witness against himself by force of any compulsion used towards him to procure in the other case testimony which cannot possibly be used in the criminal case against himself. Rev. St. 1899, § 2206, providing no person shall be excused from testifying against another in prosecution for gaming, but that the testimony shall not be used against the witness, was invalid. The United States Supreme Court, speaking by Mr. Justice Blatchford, has held that it is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which or the means by which evidence of its commission, or of his connection with it, may be obtained or made effectual for his conviction without using his answers as direct admissions against him. No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates. Ex parte Carter, 66 S. W. 540, 544, 166 Mo. 604, 57 L. R. A. 654 (quoting People v. Kelly, 24 N. Y. 74; Counselman v. Hitchcock, 12 Sup. Ct. 195, 142 U. S. 547, 35 L. Ed. 1110).

The phrase "civil suit" in Rev. St. 1899, § 818, providing that a change of venue may be awarded in any "civil suit" for causes enumerated, refers to the legal proceedings by which the rights and remedies of private individuals are enforced or protected, in distinction to the words "criminal case," which refer to public wrongs and their punishment, and includes certiorari to review proceedings of the county court resulting in the granting to one of a dramshop license, since the proceeding involves the right of the licensee to sell liquor as a dramshop keeper, which is a private right. State ex rel. Bixman v. Denton, 107 S. W. 446, 448, 128 Mo. App. 304.

The words "criminal case" apply to proceedings in a court against an accused person charged with doing something forbidden, who, if found guilty, is punished. An order of a Circuit Court of the United States declaring a judgment in a criminal action abated by the death of accused after the entry of judgment of conviction is an independent proceeding of a civil nature and reviewable on writ of error by the Circuit Court of Appeals at the instance of the United States. United States v. Dunne, 173 Fed. 254, 257, 97 C. C. A. 420, 19 Ann. Cas. 1145.

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The words, "civil case" and "civil suit" refer to the legal means by which the rights and remedies of private individuals are enforced or protected, in contradistinction to the words "criminal cases," which refer to public wrongs and their punishment. A proceeding under Rev. St. 1899, art. 3, c. 122, for the incorporation of a drainage district, is a "civil suit," within § 818, providing that a change of venue may be awarded in civil suits. State ex rel. Kochtitzky v. Riley, 101 S. W. 567, 569, 203 Mo. 175, 12 L. R. A. (N. S.) 900.

Contempt proceeding

Under Rev. Laws, c. 193, § 9, which provides that a "judgment in a criminal case" may be examined on writ of error, and chapter 156, § 3, which declares that the Supreme Judicial Court shall have general superintendence of all inferior courts, to correct errors, etc., a judgment adjudging one guilty of a criminal contempt may be reviewed on writ of error. Hurley v. Commonwealth, 74 N. E. 677, 678, 188 Mass. 443, 3 Ann. Cas. 757.

Commitment for contempt for disrespect to the court is a "criminal proceeding" by which the citizen is deprived of his liberty, and hence presumptions and intendments will not be indulged to sustain a conviction. Contempt of court is a specific criminal offense, and a fine imposed is a "judgment in a criminal case," and the adjudication is a conviction. Ex parte Shull, 121 S. W. 10, 11, 221 Mo. 623, 133 Am. St. Rep. 496.

Exceptions

A criminal case brought to the Supreme Court on exceptions of the prosecuting attorney, as authorized by Rev. St. 1899, §§ 5378–5381, is "a criminal case" within section 99 creating the office of Attorney General, and requiring him to represent the state in all criminal cases in the Supreme Court. State ex rel. Gibson v. Cornwell, 85 Pac. 977, 980, 14 Wyo. 526.

Habeas corpus proceedings

Under Pen. Code 1911, art. 3, providing that no person shall be punished for any act or omission, unless the same is made a penal offense and a penalty affixed thereto by the written law, and the further provision of the Code that no person shall be prosecuted for a criminal offense, except by indictment in case of felony, by information in case of misdemeanor, or by complaint in justice's court; and in the absence of any statute making a criminal contempt an offense, a proceeding by habeas corpus to review an order committing relator to prison for such a contempt is not a "criminal case," so as to preclude a rehearing on motion of the state, within the rules prohibiting the state to have a new trial or an appeal in criminal cases. Ex parte Wolters, 144 S. W. 531, 588, 64 Tex. Cr. R. 238 (per Harper and Prendergast, JJ.; Davidson, P. J., dissenting).

Proceedings before grand jury

Inquisition before the grand jury is a "criminal case" within the meaning of Const. U. S. Amend. 5, and Bill of Rights Ill. § 10, providing that no person can be compelled in any criminal case to give evidence against himself. People v. Argo, 86 N. E. 679, 680, 237 Ill. 173.

A proceeding before a grand jury for the purpose of determining whether a crime has been committed is a "criminal case" within the constitutional and statutory provisions that no person shall be compelled in a "criminal case" to be a witness against himself. People v. Gillette, 111 N. Y. Supp. 133, 135, 126 App. Div. 665.

Const. art. 2, § 23, providing "that no person shall be compelled to testify against himself in a criminal cause," is violated by the examination by a grand jury of one as to a felony who was subsequently indicted as accessory after the fact to the commission of the same felony, and taking place after the principals in the felony were indicted, as an investigation of a crime by a grand jury is within the term "criminal cause." State v. Naughton, 120 S. W. 53, 58, 221 Mo. 398.

Summary trial

A summary trial in a magistrates' court of New York City for disorderly conduct tending to a breach of the peace is not a "criminal case" within the meaning of Judiciary Law (Consol. Laws 1909, c. 30) § 5, which limits the Sunday jurisdiction of magistrates in a criminal case to the arrest, committal, or discharge of accused. People ex rel. Burke v. Fox, 99 N. E. 147, 149, 205 N. Y. 490.

CRIMINAL CODE

Under the rule that the title of an amendatory act which expresses the legislative purpose intelligently is sufficient, and that an amendatory act is valid though there is a mistake in the title, the title of an act entitled "An act to amend the Criminal Code to change the punishment of persons convicted of misdemeanors" is sufficient, though the principal act (Hurd's Rev. St. 1909, c. 38), commonly known as "Criminal Code," is an act to revise the law in relation to "criminal jurisprudence"; the words "criminal code" in the title of the amendatory act being synonymous with "criminal jurisprudence." People v. Van Bever, 93 N. E. 725, 726, 248 Ill. 136.

CRIMINAL CONSPIRACY

See Completed Criminal Conspiracy.

At common law, "criminal conspiracy" is an agreement to accomplish an unlawful purpose, or do a lawful act by criminal or unlawful means; the unlawful combination and

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agreement being the gist of the offense. Garland v. State, 75 Atl. 631, 633, 112 Md. 83, 21 Ann. Cas. 28.

"To make an agreement between two or more persons to do an act innocent in itself a 'criminal conspiracy,' it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt. The agreement must have been entered into with an evil purpose, as distinguishable from a purpose simply to do the act prohibited in ignorance. * * * The actual criminal intention belongs to the definition of the offense and must be shown to justify a conviction for conspiracy." People ex rel. Perkins v. Moss, 100 N. Y. Supp. 427, 431, 50 Misc. Rep. 198 (quoting People v. Powell, 63 N. Y. 88).

When the ingredients constituting the "criminal conspiracy" at common law and the ingredients constituting the "conspiracy to defraud" under anti-trust acts are examined, it is apparent that the offenses are not identical. The latter is doing business while a member of an illegal combination, while the former is a conspiracy to do an unlawful act, or a conspiracy to do a lawful act in an unlawful manner. The remedies against the common-law conspiracy were indictment for the criminal conspiracy and an action on the case for damages by an aggrieved party, or quo warranto by the state against an offending corporation. Hammond Packing Co. v. State, 100 S. W. 407, 410, 81 Ark. 519, 126 Am. St. Rep. 1047 (citing Eddy, Combinations, §§ 335–363, 371; Beach, Monopolies, §§ 77–87).

A "criminal conspiracy" is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. Harris v. Commonwealth, 73 S. E. 561, 562, 113 Va. 746, 38 L. R. A. (N. S.) 458.

Where the concerted action of two or more results in an increased ability to accomplish an injurious purpose, either the means or the purpose will be rendered criminal so as to amount to a criminal conspiracy, though the means or the end were not criminal if performed by a single individual. State v. Dalton & Fay, 114 S. W. 1132, 1137, 134 Mo. App. 517.

Criminal conspiracy is a confederation to do something unlawful, either as a means or an end. State v. Eastern Coal Co., 70 Atl. 1, 2, 29 R. I. 254, 132 Am. St. Rep. 817, 17 Ann. Cas. 96.

" 'Criminal conspiracy' is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means. No overt act is necessary to constitute the offense, the gist of the offense being the unlawful conspiring together." An information charging one with setting fire to and burning a house belonging to others, and alleging that defendant, though not personally present when the building was fired, aided and abetted setting it on fire, charges the offense of arson, and not a conspiracy to commit arson. State v. Mann, 81 Pac. 561, 563, 39 Wash. 144.

"It is said that the gist of a 'criminal conspiracy' is the unlawful concurrence of many in a wicked scheme, and that the crime of conspiracy is complete without any act having been done to carry it into execution" (quoting and adopting the definition in State v. Trammell, 24 N. C. 379). "Crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the constitution" (quoting and adopting definition in United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588). A "criminal conspiracy" is defined to be an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. "A conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. We use the terms 'criminal' or 'unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment. * * * But yet it is clear that it is not every combination to do unlawful acts to the prejudice of another which is punishable as a conspiracy" (quoting and adopting definition in Commonwealth v. Hunt, 4 Metc. [45 Mass.] 111, 38 Am. Dec. 346). The definition that a "criminal conspiracy" consists of an "agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means," may be shortened by omitting the latter half, for, where the conspiracy is to resort to unlawful means to secure the lawful end, such unlawful means is the unlawful act which the conspiracy contemplates. State v. Van Pelt, 49 S. E. 177, 180, 181, 191, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495.

CRIMINAL CONTEMPT

See Quasi Criminal Contempt.

Criminal contempts embrace all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority. Fiedler v. Bambrick Bros. Const. Co., 142 S. W. 1111, 1113, 162 Mo. App. 528; Ex parte Clark, 106 S. W. 990, 996, 208 Mo. 121, 15 L. R. A. (N. S.) 389.

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Criminal "contempts" are acts against the majesty of the law, or the court as an agency of the government. In re Smith, 107 N. W. 724, 144 Mich. 39 (quoting and adopting definition in 3 Current Law, 796).

A "criminal contempt" is conduct that is directed against the dignity and authority of the court. McCarthy v. Hugo, 73 Atl. 778, 779, 82 Conn. 262, 135 Am. St. Rep. 270, 17 Ann. Cas. 219; In re Rice, 181 Fed. 217, 220.

"Criminal contempts" are those acts in disrespect of the court or its process which obstruct the administration of justice or tend to bring the court into disrepute. People ex rel. Attorney General v. News-Times Pub. Co., 84 Pac. 912, 956, 35 Colo. 253 (quoting Wyatt v. People, 28 Pac. 963, 17 Colo. 258).

A "criminal contempt" at common law is generally defined as any act which tends either to obstruct the cause of justice or to prejudice the trial of any action or proceeding pending in court. Fellman v. Mercantile Fire & Marine Ins. Co., 41 South. 49, 52, 116 La. 723.

Criminal contempts of court consist in such disobedience of the mandates of the court as constitutes a defiance of the court's power and authority, and for which the guilty party is punishable by fine or imprisonment. Gompers v. Buck's Stove & Range Co., 33 App. D. C. 516, 565.

A "criminal contempt" is an act committed against the court as an agency of the government, and as to this class of contempts the public is primarily interested. A contempt of this character may consist in "speaking or writing contemptuously of the court, or judges acting in their judicial capacity." Contempts of this character need not relate to a cause that is still pending in the court. In re Fite, 76 S. E. 397, 405, 11 Ga. App. 665.

A "criminal contempt" proceeding is one "prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders." "A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment." Where, after an adjudication of bankruptcy, defendant knowingly took a part of the bankrupt's money, lent some of it on notes and mortgages in his name, and with some of it bought real estate in his name for the purpose of concealing it from the trustee in bankruptcy and appropriating it to himself, and the trustee brought suit for these notes and this real estate, and, after the suit was commenced and before the decree, defendant disposed of the notes and the real estate to innocent parties for the purpose of withdrawing the property from the jurisdiction of the court and defeating its coming decree, defendant was guilty of criminal contempt. Clay v. Waters, 178 Fed. 385, 389, 101 C. C. A. 645, 21 Ann. Cas. 897 (quoting In re Nevitt, 117 Fed. 448, 458, 54 C. C. A. 622).

" 'Criminal contempts' are all those acts in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute. To this class of contempts belong such acts as misconduct by attorneys or other officers, disobedience of subpœnas or other process, disobedience or insolent behavior in the presence or immediate vicinity of the court, and the like." Ex parte Hedden, 90 Pac. 737, 744, 29 Nev. 352, 13 Ann. Cas. 1173 (quoting definition in Rap. Contempts, § 21).

A "criminal contempt" means acts committed against the majesty of the law, the primary purpose of their punishment being the vindication of public authority; acts of disrespect to the court or its process; cases in which the state alone is interested in the enforcement of the order. Ex parte Wolters, 144 S. W. 531, 587, 64 Tex. Cr. R. 238 (per Davidson, P. J., and Harper, J).

" 'Criminal contempts' are all acts in disrespect of the court or its process which obstruct the administration of justice or tend to bring the court into disrepute. A criminal contempt is a misdemeanor, and an appeal from a judgment imposing a fine for such contempt must be taken as in other misdemeanor cases." French v. Commonwealth (Ky.) 97 S. W. 427, 429 (quoting Rap., Contempts, § 21, as quoted and approved in Wages v. Commonwealth, 13 Ky. Law Rep. 925).

A person soliciting an attorney engaged in the trial of a case to bribe the jurors through him by gifts of money is guilty of "criminal contempt." Hurley v. Commonwealth, 74 N. E. 677, 678, 188 Mass. 443, 3 Ann. Cas. 757.

Under Code Civ. Proc. § 8, subds. 3, 4, defining a criminal contempt of court to be willful disobedience to the court's lawful mandate or resistance willfully to its lawful mandate, a party may not be convicted of criminal contempt for failing to appear for examination as to his property in proceedings supplementary to execution on the day directed by an order rather than two days later, when he actually did appear and offer to submit to the examination in the absence of any showing that his conduct was willful and intended. In re Jones, 110 N. Y. Supp. 565, 566, 126 App. Div. 112.

A "criminal contempt" may be a willful disobedience of the court's lawful mandates, or resistance willfully to its lawful mandate. It is a contempt whose cause and result are a violation of the rights of the public as represented by their constituted legal tribunals, and a punishment of the wrong is in the interest of public justice rather than in the interest of an individual litigant. If a fine is imposed, its maximum is limited by a fixed

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general law, and not by the needs of individuals, and its proceeds when collected go into the public treasury. A failure to appear for examination as to his property in proceedings supplementary to execution on the day directed by an order, rather than two days later when he actually did appear and offered to submit to the examination without any showing that the conduct was willful and intended, would not authorize the conviction of a person for a "criminal contempt." Matter of Jones, 110 N. Y. Supp. 565, 566, 126 App. Div. 112 (quoting and adopting the definition in Code Civ. Proc. § 8; People ex rel. Munsell v. Court of Oyer & Term., 4 N. E. 260, 101 N. Y. 245, 248, 58 Am. Rep. 691).

Civil contempt distinguished

Contempts are divided into two classes: "Criminal contempts," which are committed in the immediate view and presence of the court, and "constructive" or "consequential" contempts. Smythe v. Smythe, 114 Pac. 257, 258, 28 Okl. 266.

Contempts are either civil or criminal, and criminal contempt consists of conduct on the part of one which amounts to an obstruction of justice, tending to bring the court into disrepute. Gordon v. Commonwealth, 133 S. W. 206, 208, 141 Ky. 461.

Contempts are of two classes: Criminal contempts, prosecuted to preserve the power of courts and to punish the offender; and civil contempts, prosecuted to preserve and enforce the rights of private parties and compel obedience to orders and decrees to enforce the rights and administer remedies which the court has found private parties entitled to. Merchants' Stock & Grain Co. v. Board of Trade of City of Chicago, 187 Fed. 398, 400, 109 C. C. A. 230.

Contempt proceedings are of two classes: Those prosecuted to preserve the power and vindicate the dignity of the courts by punishing the contemnor, and those prosecuted to compel observance and redress the violation of orders or decrees made in behalf of a party to an action pending before the court. The former are punitive and essentially criminal in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are the individuals whose private rights and remedies they are necessary to redress. Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 Fed. 774, 779, 68 C. C. A. 476.

Willful disobedience is a "criminal contempt," while a mere disobedience by which the right of a party to an action is defeated or hindered may be a civil contempt. In re Westminster Realty Corp., 108 N. Y. Supp. 551, 553, 123 App. Div. 797 (citing People v. Dwyer, 90 N. Y. 406; Code Civ. Proc. §§ 8, 14).

Contempts of court are generally classified as either civil or criminal; the former consisting in a disobedience of some judicial order made in the interest of another party to a proceeding, and the latter of acts disrespectful to the court or obstructive of the administration of justice or calculated to bring the court into disrepute. Ex parte Gudenoge, 100 Pac. 39, 43, 2 Okl. Cr. 110.

A "criminal contempt" proceeding is one prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders; while "civil contempt" is one instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The president has no power to relieve from either fine or imprisonment imposed in proceedings for civil contempt. Heinze v. Butte & B. Consol. Min. Co., 129 Fed. 274, 283, 284, 63 C. C. A. 388 (quoting and adopting definition in Re Nevitt, 117 Fed. 448, 54 C. C. A. 622).

Willful disobedience of an order of court in a civil action is not a "criminal contempt"; in such a case the punishment is only ordered for the purpose of enforcing the order. Flathers v. State, 125 Pac. 902, 903, 7 Okl. Cr. 668.

CRIMINAL COURTS

Owing to the distribution of the jurisdiction into civil and criminal cases, the courts having jurisdiction of criminal cases were designated as "criminal courts," and those having jurisdiction of civil cases became known as "civil courts." State ex rel. Board of Education of St. Louis v. Nast, 108 S. W. 563, 566, 209 Mo. 708.

Const. art. 6, vests the judicial power of the state as to matters of law and equity in a Supreme Court, district court, county court, justices of the peace, and such other courts as may be provided by law. It then provides the jurisdiction of various courts designated, "district court," "county court," and "criminal court," and for the election of judges thereof. Article 14 treats of counties and county officers, not including the judge of the county court, and article 20, creating the city and county of Denver, and providing for the termination of the terms of office of county officers, declares that district and county judges and the district attorneys should serve their full term, respectively, for which they had been elected. Held, that the words "district," "county," and "criminal" in Const. art. 6, as prefixed to the word "court," had no other significance than to give appropriate names to the tribunals of government, and that a judge of the county court in the city and county of Denver was not a county officer

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within Const. art. 20, and hence, after the adoption of such article and the charter of the city and county of Denver, he continued to hold his office under Const. art. 6, and not under the charter, and this, notwithstanding the charter, provided additional duties for such office and also for two incumbents. Dixon v. People, 127 Pac. 930, 932, 53 Colo. 527.

CRIMINAL INTENT

A charge that "a 'criminal intent' is attributed to a person who even does a grossly careless act," which in the light of undisputed facts in the case meant, "a criminal intent is attributed to a person who kills another with a deadly weapon from gross carelessness," was not erroneous. It is immaterial whether we say the law attributes or presumes or imputes or infers or merely supplies the necessary "criminal intent" from gross carelessness. One cannot be permitted to say that he committed homicide with a deadly weapon accidentally, if it appears that it was the result of his gross carelessness. State v. Clardy, 53 S. E. 493, 499, 73 S. C. 340.

Criminal intent in forgery, under Rev. St. 1870, § 833, is to defraud any person, and it suffices if the forged instrument does or may prejudice the rights of another, and an intent to profit by the act is not a necessary element of the offense. State v. Laborde, 45 South. 38, 40, 120 La. 136.

While there must be a criminal intent to constitute a crime, the "criminal intent" is the doing of the act prohibited with the intent specified in the statute. Greene v. Frankhauser, 121 N. Y. Supp. 1004, 1011, 137 App. Div. 124.

To constitute criminal intent, it is necessary only that one make affidavit to statements knowing them to be false, whatever be his motive. People ex rel. Hegeman v. Corrigan, 87 N. E. 792, 796, 195 N. Y. 1.

CRIMINAL JURISDICTION

The word "jurisdiction," with reference to criminal proceedings, embraces every kind of judicial action on the subject-matter, from the finding of the indictment to the pronouncing of sentence. It means to have power to inquire into the fact, to apply the law, and to declare the punishment in a regular course of judicial proceeding. It is the right of administering justice through the laws, by the means which the law has provided for that purpose. It does not, however, depend on the sufficiency of the complaint; it being sufficient that the court has jurisdiction of the parties and of the subject-matter. "Jurisdiction" is the power to hear and determine the subject-matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, the court has jurisdiction. State v. Smith, 72 Atl. 710, 714, 29 R. I. 513.

The physical absence of the accused from the state of Missouri when the acceptance by a St. Louis corporation of his offer to render services in consideration of the compensation forbidden by Rev. St. § 1782, was dispatched by mail or telegram, does not deprive the Circuit Court of the United States for the Eastern District of Missouri of jurisdiction of the offense, on the theory that the crime was not committed in that district, within the meaning of Const. art. 3, § 2, and Amendment 6, requiring the trial of all crimes against the United States to be held in the state and district where such crimes shall have been committed. Burton v. United States, 26 Sup. Ct. 688, 699, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

CRIMINAL JURISPRUDENCE

Under the rule that the title of an amendatory act which expresses the legislative purpose intelligently is sufficient, and that an amendatory act is valid though there is a mistake in the title, the title of an act entitled "An act to amend the Criminal Code to change the punishment of persons convicted of misdemeanors" is sufficient, though the principal act (Hurd's Rev. St. 1909, c. 38), commonly known as "Criminal Code," is an act to revise the law in relation to "criminal jurisprudence"; the words "criminal code" in the title of the amendatory act being synonymous with "criminal jurisprudence." People v. Van Bever, 93 N. E. 725, 726, 248 Ill. 136.

CRIMINAL LAW

Village ordinances are not criminal laws, and prosecutions under them are not governed by the provision of the Constitution that all prosecutions shall be in the name of the state, but the action is properly brought in the name of the village. Village of Litchville v. Hanson, 124 N. W. 1119, 1120, 19 N. D. 672.

Under Const. art 11, § 2, prior to its amendment November 8, 1910, providing for the enactment or amendment of corporate charters so long as the provisions thereof are not violative of the constitutional or criminal laws of the state, a provision of a charter in contravention of the criminal law, whether relating to felonies or misdemeanors, was invalid; the term "criminal laws" including all general statutes in force in the state, whether relating to acts malum in se or malum prohibitum, or to acts constituting felonies or misdemeanors. State v. Schluer, 115 Pac. 1057, 1060, 59 Or. 18.

CRIMINAL LIBEL

"Criminal libel" is defined by Pen. Code 1895, § 335, as a malicious defamation, expressed either by printing or writing, or signs, pictures, or the like, tending to blacken

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the memory of one who is dead, or the honesty, virtue, integrity, or reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. Michael v. Bacon, 63 S. E. 228, 229, 5 Ga. App. 331.

Code, § 5086, defining criminal libel as the malicious defamation of a person, made public by any printing tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse, is applicable to civil actions to recover damages for libel. Shelbley v. Ashton, 106 N. W. 618, 619, 130 Iowa, 195.

CRIMINAL NEGLIGENCE

Criminal negligence necessarily implies not only knowledge of probable consequences which may result from the use of an instrumentality, but also willful or wanton disregard of the probable effects thereof on others likely to be affected thereby. Carbo v. State, 62 S. E. 140, 4 Ga. App. 583.

The term "criminal negligence," as used in Cobbey's Ann. St. 1903, § 10039, which makes railroad companies liable for injuries to passengers being transported, except where the injury resulted from the criminal negligence of the person injured, means gross negligence such as amounts to a reckless disregard of one's own safety and a willful indifference to the consequence liable to follow. Riley v. Chicago, B. & Q. R. Co., 111 N. W. 847, 78 Neb. 748 (citing Chicago, B. & Q. R. Co. v. Winfrey, 93 N. W. 526, 67 Neb. 13; Union Pac. Ry. Co. v. Porter, 56 N. W. 808, 38 Neb. 226; Omaha & R. V. R. Co. v. Chollette, 49 N. W. 1114, 33 Neb. 146).

A person is guilty of "criminal negligence" when he does some act or omits some duty under circumstances showing an actual intent to injure, or when the breach of duty is so flagrant as to warrant an implication that the resulting injury was intended; that is, when his negligent conduct is incompatible with a proper regard for human life. Negligence is the gist of the offense, and in the absence of recklessness, or of want of due caution, there is no criminal liability. Actual intent is not an essential element of the offense. It is enough if there is shown a negligent and reckless indifference of the lives and safety of others. One who drives an automobile willfully, recklessly, carelessly, and negligently, and at a rate of speed forbidden by the statute, upon the public streets or highways of this state, and thereby causes the death of another, is guilty of criminal homicide. Schultz v. State, 130 N. W. 972, 977, 89 Neb. 34, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C, 495 (quoting and adopting definition in Berry, Law of Automobiles, § 159).

A charge on a trial of an automobile driver for negligent homicide that "gross negligence" imports a thoughtless disregard of consequences, and that if the circumstances establish a degree of carelessness amounting to a culpable disregard of the safety of others, "criminal negligence" is established, and one who without intention to take life causes the death of another by his own unlawful act is criminally responsible, and it is unlawful for any person to operate an automobile recklessly, or at a rate of speed greater than is reasonable, having regard to the width, traffic, and use of the highway, etc., requires the jury, in order to convict, to find that accused with reckless disregard for the safety of others negligently drove his automobile in a public street and thereby caused the death of decedent, and is sufficiently favorable to accused. State v. Goetz, 76 Atl. 1000, 1001, 83 Conn. 437, 30 L. R. A. (N. S.) 458.

Where one is charged with a special duty, the nonperformance of which involves danger to the safety of others, the failure to perform the duty, even through inattention, is gross and culpable, or, in other words, criminal negligence. State v. Irvine, 52 South. 567, 569, 126 La. 434.

Criminal "negligence," as used in a statute exempting from liability, where an injury done arises from the criminal negligence of the persons injured, has been defined to mean gross negligence, such negligence as would amount to a flagrant and reckless disregard by a person of his own safety, and amount to a willful indifference to the injury liable to follow. Chicago, R. I. & P. R. Co. v. Zernecke, 22 Sup. Ct. 229, 230, 183 U. S. 582, 46 L. Ed. 339 (citing Omaha & R. V. R. Co. v. Chollette, 49 N. W. 1114, 33 Neb. 143).

CRIMINAL OFFENSE

See Specific Criminal Offense.

To constitute a "criminal offense" there must have been an act following an unlawful thought; mere intent to commit a crime not being such an offense. Ex parte Green, 103 S. W. 503, 505, 126 Mo. App. 309 (quoting and adopting definition in 1 Bish., Cr. Law, § 204).

A "criminal offense" consists in a violation of a public law in the commission of which there shall be a union or joint operation of act, and intention or criminal negligence. Weare Commission Co. v. People, 70 N. E. 1076, 1079, 209 Ill. 528 (citing Hurd's Rev. St. 1899, c. 38, par. 280).

As all grades of crime

Under Rev. St. 1898, § 2598, defining a criminal action as one prosecuted by the state as a party against a person charged with a public offense, the words "criminal offense," in section 4073, providing that a witness' conviction of a criminal offense may be proved on his cross-examination, etc., include misdemeanors as well as felonies, but do not include an offense punishable by a municipal ordinance. Koch v. State, 106 N.

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W. 531, 583, 126 Wis. 470, 3 L. R. A. (N. S.) 1086, 5 Ann. Cas. 389.

Violation of city ordinance

The offense defined by a city ordinance prohibiting the furnishing of food by liquor dealers and prescribing a punishment by a fine or imprisonment is a "criminal offense" within the constitutional provision as to former jeopardy. City of St. Paul v. Stamm, 118 N. W. 154, 155, 106 Minn. 81.

Violation of military code

A violation of the rules and regulations of the military code which are merely disciplinary in their nature, designed to secure higher efficiency in military service, does not constitute a "criminal offense" within the meaning of section 7 of the Bill of Rights, declaring that no person shall be held to answer for a criminal offense unless on the presentment or indictment of the grand jury. State ex rel. Madigan v. Wagener, 77 N. W. 424, 426, 74 Minn. 518, 42 L. R. A. 749, 73 Am. St. Rep. 369.

CRIMINAL ORDINANCE

An ordinance relating to juvenile vagrants, and authorizing the commitment of such persons to the House of Good Shepherd, is not a criminal ordinance. It is a mere administrative police regulation, designed as a preventative against wrongdoing, and not as a punishment therefor. State ex rel. Caillouet v. Marmouget, 35 South. 529, 533, 111 La. 225.

CRIMINAL PROCEDURE

The words "criminal procedure," in Laws 1895, c. 41, § 45 (Wilson's Rev. & Ann. St. 1903, § 5306), entitled "Criminal Procedure," and providing that in all misdemeanor cases, before a warrant shall issue for the arrest of accused, the complaint must be submitted to the county attorney, etc., refer to all misdemeanors, whether the same are triable before the district court, probate court, or justice of the peace. Bailey v. Territory, 79 Pac. 775, 776, 15 Okl. 80.

The provisions of the statute governing the juvenile courts, where children are brought before it, are not intended to come within what is termed "criminal procedure." State v. Dunn, 99 Pac. 278, 280, 53 Or. 304.

CRIMINAL PROCEEDING

See Part of Criminal Proceedings.

Judgment in criminal proceeding, see Judgment.

See, also, Proceeding.

A proceeding under Acts 1909, c. 260, § 8, as amended by Acts 1911, c. 295, § 5, which provides for a proceeding by a grand juror or prosecuting attorney against a delinquent taxpayer and for the commitment of such taxpayer to jail or the workhouse by a justice of the peace or committing magistrate upon his failure to show reason why the tax has not been paid, to stand committed, until the tax, interest, and costs of proceedings are paid, is designed, not to punish the delinquent, but more as an additional proceeding to enforce the payment of the tax and to give an opportunity to escape commitment if sufficient reason for its nonpayment exist, so that it is not a "criminal proceeding" within Gen. St. 1902, § 1482, which provides that criminal courts of common pleas have jurisdiction only of criminal cases which are within the final jurisdiction of city, borough, and other inferior courts and which have been appealed therefrom to the criminal courts of common pleas, and section 1483, providing for the filing of an original information by the prosecuting attorney in cases of which such court may obtain jurisdiction by appeal from a lower court. State v. Hall, 84 Atl. 923, 86 Conn. 191.

The distinction between a "civil proceeding" and a "criminal proceeding" is not dependent on whether the crown or the sovereign is a party, but whether the real end or object of the proceeding is punishment or reparation. Code 1904, p. 1045, § 2071, declares any one who fishes in the waters on another's land guilty of a trespass, and provides that on conviction he shall be fined. Section 2073, p. 1046, provides that the offender shall be carried before a justice, who shall try the case, and that, if judgment be rendered against the offender, it shall be for the forfeitures and costs, and if he does not satisfy the judgment the justice shall commit him to jail for one month, unless satisfaction be made. Section 2070b, cl. 8, p. 1044, provides that all penalties imposed or collected under the provisions of the chapter of which the above sections are part shall be paid to the commonwealth. Section 3879, p. 2061, declares offenses which are not felonies to be misdemeanors. Held, that sections 2071 and 2073 create a criminal offense of the misdemeanor class and prescribe a criminal proceeding for their violation, and consequently an appeal from a judgment of conviction lies to the circuit court under Code 1904, pp. 2152, 2154, §§ 4106, 4107, providing for appeals to the circuit court from judgments of conviction in criminal cases before justices, although the fine imposed is less than $10, so that no appeal would lie to the circuit court under section 2947, p. 1562, providing for appeals in civil cases. Jernigan v. Commonwealth, 52 S. E. 361, 362, 104 Va. 850.

Bastardy proceedings

A "bastardy proceeding" is neither a civil nor criminal action, strictly speaking, but is a mere statutory proceeding designed primarily to enable the injured female to recover of the person who in the eyes of the law has committed a grievous injury to her, compensation therefor. Meyer v. Meyer, 102 N. W. 52, 55, 123 Wis. 538.

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A "bastardy proceeding" is civil and not criminal in its nature, and is intended merely for the enforcement of a police regulation. State v. Addington, 57 S. E. 398, 399, 143 N. C. 683, 11 Ann. Cas. 314 (citing State v. Liles, 47 S. E. 750, 134 N. C. 735).

"Bastardy proceedings" are so far of a criminal nature that a person who is within the state only for the purpose of putting in special bail in an action in which he was arrested under a capias is not privileged from arrest on a charge of bastardy. Cady v. St. Clair Circuit Judge, 102 N. W. 1025, 139 Mich. 618.

Contempt proceeding

See Contempt Proceeding.

Contested election

See Contest.

Habeas corpus proceedings

Habeas corpus proceedings are "civil" and not "criminal." Winnovich v. Emery, 93 Pac. 988, 989, 33 Utah, 345.

Habeas corpus proceedings is not intended to be summary and is not a "criminal proceeding" permitting admission to bail pending an appeal from the order dismissing the petition. Orr v. Jackson, 128 N. W. 958, 960, 149 Iowa, 641.

Inquest

An inquest over a dead body is a proceeding essentially criminal in its nature, and falls within the term "criminal proceedings," for which salaries are provided in lieu of fees given by Civ. Code 1902, § 3117; section 1006 providing for salaries of magistrates in Anderson county, and section 994 providing that magistrates shall receive annual salaries in lieu of fees in criminal cases or proceedings—and a magistrate in Anderson county holding an inquest cannot collect fees from the county therefor. Acker v. Anderson County, 58 S. E. 337, 77 S. C. 478.

Proceedings to destroy liquor

Proceedings under an act providing for the condemnation and summary destruction of liquor illegally kept for sale are civil in their nature, and not criminal. Kirkland v. State, 78 S. W. 770, 773, 72 Ark. 171, 65 L. R. A. 76.

Proceedings to expel or exclude aliens

A proceeding for the deportation of a Chinese laborer not having a certificate entitling him to residence required by the Chinese Exclusion Act is not a "criminal proceeding," and hence it is competent for the government to swear such person as a witness against himself. Low Foon Yin v. United States Immigration Com'r, 145 Fed. 791, 793, 76 C. C. A. 355.

"A proceeding under our law to expel or exclude aliens is not a criminal prosecution or proceeding." Where, in proceedings for the exclusion of Chinese aliens, the only evidence of citizenship offered was unsatisfactory testimony of one witness that he was an uncle of defendants and that they were both born in San Francisco, and defendants refused to be sworn in their own behalf, a finding against the aliens' right to remain was not erroneous. United States v. Moy You, 126 Fed. 226 (citing, in support of definition, Fong Yue Ting v. United States, 13 Sup. Ct. 1016, 149 U. S. 730, 37 L. Ed. 905; United States v. Lee Huen, 118 Fed. 456).

Proceedings had conformably to provisions of the act of February 20, 1907, § 3, for the deportation of any alien found practising prostitution within three years after her entry into the United States, are not criminal, within the meaning of the guaranty of Const. U. S. Amend. 6, that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. Zakonaite v. Wolf, 33 Sup. Ct. 31, 32, 226 U. S. 272, 57 L. Ed. 218.

Proceedings relating to juvenile vagrants

A proceeding under an ordinance relating to juvenile vagrants, and authorizing the commitment of such persons to the House of Good Shepherd, is not a criminal proceeding. State ex rel. Caillouet v. Marmouget, 35 South. 529, 533, 111 La. 225.

As prosecution

See Prosecution.

Prosecution for violation of municipal ordinance

As far as imprisonment for the violation of a municipal ordinance is concerned, the prosecution for the infraction of the ordinance is to be regarded as a "criminal proceeding." Pearson v. Wimbish, 52 S. E. 751, 755, 124 Ga. 701, 4 Ann. Cas. 501 (citing Mayor, etc., of City of Macon v. Wood, 34 S. E. 322, 109 Ga. 149; Mayor and Council of Hawkinsville v. Ethridge, 22 S. E. 985, 96 Ga. 326).

Quo warranto

Proceeding by information in the nature of quo warranto was never more than incidentally "criminal," its main purpose in its early history having been, and its only one in recent times being, to try title to office. Territory ex rel. Hubbell v. Armijo, 89 Pac. 267, 268, 14 N. M. 205.

An information in the nature of quo warranto was originally "criminal" in form and purpose, but by a process of evolution has become a civil proceeding. State ex rel. Jackson v. Anheuser-Busch Brewery Ass'n, 90 Pac. 777, 778, 76 Kan. 184.

An information in the nature of quo warranto was a "criminal proceeding" in which, if the issue was found against the defendant in addition to a judgment of oust-

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er, a fine was imposed. Meehan v. Bachelder, 59 Atl. 620, 73 N. H. 113, 6 Ann. Cas. 462.

An information in the nature of quo warranto is the substitute for the ancient writ of quo warranto, and its origin was essentially a "criminal prosecution" to punish encroachments upon the royal prerogative, and it still retains that character to the extent that the proceedings are criminal in form for the purpose of punishing the usurper and ousting him from enjoying the franchise. People v. Gartenstein, 94 N. E. 128, 129, 248 Ill. 546.

Originally both quo warranto and proceedings in the nature of quo warranto partook of the character of "criminal proceedings." State v. Des Moines City R. Co., 109 N. W. 867, 870, 135 Iowa, 694.

An information in the nature of quo warranto is properly a "criminal prosecution" instituted not only to fine the usurper but to oust him from the office, franchise, or liberty. State v. Sengstacken, 122 Pac. 292, 295, 61 Or. 455.

CRIMINAL PROSECUTION

See, also, Prosecution.

A "criminal prosecution" is the mode of formally accusing offenders or the means adopted to bring a supposed offender to justice and punishment by due course of law. A preliminary proceeding antedating an indictment for a felony is not any part of a "criminal prosecution" within Bill of Rights, § 10, guarantying rights to accused in such prosecutions. Kemper v. State, 138 S. W. 1025, 1045, 63 Tex. Cr. R. 1.

A "criminal prosecution" is instituted by the state through its officer selected for that purpose, and such officer is invested with a certain discretion with respect to the cases he will call to the attention of the grand jury, the number and character of witnesses, the form in which the indictment shall be drawn, and other details in the proceeding. Hale v. Henkel, 26 Sup. Ct. 370, 375, 201 U. S. 43, 50 L. Ed. 652.

The third article of the Oklahoma Constitution provides for a jury in the trial of "all crimes except in cases of impeachment." The word "crime" in its most extended sense comprehends every violation of public law. In a limited sense, it embraces offenses of a serious or attrocious character. In our opinion, the provision is to be interpreted in the light of the principles which at common law determine whether accused in a given class of cases was entitled to be tried by a jury. It is not to be construed as relating to felonies or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the sixth amendment. A person charged with having committed a misdemeanor prior to statehood has a constitutional right of trial by jury composed of 12 persons. Miller v. State, 106 Pac. 810, 812, 3 Okl. Cr. 457 (quoting and adopting definition in Callan v. Wilson, 8 Sup. Ct. 1301, 127 U. S. 540, 32 L. Ed. 223).

Pub. Laws 1903, p. 32, c. 1100, § 13, securing a judicial trial on appeal from the decision of the board of examiners in a proceeding to revoke a barber's certificate, but making no provision for a jury trial, is not in violation of Const. art. 1, § 10, guaranteeing a trial by jury in criminal prosecutions, since the proceeding is not a criminal prosecution. State v. Armeno, 72 Atl. 216, 218, 29 R. I. 431.

Action for forfeiture or penalty

An action against a foreign corporation to recover a penalty for violation of a statute, requiring the corporation to file a copy of its articles of incorporation as a condition precedent to the transaction of business within the state, is a "civil suit" and not a "criminal prosecution," within the meaning of the Constitution and laws of the state. Western Union Tel. Co. v. Andrews, 154 Fed. 95, 98 (citing St. Louis, A. & T. Ry. Co. v. State, 19 S. W. 572, 56 Ark. 166; Kansas City, S. & M. R. Co. v. State, 37 S. W. 1047, 63 Ark. 134; St. Louis, I. M. & S. Ry. Co. v. State, 60 S. W. 654, 68 Ark. 561; Choctaw, O. & G. R. Co. v. State, 87 S. W. 631, 75 Ark. 369).

An action by the state for penalties imposed by the Texas anti-trust act declaring that corporations violating the act shall be guilty, and, when convicted, shall be subject to penalties recoverable by "suit" where the "offense" is committed, is not a "criminal prosecution," within Code Cr. Proc. 1895, art. 219, prescribing the time for the institution of criminal prosecutions, but is a civil suit; the word "offense" having reference to violations of the acts, and not being equivalent to the words "felony" or "misdemeanor," and the word "suit" being generally used to designate a civil case, and limitation is not available as defense. Waters-Pierce Oil Co. v. State, 106 S. W. 918, 927, 48 Tex. Civ. App. 162.

As an action, suit, etc.

See Action; Suit.

Contempt proceedings

A criminal contempt proceeding is not a "criminal prosecution" as that term is used in Const. art. 1, § 12, providing that no person shall be compelled, in a criminal prosecution, to testify against himself, and hence the defendant may be compelled to testify,

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although he may claim his constitutional guaranty as to questions which would tend in any manner to incriminate him. State v. Sieber, 88 Pac. 313, 317, 49 Or. 1.

Proceedings for violation of city ordinance

The common-law definition of a "crime," as given by Blackstone, is "an act committed or omitted in violation of a public law," and the term "criminal prosecutions," as employed in Const. 1819, art. 1, § 10, giving the accused the right to be heard in all "criminal prosecutions," relates exclusively to prosecutions for violation of the public laws of the state, and a city ordinance is not a public law of the state, but a local law of the particular corporation, made for its internal practice and good government. Costello v. Feagin, 50 South. 134, 135, 162 Ala. 191.

Prosecutions under city or village ordinances are not "criminal prosecutions" within the North Dakota Constitution, providing that all prosecutions shall be in the name and by the authority of the state of North Dakota. "Offenses against ordinances enacted by a municipal corporation in the exercise of its legitimate police authority for the preservation of the peace, good order, health, or morals of the community, are not generally construed to be criminal cases in the proper sense of the term 'criminal,' and the prosecutions therefor are not 'criminal prosecutions' within the meaning of the Constitution, which refers to prosecutions for offenses essentially criminal under the general laws of the state." Village of Litchville v. Hanson, 124 N. W. 1119, 1120, 19 N. D. 672 (quoting City of Mankato v. Arnold, 30 N. W. 305, 36 Minn. 62).

CRIMINAL RESPONSIBILITY

The ability to distinguish between right and wrong as to a particular act about to be committed is the general test of criminal responsibility. Carter v. State, 58 S. E. 532, 535, 2 Ga. App. 254.

In a prosecution for murder, an instruction that "to be 'criminally responsible' a person must have intelligence and capacity to have criminal intent and purpose, and if his mental powers are so deficient that he has no will or no conscience, or any controlling mental power, or if from the overwhelming violence of mental disease his intellectual power is for the time obliterated so that he has not the power of volition to do right and refrain from doing wrong, he is not 'criminally responsible,' the questions to be determined being whether at the time of the killing he had the mental capacity to entertain the criminal act and whether in point of fact he did entertain it," is not rendered erroneous by the use of the word "act" instead of the word "intent," where the court in other instructions repeatedly referred to the intent of defendant as shown by the evidence, as distinguished from the mere act of killing, and told them that in every crime there must exist a union or joint operation of act and intent. State v. McGowan, 93 Pac. 552, 556, 36 Mont. 422.

CRIMINAL TERM

St. 1909, § 965, providing for criminal terms of the circuit court of a county, and for civil terms thereof, divides the circuit court of the county into criminal and civil terms, and while the one circuit judge of the judicial district embracing the county presides at both the criminal and civil terms, he is without jurisdiction to try a criminal case at a civil term or to try a civil action at a criminal term, the words "criminal term" applying to a term of court at which indictments are found and returned, and at which persons are tried for crimes and other penal offenses, and the words "civil term" applying to a term at which civil business is disposed of, and controversies cognizable at law or in equity are litigated. Where a criminal case was continued at a criminal term of a circuit court of a county having criminal and civil terms, the case could not be called for trial until the next criminal term, and the court was without jurisdiction to try the case at the intervening civil term. Smedley v. Commonwealth, 127 S. W. 485, 488, 138 Ky. 1, opinion modified 129 S. W. 547, 138 Ky. 1.

CRIMINATE

The fact that a witness may be asked to testify concerning a fact which is not a part of a criminal transaction, but is material in a prosecution based on such transaction, as giving his name or his presence in some locality remote from the scene of the crime, or stating whether he was, in fact, a public official at the time it is claimed the offense was committed, do not in themselves constitute incriminating statements tending to show him guilty of crime, though upon a prosecution it may develop that they are material. A "fact tending to criminate" is a fact forming a necessary and essential part of a crime. Rudolph v. State, 107 N. W. 466, 470, 128 Wis. 222, 116 Am. St. Rep. 32.

A husband's testimony "criminates" his wife so as to be incompetent if it directly charges her with an indictable offense, but not if it merely tends to impute a crime, so that on a trial of the wife's paramour the husband's testimony to the act of adultery was incompetent as criminating her, although she had been previously tried and acquitted. State v. Wilson, 31 N. J. Law, 77–79.

CRITERION

A request for instructions to appraisers of a water company's plant, that neither the

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reproduction cost of the existing plant, nor the cost at present of a new one, differently constructed, but equal or even superior in efficiency to the one now existing, is the legal "criterion" of the total value to be awarded, or even of the plant or structure value, is true, if by "criterion" is meant the sole or controlling test of present value; there being other elements besides cost of reproduction or replacement which affect present value. Kennebec Water Dist. v. Waterville, 54 Atl. 6, 18, 97 Me. 185, 60 L. R. A. 856.

CRITICISM

See Fair and Honest Criticism.

"Criticism," as distinguished from defamatory statements, is an expression of opinion of facts from which differences of opinion may reasonably arise, and, if it sticks to that, it is not defamatory, no matter though it be severe, hostile, rough, caustic, bitter, sarcastic, or satirical, for these are the weapons of "criticism"; and no matter how different the opinion may be to the opinion of others, or of a majority however great, provided it derives its color from the facts, and the rule that all "fair and honest criticism" on any published book is not libellous, unless the critic goes out of his way to attack the private character of the author, is contradictory, for going out of the way to attack an author's private character is not "fair and honest criticism." It is not criticism at all, for criticism is confined to the expression of opinions on facts about which opinions may in good faith differ. It is only false aspersions or statements of fact that can be defamatory. And they are no part of criticism. Where they begin criticism ends. MacDonald v. Sun Printing & Publishing Ass'n, 92 N. Y. Supp. 37, 40, 45 Misc. Rep. 441 (citing Sickels v. Kling, 64 N. Y. Supp. 252, 31 Misc. Rep. 287; Baum v. Clause [N. Y.] 5 Hill, 199; Ullrich v. New York Press Co., 50 N. Y. Supp. 788, 23 Misc. Rep. 168).

The distinction between "criticism" and "defamation" is that criticism deals only with things that invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns; it is not concerned with the individual but only with his work, as a true critic never indulges in personalities, but confines himself to the merits of the subject-matter by conducting a fair discussion of matters of public interest, for the judicious guidance of public taste or opinion. Triggs v. Sun Printing & Pub. Ass'n, 71 N. E. 739, 743, 179 N. Y. 144, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326.

CROOKED

"Crooked" applied to an individual means dishonest. Midland Pub. Co. v. Implement Trade Journal Co., 83 S. W. 298, 301, 108 Mo. App. 223, 317.

CROP

See Growing Crops.
Other crops, see Other.
Sale of crops as interest in property, see Interest (In Property).
See, also, Emblements.

The word "crop," in its general signification, "means the product of cultivated plants while growing, or that product after it has been harvested or severed from the stalk or root to which it was attached." As stated in Cottle v. Spitzer, 4 Pac. 435, 65 Cal. 434, 52 Am. Rep. 303: "'Crop,' as defined by Webster, is '(3) that which is gathered; the corn or fruits of the earth collected; harvest; the word includes every species of fruit or product gathered for man or beast; (4) corn or other cultivated plants, while growing (a popular use of the word); (5) anything cut off or gathered.' The etymology of the word 'crop' appears to be from the Saxon 'crop' or 'cropp,' signifying the crop of a fowl, a cluster of ears of corn, grapes, ears of corn, and from the Welsh 'cropiad,' a gathering or taking hold of. Webst. verb. 'crops.' The definition given by Webster is even broader than the popular signification of the word. Under the former, as we see, not only is meant grain produced from annual vegetation, but also fruits from trees and perennial plants. But it is at least doubtful, if, under the common and restrictive acceptation of the term, anything more would be understood than products from annual plants, as cereals, maize, etc., and the latter appears to be the sense in which the term is employed in technical legal parlance. 'Crop,' says Bouvier, 'is nearly synonymous with emblements, and by this term is understood the crops growing upon the land. By crops is here meant the products of the earth which grow yearly and are raised by the annual expense and labor, or "great manurance and industry," such as grain, but not fruits which grow on trees, which are not to be planted yearly, or grasses and the like, though they are annual.' Bouv. Law Dict. word, 'Emblements.'" According to Webst. Int. Dict., "crop" is: "That which is cropped, cut, or gathered from a single field, or of a single kind of grain or fruit of any single season, especially the product of what is planted in the earth; fruit; harvest; grain or other product of the field while standing." State Mut. Ins. Co. v. Clevenger, 87 Pac. 583, 17 Okl. 49 (citing Goodrich v. Stephens, 5 Lans. [N. Y.] 230).

The word "crop," in its general significance, means the product of cultivated plants while growing, or the product after it has been harvested or severed from the stock or root to which it is attached. Corey v. Struve, 116 Pac. 975, 977, 16 Cal. App. 310.

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As appurtenances

See Appurtenance—Appurtenant.

As chattel

See Chattel.

Growing grain or grass

The word "crops" includes growing grain or grass. Pen. Code, § 604, declaring that every person who maliciously injures or destroys any standing crops in any case for which a punishment is not otherwise prescribed is guilty of a misdemeanor, intends to punish the act of injuring or destroying, not the freehold itself, but the crops, grain, etc., growing thereon, and a complaint, charging that defendant willfully injured and destroyed a standing crop of grain, is not defective for failing to allege that such destruction was not committed by means of trespass to the freehold, and therefore punishable under section 602, subd. 3, providing that every person who willfully commits a trespass by either maliciously injuring or severing from the freehold of another anything attached thereto or the produce thereof is guilty of a misdemeanor. Hogan v. Superior Court of California in and for Merced County, 117 Pac. 947, 952, 16 Cal. App. 783.

As part of real estate

See Real Property.

As personal property

See Personal Property.

CROP OF BEETS

The phrase "crop of beets" may be interpreted to include the tops of the beets. A lease of a farm which provided that a part should be devoted to the growing of a crop of beets, and that at the proper time and when directed by a sugar company the tenant would harvest, top, haul, and deliver the beets to the company, and when so delivered one-half of the beets in weight should be delivered in the name of the landlord as his property as a yearly rental, but which makes no provision for the disposition of the tops, does not give the tops to the tenant in view of the evidence that the landlord in such leases always kept the tops. Corey v. Struve, 116 Pac. 975, 977, 16 Cal. App. 310.

CROPPER

See Landlord and Cropper.

Place of business of, see Place of Business.

A "cropper" is one hired to work land and to be compensated by a share of the produce. Such a contract gives him no legal possession of the premises further than as a hireling. Wanamaker v. Buchanan, 33 Pa. Super. Ct. 138, 140.

A "cropper," who is himself to perform services and labor in making the crop, is within the provisions of the act of 1903, "to make it illegal for any person to procure money, or other thing of value, on a contract to perform services with intent to defraud." A "cropper" does not occupy the position of a partner. If the agreement contemplates that he shall not himself perform services but shall procure and furnish labor, he is not a servant but a contractor. If he is to work himself, he is a laborer. Vinson v. State, 52 S. E. 79, 80, 124 Ga. 19 (citing Padgett v. Ford, 43 S. E. 1002, 117 Ga. 508; De Loach v. Delk, 47 S. E. 204, 119 Ga. 884; Barron v. Collins, 49 Ga. 580; Duncan v. Anderson, 56 Ga. 398).

Tenant distinguished

One who takes land of another and agrees to cultivate the same and deliver to the owner one-third of the crop is a tenant and not a mere cropper. A "tenant" is one who rents land and pays for it either in money or a part of the crops, or the equivalent. A "cropper" farms the land and is paid for his work in a part of the crop. Hansen v. Hansen, 129 N. W. 982, 983, 88 Neb. 517.

Under Code, § 1754, which provides that, where lands are leased for agriculture or cultivated by a lessee, the crops shall vest in the possession of the lessor with a preferred lien for rents and advances, and section 1755, which provides a special action by the lessor to compel division of the crop, the lessee is not a mere servant working for wages, nor, except in the sense that he makes a crop, and the lease has that object in view, the term "cropper" is not in harmony with the language of the statute. Parker v. Brown, 48 S. E. 657, 660, 136 N. C. 280.

"The distinction between a 'tenant' and a 'cropper' is that a tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is." Taylor v. Donahoe, 103 N. W. 1099, 1100, 125 Wis. 513.

CROSS

Where an honest attempt was made by a voter to make a cross in the appropriate square in the ballot, that the cross was imperfect does not invalidate the ballot. Lines which meet, but which do not intersect, do not form a cross essential to mark a ballot, but lines which intersect slightly make a cross sufficient to require the counting of the ballot. A ballot having a V-shaped mark in the square before a candidate's name, without any intersection of lines to form a cross, must be rejected. A ballot having in a party circle an irregular-shaped mark in the form of "T" must be counted. A ballot with dim crosses in the proper circle or

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square, made by pressing the pencil lightly, or by using a pencil with the lead broken, must be counted. A ballot having a mark in a party circle resembling the letter "O," without any attempt at a cross, cannot be counted. A ballot having a cross in the democratic circle and the names of the democratic and republican candidates for an office marked out with a lead pencil drawn horizontally through each name cannot be counted for the democratic candidate. A ballot having a lead pencil cross in the democratic circle and a large pencil cross covering the whole length of the democratic ticket, with no other marks, cannot be counted for a democratic candidate. A ballot was marked with pencil crosses in the squares before the first eight names on the socialist ticket, and down the entire length of the ticket was a large cross. The crosses in the squares and the large cross were partly erased. There were crosses in squares on the republican ticket and an erasure thereof. There were crosses in the respective squares on the democratic ticket. Held, that the ballot must be counted for the democratic candidates; the crosses on the socialist and republican tickets having been made by mistake, or the voter changing his mind. A ballot marked by a voter placing crosses in the squares before the names of opposing candidates for the same office cannot be counted. Brents v. Smith, 95 N. E. 484, 487, 488, 491, 250 Ill. 521.

A street or highway which extends to, but not beyond, another highway, "crosses and intersects" such highway, within the meaning of section 5 of the act approved August 13, 1910 (Laws 1910, p. 92), regulating the use of automobiles. Hayes v. State, 75 S. E. 523, 527, 11 Ga. App. 371.

The statutes of South Dakota conferring the power of eminent domain on railroad companies (Civ. Code, §§ 488, 505), while authorizing one railroad company to "'cross, intersect, join and unite' its road with the railroad of any other company" do not authorize to build its road longitudinally upon the right of way of another company, and in the absence of such statutory authority it cannot condemn a right of way to do so. South Dakota Cent. R. Co. v. Chicago, M. & St. P. R. Co., 141 Fed. 578, 585, 73 C. C. A. 176.

CROSS-BILL

See, also, Cross-Complaint; Cross-Petition.

A "cross-bill" may be filed to obtain affirmative relief for defendant in the original suit, to obtain a discovery in aid of a defense in that suit, to enable defendant to interpose a more complete defense than could be had by answer, or to obtain full relief to all parties and a complete determination of all controversies arising out of the matters charged in the original bill, and in a suit in a federal court of equity to establish and protect rights in the waters of a stream against other separate appropriators of water from the stream, all of whom are citizens of different states from complainant, the court may entertain a cross-bill by any or all of the defendants setting up priority of right as against complainant or their codefendants. Ames Realty Co. v. Big Indian Mining Co., 146 Fed. 166, 169.

A bill having been filed to enjoin a township from repealing an ordinance granting a street railway company a location for its tracks and their removal, "a cross-bill" was filed by the township, demanding that the company account as to compensation required by the ordinance granting such location to be made annually to the township. Held, that the "cross-bill" was not subject to the objection that it sought a legal remedy only, since, though a "cross-bill" filed against a codefendant must rest on considerations of equity, a more liberal rule applies as to a "cross-bill" filed against complainant. Asbury Park & S. G. Ry. Co. v. Township Committee of Neptune Tp., 67 Atl. 790, 794, 73 N. J. Eq. 323 (citing 2 Dan. Ch. Pr. 1549; Mitford, Eq. Pl. [81] 99; Shipman, Eq. Pl. 406).

As against plaintiff in the original bill, the cross-bill need not show any ground of equity or ask equitable relief. To obtain affirmative relief on behalf of a defendant a cross-bill must be filed, since such relief cannot be obtained under an answer. Inadequacy of legal remedies in the first place is not an essential element of a cross-bill. It must relate to the subject-matter of the original bill, but it is regarded as bringing forward purely legal claims. As stated in 2 Parsons, Contracts, pp. 562, 563: "The essential difference between recoupment or reduction on the one hand, and set-off on the other, is that in set-off the ground taken by the defendant is that he may owe the plaintiff what he claims, but that a part or the whole of the debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes him; * * * while on a plea of recoupment a defendant may deduct from plaintiff's claim all just demands or claims owed by him, or judgments made by him in the very same transaction, or even in other but clearly connected transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff on that cause of action so much as he seeks, and not that he ought not to pay plaintiff so much, because on another cause of action the plaintiff owes him." As was said in Grisham v. Bodman, 20 South. 515, 111 Ala. 200: "Recoupment is not merely a cross-action, as is set-off; the plea does not confess the indebtedness counted on in the complaint and bring forward a counter indebtedness from the plaintiff to the defendant, as does the plea of set-off; but its prop-

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osition is that plaintiff's claim is based upon a particular contract or transaction, that to entitle the plaintiff to the sum he claims it was upon him to comply with certain obligations of the contract or to discharge certain duties which the law imposed upon him in the making or performing of the contract, that he has failed to comply with such obligations or to discharge such duties, and that thereby the defendant has been so damaged in the particular transaction, or in respect of the particular contract, that the plaintiff is not entitled to recover; or, in other words, that the plaintiff has no debt or a less debt than he claims, as the case may be, against the defendant." As is stated in 25 Am. & Eng. Ency. Law (2d Ed.) 558: "It is not necessary that the opposing claims should be of the same character, but it is sufficient if they arise out of the same transaction or relate to the same subject-matter, and are susceptible of adjustment in one action. Within this principle a claim originating in a contract may be recouped against one founded in tort." Ashe-Carson Co. v. Bonifay, 41 South. 816, 817, 818, 147 Ala. 376 (citing Davis v. Cook, 65 Ala. 617; Morton v. New Orleans & S. Ry. Co., 79 Ala. 591, 607; Whitfield v. Riddle, 78 Ala. 104; Nelson v. Dunn, 15 Ala. 501; Stevens v. Hertzler, 22 South. 121, 114 Ala. 564, 578; Wadsworth v. Goree, 96 Ala. 227, 10 South. 848; Nelson v. Dunn, 15 Ala. 502).

The office of a "cross-bill" is either to warrant the grant of affirmative relief to defendant in the original suit to obtain a discovery in aid of the defense in that suit, to enable defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The fact that the cross-bill fairly tends to accomplish either of these purposes is generally a sufficient ground for its interposition. Koch v. Sumner, 108 N. W. 725, 726, 145 Mich. 358, 116 Am. St. Rep. 302, 9 Ann. Cas. 225.

A "cross-bill" is a bill filed by a defendant against the plaintiff or some other defendant, or both, in the same suit, touching the matter involved in the original bill. It may be used either to obtain a discovery in aid of the defense to the original bill, or to obtain relief for all parties touching the subject-matter of the bill. A cross-bill lies where a question arises between two defendants upon a case made out by evidence arising from pleadings and proofs between the plaintiffs and defendants, or where at the hearing it appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it to decide upon the rights of all the parties. Moon's Adm'x v. Highland Development Co., 52 S. E. 209, 212, 104 Va. 551.

A "cross-bill" must grow out of matters alleged in the original bill and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action. It is brought either to aid in the defense of the original suit, or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. It may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. It is auxiliary to the proceeding in the original suit, and dependent upon it. Both the original and cross-bill constitute but one suit, so intimately are they connected together. Rickey Land & Cattle Co. v. Wood, 152 Fed. 22, 23, 81 C. C. A. 218 (citing Ayres v. Carver, 17 How. [58 U. S.] 591, 595, 15 L. Ed. 179; Ex parte South & N. A. R. Co., 95 U. S. 221, 225, 24 L. Ed. 355; Stuart v. Hayden, 72 Fed. 402, 410, 18 C. C. A. 618; Cross v. De Valle, 1 Wall. [68 U. S.] 1, 17 L. Ed. 515; Providence Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 807, 19 L. Ed. 587; Young v. Colt, 30 Fed. Cas. 841, 2 Blatchf. 373; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 46 Fed. 851).

As answer

See Answer.

As a defense or auxiliary suit

A cross-bill is a mere auxiliary suit, and is to be considered as a defense to the original bill or proceeding necessary to the determination of some matter already in litigation. Cecil v. Karnes, 56 S. E. 885, 886, 61 W. Va. 543.

A "cross-bill" ex vi termini implies a bill by defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching matters in question in the original bill. It is regarded as auxiliary to or as a dependency on the original suit, and its subject-matter is that of the original bill. Where a wife sued for alimony on the ground of the husband's desertion, the wife's adultery might be properly alleged as a cross-bill. Bickley v. Bickley, 34 South. 946, 947, 136 Ala. 548.

A "cross-bill" is auxiliary to the original suit and a dependency upon it, and it cannot introduce new controversies between the defendants to the original bill, the decision of which is in no way necessary to a complete determination of the controversy between complainant and the defendants over the subject-matter of the original bill. Gilmore v. Bort, 134 Fed. 658, 661 (citing Cross v. De Valle, 1 Wall. [68 U. S.] 5, 17 L. Ed. 515; Providence Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 807, 19 L. Ed. 587; Stuart v. Hayden, 72 Fed. 402, 18 C. C. A. 618).

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A cross-bill is one brought by a defendant in a suit against complainant in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill, and is considered as an auxiliary suit or a dependency upon the original bill, and can be sustained only on matters growing out of the original bill. Such cross-bill may set up new matter arising subsequently, but still it must constitute part of the same defense, or relate to the same subject-matter in such a way as to be a defense to the original suit. Special Tax School Dist. No. 1 of Palm Beach County v. Smith, 54 South. 376, 381, 61 Fla. 782, Ann. Cas. 1913A, 757.

A "cross-bill" in equity is but an auxiliary to the original suit, and depends thereon. It is brought in the court in which the original suit of which it becomes a part is pending, and must be preferred by a defendant to the original bill against plaintiff in the same suit, or against other defendants, or both. It must state the parties to the original bill, the object, prayer, or proceedings thereon, as also the facts and rights of the exhibiting party, the ground on which he resists complainant's claim, and should pray that the cross-cause and the original cause be heard at the same time, and one decree made adjudicating all the rights of the parties. United States v. Reese, 166 Fed. 347, 350.

"A 'cross-bill' is a mode of defense to the original suit, and in its subject-matter it must be confined to the scope of the original cause of action and to the defense set out in the answer of the cross-complainant." United States Fidelity & Guaranty Co. v. Newark, 66 Atl. 904, 906, 72 N. J. Eq. 841.

"A 'cross-bill' is considered a defense to the original action." 1 Bouv. Law Dict. 481. "A 'cross-bill' is nothing more than an addition to the answer. It makes a part of the pleading which states the defense; the answer being the other part." Canant v. Mappin, 20 Ga. 731. "A 'cross-bill,' ex vi terminorum, implies a bill brought by defendant in a suit against the plaintiff respecting the matter in question in that bill, and it is a weapon of defense in such case." Hawley v. Griffin, 97 N. W. 86-90, 121 Iowa, 667.

"A 'cross-bill' is brought by defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit. The cross-bill is an auxiliary to the proceeding in the original suit and a dependency upon it." Blythe Co. v. Bankers' Inv. Co., 81 Pac. 281, 286, 147 Cal. 82 (quoting and adopting the definition in Ayres v. Carver, 17 How. [58 U. S.] 591, 15 L. Ed. 179, and citing Cross v. De Valle, 1 Wall. [68 U. S.] 5, 17 L. Ed. 515).

New matter and parties

The office of a cross-bill is to obtain affirmative relief upon the case stated in the bill, not to obtain relief with regard to other matters. A cross-bill is a defense to the original bill, or a proceeding necessary to a complete determination of a matter already in litigation. A bill by a testamentary trustee and beneficiary against his co-trustees and cestuis que trust sought to have certain portions of the trust estate divided from the residue and held separately for certain cestuis que trust, claiming that it would be for the benefit of the parties interested. The answer, besides joining issue on the propositions of law and fact, assumed the character of a cross-bill, and, alleging misbehavior and incapacity of complainant, prayed that he be removed. In so far as the answer sought affirmative relief it should be stricken out, because it introduced an issue not affecting nor depending on the question whether complainant was entitled to relief, and only tended to complication and delay. Paine v. Sackett, 57 Atl. 376, 377, 25 R. I. 561 (quoting Story, Eq. Pl. § 399).

A "cross-bill" is one brought by the defendant against the plaintiff (and other parties, if necessary) in another suit touching the same matter, either to obtain discovery of facts in aid of a defense to the original bill, or to obtain full relief to all parties touching the matters of the original bill. Only such new facts are properly pleaded in a cross-bill as are necessary for the court to to have before it in deciding the question raised in the original suit and to enable the court to do complete justice to all the parties in respect to the cause of action pleaded in the bill. Where an original bill was filed against a city to restrain a nuisance consisting of a pollution of a river, a cross-bill filed by the city, in which it admitted the nuisance, but averred that a certain water company had unlawfully diverted, for the benefit of another city, water which would otherwise have flowed past defendant city and helped to dilute its sewage, and that another water company had constructed a dam across the river below defendant city, which prevented the passage of sewage down the stream, was fatally defective as pleading matters not germane to the original bill. Doremus v. City of Paterson, 62 Atl. 3, 70 N. J. Eq. 296.

"The purpose of a 'cross-bill' is either to obtain a discovery in aid of a defense to the original bill or to obtain full relief to all the parties touching the matter of the original bill." A cross-bill cannot introduce a new controversy which is not necessary to be

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decided to have a final decree on the case presented by the original bill. New parties cannot be brought into a suit in equity by cross-bill. In a suit in equity by the purchaser of coal rights in lands, for a specific enforcement of the contract, the terms of which were in dispute, defendant cannot by cross-bill bring in as parties defendant the agents who made the contract on his behalf and with his approval to have their right to commissions determined, a controversy having no relevancy to the principal suit, and one in which complainant has no interest. Patton v. Marshall, 173 Fed. 350, 354, 97 C. C. A. 610, 26 L. R. A. (N. S.) 127.

"A 'cross-bill' is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original independent suit. The cross-bill is auxiliary to the proceeding in the original suit and a dependency upon it." Special Tax School Dist. No. 1 of Dade County v. Smith, 54 South. 376, 381, 61 Fla. 782, Ann. Cas. 1913A, 757 (quoting Van Zile, Eq. Pl. & Pr. § 212).

A motion to strike the cross-bill, as being based on matters irrelevant to the case made by the original bill, is properly overruled; the real basis of the bill to enjoin waste pending orators' action of ejectment being a claimed forfeiture of the contract of purchase, under which, if in force, defendant has rights paramount to those of orators on the case made by their bill; and defendant by his answer denying a forfeiture in equity, and by cross-bill praying that the contract be performed, and that further prosecution of orators' action of ejectment be enjoined, so that the cross-bill is a proceeding to procure a complete determination of a matter already in litigation, and the new facts introduced by it being such only as are necessary to have before the court in the decision of the questions raised in the original suit, to enable it to do full and complete justice to all parties in respect to the cause of action on which orators rest their right to aid or relief. Van Dyke v. Cole, 70 Atl. 593, 595, 81 Vt. 379.

CROSS-COMPLAINT

See, also, Cross-Bill; Cross-Petition.

A "cross-complaint" is in the nature of an original action. When the defendant files such a complaint and seeks affirmative relief, he becomes the plaintiff, and plaintiff becomes defendant. Waterman v. Bash, 89 Pac. 556, 558, 46 Wash. 212 (citing Powell v. Nolan, 67 Pac. 712, 27 Wash. 318; Pom. Rem. & Rem. Rights, § 808).

Code Civ. Proc. § 661, provides that the forms of pleading shall be those prescribed in the Code. Section 662 provides that the only pleadings allowed on the part of the plaintiff are the complaint, a demurrer to the answer, and a reply, and, on the part of the defendant, the demurrer to the complaint, the answer, and the demurrer to the reply. By section 690 the answer may consist of denials and statements of new matter; the new matter being a defense or counterclaim. By section 754 every allegation of new matter in a reply is deemed to be denied. By Laws 1905, c, 5, the plaintiff, in a reply, may allege any new matter not inconsistent with the complaint constituting a defense to the counterclaim or new matter in the answer. In an action by an attorney to foreclose his attorney's lien on certain land, a defendant answered, setting forth that she had a mortgage on the property, and seeking the foreclosure of the same, and plaintiff filed a reply alleging that defendant had received rents and profits from the property amounting to a specified amount. Held, that plaintiff's allegations as to the amounts received by defendant were denied, a contention that defendant's pleading constituted a "cross-complaint" and plaintiff's second pleading an answer which required from defendant a reply, in the absence of which the affirmative allegations of plaintiff's second pleading were admitted, being untenable. Gilchrist v. Hore, 87 Pac. 443, 445, 34 Mont. 443.

Under Rev. St. 1887, § 4188, the scope of pleading for a "cross-complaint" is not as comprehensive as for a counterclaim, for a cross-complaint must relate to or depend upon the contract or transaction upon which the main case is founded, or affect the property to which the action relates, while a counterclaim may go further, and, if the cause arose on contract, may set forth any other action arising out of contract. Hunter v. Porter, 77 Pac. 434, 438, 10 Idaho, 72.

In an action of ejectment, where defendants filed a purported cross-complaint, which did not relate to the land for the recovery of which the action was brought, it was not a "cross-complaint" within Code Civ. Proc. § 442, permitting defendant seeking affirmative relief against any party, relating to or depending upon the transaction upon which the action is brought, or affecting property to which the action relates, to file, with his answer, a cross-complaint, and hence a demurrer was properly sustained thereto. McFarland v. Matthai, 95 Pac. 179, 180, 7 Cal. App. 599.

Under the Code of Practice abolishing all forms of action, relief may be properly granted according to the facts alleged and

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proved in a pleading, though such facts are not such as to constitute a "cross-complaint," by which name the pleading was designated. Randolph v. Nichol, 84 S. W. 1037, 1040, 74 Ark. 93.

Where plaintiff agreed to sell all its lumber to a foreign corporation and brought suit against the corporation for the price of lumber sold, an answer, alleging that plaintiff had not delivered all the lumber manufactured by it but had wrongfully disposed of a large part of it, was a defense operating to defeat plaintiff's recovery, and therefore not a "counterclaim" or "cross-complaint," within St. § 3656. The declaration that the statutory counterclaim embraced both recoupment and set-off must be applied in the sense in which it is employed in the statute, namely, a cross-demand of the defendant against the award in which the plaintiff is entitled upon the cause of action alleged by him, and the term "counterclaim" must be used as referring to a cause of action of the defendant constituting a defense for affirmative relief, and not as a defense which goes only to defeat plaintiff's cause of action. Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co., 129 N. W. 595, 597, 144 Wis. 362.

An answer setting up grounds for and claiming affirmative relief is termed by the Code a "cross-complaint"; but the failure to so designate such a pleading by the pleader did not affect his rights thereunder, where issue was joined and the case was fairly before the court. Schneider v. Reed, 101 N. W. 682, 684, 123 Wis. 488.

CROSS-CUT

Pol. Code, § 3611, provides that a "cut" or "cross-cut," or a tunnel which cuts a lode at a depth of ten feet below the surface, or an open cut at least ten feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft, within section 3612, requiring declaratory statements to set forth the dimensions and location of the discovery shaft or its equivalent sunk upon lode or placer claims. Wilson v. Freeman, 75 Pac. 84, 85, 29 Mont. 470, 68 L. R. A. 833.

CROSS-EXAMINATION

" 'Cross-examination' is not only to ascertain the means of knowledge which the witness has of the things about which he has testified, his feelings, prejudices, capacity, etc., but it is also to try his integrity (for which the party introducing him has vouched), and to do that the right exists to take him over the whole course of matters involved in any one of the issues of the whole case, so that, if he be caught in any willful misstatement of any matter material to any of those issues, the opposite party may ask the jury to place no reliance in any other thing he has said. But if no question is asked by the party having him sworn, there is no reason for cross-examination, since his want of knowledge, his prejudices, feelings, etc., are not involved, and his integrity is of no consequence." Harris v. Quincy, O. & K. C. R. Co., 91 S. W. 1010, 1011, 115 Mo. App. 527.

CROSS-PETITION

See, also, Cross-Bill; Cross-Complaint.

By Civ. Code Prac. § 96, subsec. 3, a "cross-petition" is defined as "the commencement of an action by a defendant against a codefendant," and it is not allowed to a defendant except upon a cause of action which affects or is affected by the original cause of action. Where a vendor sued to recover the purchase price, and such action was consolidated with actions by creditors of the vendor against him, and the creditors sought to reach the fund owing from the vendee, the vendor had a right by cross-petition to be heard as to the amount owing him. Brackett's Adm'r v. Boreing (Ky.) 89 S. W. 496, 499.

Under Civ. Code Prac. § 96, subsec. 3, which defines a "cross-petition" to be the commencement of an action by defendant against a codefendant or some person not a party to the action, and which is not allowed to a defendant except upon a cause of action which affects or is affected by the original cause of action, an action by sureties of a sheriff, sued on his bond for wrongful levy on property, over against the sureties on the bond of attaching creditors indemnifying the sheriff, and but for which indemnity the attachment would not have been levied, is so connected with the other cause of action that the sheriff's sureties could proceed by cross-petition in the original action against sureties on the indemnifying bond to be subrogated to the sheriff's right thereunder. Dine v. Donnelly, 121 S. W. 685, 687, 134 Ky. 776.

CROSS-SECTION

See Accurate Cross-Section.

CROSS-TALK

"Cross-talk," as a term of the telephone business is the production by magnetic induction between adjacent electric annunciators of a transfer of a voice current from one talking circuit to another. Western Electric Co. v. North Electric Co., 130 Fed. 457, 458, 64 C. C. A. 396.

CROSS-TIES

As lumber, see Lumber.

CROSS-WALK

There is no variance between the notice of a claim for injury, filed with the city, where it stated that the injury was caused by a fall on the "walk" near the northeast corner of S. & M. street, and a petition, where the claim was referred to as a "cross-walk," "cross-walk" and "walk" mean the same thing. Both are sidewalks, and the city is

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bound to keep both in repair. Ottawa v. Green, 83 Pac. 616, 618, 72 Kan. 214.

CROSSING

See Farm Crossing; Grade Crossing; Open Crossing; Property Crossing; Railroad Crossing.

Any road crossing, see Any.

In order that a railroad "crossing" shall exist, the railroad and the highway must intersect each other at some degree, or at least one must be superimposed on the other. Borough of South Amboy v. Pennsylvania R. Co., 73 Atl. 852, 856, 76 N. J. Eq. 57.

A finding that plaintiff, when struck by a team, was "crossing the junction" of two streets, as alleged in the complaint, is authorized, although he was on the edge of the sidewalk, and for two or three seconds had stopped to look across. Drew v. Farnsworth, 71 N. E. 783, 784, 186 Mass. 365.

The word "crossing," as used in Code 1906, § 4058, making it the duty of every railroad company to make and maintain convenient and suitable crossings over its track for necessary plantation roads, means a crossing over the whole width of the right of way. Illinois Cent. R. Co. v. McGowan, 46 South. 55, 56, 92 Miss. 603.

Code, § 2063, provides that a railway company desiring to cross another at grade may be compelled by the other to interlock the crossing; section 2065 provides for the modification of any decree relating to the expense of interlocking crossings; and section 2064 provides that, on proceedings under section 2063, not less than one-third of the cost shall be apportioned to either road. The word "crossing," as used in the statute, is not the actual crossing, but includes the interlocking. Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co., 99 N. W. 181, 182, 123 Iowa, 543.

A railroad company operated a line of railroad from a junction at Kennett easterly to Pascola; thence east to Hayti; and thence east to Caruthersville. It constructed a branch from Pascola in a southerly direction to Deering, and subsequently extended the line so as to cross the Caruthersville branch at grade 400 feet west of the Pascola station, and ran north to Wardell. There was no separate operation of the two lines, nor any separate train run on the track between Deering and Wardell, but they were operated as two spurs, forming a part of the main line. Held, that the railroad company was not required to maintain a depot at the Pascola crossing, within Rev. St. 1899, § 1075, requiring every railroad corporation to maintain at all "crossings" of other railroads a passenger depot. State ex Inf. Collins v. St. Louis & S. F. R. Co., 142 S. W. 279, 281, 238 Mo. 605.

The violation of a local ordinance which forbids driving faster than a walk over or upon a crossing is negligence per se, if such violation contributes proximately to an accident, the word "crossing" including not merely that part of the street used ordinarily by pedestrians in moving from one side of the street to the other, but the entire area covered by the intersection of two streets. Stein v. United Railroads of San Francisco, 113 Pac. 663, 664, 159 Cal. 368.

The purpose of a "switch" is to direct a car from the course, while that of a "crossing" is to keep it on the course. Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. 542, 546.

Where an automobile ordinance provided that automobiles should slow down to four miles an hour at crossings, the term "crossings" should be construed as referring to street crossings. Eichmann v. Buchheit, 107 N. W. 325, 128 Wis. 385, 8 Ann. Cas. 435.

"What is the crossing of a railway right of way? Not alone, we think, the boards or other appliances which must be laid between the rails and adjacent to them on the outside, and cattle guards and wing fences to keep cattle from straying on the right of way beyond the crossing; but such structures, too, as will enable a wagon or team to go safely and conveniently on the track. This is said to be the legal definition of the word 'crossing' in an authoritative treatise on railroad law, and respectable authorities are cited in support of the text. 3 Elliott, Railways, § 1097. In contemplation of law, a crossing is not only that portion of the earth's surface immediately by or between the rails of a track, but the approaches on both sides of the track; and it is incumbent on a railroad company to construct approaches needed to make a crossing usable, and so courts of authority have decided." Birlew v. St. Louis & S. F. R. Co., 79 S. W. 490, 491, 104 Mo. App. 561.

The word "highway," within Rev. St. c. 52, § 86, providing that no engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour, unless the railroad maintains a flagman, a gate, or certain signals at such crossing, is not limited to ways established by county commissioners or municipal authorities, but is used in its more generic and popular legal sense. A certain way was a short cut-off between two roads. There was evidence justifying a finding that, though never laid out as a way, under the statute, it had been open, and commonly used by the public for travel for at least 40 years, and that the public had gained a prescriptive right of travel thereover. A railroad company, when it built its road, took a deed of the premises providing that the company would maintain a train crossing over the track at such place, and it appeared that the successor of such railroad company had kept the crossing open, planked, and at times it

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stretched a rope across the way while fast trains were passing, and maintained a sign at the crossing on which were the words "Railroad Crossing," which, as well as being a warning, was an invitation to the public to use the crossing. Held, that the crossing was a "highway" within Rev. St. c. 52, § 86, providing that no engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour, unless the company maintains a flagman, gate, or certain signals there. The phrase "near the compact part of a town" in Rev. St. c. 52, § 86, providing that no engine or train shall run across a highway near the compact part of a town at a speed greater than 6 miles an hour, unless the railroad maintains a flagman, a gate, or certain signals at such crossing, is not limited to the largest or principal compact part of a town, but applies to any compact portion, and includes a village with church, schoolhouse, engine house, store and dwelling houses, in all at least 25 buildings, and all situated within 350 feet of the central point. Moore v. Maine Cent. R. Co., 76 Atl. 871, 873, 106 Me. 297.

As crossing in same level

A railroad crossing of roads in its primary and natural sense is an intersection in the same plane, and does not include an underpass which obviates the necessity of a crossing. In a broader sense the word covers all the means by which a traveler passes from one side of an obstructing line to another. Libby v. Canadian Pac. Ry. Co., 73 Atl. 593, 82 Vt. 316.

In a deed to a railroad company containing a covenant that it would provide grantor with "a suitable and convenient road 'crossing' across the track of said railway," the natural meaning of the quoted expression is a grade crossing. Speer v. Erie R. Co., 60 Atl. 197, 198, 68 N. J. Eq. 615.

CROTON WATER

As spring water, see Spring Water.

CROWBAR

A "crowbar" or "pinch bar" is an iron bar about 4 or 4½ feet long, round except for a foot or more at the lower end, which is square, and about 1 or 1½ inches in diameter. The lower or square end of the bar is cut off diagonally so as to form a pointed wedge with one of the square surfaces and an obtuse angle with the opposite square surface. The last point of contact between the diagonal cut-off and the square surface is called the heel and the former point of contact the point. Gussart v. Greenleaf Stone Co., 114 N. W. 799, 800, 134 Wis. 418.

CROWD

Two or three persons would constitute a "crowd" within an averment in a petition, in an action for negligent shooting, that a pistol was fired "into a crowd." Morgan v. Mulhall, 114 S. W. 4, 6, 214 Mo. 451.

CROWN

See Pleas of the Crown.

CROWN CORK

A "crown seal" or "crown cork" consists of a cap of hard metal with corrugated flange, containing a sealing disk of the diameter of the cap, placed upon a bottle having an annular projecting shoulder, under which the corrugated flange of the cap is compressed by suitable pressure into fixed contact with the neck of the bottle, and at the same time the cap with the inclosed sealing disk is forced down upon the mouth of the bottle, making a tight seal, which is held in place by the locking effect of the compression of the corrugated hard-metal flange under the swell of the annular shoulder. The corrugations of the flange, among other uses, afford a projecting edge for the engagement of any simple tool by which, when it is desired to open the bottle, the whole device can be easily and quickly pried off. Crown Cork & Seal Co. v. Imperial Bottle Cap & Machine Co., 123 Fed. 669, 670.

CROWN GRANT

A crown grant of land under navigable waters is a grant of the crown's private property, subject to the public rights in the navigable waters held in trust by the crown for the people. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 91 N. E. 846, 847, 198 N. Y. 287, 34 L. R. A. (N. S.) 1084, 19 Ann. Cas. 694; Id., 114 N. Y. Supp. 313, 129 App. Div. 574.

CROWN LAND

Lands owned by the province of Quebec and known as "crown lands" correspond to what is known in this country as public lands. Myers v. United States, 140 Fed. 648, 649.

CROWN SEAL

See Crown Cork.

CRUDE

The word "crude," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 43, providing for a duty on opium, "crude" or unmanufactured is used in the sense of not refined; consequently powdered opium produced by grinding and sifting lump opium, which has been subjected to an artificial process of evaporation, is "crude" in the sense that it has not been refined. Merck & Co. v. United States, 143 Fed. 694, 695.

Powdered opium prepared by a series of processes from gum opium, resulting in a more valuable article having a new use and a new commercial signification, is not opium "crude" or unmanufactured, within the mean-

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ing of a tariff act. Merck v. United States, 151 Fed. 14, 15, 80 C. C. A. 510.

"Crude" or "prime crude" is a standard grade of oil. Authority to a broker to sell it could not be limited to a right to sell only "season's prime," which was not a classification known in the exchanges of the country. Southern Cotton Oil Co. v. Shreveport Cotton Oil Co., 35 South. 610, 611, 111 La. 387.

CRUDE ARTICLE

So-called lentiscum or lentiscus, consisting of the leaves or stems of the pistacia lentiscus, or mastic tree, ground or crushed to a finely powdered condition, is held to be a crude article, and to be within paragraph 482, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 195, relating to "articles in a crude state used in dyeing or tanning." Leber & Meyer v. United States, 135 Fed. 243, 244.

CRUDE DRUGS

Where the process of placing crude balsam in gelatin capsules has resulted in an article with a greater value and an improved condition, the combination is not classible as "crude drugs not advanced in value or condition," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 548, 30 Stat. 197. United States v. Lehn & Fink, 172 Fed. 171, 172.

CRUDE FEATHERS

Eagle and condor quills, which are ornamental feathers, but are in a crude state, and require further treatment before becoming suitable for ornamental purposes, are dutiable as crude feathers, and not as ornamental feathers, under paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191. Brodie v. United States, 135 Fed. 914; Spero v. Same, 135 Fed. 915.

Crude ostrich feathers, which in that condition are never used for ornamental purposes, but need to be dressed and otherwise manufactured before becoming suitable for such use, are dutiable as "feathers * * * crude," and not as "ornamental feathers," under paragraph 425, Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191. Brodie v. United States, 135 Fed. 914, 915.

CRUDE MINERAL

Ground corundum ore, that has been advanced in value by processes of manufacture for a specific use, is not a "crude mineral," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 614, 30 Stat. 199, nor "manufactured sand," within the meaning of paragraph 671, 30 Stat. 1688, but is dutiable as emery by similitude, under section 1, Schedule N, par. 419, 30 Stat. 191. F. W. Myers & Co. v. United States, 178 Fed. 462, 463.

Where marble waste, a comparatively valueless material, has been converted into a commodity of use and value by a special manufacturing process whereby it has acquired a new name and use, it ceases to be a "crude mineral" and becomes a manufactured one. United States v. Graser-Rothe, 164 Fed. 205, 207.

Whetstone blocks, of an approximately rectangular shape, which after being quarried have had their projections removed by a process of rough dressing, and which are used in that state, held within the provision for "minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 614, 30 Stat. 199. Charles A. Johnson & Co. v. United States, 152 Fed. 656, 657.

So-called granito or terrazo, produced by crushing the waste of marble quarries and sifting or sorting it into various sizes, is subject to classification as an unenumerated manufactured article, under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205, rather than as "waste," under section 1, Schedule N, par. 463, 30 Stat. 194, or as minerals "crude," under section 2, Free List, par. 614, 30 Stat. 199. United States v. Graser-Rothe, 164 Fed. 205, 206.

The zinc ores known as carbonate, silicate, and sulphide of zinc are free of duty, the carbonate and silicate as "calamine," and the sulphide as "minerals, crude," under Tariff Act July 24, 1897, c. 11, § 2, Free List, pars. 514, 614, 30 Stat. 196, 199, except that when they contain lead they are subject to the duty provided on "lead-bearing ore of all kinds," in section 1, Schedule C, par. 181, 30 Stat. 166. United States v. Brewster, 167 Fed. 122, 123, 92 C. C. A. 574.

CRUDE OPIUM

Powdered opium is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 43, 30 Stat. 153, as opium, "crude or unmanufactured," but, under paragraph 20, 30 Stat. 152, as a drug advanced in value or condition. Merck v. United States, 151 Fed. 14, 15, 80 C. C. A. 510.

CRUDE SAND

Under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 671, 30 Stat. 201, relating to "sand, crude or manufactured," "crude sand" is such as is found in nature, and "manufactured sand" is, though manufactured substantially the same as crude sand; and pulverized corundum, which is not produced from crude sand, is therefore not sand of either kind within the meaning of the act. F. W. Myers & Co. v. United States, 155 Fed. 502, 503.

CRUDE STATE

The term "crude state," as used in Tariff Act 1897, c. 11, § 2, admitting without the payment of tariff certain articles in a "crude state," does not include chrome alum, which is a by-product of the process of manufac-

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turing certain coal tar colors. In that process two products are formed, and these combined with water constitute chrome alum, which is then in the form of a paste. This paste is thereafter treated with sulphuric acid, and from the solution the chrome alum of importation crystallizes out. The alum as thus crystallized is not in a "crude state." Kuttroff, Pickhardt & Co. v. United States, 169 Fed. 283, 284, 94 C. C. A. 559.

CRUDE TURPENTINE

As personal property, see Personal Property.

"Crude turpentine" in boxes includes "scrape," resin, and gum. Melrose Mfg. Co. v. Kennedy, 51 South. 595, 596, 59 Fla. 312.

CRUEL

In a limited sense, anything is "cruel" which is calculated to given pain or distress, and, since punishment imports pain and suffering to the offender, it may be said that all punishments are in some sense cruel. State v. Tomassi, 69 Atl. 214, 217, 75 N. J. Law, 739.

A policeman, upon resistance to lawful arrest, or an attack putting him in danger of bodily harm, may use force against force, using no more than is necessary, and although in doing so he might severely assault and bruise the prisoner, and such assault might be "cruel" (that is, heartless and unfeeling), yet it would not be illegal; and hence the mere averment, in a petition based on an alleged breach of a policeman's official bond, that he had arrested plaintiff, "wrongfully, cruelly, and severely assaulted and beat and bruised him," was not sufficiently specific as to constitute a cause of action. Connelly v. American Bonding & Trust Co., 69 S. W. 960, 961, 113 Ky. 903.

The question as to whether one is criminally "cruel" to animals does not depend on whether he thought he was unnecessarily cruel but on whether he was so in fact and did unnecessarily cruel acts knowingly. Commonwealth v. Magoon, 51 N. E. 1082, 1083, 172 Mass. 214, 215.

CRUEL AND INHUMAN TREATMENT

See Cruelty.

CRUEL AND UNUSUAL MANNER

Under a statute defining manslaughter in the second degree to be a killing in a "cruel and unusual manner," etc., to constitute the offense "there must be some refinement or excess of cruelty sufficiently marked to approach barbarity and to make it especially shocking, and the unusual character of the manner displayed must stand out as sufficiently peculiar and unique to create surprise and astonishment and to be capable of discrimination as rare and strange." State v. Knoll, 83 Pac. 622, 623, 72 Kan. 237.

Sand. & H. Dig. Ark. § 1660, providing that the killing of a human being, without design to effect death, in the heat of passion, but in a "cruel and unusual" manner, unless under circumstances that would constitute excusable or justifiable homicide, shall be adjudged manslaughter, is not applicable to a killing with a pistol. In one sense, "all killing is cruel, but, in the sense of the statute, killing with such a common and effective instrument of death as a pistol cannot be regarded as cruel; still less is this manner unusual." Tanks v. State, 75 S. W. 851, 852, 71 Ark. 459.

CRUEL AND UNUSUAL PUNISHMENT

See Vasectomy.

The word "cruel," as used in the Constitution, providing that cruel and unusual punishments shall not be inflicted, was intended to prohibit torture, agonizing punishment, but never intended to abridge the selection of the lawmaking power of such kind of punishment as was deemed most effective in the suppression of crime. State v. Woodward, 69 S. E. 385, 389, 68 W. Va. 66, 30 L. R. A. (N. S.) 1004; Same v. Wamsley, 69 S. E. 475, 68 W. Va. 103; Id., 69 S. E. 476, 68 W. Va. 104.

Rem. & Bal. Code, § 2287, authorizing the court to direct the performance of an operation for the prevention of procreation on a person adjudged guilty of statutory rape, is not invalid as authorizing "cruel punishment," in violation of Const. art. 1, § 14, where the operation known as vasectomy may be performed in a few minutes under an anæsthetic, without entailing any wound infection or confinement to bed. State v. Feilen, 126 Pac. 75, 77, 70 Wash. 65, 41 L. R. A. (N. S.) 418.

A statute providing that, when any person indicted for an offense is acquitted by reason of insanity, the jury shall so state in the verdict, and, if the discharge of the insane person is deemed dangerous to the community, he may be committed to prison, does not violate the constitutional provision prohibiting the infliction of "cruel punishment." Ex parte Brown, 81 Pac. 552, 554, 39 Wash. 160, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488.

It is not easy to define "cruel and unusual punishments" within the constitutional inhibition. In a limited sense anything is cruel which is calculated to give pain or distress, and, since punishment imports pain and suffering to the convict, it may be said that all punishments are in some sense cruel. But of course the Constitution does not mean that crime for this reason is to go unpunished. On the contrary, it plainly contemplates that crime can only be effectually deterred by inflicting some sort of pain or suffering upon the convicted offender. Electrocution Act (P. L. 1906, p. 112) is not unconstitutional as prescribing "cruel and unusual punishments."

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State v. Tomassi, 69 Atl. 214, 217, 75 N. J. Law, 739.

Death

A statute providing that every person under life sentence in a state prison, who with malice aforethought commits an assault on the person of another with a deadly weapon or instrument, or by means or force likely to produce great bodily injury, is punishable with death is not unconstitutional as inflicting "cruel and unusual punishment." Ex parte Finley, 81 Pac. 1041, 1042, 1043, 1 Cal. App. 198.

Pen. Code, § 246, providing that every person undergoing a life sentence in a state prison, who with malice aforethought commits an assault with a deadly weapon, or by any means or force likely to produce great bodily injury, is punishable with death, is not violative of Const. art. 1, § 6, prohibiting "cruel or unusual punishment," as the infliction of the death penalty by any methods ordinarily adopted by civilized people is neither a cruel nor unusual punishment, unless it be so disproportionate to the offense for which it is inflicted as to shock the moral sense of the people. People v. Oppenheimer, 106 Pac. 74, 77, 156 Cal. 733.

Disproportionate punishment

Assessing a penalty at 30 years' confinement in a penitentiary for burglary of a private residence at night is not cruel or excessive punishment, where the Legislature has provided that punishment for burglary at night shall not be less than 5 years. Handy v. State, 80 S. W. 526, 46 Tex. Cr. R. 406.

Under Mansf. Dig. § 1628 (Ind. T. Ann. St. 1899, § 971), providing that every one stealing any cattle shall be guilty of a felony and imprisoned at hard labor not less than one or more than five years, a sentence for two years in the penitentiary at hard labor on conviction of the larceny of a calf was not the imposition of a cruel and unusual punishment. Clampitt v. United States, 89 S. W. 666, 668, 6 Ind. T. 92, 10 Ann. Cas. 1087.

Pen. Code, § 337a, making poolselling punishable by imprisonment in the county jail or state prison for not less than 30 days and not more than a year, is not in conflict with Const. art. 1, § 6, prohibiting cruel and unusual punishments; imprisonment in the county jail or state prison not being cruel or unusual, which relate only to punishments of a barbarous character and unknown to the common law, such as by burning at the stake, breaking on the wheel, and the like. Ex parte O'Shea, 105 Pac. 776, 779, 11 Cal. App. 568.

The sentence of one convicted of criminal libel to imprisonment in the penitentiary for five years, with hard labor, which is the maximum penalty prescribed by Code, § 815 (31 Stat. 1323, c. 854), for such an offense, is not in itself a cruel and unusual punishment in the sense of the constitutional prohibition against such punishments. It is not so much the extent as the nature of the punishment that makes it cruel and unusual. Raymond v. United States, 25 App. D. C. 555, 560.

A nine-year penitentiary sentence, on a conviction of manslaughter for recklessly shooting out of a car window and killing a girl alongside the track, was not a cruel and unusual punishment within the meaning of the Constitution. State v. Lance, 63 S. E. 198, 201, 149 N. C. 551.

Rev. St. 1895, art. 4496, imposing upon a railroad company a penalty of five per cent. per month on the value of a shipment during its negligent detention in transportation, does not amount to "cruel or unusual punishment" within the state and federal Constitutions. Texas Cent. R. Co. v. Hannay-Frerichs & Co. (Tex.) 130 S. W. 250, 253.

Acts 31st Leg. c. 50, § 1, in force March 17, 1909, provides that if any person by promise of marriage shall seduce an unmarried female under 25, and if, after prosecution is begun, the parties marry before the defendant pleads to the indictment, and the defendant, within two years after said marriage, without his wife's fault, such as would entitle him to a divorce, shall abandon her, he shall be guilty of a penitentiary offense. Held, that the act does not impose a "cruel or unusual punishment" within Const. art. 1, § 13. Thacker v. State, 136 S. W. 1095, 62 Tex. Cr. R. 294.

CRUEL AND UNUSUAL WEAPON

Under section 4362, Rev. St. 1898, providing that the involuntary killing of another by any weapon or by any means, neither cruel nor unusual, etc., a lighted kerosene lamp full of oil must be considered a "cruel and unusual weapon." Bliss v. State, 94 N. W. 325, 329, 117 Wis. 596.

CRUELLY

A dog is the subject of property, both in the absence of statute and under Revisal 1905, § 3299, making it a misdemeanor to willfully injure or cruelly kill any useful animal, and defining the word "animal" as including every living creature, and the word "cruelly" to include every act causing unjustifiable physical pain or death, so that accused was guilty of the offense of willfully killing a dog, where the dog, when killed, was in the street outside of his turkey yard, which was inclosed by an impassable fence and gate, and could have been driven away; the fact that the dog had been in the yard before, harassing the turkeys, and his bad habits being immaterial. State v. Smith, 72 S. E. 321, 324, 156 N. C. 628, 36 L. R. A. (N. S.) 910.

The words "cruelly, unreasonably, and maliciously" are relative terms. While it

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might not be cruel or unreasonable to whip an ox with an ox whip, or, even in some instances, to use such a whip in whipping a man, for a strong man in whipping a child of tender years to use such a whip might be regarded by a jury as "cruel, unreasonable, and malicious." To establish the offense of "cruelly, unreasonably, and maliciously" beating and ill treating a child, it is not necessary that any marks of physical injury should appear on the child's body, and, where the evidence showed that a father whipped his child for several hours with an ox whip, that she cried out from the pain, and that he said he intended to kill her, there was sufficient proof of the corpus delicti, although there were no marks of physical injury. Stone v. State, 57 S. E. 992, 1 Ga. App. 292.

CRUELTY

See Extreme Atrocity or Cruelty; Extreme Cruelty.

In a suit for divorce from bed and board, based on alleged cruel and inhuman treatment, the test is whether, under all the facts proved, plaintiff could, with safety to person and health, continue to live with defendant. It is not cruel and inhuman treatment, justifying a divorce for a husband residing with a second wife and his children by a former wife, to separate her from them, and to provide for himself and her elsewhere, if it be necessary for the protection of the children against the wife's abuse, or evil influences, or for the peace and happiness of all concerned. Maxwell v. Maxwell, 71 S. E. 571, 572, 69 W. Va. 414.

There is no exact standard of what constitutes "cruel and inhuman treatment," authorizing a limited divorce, it depending upon the temperament, breeding, and condition in life of the parties, which cannot be made to appear in a printed record, so that, in the absence of legal error, the courts will be reluctant to disturb the finding of facts of the trial justice. Tower v. Tower, 119 N. Y. Supp. 506, 507, 134 App. Div. 670.

"Cruel treatment," as a ground for divorce, under Civ. Code 1895, § 2427, is "the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health. * * * The intention to wound is a necessary element of the cruel treatment for which a divorce is allowed." Brown v. Brown, 58 S. E. 825, 129 Ga. 246.

An allegation that a wife has hindered her husband from making large sums of money by refusing to join with him in the conveyance of real estate owned by him does not show cruel treatment within the meaning of the divorce law. Hofman v. Hofman, 82 N. E. 477, 40 Ind. App. 476.

"'Cruelty' is frequently a term of relative meaning," and "where the wife has brought upon herself the ill treatment of which she complains by her own misconduct," or "if, by a gross violation of her duties as wife, she has provoked her husband to go further than he should have gone, the blame in a great measure rests with herself, and it would require a much stronger case to authorize a divorce than if her conduct had been blameless." May v. May (Ala.) 39 South. 679 (quoting and adopting David v. David, 27 Ala. 222, 224, 225).

Cruel treatment, within Civ. Code 1895, § 2427, making such treatment ground for divorce, is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health, and mere petulance, rudeness, and occasional sallies of passion do not constitute such treatment. Stoner v. Stoner, 67 S. E. 1030, 1031, 134 Ga. 368.

The crime of pederasty, whether restricted to sodomy, as commonly understood, or defined so as to include bestial habits and improper intimacy with the male sex, is cruel and inhuman treatment, within the meaning of the divorce statutes. Crutcher v. Crutcher, 38 South. 337, 86 Miss. 231.

"Indignities to the person" and "cruel and barbarous treatment" are two distinct causes of divorce, and in the legislation on the latter a distinction is made between the case where the wife, and the case where the husband, is the complaining party. In the former the language of the statute is, "when any husband shall have, by cruel and barbarous treatment, endangered his wife's life." Act March 13, 1815 (6 Smith's Laws, p. 286). In the latter the language is, "where the wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable or life burdensome." Act May 8, 1854 (P. L. 644); Act June 25, 1895 (P. L. 308). This distinction has been recognized by the decisions as substantial. The acts or conduct of a wife toward her husband that will entitle the latter to a divorce must be not only such as render his condition intolerable and life burdensome, but such as amount to cruel and barbarous treatment. Both of these statutory elements must concur. If by other means which do not constitute legal cruelty his condition is rendered intolerable, this clause of the statute does not apply. The decisions in which it has been held or said that the cruel and barbarous treatment which will entitle a wife to a divorce must endanger life do not apply to a libel filed by a husband. In a libel for divorce, in determining whether there was cruel and barbarous treatment within the meaning of the statute, the whole conduct of the wife toward her husband during the period of the alleged ill treatment

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should be considered. Fay v. Fay, 27 Pa. Super. Ct. 328, 329.

"Cruelty," to justify a decree a mensa et thoro in favor of a wife, means such conduct by the husband as will justify the court in believing that if he is allowed to retain his power over his wife, and she is compelled to remain subject to him, her life or health will be endangered, or that he will render her life one of such extreme discomfort or wretchedness as to incapacitate her to discharge the duties of a wife. Taylor v. Taylor, 70 Atl. 323, 324, 73 N. J. Eq. 745 (citing Black v. Black, 30 N. J. Eq. 215).

Any act or conduct on the part of a spouse which tends to impair either the mind or the body is "cruelty," under Burns' Ann. St. 1908, § 1067, which provides that cruel and inhuman treatment is a ground for divorce. Zweig v. Zweig, 93 N. E. 234, 235, 46 Ind. App. 594.

Accusation of infidelity

Where a husband had repeatedly falsely charged that his wife was unchaste, and that he was not the father of their youngest child, which charges had so injured the wife's health as to imperil her life, they constituted such cruel and inhuman treatment as to entitle her to a divorce. Turner v. Turner, 97 N. W. 997, 122 Iowa, 113.

Continual charges to a wife of unchastity with a disavowal of paternity of the children, made continuously in the presence of others and in the presence of the children, would constitute "cruelty" within the meaning of the divorce laws. Morris v. Morris, 107 Pac. 186, 57 Wash. 465.

For one without justification to charge his wife with intercourse with other men is cruel and inhuman treatment within the divorce statute. Cooper v. Cooper (Ind.) 99 N. E. 782, 783.

Communication of disease

A separation from bed and board on the ground of cruel treatment is properly granted a wife who has become inoculated with gonorrhea and syphilis by her husband, who was treated for the diseases six months before the marriage, and consulted a physician relating thereto within three days of the marriage. Carbajal v. Fernandez, 58 South. 581, 130 La. 812.

Habits or conduct toward others

Where a husband brought another woman into his home, to whom he showed marked attention both in public and in private, and both stated to the wife that they loved each other, and the husband told her that he cared no more for her, which resulted in her becoming nervous and anemic and ill in health, such conduct amounted to cruel and inhuman treatment, entitling her to a divorce. Craig v. Craig, 105 N. W. 446, 447, 129 Iowa, 192, 2 L. R. A. (N. S.) 669.

Though drunkenness, not habitual, is not ground for divorce from bed and board, under Code 1906, c. 64, § 6, allowing such a divorce where either party after marriage becomes an habitual drunkard, such drunkenness is no excuse for cruelty, and cruelty resulting from drunkenness is a cause for divorce. Maxwell v. Maxwell, 71 S. E. 571, 572, 69 W. Va. 414.

Under a statute entitling the wife to a divorce for the husband's behavior in such "cruel and inhuman manner" as to indicate a settled aversion to her, or destroy her peace and happiness, a showing that the husband had for more than six months been meeting the corespondent, made her gifts, and when charged with adultery had practically admitted his guilt, and had used harsh and cruel epithets to his wife and made efforts to poison the minds of his children against her, and had declared that he would like to see her in poverty, and that he had a settled aversion toward her, constituted such "cruel and inhuman treatment" as to entitle the wife to a divorce. Zumbiel v. Zumbiel, 69 S. W. 708, 710, 113 Ky. 839, 841.

Mental distress

Personal violence to a wife, coupled with threats to do her personal injury, the effects of which are to make her nervous and constantly afraid, constitute cruelty justifying a divorce. Utley v. Utley, 118 N. W. 932, 155 Mich. 258.

The ordinary meaning of "cruelty," in actions for divorce, is that the act endangers or threatens the life, limb, or health of the aggrieved party. To this, in our courts, is added any outrage upon the feelings inflicting mental pain or anguish. Plaintiff's complaint for divorce alleged that his wife had stated to numerous citizens of the community that he was unchaste, all of which she knew to be false; that she endeavored to destroy his business; that she was petulant and irritable, frequently asserting that she cared nothing for him, for his home, or business; that she refused to take any interest in the home or to prepare the daily meals for himself and his hands; and that she read frivolous literature, to the neglect of her household duties, and was cold, abusive, and indifferent to plaintiff's happiness, by reason of which she kept complainant in continual distress and trouble, destroying his peace of mind and breaking up his home. Held, to charge "cruel and inhuman treatment" authorizing a divorce as provided by Burns' Ann. St. 1901, § 1044. Massey v. Massey, 80 N. E. 977, 978, 81 N. E. 732, 40 Ind. App. 407.

In divorce actions "cruelty," "extreme cruelty," "cruel and inhuman treatment," and the like may be established by evidence of any line of misconduct persisted in by the offending party to such an extent as to cause injury to the life, limb, or health of the oth-

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er, or to threaten or to create a danger of such injury, and it is not necessary that such injury, present or threatened, should be the direct result of such misconduct, but it is sufficient if it is produced by grief, worry, or mental anguish occasioned by such misconduct. Mathewson v. Mathewson, 69 Atl. 646, 648, 81 Vt. 173, 18 L. R. A. (N. S.) 300.

"What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied by bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion (if they do not threaten bodily harm), do not amount to legal cruelty." Levin v. Levin, 46 S. E. 945, 946, 68 S. C. 123.

Pederasty

The crime of "pederasty," whether restricted to sodomy, as commonly understood, or defined so as to include bestial habits and improper intimacy with the male sex, is "cruel and inhuman treatment," within the meaning of the divorce statutes. Crutcher v. Crutcher, 38 South. 337, 86 Miss. 231.

Physical violence

"Cruelty," in the statute authorizing a divorce on the ground of cruelty, means physical acts of violence, bodily harm endangering life or limb, and such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the married state; and bad temper, petulance of manner, rude language, want of civil attentions, or angry or abusive words are not sufficient. Trenchard v. Trenchard, 92 N. E. 243, 245 Ill. 313.

"'Cruelty,' in the sense of the statutes on this subject, is such conduct in one of the married parties as renders his continuance of cohabitation either so dangerous to the other party in fact, or attended with such reasonable apprehension in the mind of the other, to the physical distress or discomfort of the other, as to demand his separation on the ground of the real physical safety of the other or of mental or physical capacity of the other to discharge well the duties of husband or wife." Crutcher v. Crutcher, 38 South. 337, 86 Miss. 231 (quoting and adopting definition in 1 Bish. Mar. & Div. [4th Ed.] 716).

"Cruelty," within the divorce law, is any conduct of a husband which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the wife, though it does not necessarily require actual violence. Evidence that a husband ran the wife out of the house and threatened to kill her shows such cruelty as to warrant a decree in her favor. Carr v. Carr, 55 South. 96, 97, 171 Ala. 600 (quoting with approval Smedley v. Smedley, 30 Ala. 715).

Cruel and inhuman treatment as a ground for absolute divorce consists of actual or threatened physical violence endangering the personal health or safety, or creating a reasonable apprehension therefor, or such other equivalent and serious misconduct which is so plainly subversive of the relationship of husband and wife as to make it impossible to discharge the duties of married life. Williams v. Williams, 112 N. W. 528, 530, 101 Minn. 400.

It is not necessary, to obtain a divorce for "cruel and inhuman treatment," for the wife to show physical assaults; but it is sufficient if the husband's general ill treatment has been such as to endanger her health and life. Where a wife was comparatively a well woman when she was married, and within a few weeks thereafter her husband became abusive, insulting, profane, and vulgar, showed a lack of affection, and failed to furnish her with the necessaries of life, by which her health and spirits were broken, she was entitled to a divorce for cruelty. Rader v. Rader, 113 N. W. 817, 136 Iowa, 223.

While it is not necessary, to establish "cruel and inhuman treatment" in a suit for separation and support, to prove actual physical violence inflicted by the husband on the wife, but it is sufficient to prove a course of ill treatment by the husband, by words of abuse or otherwise, having a natural effect of keeping her in a state of mental agony, viz., acts which indicate a studied and persistent attempt by the husband to render her life intolerable, mere incompatibility of temperament, or capricious or arbitrary conduct, is insufficient. Kinsey v. Kinsey, 124 N. Y. Supp. 30, 31.

Personal violence is not required, in order to constitute such cruel and inhuman treatment as will authorize a divorce. Pierce v. Pierce, 38 South. 46.

Such conduct and acts by a husband toward his wife as produce reasonable apprehension in her of personal violence, or produce mental anguish, distress, and sorrow, and render living together miserable, impairing, or likely to impair, the wife's health or mind, is "cruel and inhuman treatment" authorizing a divorce, though there be no personal violence. Goff v. Goff, 53 S. E. 769, 772, 60 W. Va. 9, 9 Ann. Cas. 1083.

Refusal of sexual intercourse

The habitual refusal of a wife to accede to her husband's request for sexual intercourse is not "cruel treatment" of such a nature as to render their living together insupportable, within the meaning of the divorce statute, where the husband is old, his virility diminished, and amorous desires fee-

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ble. Varner v. Varner, 80 S. W. 386, 35 Tex. Civ. App. 381.

Threats

Threats evidently intended to be executed, and so understood by the injured party to the marriage contract, inducing in the mind of the latter a reasonable apprehension of danger to life or health, rendering it extremely difficult to discharge the duties of the domestic relation, constitute such "cruel and inhuman treatment" as to justify a decree of divorce in a suit instituted for that purpose. Benfield v. Benfield, 74 Pac. 495, 44 Or. 94.

CRUELTY TO ANIMALS

Administration of drug

Revisal 1905, § 3299, relating to cruelty to animals, enumerates as subjects protected from cruelty any useful beast, fowl, or animal, and provides that the words "torture," "torment," or "cruelty" shall include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is permitted. Held, that poisoning chickens is within the purview of the statute. State v. Bossee, 59 S. E. 879, 145 N. C. 579.

Beating

Penal Code 1895, § 105, defines the word "cruelty" as "every willful act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted," and hence the infliction of unjustifiable pain upon a cow is a violation of section 703, defining an offense, the gist of which is cruelty to a domestic animal. James v. State, 57 S. E. 959, 1 Ga. App. 779.

CRUSH

CRUSHED STONE

"Crushed stone" is not a term of exact meaning, but stone broken by machinery may be of different sizes after being crushed, and yet the entire product will be properly so denominated. Viernow v. City of Carthage, 123 S. W. 67, 69, 139 Mo. App. 276.

CRUSHING

"Crushing," as defined by the Standard Dictionary, consists of breaking into bits by pressure; the process being simply a reduction in size. So called "granito" or "terrazo," produced by crushing the waste of marble quarries and sifting or sorting it into various sizes, is subject to classification as an unenumerated manufactured article under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205. United States v. Graser-Rothe, 164 Fed. 205, 206.

CRYSTALLINE

"Crystalline" is thus defined by the Century Dictionary: "Consisting of crystal, relating or pertaining to crystals or crystallization, formed by crystallization; of the nature of a crystal, especially as regards its internal structure, cleavage, etc., opposed to amorphous." A patent covering "as a new product calcium carbide existing as masses of aggregated crystals" is valid, but is limited to one form of crystalline carbide "existing in masses of aggregated crystals," and does not include other forms which had been previously produced. Union Carbide Co. v. American Carbide Co., 172 Fed. 120, 125.

CRYSTALLINE CALCIUM CARBIDE

On a claim for patent, "as a new product, crystalline calcium carbide, having a bluish iridescence," the claimant afterwards inserted the words "existing as masses of aggregate crystals," this was held, on a motion for preliminary injunction, to cover calcium carbide existing as a mass of crystal grains, devoid of their characteristic forms and closely packed together, termed a "crystalline aggregate" if not "crystalline calcium carbide" in any form, and an injunction granted. Union Carbide Co. v. American Carbolite Co., 188 Fed. 334, 335.

CUBAN INVOICE

A provision in a charter party for the carriage of a cargo of timber from a Cuban port to New York, fixing the freight per thousand feet, "Cuban invoice," means the same as "Cuban invoice measure"; the term having a known meaning in the trade, as relating to a peculiar system of measurement. Arenburg v. Grupe, 135 Fed. 238, 239.

CUL-DE-SAC

See, Also, Public Alley.

A "cul-de-sac" may be a highway, and it is not essential that a highway be open at both ends so as to form a thoroughfare, but it may be closed at one end by private land or buildings, and uninterrupted travel on a highway for over 50 years under a claim of right is sufficient to establish a highway by prescription, though it is not open at both ends. State v. Rixie, 97 Pac. 804, 805, 50 Wash. 676.

A "cul-de-sac" may be a public road. A road may go to a park, or some public institution, or through a neighborhood, without being open except at one end, and it is not essential that a highway should be open at both ends in order for it to be a public road. Penick v. Morgan, 62 S. E. 300, 303, 131 Ga. 385 (quoting Elliott, Roads & St. [2d Ed.] § 2).

Where an owner of land divided it into two equal parts by an open strip of land commencing at a street and running to the rear of the lot, where it did not connect with any other street, there was a "cul-de-sac." While it is not a legal impossibility for such a cul-de-sac, although not a thoroughfare, to

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be a public highway, a verdict that it is a public highway should be supported by very clear and satisfactory evidence, and a verdict that it is not a public highway should not be disturbed on appeal, unless the evidence is almost overwhelmingly the other way. Gilfillan v. Shattuck, 75 Pac. 646, 648, 142 Cal. 27.

CULPABLE

CULPABLE NEGLECT

"Culpable neglect," as used in Rev. St. 1883, c. 87, § 19, providing that relief in equity will depend upon the proposition that a creditor is not chargeable with "culpable neglect" in not seasonably prosecuting his claim, is less than gross carelessness, but more than the failure to use ordinary care; it is a culpable want of watchfulness and diligence, an unreasonable inattention and inactivity of creditors who slumber on their rights. Holway v. Ames, 60 Atl. 897, 898, 100 Me. 208.

CULPABLE NEGLIGENCE

An instruction that "culpable negligence" is the want of that usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions held correct. Kent v. State, 126 Pac. 1040, 1043, 8 Okl. Cr. 188.

"'Culpable negligence' is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under the circumstances surrounding the particular case." Noonan v. Luther, 104 N. Y. Supp. 684, 685, 119 App. Div. 701 (quoting and adopting definition in 2 Words and Phrases, p. 1780).

The phrase "culpable negligence," as used in Rev. St. c. 89, § 21, authorizing the Supreme Court to allow a bill in equity to be filed by a creditor of the decedent's estate after the statutory time for filing claims, means censurable, blameworthy neglect, the neglect which exists when the loss can be fairly ascribed to plaintiff's own carelessness, improvidence, or folly. Beale v. Swasey, 75 Atl. 134, 106 Me. 35, 20 Ann. Cas. 396.

Under a fidelity bond to secure faithful performance of his duty by a clerk in a railroad freight office, which exempted liability for any loss by mistake, error of judgment on the part of any employé, or by robbery, unless by or with his connivance or culpable negligence, defining such negligence as the failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs of the same character, the clerk's delivery of goods consigned to shipper's order, with draft against the purchaser attached to bill of lading, made to the purchaser without presentation of the original bill of lading properly indorsed, in violation of the carrier's rule, was "culpable negligence," within the meaning of the bond. Louisville & N. R. Co. v. United States Fidelity & Guaranty Co., 148 S. W. 671, 676, 125 Tenn. 658.

Under Civ. Code Cal. § 2629, providing that "an insurer is not liable for a loss caused by the willful act of the insured, but he is not exonerated by the negligence of the insured or of his agents or others," expressly made a part of a marine policy on cargo, there can be no recovery for loss or damage resulting directly from the act of the master in designedly undertaking to force the vessel through floating ice on a voyage to Alaska, with knowledge of the dangers to be encountered and with ample time to have avoided them, in order to arrive more quickly at his destination and secure a better market for his cargo. Such conduct is not mere negligence but is a willful omission to perform his legal duty and an intentional commission of a wrongful act. The court quotes from the opinion of Chief Justice Shaw in Chandler v. Worcester Mut. Fire Ins. Co., 3 Cush. (57 Mass.) 328, which was an action on a fire policy: "By an intent to burn the building we understand a purpose manifested and followed by some act done, tending to carry that purpose into effect, but not including a mere 'nonfeasance.' Suppose the assured, in his own house, sees the burning coals in the fireplace roll down onto the wooden floor and does not brush them away. This would be mere nonfeasance. It would not prove an intent to burn the building; but it would show a 'culpable recklessness' and indifference to the rights of others. * * * To what extent such negligence must go, in order to amount to 'gross misconduct,' it is difficult, by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law that 'crassa negligentia' was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration that although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury." Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co., 133 Fed. 636, 648, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

Intent implied

"Culpable negligence" does not necessarily result from an "intentional" act. If the killing is caused by culpable negligence, then it is not necessarily "intentional." Hence a requested instruction that culpable

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negligence is not merely an omission to use ordinary caution and care, but must be the result of intentional act, or acts which are done without the exercise of ordinary care or caution, was erroneous, because requiring it to be the result of "intentional" acts. Kent v. State, 43 South. 773, 774, 53 Fla. 51 (citing State v. Lochwood, 24 S. W. 1015, 119 Mo. 463).

CULTIVATE—CULTIVATION

See Suitable for Cultivation; Susceptible of Cultivation; Usually Cultivated and Improved.

A "pasture" field is not "ground under cultivation," within Rev. Code, c. 48, § 1, providing that "every planter shall make a sufficient fence about his cleared ground under cultivation at least five feet high," etc. State v. Perry, 64 N. C. 305, 306.

Code Civ. Proc. § 370, provides that for the purpose of constituting adverse possession by one claiming title founded upon a written instrument, etc., land is deemed to have been possessed, where it has been usually cultivated or improved. Defendants and their predecessors had openly and notoriously, for a sufficient length of time to create the presumption of a grant, cut and removed for purposes of husbandry the hay which grew on salt meadow land; that being the only purpose for which the land could be used. Held, that as to "cultivate" meant to improve the product of the earth by manual industry, and "improved" land generally meant such as had been reclaimed and was used for husbandry, whether for tillage, meadow, or pasture, the yearly cutting and removal of the grass was such an act of ownership as to constitute a technical adverse possession within the statute. Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich, 116 N. Y. Supp. 532, 537, 132 App. Div. 118.

A state of cultivation being the converse of a state of nature, land which one, before marrying, permitted to revert to its natural condition, was not in a state of "cultivation" during the marriage, so as to entitle his widow to dower therein, under Pub. St. 1901, c. 195, § 4, even if so permitting it to revert is forestry, though when, each year, he removed mature trees, he did it so as not to damage small ones. Snow v. Snow, 75 Atl. 881, 75 N. H. 433.

Defendant purchased an acre tract of salt meadow in January, 1887, but by his deed acquired only an undivided one-fifth of the land. After he acquired his deed, he cut the salt grass from the land, which was the only use to which it was adapted, until February 15, 1907, when he conveyed the land to plaintiff. Held, that the land had been usually "cultivated" so as to give defendant title by adverse possession. Koch v. Ellwood, 123 N. Y. Supp. 502, 503, 138 App. Div. 584.

The turpentine industry does not involve a "cultivation" of the trees, so as to make the sap fructus industriales, which may as properly be taken by an entryman as grasses or fruits; "cultivation," as an agricultural term, not being applicable to the process of extracting turpentine sap. United States v. Waters-Pierce Oil Co., 196 Fed. 767, 769, 116 C. C. A. 391.

CULTIVATED INCLOSURE

The term "cultivated inclosure" in the clause of the mining lease made by the Osage Nation on March 16, 1896, to Foster, which prohibits boring wells on the Osage Indian reservation for oil and gas on such inclosures, includes those made after as well as those which were in existence at the date of the lease. An inclosure which contains a cultivated tract and an uncultivated tract is a cultivated inclosure, and the lessee may not prospect or bore wells on the former, but he may do so on the latter if his operations do not unnecessarily interfere with the use of the cultivated tract for agricultural purposes. Barnsdall Oil Co. v. Leahy, 195 Fed. 731, 735, 115 C. C. A. 521.

CULTIVATED LANDS

A mill lot, upon which a mill is erected, is "cultivated and improved land," within Rev. St. c. 18, § 18, authorizing the selectmen of a town to lay out private ways for one or more of its inhabitants leading from land under improvement to a town or highway. Lyon v. Hamor, 73 Me. 56, 57.

CULVERT

The words "bridge" and "culvert" as used in the statute giving an action for damages caused by reason of the insufficiency of "any bridge or culvert" are not synonymous. Cleveland v. Town of Washington, 65 Atl. 584, 585, 79 Vt. 498.

A tile drain consisting of an opening or a channel through which water flows is a "sluice," and "culvert" includes "sluice." Herrick v. Town of Holland, 77 Atl. 6, 11, 83 Vt. 502.

CUMBERSOME

CUMBERSOME PACKAGE

A cage 2½ feet high and 2 feet square is a "cumbersome package," within a rule of a street car company prohibiting passengers from carrying cumbersome packages into the cars. Ray v. United Traction Co., 89 N. Y. Supp. 49, 51, 96 App. Div. 48.

CUMULATIVE

"Where one thing is cumulative of another, whether it be remedy, penalty, or power, we are speaking commonly of two things which are at least consistent, and might, without incongruity, be applied at the same

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time." An action for mandamus under Act March 2, 1889, c. 382, § 10, amendatory of the Interstate Commerce Act, which authorizes an action by a shipper against an interstate carrier to compel compliance with the act, and provides that "the remedy here given by mandamus shall be cumulative," does not preclude relator from proceeding with regard to the same matter by petition to the Interstate Commerce Commission; the remedies being "cumulative." Merchants' Coal Co. v. Fairmont Coal Co., 160 Fed. 769, 779, 88 C. C. A. 23.

The provisions of the amendment to Rev. St. Ohio, § 3256, and of section 3300, now sections 8806, 8807, and 8809, Gen. Code, relating to stock purchases and holdings, are clearly cumulative and meet the requirements of section 3269, now section 8733, Gen. Code, reciting that a "special provision shall govern unless it clearly appear that the provisions are cumulative"—the word "clearly" meaning in a clear manner, without obscurity, without entanglement or confusion, without uncertainty; and "cumulative" meaning "additional," that which is superadded to another thing of the same character and not substituted for it. Mannington v. Hocking Valley Ry. Co., 183 Fed. 133, 153.

The term "cumulative," as used in Tex. Acts 1899, p. 257, c. 146, § 14, providing that the provisions of the act shall be held to be "cumulative" of all laws now in force in this state, indicates a harmonious coexistence and cooperation rather than a consolidation of two things into one. An amendment of a statute is not cumulative because it repeals and takes the place of the part of the law that it amends, thereby becoming a part of the law amended, and such act of 1899 does not become a part of the anti-trust act of 1895 (Acts 1895, p. 112, c. 83), so as to incorporate into the former the provision of section 12 of the latter, exempting certain organizations from the operation of the latter act. State v. Laredo Ice Co., 73 S. W. 951, 952, 96 Tex. 461.

CUMULATIVE EVIDENCE

"Cumulative evidence" is additional evidence of the same kind to the same point. Clark v. Gallagher, 52 Atl. 539, 541, 74 Vt. 331.

"Cumulative evidence" is additional evidence offered to establish a fact to which witnesses have already testified, and it does not necessarily include all evidence which tends to establish the same ultimate or principally controverted fact. Saylors v. State, 70 S. E. 975, 976, 9 Ga. App. 227.

"Cumulative evidence" is "additional evidence of the same kind to the same point." Evidence is not rendered noncumulative, so as to afford a basis for a new trial on the ground of newly discovered evidence, merely because it is to be furnished by a stranger to the litigation on a matter covered only by the testimony of the parties. Horner v. Schinstock, 96 Pac. 143, 144, 77 Kan. 663 (quoting and adopting definition in 12 Cyc. p. 922).

Evidence is cumulative so as not to be ground for new trial which only multiplies witnesses as to one or more facts, or adds other particulars of the same general character. Garza v. State (Tex.) 145 S. W. 590, 591.

Testimony of a surgeon that, in the progress of an operation involving the opening of the abdomen of a patient, he found an intestine ruptured is not merely "cumulative," in that, upon an external examination, he concluded that such a rupture probably existed. To be cumulative, new evidence must not only prove a conclusion to a fact already testified to, but it must tend to prove it in the same way. It must be evidence of the same kind to the same point. Bousman v. Stafford, 81 Pac. 184, 185, 71 Kan. 648.

Evidence of an admission of the same kind, and to the same point, as that given in evidence on the trial, though made to another person, at a different time and place, and under different circumstances, is cumulative, and is not ground for a new trial. Goshorn v. Wheeling Mold & Foundry Co., 64 S. E. 22, 27, 65 W. Va. 250.

"Evidence is 'cumulative' if it relates to the same subordinate or specific fact to which proof was before adduced, but not when it tends to prove a new fact respecting the general question or point in issue." "From some of the cases on this subject it may, perhaps, be inferred that courts have supposed all additional evidence to be cumulative merely which conduced to establish the same ground of claim or defense before relied upon, and that none would be available for a new trial unless it disclosed or established some new ground. But this does not seem to us to be the true rule, as recognized in the best considered cases. There are often various distinct and independent facts going to establish the same ground on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigation, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative, within the true meaning of the rule on this subject. When petitioners, claiming as descendants of a decedent, put in evidence a certified copy of a record of a marriage in a foreign country purporting to be the marriage of decedent, but judgment went against them, newly discovered evidence consisting of a photograph of the original marriage record, containing the signatures of the contracting parties, one of which signatures was that

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of decedent, was not cumulative within the rule relating to new trials, though it tended to prove the ultimate fact sought to be proved. In re McClellan's Estate, 111 N. W. 540, 542, 21 S. D. 209.

"Cumulative evidence" is additional evidence of the same kind to the same point, and, where evidence offered on motion for new trial is merely additional upon the same point upon which evidence was given at the trial, it will be rejected as cumulative; but where it is respecting a new and distinct fact, though it tends to establish the same general result, sought to be established by evidence at the trial, it is not cumulative, and will be received if otherwise competent. Kroger v. Ryan, 94 N. E. 428, 431, 83 Ohio St. 299.

"Cumulative evidence" is additional evidence of the same kind to the same point. Where the material question on trial in a criminal case was as to the identity of defendant, and the evidence relied on to obtain a new trial only went to the question of identity, it was cumulative. May v. State, 60 Atl. 1, 77 Vt. 330.

Testimony which is corroborative only of that given by a party to the suit, and does not corroborate the testimony of any disinterested witness, is "cumulative evidence," within the rule that a new trial will not be granted for newly discovered evidence which is merely cumulative of that introduced at the former trial. O'Toole v. Faulkner, 75 Pac. 975, 977, 34 Wash. 371.

Cumulative evidence, within the rule excluding it when offered as newly discovered evidence as ground for new trial, is additional evidence in support of the same point, which is of the same character with evidence already produced, and if it is of a different kind upon the same issues, or of the same kind upon a different issue, it is not cumulative. State v. De Marias, 130 N. W. 782, 784, 27 S. D. 303, Ann. Cas. 1913D, 154.

"Cumulative evidence" is evidence tending to prove the same point to which other evidence has been offered. It is additional or corroborative evidence to the same point; that which goes to prove that which has already been established by other evidence. Evidence cannot be regarded as cumulative merely because it tends to establish the same ultimate fact or principle controverted, but to be such it must be further or additional evidence of the same kind to the same point. Torian v. Terrell, 93 S. W. 10, 12, 122 Ky. 745.

"Cumulative evidence" for which a new trial will not be granted is evidence of the same kind or character, to the same point, which is not the case in a suit depending on the true location of a government quarter section corner, there having on the trial been no direct evidence of the location of the corner, but the witnesses, surveyors, having treated it as a lost corner, and proceeded to re-establish it by secondary evidence, the courses and distances from other recognized original corners, and the newly discovered evidence being the government corner stone, discovered in place, direct evidence to which the courses and distances must yield. Tucker v. Wyoming Coal Min. Co., 104 Pac. 529, 530, 18 Wyo. 97.

"Cumulative evidence" is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admissions of a party, evidence of another verbal admission to the same effect is cumulative. Where a witness testified to making a payment to L. at a certain time and place, and L. testified that no such payment was made at any time or place, newly discovered evidence that the place did not exist at the time of payment is not "cumulative" within the rule as to new trials. Union Cent. Life Ins. Co. v. Loughmiller, 69 N. E. 264, 266, 33 Ind. App. 309 (citing 1 Greenl. Ev. § 2; Hines v. Driver, 100 Ind. 315, 327).

"Cumulative evidence," within the rule that courts will grant with great reluctance new trials on the ground of newly discovered evidence which is merely cumulative, is evidence of the same kind as that given to the same point on the trial; but evidence establishing the disputed fact by other circumstances than those shown on the trial is "corroborative evidence," and, when newly discovered, authorizes a new trial. Williams v. State, 54 South. 857, 858, 99 Miss. 274.

Where plaintiff called a witness to testify to statements made by defendant and rested his case, and defendant then testified giving a contradictory version of the conversation in which such statements were said to have been made, further evidence on the part of plaintiff to the same conversation was "cumulative." Yeaton v. Chapman, 65 Me. 126, 127.

CUMULATIVE LEGACY

Where a testator, after making several legacies, gave the residue of his estate to his heirs, and on the same day executed a codicil giving a certain sum to three persons, who were his heirs, "and no more," it was held that the three heirs were not excluded by the words "and no more" from sharing in the balance of the estate; but such words applied only to the amounts mentioned in the codicil. In re Sigel's Estate, 62 Atl. 175, 176, 213 Pa. 14, 1 L. R. A. (N. S.) 397, 110 Am. St. Rep. 515.

CUMULATIVE REMEDY

A cumulative remedy is one created by statute in addition to one which still remains in force, and when a statute gives a new remedy, and contains no negative, express or implied, of the old remedy, the new one provided is cumulative and the party may elect between the two. Bowles v. Neely, 115 Pac. 344, 346, 28 Okl. 556.

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CUMULATIVE SENTENCE

A "cumulative" sentence is a sentence to begin in the future upon the expiration of a prior sentence. A court may lawfully impose a sentence to begin in the future upon the expiration of a prior sentence imposed by another and different tribunal of the same commonwealth. Rigor v. State, 61 Atl. 631, 633, 101 Md. 465, 4 Ann. Cas. 719.

Successive sentences—that is, one to commence on the expiration of another for distinct offenses—are not cumulative sentences. Harris v. Nixon, 27 App. D. C. 94, 97.

CUPOLA

A declaration by a servant for injuries alleged that defendant maintained "a one and two story building, * * * a one story building having a second story or cupola, or a portion of the same near the middle part which was connected to the first story" by a "stairway which was in fact a ladder" not having any handrail, by reason of which plaintiff fell and was injured. Held, that the terms "stairway" and "ladder" are not synonymous, a stairway pertaining to architecture and having various technical parts, consisting of risers, treads, nosings, fliers, and winders, and being stationary, while a ladder is in the nature of a tool consisting of a frame, usually portable, of wood, metal, or rope, used for ascent or descent, consisting only of two parts the sides and cross-steps or rounds, which form the steps, and a cupola is not a story of a building, but is the top of a structure, usually a cup-shaped spherical roof, though the term is also applied to any similar structure rising above the roof of a building, whatever its shape may be; and, while the declaration was indefinite as to the description of the building, an allegation that plaintiff was required to use such "stairway" in the course of his employment sufficiently alleged a violation of Pub. Laws 1909, No. 285, § 14, providing that stairways with substantial handrails shall be provided in manufacturing establishments, and, where necessary, steps shall be substantially covered with rubber for the better safety of persons employed in such establishments, the risk of which plaintiff did not assume, and was therefore not demurrable. Davis v. Buss Mach. Works, 135 N. W. 303, 304, 169 Mich. 498.

CURATIVE ACT

See, also, Healing Act.

A "curative act" is one intended to give effect to past acts or transactions which are ineffective because of neglect to comply with some requirement of law, and is intended to operate retroactively. Schamblin v. Means, 91 Pac. 1020, 1022, 6 Cal. App. 261 (citing Baird v. Monroe, 89 Pac. 352, 354, 150 Cal. 560).

A curative act is necessarily retrospective in character, and undertakes to cure errors or irregularities in legal or administrative proceedings, and to give effect to contracts for failure to comply with some technical requirement. McSurely v. McGrew, 118 N. W. 415, 419, 140 Iowa, 163, 132 Am. St. Rep. 248.

CURB

See On the Curb.

Sidewalks are generally elevated above the outer edge of the street, and the line of demarcation is designated by what is usually known as the "curb," which is only a level with the sidewalk. The distance from the top of the curb to the street surface varies, but is seldom less than from six to eight inches. City of Vincennes v. Spees, 74 N. E. 277, 280, 35 Ind. App. 389.

Tenement House Act, par. 17, defines "curb" as the level of the established curb line where the same exists, taken at the center of the street frontage. Board of Tenement House Supervision of New Jersey v. Schlechter, 83 Atl. 783, 784, 83 N. J. Law, 88.

Under a municipal ordinance making it the duty of one driving an automobile, on turning the corner of any street, to leave a space of at least six feet between the curb and the automobile, where, in repairing a building, débris was piled in the corner of the street, and a fence or barricade had been constructed on the outside, such fence became the "curb" within the meaning of the ordinance, the purpose of which was to keep vehicles in rounding corners out of the path usually taken by foot passengers; the word "curb" being used as the most convenient term to mark one of the boundaries of the path and not in a technical sense. Domke v. Gunning, 114 Pac. 436, 438, 62 Wash. 629.

"The common meaning of the word 'curb,' as applied to a street, is a stone or row of stones, or a similar construction of concrete, wood, or other material, along the margin of the roadway, as a limit to the roadway and a restraint upon and protection to the adjoining sidewalk space. The word could not be applied to such an impassable construction across a roadway which would prevent travel." Lyman v. Town of Cicero, 78 N. E. 830, 222 Ill. 379.

CURB LINE

The "curb line" of a street is the dividing line between the roadway and that portion reserved on each side of the roadway for the use of pedestrians. Wetmore v. City of Chicago, 69 N. E. 234, 206 Ill. 367.

An ordinance for a street improvement provided "that L. street, together with s" street intersections within the north an south lines of said L. street from the center line of S. avenue to the west curb line of

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A. avenue, be improved by curbing, grading, and paving the same with a brick pavement and a concrete combined curb and gutter," etc.; the provision in regard to the curb and gutter being that a "granite concrete combined curb and gutter shall be constructed upon each side of all intersecting streets, and produced between said points from the street line to the curb line of said L. street." Held that, even though the use of the words "curb line" means the roadway face of the curb, the ordinance did not contemplate, and the improvement did not include, the construction of a curb on the west side of A. avenue. Chicago Consol. Traction Co. v. Village of Oak Park, 80 N. E. 42, 43, 225 Ill. 9.

CURBING

"Curbing" is a necessary part of the improvements contemplated by a statute authorizing cities to cause streets to be "constructed" and "paved" at the abutting owners' expense. City of Excelsior Springs v. Ettenson, 96 S. W. 701, 705, 120 Mo. App. 215 (citing 6 Words and Phrases, p. 5239).

Under Avondale City Charter, § 12, declaring that not more than one-third of the cost of street improvements should be assessed against abutting property owners, "not including sidewalks," an assessment against property owners for the entire cost of "guttering" was erroneous. While "curbing" may be so constructed as to make it a part of the sidewalk, "guttering" is a part of the street proper and not of the sidewalk. Harton v. Town of Avondale, 41 South. 934, 939, 147 Ala. 458 (citing Job v. People ex rel. Tetherington, 61 N. E. 1079, 193 Ill. 609; Allman v. Dist. Columbia, 3 App. D. C. 8, 17; Wilson v. Chilcott, 21 Pac. 901, 12 Colo. 600, 602, 603).

CURE

See Gall Cure.

The word "cure," relative to the obligation of a vessel to cure, means proper care of an injured seaman, and not a positive cure, which may be impossible, and the duty is to furnish means of cure and to use all reasonable efforts for that purpose. The Mars, 149 Fed. 729, 731, 79 C. C. A. 435.

Under the doctrine in admiralty that a seaman, who sustains injuries in the service of the ship, shall be cured at the expense of the ship, the term "cure" was probably employed originally in the sense of taking charge or care of the disabled seaman and not in that of positive healing. The Troy, 121 Fed. 901, 906.

"Improved," used with reference to an insane person, is not the equivalent of "cured." Only such patients of the state hospital for the insane as have been discharged as cured, or are not insane, are entitled to an order of restoration to the rights of citizenship. Johnson v. Schoch, 118 Pac. 696, 697, 85 Kan. 837.

CURED BY VERDICT

The term "cured by verdict," applied to defective pleading, signifies that a court will, after verdict, presume the particular thing appearing to be defectively or imperfectly stated, or omitted, in the pleading, was duly proved. Walters v. City of Ottawa, 88 N. E. 651, 653, 240 Ill. 259.

CURED MEAT

The tax imposed by section 16 of chapter 5106, p. 9, Laws of 1903, is upon the wholesale dealer in "fresh" meats only. Whether the same be either "packed or refrigerated," it must be, at the time that he sells it in the ordinary course of his business, in that state where it can properly be termed "fresh meat," as contradistinguished from cured or salted meats, in order to render him liable to the occupational tax imposed by said section. Meats technically known as "cured," from having been treated with salt, smoke, etc., keep in an edible condition indefinitely, even in the warmest latitudes, whereas the same meats, when untreated and fresh, though capable of being kept in their fresh and natural condition for long periods in a low temperature, either natural or artificial, quickly spoil, become putrid, and unfit for food when subjected to high or even mean or ordinary temperatures. It is upon the wholesale dealer, in the last-described commodity, that the said section 16 of chapter 5106, p. 9, Laws of 1903, imposes the license tax, and not upon the dealers in "cured" or salted meats. Florida Packing & Ice Co. v. Carney, 41 South. 190, 192, 51 Fla. 190 (citing Cross v. Seeberger, 30 Fed. 427).

CURRENCY

See Lawful Currency.

As coin or equivalent

"There is no principle on which the sensibilities of communities are so easily excited, as that which acts upon the 'currency'; none of which states are so jealous as that which is restrictive of the exercise of the sovereign powers." Briscoe v. Bank of Kentucky, 11 Pet. (36 U. S.) 257, 312, 9 L. Ed. 709.

"Currency" is broad enough to include gold and silver, as well as what is usually termed paper currency, so that an indictment charging theft of a person of $2 in money, lawful currency of America, and of the value of $2, was sustained by proof of the theft of $2 in silver. Britain v. State, 105 S. W. 817, 819, 820, 52 Tex. Cr. R. 169.

CURRENT

See Prices Current and Commercial Lists.

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CURRENT ACCOUNT

Mutual current account, see Mutual Accounts.

CURRENT BREAKER

A "current breaker" is a device fixed against the inside of the roof or hood of a trolley car just overhead where the motorman stands, and through which the electric current drawn from the wire on the outside passes. Its office is to prevent an excess of the current from flowing through the motors. An excess of current causes the device to open with a flash and a report, and while it is open no current can pass through. Masterson v. St. Louis Transit Co., 103 S. W. 48, 50, 204 Mo. 507.

CURRENT EXPENSES

The limit of 1.12 mills for current expenses fixed by Laws 1909, c. 245, § 5, does not apply to a road levy of one mill under Laws 1911, c. 248, § 33; the maintenance of a road, designated a "county road," under the latter act not being a part of the current expenses of the county, within the meaning of the previous limiting act. State ex rel. Faulconer v. Board of Com'rs of Cowley County, 119 Pac. 327, 330, 86 Kan. 201.

Sess. Laws 1903, p. 42, was passed immediately after a holding by the Supreme Court that a city which had reached the constitutional limit of indebtedness had no power to pay out funds for any purpose, and provided that, even after a city had reached the constitutional limit of indebtedness, it should still have power to manage and conduct its affairs on a cash basis, and pay its reasonable and necessary current expenses. Held, that an expenditure to install and operate a water system to belong to the city is not for current expenses, and not authorized by the statute. Helena Waterworks Co. v. City of Helena, 78 Pac. 220, 222, 31 Mont. 243.

The term "current and incidental expenses," as used in St. Paul Charter 1905, p. 37, subsec. 22, means the reasonable necessary expenses, not otherwise provided for, for carrying into effect the duties imposed by the charter; and advertising the city is not such an expense, but is payable out of the contingent fund for promoting the welfare of the city. Mitchell v. City of St. Paul, 130 N. W. 66, 67, 114 Minn. 141.

Of railroads

The "current expenses" of a railroad includes expense occasioned by repairs and purchase of materials for improvement of the road. Poland v. Lamoille Val. R. Co., 52 Vt. 144, 163.

CURRENT FISCAL YEAR

Ky. St. § 3219, relating to taxes by cities of the second class to defray expenses of schools for the "current fiscal year," refers to the fiscal year of the city beginning January 1st, as against the contention that the school board was a part of the common school system of the state, and that the "current fiscal year" was that of the state, which Constitution, § 169, fixes as commencing July 1st. Board of Education v. Nelson, 58 S. W. 700, 701, 109 Ky. 203.

CURRENT INFORMATION

"A copyrighted article published without authority is not 'current information' free for the use of all." American Press Ass'n v. Daily Story Pub. Co., 120 Fed. 766, 769, 57 C. C. A. 70, 66 L. R. A. 444.

CURRENT MARKET PRICE

A provision in a will that, if any residuary legatee desire to purchase any of the real or personal property, he may do so at its "current market price" at the time of testator's death as valued by the executors, etc., applies to real as well as personal property, for real estate has a current market price. In re Walbridge, 91 N. E. 590, 591, 198 N. Y. 234.

CURRENT MARKET VALUE

"Real estate has a 'current market value' the same as personal property, though it may be much more difficult of ascertainment," and a provision in a will that, if any residuary legatee desire to purchase any of the real or personal property, he may do so at its "current market price" at the time of testator's death, as valued by the executors, etc., applies to real as well as personal property. In re Walbridge, 91 N. E. 590, 591, 198 N. Y. 234.

CURRENT MONEY

See Lawful Currency.

The expression "current money of the United States" covers any kind of currency of the United States which is guaranteed by the government and passes as money. Butler v. State, 81 S. W. 743, 744, 46 Tex. Cr. R. 287.

"The term 'current money of the United States' means that which, by the act of Congress, is made a legal tender, whether coin or currency; and this has been construed to include legal tender treasury notes of the United States, demanded notes of the United States, and coin money of the United States, but does not include national bank bills." Allegation in an indictment for larceny, describing the property stolen as "one $5 bill, current money of the United States, of the value of $5," is not proven by evidence that the prosecutor did not know whether the money stolen was a national bank note, a treasury note, or a silver certificate, but knew that it was a $5 bill, and was good American money, as "current money" means that which by act of Congress, whether coin or currency, is made legal tender. Summers v. State, 76 S. W. 762, 45 Tex. Cr. R. 423.

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As lawful currency or money

"Current money" means money which passes from hand to hand and from person to person and circulates through the community and is synonymous with "lawful money." Current money is that which is generally used as a medium of exchange. State v. Quackenbush, 108 N. W. 953, 955, 98 Minn. 515.

Treasury notes

Where an indictment charges theft of "current money" of the United States of America, giving the denomination and value thereof, the allegation can be proven by theft of United States legal tender treasury notes, or of United States demand notes, or of United States gold or silver certificates, or of national bank bills of the United States. Gold and silver coins having always been treated as "money." Berry v. State, 80 S. W. 630, 631, 46 Tex. Cr. R. 420.

CURRENT MONTH'S ACCOUNT

In a guaranty to pay the "current month's account" of a certain firm on the 15th of the following month, if not paid by them before, when made in response to a request for a guaranty to pay the bills of one month upon the 15th of the succeeding month, if not already paid, the phrase "current month's account" meant the account that would accrue from month to month and not merely the account of the month then current. Celluloid Co. v. Haines, 57 N. E. 691, 692, 176 Mass. 415, 417.

CURRENT NEGOTIABLE PAPER

Negotiable notes, which have been placed in the hands of the maker by the payee, before maturity, to sell to a third person, cease to be "current negotiable paper," according to the law merchant, while in the hands of the maker, and are subject to garnishment at the suit of a judgment creditor of the payee. Hutcheson v. King, 83 S. W. 215, 216, 37 Tex. Civ. App. 151.

CURRENT YEAR

The statutory limitation on the power of the county board to contract for bridge building, to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of "previous years" and two-thirds of the levy of the "current year," gives no authority to the board to take into account the levy of the "current calendar year" prior to the making of such levy. Until it is made, there is no "levy of the current year." Ordinarily the terms "this year," "current year," or "the previous year" mean in each instance the calendar year in which the event under discussion took place and the one before it, but the Legislature did not have this meaning in putting the words into this statute. Clark v. Lancaster County, 96 N. W. 593, 599, 69 Neb. 717.

The words "current year" in Code Prac. art. 645, exempting from seizure upon execution, apart from the land, corn, provisions, and other supplies necessary for running the plantation to which they are attached for the current year, means from harvest to harvest, and not a calendar year. Hinton v. Roane, 50 South. 798, 124 La. 927, 134 Am. St. Rep. 526.

As used in Rev. St. § 2745, providing that a police jury, before fixing the taxes for the "current year," shall estimate expenditures and publish same, the words "current year" relate to the year in which the taxes are levied and assessed, and their use does not militate against the theory that the budget of expenditures may be adopted before the beginning of such year. Murphy v. Police Jury, St. Mary Parish, 42 South. 979, 982, 118 La. 401.

The expression "current year," in Rev. St. 1906, § 2803, authorizing the county auditor on discovery of any omitted real estate to add to the taxes of a "current year" the taxes which have been omitted for the preceding years, means the "current tax year," and not the "current calendar year." Pittsburg, C., C. & St. L. Ry. Co. v. County Treasurer of Clark County, 85 N. E. 49, 50, 78 Ohio St. 227.

CURRENT YEARLY PAY

Congress, in using the words "current yearly pay" as the basis of the computation of the longevity pay provided for by the act of May 13, 1908, must be deemed to have adopted its construction of those words as used in Rev. St. § 1262, giving a 10 per cent. longevity increase on "current yearly pay," which it declared by the act of June 30, 1882, 22 Stat. 118, c. 254, should be computed on the yearly pay of the grade. Plummer v. United States, 32 Sup. Ct. 467, 469, 224 U. S. 137, 56 L. Ed. 697.

"Current yearly pay," as used in Rev. St. § 1262, providing that there shall be paid to the officers below the rank of brigadier general "10 per centum of their 'current yearly pay' for each term of five years of service," and "pay proper," as used in the acts of Congress May 26, 1900, and March 2, 1901, mean the regular, ordinary pay which an officer may be entitled to under the facts in his case, and if, by virtue of length of service, he is entitled to receive the compensation provided for in section 1262, that compensation is his "pay" or his "pay proper," as distinguished from other probable compensation by any allowances or commutations, or otherwise. The "pay proper," on which the percentage of increased pay to an army officer serving in the Philippine Islands is to be computed, under Acts May 26, 1900, c. 586, 31 Stat. 211, and March 2, 1901, c. 803, 31 Stat. 903, includes the longevity pay to which he is entitled, under Rev. St. § 1262, as well as the minimum pay prescribed by

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section 1261 for his grade. United States v. Mills, 25 Sup. Ct. 434, 436, 197 U. S. 223, 49 L. Ed. 732.

CURTAINS

Dutiable as articles in part of beads, see Articles Within Tariff Act.

CURTESY

In addition to curtesy, see In Addition to. See, also, Husband's Dower.

To curtesy there were four requisites: (1) Marriage; (2) seisin of wife during coverture; (3) birth of a child; (4) death of the wife. Decedent left, him surviving, his wife and four children. The latter conveyed to the widow a life estate in the real estate belonging to their deceased father. One of such children died prior to the widow, leaving a husband and children. On the widow's death the husband was entitled to an estate by the curtesy in two-thirds of the interest of the property in which his wife had seisin at the time of the death of her father. Valentine v. Hutchinson, 88 N. Y. Supp. 862, 863, 43 Misc. Rep. 314.

Curtesy is the estate to which by common law a man is entitled on the death of his wife in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they had lawful issue born alive which might have been capable of inheriting the estate, and it attaches to the wife's equitable as well as her legal estates of inheritance. Armstrong v. Wood, 195 Fed. 137, 141.

All the requisites of curtesy existed where there was a valid marriage, children born alive and the wife died seised of real property. In re Starbuck's Estate, 116 N. Y. Supp. 1030, 1031, 63 Misc. Rep. 156.

By Act May 2, 1890, c. 182, § 31, 26 Stat. 94, sections 566, 567, Mansf. Dig., was extended over Indian Territory with a proviso excepting Indians and their estates. By act June 7, 1897, c. 3, § 1, 30 Stat. 83, such laws were made to apply to all persons in the territory "irrespective of race" and by the Curtis Act June 28, 1898, c. 517, § 26, 30 Stat. 504, it was provided that the laws of the Indian tribes should no longer be enforced. Held that, by virtue of such provisions, a noncitizen husband of a Creek allottee who died after the birth of a child of the marriage was entitled by the curtesy to a life estate in her allotted lands. Armstrong v. Wood, 195 Fed. 137, 141.

Curtesy is an estate created by law in the real property of the wife, subject to being divested by her will or deed and is not derived from the wife's estate or by inheritance from her; Laws 1896, p. 619, c. 547, § 281, the general rule of descent, not including curtesy, and section 280 providing that that article does not affect a limitation of an estate by curtesy. In re Starbuck's Estate, 116 N. Y. Supp. 1030, 1032, 63 Misc. Rep. 156.

Minor's Institutes, vol. 2, p. 103, thus defines "curtesy": When a man takes a wife seised during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue born alive, and the wife dies, the husband surviving has an estate in the land for his life, which is called an estate by the curtesy, and the requisites of an estate by the curtesy are marriage, seisin of the wife, birth of issue alive, and death of the wife. Dozier v. Toalson, 79 S. W. 420, 421, 180 Mo. 546, 103 Am. St. Rep. 586.

A "tenancy by curtesy" arises where a man marries a woman seised of an estate of inheritance (that is, of land and tenements in fee simple or fee tail), and has by her issue born alive capable of inheriting her estate. There are four requisites necessary to make a tenancy by curtesy: Marriage, seisin of the wife, issue, and death of the wife. The marriage must be canonical and legal, and the seisin of the wife must be actual; the possession of the land must not be a bare right to possess, which is seisin in law, but an actual possession, which is seisin in deed, and therefore a man cannot be tenant by curtesy of a remainder or reversion. Snyder v. Jones, 59 Atl. 118, 119, 99 Md. 693 (quoting 2 Bl. Comm. 126).

"Tenancy by curtesy" is defined by Littleton as: "Where a man taketh a wife seised in fee simple or in fee taile general or seised as heir in taile especial and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life." And Justice Kent in his Commentaries, vol. 4, p. 27, says: "Tenancy by the curtesy is an estate for life created by the act of the law. When a man marries a woman seised at any time during the coverture of an estate of inheritance in severalty in coparcenary, or in common, and hath issue by her born alive, which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by curtesy." The husband's right to curtesy at the common law was contingent upon their being issue of the marriage born alive, capable of inheriting the mother's estate; and as he has no estate by curtesy at the wife's death, unless such issue has been born, he could have had no interest prior to the birth of such issue. Turner v. Heinberg, 65 N. E. 294, 295, 30 Ind. App. 615.

The estate by the "curtesy" is created by the law, and is as independent of the wife as is the wife's dower independent of the husband. It is dependent for its creation on certain facts, one of which is that the wife in

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her lifetime, and during the marriage, was seised of an estate of inheritance, but that, facts given and the other conditions having existed, the law by its own force creates the estate. From 12 Cyc. the following definitions are taken: "Curtesy is the estate to which by common law a man is entitled on the death of his wife to the lands or tenements of which she was seised in possession in fee simple or fee tail during coverture, provided they had lawful issue born alive which might have been capable of inheriting the estate." Page 1002. And in a note to the text it is said: "It is a freehold estate in the husband for his natural life cast upon him by operation of law immediately upon the happening of the necessary incidents." The same author further says: "Curtesy initiate becomes a vested interest as soon as it attaches to the wife's estate and cannot be modified or abolished by the Legislature of the state; but until it attaches it is a mere right and may be modified or destroyed. When vested, curtesy initiate is an estate in the husband for his natural life, separate and distinct from the estate of the wife." Id. pp. 1003, 1004. And again: "On her death the surviving husband, if all other requisites have existed, becomes vested with a freehold estate known as curtesy consummate." Id. p. 1008. Estate by the curtesy is not a creation of a statute. It is created by the common law. We do not find it mentioned in the writings of the common law that the estate by the curtesy is free from the burden of the wife's debts, as we do find it said that the widow takes her dower free from the husband's debts; but the reason for that is that by the common law the wife could make no debts. But the estate by the curtesy which we have is as it came to us through the common law, and is affected by our statutes only as they expressly or by necessary implication affect it. Under section 6869, Rev. St. 1889 (now section 4340, Rev. St. 1899 [Ann. St. 1906, p. 2382]), a married woman's real estate is her separate estate. She is given the sole right to its possession, its rents and profits. The husband is thereby deprived of his common-law right to the possession of his wife's land during coverture, and to that extent his curtesy initiate is impaired, but it is not destroyed, and upon the death of the wife it becomes consummate. Myers v. Hansbrough, 100 S. W. 1137, 202 Mo. 495.

As interest in property

See Interest (In Property).

CURTESY CONSUMMATE

The requisites of "curtesy consummate" are marriage, seisin, issue, and death of the wife. Richardson v. Richardson, 64 S. E. 510, 511, 150 N. C. 549, 134 Am. St. Rep. 948.

CURTESY INITIATE

A husband's curtesy initiate is merely a status, and not a vested right; nor is it separately alienable during coverture, but a mere possibility or expectancy, which may be destroyed at the will of the owner of the fee, and, not being coupled with any interest in the property, cannot be made the subject of mortgage or transfer. Hope v. Seaman, 119 N. Y. Supp. 713, 719.

Curtesy is initiate from the time of seisin and the birth of issue alive, and, unless it is defeated by will or deed, becomes consummate on the wife's death, and relates back to the time it became initiate. In re Starbuck's Estate, 116 N. Y. Supp. 1030, 1031, 63 Misc. Rep. 156.

At common law, a husband had no vested curtesy interest in lands of his wife, until the birth of issue, and he then became a tenant by the "curtesy initiate" to a separate estate for his life in his wife's lands, the profits of which during that period were exclusively his own. Richardson v. Richardson, 64 S. E. 510, 511, 150 N. C. 549, 134 Am. St. Rep. 948.

CURTILAGE

See Within the Curtilage.

Garden or land adjoining

"Curtilage" is a yard, courtyard, or piece of ground lying around or near to a dwelling house, included within the same fence; a fence or inclosure of a small piece of land around a dwelling house, usually including the buildings used in connection with the house, which inclosure may consist wholly of a fence or partly of a fence and partly of the exterior side of buildings so within the inclosure. It includes the yard, garden, or field which is near to and usually in connection with the dwelling house. At common law the word was very nearly synonymous with courtyard. The word always denotes an inclosure, including the dwelling house, though changed conditions in this country and the absence of fences in many instances may necessarily affect the definition so as not to render the presence of an inclosure indispensable. But to supply the place of an inclosure there must be apparent necessity for the use of the outhouse alleged to be within the curtilage either as a part of the dwelling house or that the use of such outhouse is indispensably necessary to the domestic comfort of the household. A barn and corncrib about 50 yards from the dwelling house, the yard of which is not inclosed, but which are themselves separately inclosed by a high plank fence not connected in any way with the dwelling house, cannot be said to be within the curtilage of the dwelling house. Hutchins v. State, 59 S. E. 848, 849, 3 Ga. App. 300.

Under Act June 4, 1901 (P. L. 431), providing that curtilage to be regarded as appurtenant to a building and bound by a mechanic's lien filed against it is such as is reasonably needed for the general purpose for

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which the structure is erected, and belongs to the same owner, curtilage, as a general rule, does not extend beyond the lot on which the building is erected, but if more land is reasonably needed for the general purpose of the structure, and at the time the structure is being erected the owner intends that another lot in addition to the one upon which it is built shall be included in the curtilage, a mechanic's lien will cover the other lot, and hence will cover a lot separated from a hotel property subject to lien by a railroad and intervening private lands, where the lot contains a mineral spring, and it was the owner's intention to use it in connection with the hotel as a sanitarium, and to erect a light and heat plant on the lot. Wirsing v. Pennsylvania Hotel & Sanitarium Co., 75 Atl. 259, 260, 226 Pa. 234, 26 L. R. A. (N. S.) 831.

CUSTODIA LEGIS

See Custody of the Law.

CUSTODY

See Care and Custody; Held in Custody; Possession, Custody, or Control.
See, also, Imprison—Imprisonment.

"Custody" means a keeping, guarding, care, watch, inspection, preservation, or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Turner v. Coffin, 74 Pac. 962, 968, 9 Idaho, 338.

To constitute a violation of Pen. Code, § 266d, making it a felony for any person to receive money or any valuable thing for placing in "custody" any female for the purpose of causing her to cohabit with a male to whom she is not married, the female in question must be under some sort of restraint, so that she is not free to come and go, or otherwise act as she pleases. People v. Drake, 121 Pac. 1006, 162 Cal. 248.

"Custody" means keeping, and implies responsibility for the protection and preservation of the thing in custody. Martin v. United States, 168 Fed. 198, 204, 93 C. C. A. 484.

Gen. St. 1902, § 363, prescribing who shall have the "custody and control" of a decedent's remains, does not limit such "custody and control" to the immediate possession of a dead body prior to interment. Hence a widow, having removed and reinterred her husband's body in her own burial lot, could not be compelled to remove the same to its original place of interment in the lot of the husband's mother. Swits v. Swits, 71 Atl. 782, 81 Conn. 598.

"There is a difference between the terms 'custody' and 'possession.' 'Possession' is the present right and power to control a thing. A person has the 'custody' of property, as distinguished from the 'possession,' where he merely has the care of it for one who retains the right to control it, and who therefore retains constructive possession. Where goods are delivered by the master to his servant or other agent, he parts with the custody only, and not the possession; he has constructive possession. A servant, therefore, or other agent, who has merely the care and custody of his master's goods, is guilty of larceny if he converts them to his own use without his master's consent." Shipp v. Patton, 93 S. W. 1033, 123 Ky. 65 (quoting and adopting 1 Robertson's Ky. Cr. Law, § 420).

A ship bound from Antwerp to San Francisco, with a cargo of cement, encountered such rough weather in attempting to round Cape Horn and was subjected to such strain that her deck seams opened and a part of the cargo was damaged by water. She finally abandoned the attempt and completed the voyage by way of the Cape of Good Hope and Australia. At the time of her change of course, she was 370 miles distant from Port Stanley, where she could have been repaired; but she did not put in for repairs, and before she reached Australia the cargo received further damage by reason of the open seams. The change of course, and also the determination of the master to proceed without putting in for repairs, were matters pertaining to the "navigation and management of the vessel," within Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445, and not to the "custody, care, or proper delivery" of the cargo, within the meaning of section 2, and that, assuming the vessel to have been in all respects seaworthy and properly manned, equipped, and supplied, at the beginning of the voyage, she was exempted by the act from liability for the damage caused or contributed to by the failure to repair. Corsar v. J. D. Spreckels & Bros. Co., 141 Fed. 260, 262, 72 C. C. A. 378.

As charge or control

A third person permitted by the officers of election to inspect a ballot, or who by force took a ballot within his control, is a "person having custody or control" of a ballot, within the meaning of Ky. St. § 1476, making it a felony for any person intrusted with the custody or control of a ballot to mutilate or place distinguishing marks thereon. Commonwealth v. Goulet, 125 S. W. 1083, 1085, 137 Ky. 464.

A city ordinance requiring the city treasurer to deposit moneys in his hands belonging to the city to such banks as might qualify as provided in the ordinance but not attempting to restrict the paying out by him under the law of such moneys by his own checks, would not operate to deprive him of the custody of such moneys within Comp. Laws 1897, § 2424, providing that a city treasurer may be required to keep all moneys in his hands be-

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longing to the corporation where designated by ordinance, but that no such ordinance shall take the custody of such money from the treasurer; "custody" in such connection meaning immediate charge and control, and not the final absolute control of ownership. Territory v. Matson, 113 Pac. 816, 818, 16 N. M. 135.

Guardianship

The words "custody and tuition," as applied to minors, "have more than ordinary signification, for they include not only the person but the care and management of the personal estate, and also the profits of the real estate of the minor; that is, the guardianship of the person includes the guardianship of the estate." In re Burdick's Estate, 95 N. Y. Supp. 206, 207, 47 Misc. Rep. 28.

In Laws 1893, p. 303, c. 175, giving a surviving parent authority by will or deed to dispose of the "custody and tuition" of their minor children, "custody and tuition" indicates the management of property. "Tuition" implies not alone the instruction of the minor, but the expenditure of money for that instruction, which is one of the important duties imposed upon guardians or one charged with the control of a minor. Matter of Kellogg, 96 N. Y. Supp. 965, 967, 110 App Div. 472.

Imprisonment

"'Custody,' in criminal law, is the same thing as detention, in civil law, and is synonymous with 'imprisonment.'" "'Imprisonment' is the detention of a person contrary to his will." While the provisions of the Code in bail trover proceedings contemplate imprisonment in jail, the defendant may petition for release from any detention against his will by a sheriff or his deputy by virtue of proper bail process. Everett, Ridley & Co. v. Holcomb, 58 S. E. 287, 289, 1 Ga. App. 794 (citing Rap. & L. Law Dict.).

A person in prison under a conviction by a state court on an indictment charging him with being accessory to a murder, and pending an appeal from such conviction, is not "in custody" in violation of the Constitution or of a law or treaty of the United States. Ex parte Powers, 129 Fed. 985, 986.

CUSTODY OF THE LAW

A thing is in custodia legis when it is shown that it has been and is subjected to the official custody of the judicial executive officer in pursuance of his execution of a legal writ, and where property attached is sold under order of the court and attachment is dissolved, the proceeds are in custodia legis. First Nat. Bank v. Livingood, 109 P. 987, 988, 83 Kan. 118 (quoting 2 Words and Phrases, p. 1801).

When property is lawfully taken by virtue of legal process, it is in the "custody of the law." Property once levied on remains in the custody of the law and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction. Personal property levied upon under a fieri facias is in the custody of the law so as to empower the court by attachment, punishment for contempt, and the writ of restitution to maintain jurisdiction against parties, its own officers, and all other persons. August v. Gilmer, 44 S. E. 143, 144, 53 W. Va. 65 (quoting and adopting Bouv. Law Dict. tit. "Custodia Legis," and Hagan v. Lucas, 10 Pet. 411 [35 U. S.] 9 L. Ed. 470).

The filing of a petition in bankruptcy and the adjudication thereon operates to place the property of the bankrupt in the "custody of the law." Moore Mfg. Co. v. Billings, 80 Pac. 422, 424, 46 Or. 401.

One charged with crime and at large on bail is constructively in the "custody of the law," for he is in custody of his bondsmen, who are his jailers, with the right to seize him and deliver him up to the court at any time, and with the right to imprison him until that can be done. A nonresident who is arrested on a criminal charge while temporarily in the state, and who is held for trial and who gives bail for his appearance for trial, and who subsequently comes into the state to attend his trial, is constructively in the custody of the law, and is within the jurisdiction by compulsion, and not voluntarily in aid of the administration of justice, and he is not exempt from service of process in a civil suit while remaining in the state after his acquittal for a proper purpose and not unreasonable in duration. Netograph Mfg. Co. v. Scrugham, 90 N. E. 962, 963, 197 N. Y. 377, 27 L. R. A. (N. S.) 333, 134 Am. St. Rep. 886.

CUSTOM

See Right of Way by Custom.

A method of doing a thing becomes a "custom" through its adoption by many prudent men, who, in selecting it as a rule of conduct, have necessarily found it to be a reasonably safe method. Their uniform conclusion, as exhibited by their actions, is not only persuasive evidence that their method is reasonably careful, but also that one not recognized by usage and less safe is not reasonably careful. Brunke v. Missouri & K. Telephone Co., 90 S. W. 753, 754, 115 Mo. App. 36.

A method of doing a thing becomes a "custom" through its adoption by many prudent men who, in selecting it as a rule of conduct, have necessarily found it to be a reasonably safe method, and such conclusion is not only persuasive evidence that the method adopted is reasonably careful, but also that one recognized by usage as less safe is

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not a reasonable one. Spencer v. Bruner, 103 S. W. 578, 580, 126 Mo. App. 94 (quoting and adopting the definition in Brunke v. Missouri & K. Tel. Co., 90 S. W. 754, 115 Mo. App. loc. cit. 39).

Popularly the word "custom" may be used as a synonym for "mode" or "practice," but in law it means something else. Collins v. Chicago & N. W. R. Co., 136 N. W. 628, 630, 150 Wis. 305.

"'Custom' is second law," "'Custom' is the best expounder of the law." "Things which are done contrary to the custom and usage of our ancestors neither please nor appear right." "The usage of a court becomes somewhat the law of the court, and the fact that the profession for nearly a century have proceeded on the theory that a circuit court loses jurisdiction by an appeal, and that jurisdiction is not handed back to that court except by some appropriate entry remanding the cause for further proceedings, is very good evidence of what the law is." Donnell v. Wright, 97 S. W. 928, 931, 199 Mo. 304 (quoting in order Brown's Case, 4 Coke, 21; 2 Inst. 18; The Case of Corporations, 4 Coke, 78).

The use of the words "usage," "usual," "custom," and "ordinary," in certain questions asked in a negligence case, did not convert them into inquiries relative to the existence of any "custom," where it was apparent that the only object of the inquiry was to inform the jury as to the ordinary manner in which the work inquired about was performed, and from the result of such inquiry determine whether or not defendants were or were not guilty of negligence. Fritz v. Western Union Tel. Co., 71 Pac. 209, 213, 25 Utah, 263.

Evidence that a certain course is "generally" and "usually" pursued in a particular manner is sufficient to establish a custom, and it is not necessary to show that the particular manner is never deviated from. Glantz v. Chicago, B. & Q. R. Co., 134 N. W. 242, 243, 90 Neb. 606.

A binding "custom" must be certain, definite, uniform, and known or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject by the exercise of ordinary care. Where plaintiff's witnesses testified that there was a custom of doing certain railroad work in a certain way, and defendant's witnesses testified they did the same work at the same time in a different way, a finding of a uniform custom was not authorized. Chicago, M. & St. P. R. Co. v. Lindeman, 143 Fed. 946, 949, 75 C. C. A. 18.

A "custom" which will enter into and affect the rights and liabilities of persons in their dealings with each other must be certain, uniform, and either known to the public sought to be charged thereby or so general and notorious that knowledge and adoption thereof must be presumed. Russell's Ex'x v. Ferguson, 60 Atl. 802, 77 Vt. 433 (citing Baltimore Base Ball Club & Exhibition Co. v. Pickett, 28 Atl. 279, 78 Md. 375, 22 L. R. A. 690, 44 Am. St. Rep. 304; Citizens' Bank of Baltimore v. Graffiin, 31 Md. 507, 1 Am. Rep. 66; Harper v. Pound, 10 Ind. 32; Smith v. Gibbs, 44 N. H. 335; Linsley v. Lovely. 26 Vt. 123).

"'Customs' have sprung from the necessities and the convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions." Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. (77 U. S.) 604, 651, 19 L. Ed. 1008.

Immemorial, universal usage

The term "custom" refers to those usages which have existed and been universally recognized for so long a period as to acquire the force of law and be binding without the assent of the individual, while "usage" refers to an established method of dealing adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force because people make contracts in reference thereto. Byrd v. Beall, 43 South. 749, 751, 150 Ala. 122 (citing 12 Cyc. p. 1033).

As part of contract

A custom, to constitute a fixed element of a contract, must be certain, settled, and uniform, and known to the parties. Manzke v. Goldenberg, 129 S. W. 32, 35, 149 Mo. App. 12.

Usage distinguished

See Usage.

CUSTOM OF MERCHANTS

"Some of the states have adopted the law merchant, others have not." Nathan v. Louisiana, 8 How. (49 U. S.) 73, 82, 12 L. Ed. 992.

"In Mississippi the custom of merchants has been adopted as part of the common law." Musson v. Lake, 4 How. (45 U. S.) 262, 279, 11 L. Ed. 967.

CUSTOM OF THE PORT

"Custom of the port" means the practice or usage based on the facilities for unloading vessels, known to those engaged in the business of unloading. Cargo of The Joseph W. Brooks, 122 Fed. 881, 884.

CUSTOMARY

See As Customary.

An instruction, in an action for the death of an automobilist struck by a car, that the street railway company must use reasonable care to operate its cars on public streets with regard to "the lawful and customary use" of the streets by others, and that

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if, at the time decedent was killed, the company was not operating the car with regard to "the lawful and customary use" of the streets, but negligently operated the car, it was liable, is not erroneous as referring to the extent of travel, of which there was no evidence, but refers to the use of the street by the public; the word "lawful" meaning according to law as distinguished from an unlawful use, and the word "customary" meaning according to usage and referring to the mode of using the streets. Smiley v. East St. Louis & S. Ry. Co., 100 N. E. 157, 158, 256 Ill. 482.

CUSTOMARY DISPATCH

A provision in a charter party for "customary dispatch" in discharging has reference to the local custom at the port of discharge. Gilbert Transp. Co. v. Borden, 170 Fed. 706, 707, 96 C. C. A. 26.

CUSTOMARY USE OF STREET

The customary or usual and ordinary use of a street is for travel from one point to another by the usual and lawful modes of travel, and the use of a street by an automobile operated with due care according to the police regulations of the state is both a "customary and a lawful use of the street." Smiley v. East St. Louis & S. Ry. Co., 100 N. E. 157, 158, 256 Ill. 482.

CUSTOMER

A petition, in an action for unlawful interference with trade, which shows that plaintiff had regularly established routes for retailing oil from tank wagons, that it had supplied its customers with cards, which were displayed when oil was wanted, that defendant hired persons and furnished them with oil wagons to go about the streets soliciting the patronage of plaintiff's customers, and vexing his customers and falsely depreciating its wares, and that defendant caused its drivers to conceal the fact that the wagons and teams and oil were the property of defendant, is broad enough to justify a recovery for an interference with existing contracts between plaintiff and its customers; a "customer" being one with whom business men have repeated or regular dealings, and a customer of a retailer in oils being one to whom the retailer makes sales under contract or without contract. Dunshee v. Standard Oil Co. (Iowa) 126 N. W. 342, 344.

CUSTOMS

"Customs" are duties charged upon commodities on their being imported into or being exported from a country. As to imports, they can cover nothing which is not actually brought into the country. American Sugar Refining Co. v. Bidwell, 124 Fed. 683, 685 (quoting and adopting definitions in Lawder v. Stone, 23 Sup. Ct. 79, 187 U. S. 281, 47 L. Ed. 178; Marriott v. Brune, 9 How. [50 U. S.] 619, 13 L. Ed. 282; McCul. Dict.); Franklin Sugar Refining Co. v. United States, 142 Fed. 376, 378, 73 C. C. A. 476 (citing Marriott v. Brune, 9 How. [50 U. S.] 619, 13 L. Ed. 282).

CUSTOMS GALLON

The "customs gallon" of the United States is the wine gallon of 231 cubic inches, which is uniformly referred to by the authorities as standard gallon of this country. J. M. Ceballos & Co. v. United States, 139 Fed. 705 (citing Nichols v. Beard, 15 Fed. 435, and Standard and Century Dictionaries).

CUSTOMS OFFICER

As person, see Person.

CUT—CUTTING

See Deep Cutting; Double Cut.

As part of railroad structure, see Railroad—Railway.

The word "cut" most usually signifies to make an incision with a sharp instrument; to cut or sever by the application of a sharp knife or edged instrument of some kind. American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co., 176 Fed. 564, 571.

Where the seller covenanted to permit the purchaser to cut "all hemlock, spruce," etc., located on a certain lot, the words "to cut" import the same right as "to cut as his own," or as "to have." Brown v. Bishop, 74 Atl. 724, 727, 105 Me. 272.

As used in the descriptive portion of a chattel mortgage, the phrase "and all cordwood and piling 'cut' by or for me" has but one meaning; that is, that the property intended to be effected had been cut and was in esse in that form at the time. Galveston, etc., R. Co. v. Hill Mercantile Co., 71 S. W. 797, 798, 31 Tex. Civ. App. 196.

A "cut" in a highway is the opposite of an embankment. Where plaintiff was injured by the overturning of her sleigh while passing through a cut in a highway, caused by alleged defective banks sloping to the wrought surface of the highway, such cut was not a "dangerous embankment and defective railing," within Laws 1893, p. 47, § 1, providing that towns shall be liable for damages happening to a person traveling upon a dangerous embankment and defective railing on any highway by reason of any defect rendering it unsuitable for travel. Miner v. Town of Hopkinton, 60 Atl. 433, 434, 73 N. H. 232.

Pol. Code, § 3611, provides that a "cut" or "crosscut" or a tunnel which cuts a lode at a depth of 10 feet below the surface, or an open cut at least 10 feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft within section 3612,

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requiring declaratory statements to set forth the dimensions and location of the discovery shaft or its equivalent sunk upon lode or placer claims. Wilson v. Freeman, 75 Pac. 84, 85, 29 Mont. 470, 68 L. R. A. 833.

An instruction, defining "cutting and wounding" with a knife as meaning the intentional infliction of a wound by one person on another by cutting the person of such other with a knife, should have followed the language of Ky. St. § 1166, defining the offense, and was especially wrong in omitting the qualification "with intent to kill." Bailey v. Commonwealth (Ky.) 70 S. W. 838, 839.

Sawing off the end of a railroad tie containing the owner's brand is within St. 1909, § 1409, subsec. 11 (Russell's St. § 5867), making it a crime to "cut out, cancel, obliterate, or deface" the brand. Bennett v. Commonwealth, 118 S. W. 332, 334, 133 Ky. 452.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170, relating (1) to "rose plants" and (2) to "cuttings" of "shrubs" and of "plants," rooted rose cuttings that have been placed in sand to facilitate handling, but have never been in soil, fall within the latter provision as cuttings of shrubs or plants. United States v. American Exp. Co., 158 Fed. 808, 86 C. C. A. 68.

CUT AND REMOVE

Under the terms of a contract whereby defendant was to have until a certain time to "cut and remove" certain logs from plaintiff's land, the term "cut and remove" imposes on defendant the duty not only to cut the logs but to remove the same before the limitation expires, and on his failure to do so the title to all the logs severed from the soil reverted to the owners of the land, and the latter could recover the same. Alexander v. Bauer, 102 N. W. 387, 94 Minn. 174.

On a permit to "cut and remove" timber from state lands prior to June 1, 1900, the person to whom it was issued had only the right to "cut and remove" during the life of the permit, and was liable in trespass for removal of timber cut during that time but not removed until afterwards. State v. Rat Portage Lumber Co., 115 N. W. 162, 164, 106 Minn. 1.

CUT GLASS

Tariff legislation having distinguished between glass and form of it known as paste, articles in chief value of paste, cut, are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157, for goods in chief value of cut "glass," but are dutiable as manufacturers of "paste," under paragraph 112, 30 Stat. 158. United States v. New York Merchandise Co., 167 Fed. 684.

CUT-OFF

Of railroad

A railroad track leading from one main track to another by means of which cars may be switched from one to another is called a "cut-off." Houston & T. C. R. Co. v. Finn (Tex.) 107 S. W. 94, 95.

CUT-OFF LEVER

The lever on a machine used in making sewer pipe which operates the knife used to cut the pipe to the required length, is called the "cut-off lever." Dickey v. Dickey, 86 S. W. 909, 910, 111 Mo. App. 304.

CUT-THROAT MORTGAGE

See Kansas Cut-Throat Mortgage.

CUTTING SIZE

The "cutting size" of post cards, imported in a folded, undetached condition, should be ascertained, under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188, by measuring each card by itself, rather than taking the whole series as the unit of measurement. Downing & Co. v. United States, 172 Fed. 447, 448.

CUTCH

The importation in question, being an extract of the bark of the mangrove, used for tanning, is classifiable as "cutch," under paragraph 542 of the Tariff Act of July 24, 1897, 30 Stat. 197. United States v. Marden, 175 Fed. 153.

CYCLONE

Dictionary definitions are not always reliable signboards for legal construction of contracts. It is a conceded fact among etymologists, as well as a matter of common learning, that words have their development and enlargement, so that in time they are used and understood among people so as to express and comprehend a broader application than was implied in their origin, if not in an entirely different sense. Words undergo in lexicography the changes attached to them in common parlance. The law, in its flexibility, constantly adjusting and adapting itself to new conditions as they arise, declares that words and phrases employed in business transactions and in ordinary dealings among men shall be deemed to have been employed in their popular sense and acceptation, unless it clearly appears that they were intended to be used in their technical or more restricted sense. Thus, where a policy, insuring against loss from the accidental discharge or leakage from an automatic sprinkler system, exempted insurer from liability for loss caused by earthquakes or cyclones, or by blasting or by explosions of any kind, or by the fall or collapse of any building or buildings or part thereof, the term "cyclone" should be construed in its popular sense as referring to any character of a windstorm, distinguished by its concentrated force and violence, so resistless as to make it especially destructive to buildings in its narrow pathway, and was

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not limited to a storm proved to have been characterized by high winds rotating about a center of low atmospheric pressure, which center moved with greater or less velocity. Accordingly, in construing the word "cyclone" in said policy in order to ascertain the sense in which it was employed, the rule of "noscitur a sociis" may be applied. So, where the policy excepts from liability injury resulting from or caused by earthquakes, or cyclones, or blasting, or explosives of any kind, etc., held that, from its associates, the conclusion is warranted that it was not the purpose to apply the insurance policy to a violent windstorm, which, like an earthquake, blasting, or explosive, from without, was calculated to so jar or topple the building as to dislodge the automatic sprinkler, whereby the house was flooded and the injury done. Maryland Casualty Co. v. Finch, 147 Fed. 388, 396, 77 C. C. A. 566, 8 L. R. A. (N. S.) 308.

CYLINDER

The Standard Dictionary defines one use of the word "cylinder" as meaning any cylindrical portion of a machine, especially if hollow, proportioned so as that the length of it exceeds the diameter. In mathematics the word "cylinder" is often used so loosely that in order to point out a right cylinder, which is a solid, it is sometimes advisable to connect with it the word "circular," styling it a "circular cylinder." Anything which approximates a right cylinder and which permits the friction necessary in generating electricity would be called in the science of electricity a cylinder. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 Fed. 479, 498.

CYLINDER GLASS

The term "cylinder glass," as used in the Tariff Act of 1897 (30 Stat. 151), is descriptive of glass manufactured by first blowing the glass into large cylinders, flattening it on hot iron plates, then cutting it into squares and sizes named in the statute, and finishing it by polishing or beveling. The provision in the Tariff Act, c. 11, § 1, Schedule B, par. 107, for an additional duty of 5 per cent. ad valorem on "cylinder * * * glass * * * when beveled * * * or otherwise ornamented or decorated" is applicable to the "cylinder glass * * * polished," which is enumerated in paragraph 102 of said act. Riegelman v. United States, 127 Fed. 493.

CY PRES

When the donor's scheme for administering a trust breaks down, it is the duty of the court by the doctrine of cy pres to devise one for that purpose "as nearly" like the donor's as possible. Adams v. Page, 79 Atl. 837, 838, 76 N. H. 96.

"Cy pres," relating to the administration of charitable trusts, means the doctrine by which courts of chancery administered charitable trusts under the kingly prerogative. In re Nilson's Estate, 116 N. W. 971, 972, 81 Neb. 809.

"Cy pres" is a judicial rule of construction applied to a will by which, when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. It is applied only to valid charitable gifts. Lynch v. South Congregational Parish of Augusta, 82 Atl. 432, 435, 109 Me. 32.

The doctrine of "cy pres," recognized and administered by the English Court of Chancery with reference to trusts, being based on the prerogative power of the King, is not recognized in Alabama. Universalist Convention of Alabama v. May, 41 South. 515, 147 Ala. 455.

"Where an apparent charitable intention has failed, whether by incomplete disposition at the outset or by subsequent inadequacy of the original object, effect will be given to it by a 'cy pres' or approximation of application, notwithstanding that in ordinary cases the trust would be void for uncertainty, or would result to the donor or his representatives." Crow v. Clay County, 95 S. W. 369, 375, 196 Mo. 234 (citing and adopting definition in Adams, Equity, 69).

The rule "cy pres" is applied in the English Chancery Court to sustain bequests, where charity is the general substantial intention, and no object is mentioned, or if mentioned, fails for any reason, or where the mode provided for the execution of the charity is uncertain and impracticable. Grant v. Saunders, 95 N. W. 411, 412, 121 Iowa, 80, 100 Am. St. Rep. 310 (citing 2 Pom. Eq. Jur. 595; Boyle, Char. 147, 155).

The doctrine of cy pres obtains in New Jersey but cannot be applied where donor himself has directed what disposition shall be made of the trust property in the event of a failure of the charitable use to which he has directed it to be devoted. Larkin v. Wikoff, 72 Atl. 98, 104, 75 N. J. Eq. 462.

The "cy pres" doctrine does not involve a deviation from the founder's intention as to the objects of the charity but only from his directions as to the management, varying only administrative duties originally meant to be governed by circumstances. The doctrine in its last analysis is found to be a simple rule of judicial construction designed to aid the court to ascertain and carry out as nearly as may be the intention of the donor. There are two features in this doctrine: (1) The right to exercise prerogative authority enabling a court to deal with a bequest to a charitable use having no designated particular purpose as a bequest to charity

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generally, treating the purpose as the legatee, or a bequest for an illegal purpose or some purpose impossible of execution for some reason; and (2) the right, by liberal rules of construction, to deal with a trust having a designated particular purpose, though in general terms, and enforce it within the limits of such purpose, supplying the trustee, if necessary. The first-named feature of the doctrine is not exercised in this country, but the latter element is. Tincher v. Arnold, 147 Fed. 665, 676, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917 (citing Lackland v. Walker, 52 S. W. 414, 151 Mo. 210; McDonogh v. Murdoch, 15 How. [56 U. S.] 367, 14 L. Ed. 732; In re Daly's Estate, 57 Atl. 180, 208 Pa. 58; Amory v. Attorney General, 60 N. E. 391, 179 Mass. 89; Stuart v. City of Easton, 74 Fed. 854, 21 C. C. A. 146; In re Mercer Home for Disabled Clergymen of the Presbyterian Faith, 29 Atl. 731, 162 Pa. 232; John v. Smith, 102 Fed. 218, 42 C. C. A. 275; City of Philadelphia v. Girard's Heirs, 45 Pa. 9, 28, 84 Am. Dec. 470; Doyle v. Whalen, 32 Atl. 1022, 1026, 87 Me. 414, 31 L. R. A. 118; Taylor v. Keep, 2 Ill. App. 368, 383; Kronshage v. Varrell, 97 N. W. 928, 120 Wis. 161).

The doctrine of "cy pres" is the doctrine of nearness or approximation; and it appears in English jurisprudence in three separate departments. Firstly, in the law of testaments, where a personal legacy has been given upon a condition precedent, and the literal performance of this condition has become impossible from unavoidable circumstances and without fault of the person to be benefited. Here it is sufficient if the condition be performed as nearly as it can be. Secondly, in the law of private trusts, where lands are limited to an unborn person for life, with remainder to his first and other sons, successively, in tail. Here, in order to secure the flowing of the testator's bounty to the issue, the limitations may be held to create an estate in tail in the first taker. Thirdly, in the law of charitable trusts, where gifts have been made for charitable purposes, which, either originally or in the course of time, cannot be literally executed. Here the gift will be administered as nearly as may be according to the donor's purpose under general rules of law. A trust, which is declared for public worship and instruction for the benefit of an indefinite number of persons according to the Presbyterian faith and polity is enforceable, either exactly or, under the doctrine of cy pres, approximately. MacKenzie v. Trustees of Presbytery of Jersey City, 61 Atl. 1027, 1035, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

"Cy pres" is a doctrine of the early common law, by which, if gifts were made for charitable uses that were illegal or contrary to public policy, or that were impossible to be carried into effect, the King, as general supervisor of charities, or the chancellor acting for him, could devote them to such other charitable purposes, cy pres the original gift, as he pleased. This power does not exist in America, and the English cases in which gifts to illegal charities were devoted to other charitable purposes, either expressly under the prerogative power of the King, or by confusing that power with the judicial powers of the chancellor, are not authority here. The power of equity being limited to supplying the mode of carrying out a charitable bequest to an identified or ascertainable object, a bequest "to the poor" generally could not be aided cy pres. Thompson's Ex'r v. Brown (Ky.) 70 S. W. 674, 677, 62 L. R. A. 398 (citing Perry, Trusts, § 718).

Where there is an intention exhibited to devote the gift to charity, and no object is mentioned, or the particular object fails, the court will execute the trust "cy pres" and will apply the fund to some charitable purposes similar to those (if any) mentioned by the donor. If the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor of defined objects which happen to fail from whatever cause, even though in such cases the particular mode of operation contemplated by the donor is uncertain or impracticable, yet, the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect. Loch v. Mayer, 100 N. Y. Supp. 837, 839, 50 Misc. Rep. 442 (quoting Pom. Eq. Jur. [3d Ed.] § 1027).

Testatrix, having no knowledge of the work conducted for the benefit of sick seamen in the Brooklyn Navy Yard, but having previously given small sums to W., a missionary working there, bequeathed the surplus of her estate, if any, to the hospital fund for sick seamen at Navy Yard, Brooklyn, care of W., chaplain. Held, that the Court of Chancery could not, under the "cy pres" doctrine, decree the bequest to another institution, conducting religious and charitable work among the sailors of larger scope than that conducted by W., but the bequest lapsed; where the conditions existing at the time of testator's death make the actual charitable purpose impracticable of accomplishment, the gift lapses (citing Teele v. Bishop of Derry, 47 N. E. 422, 168 Mass. 341, 38 L. R. A. 629, 60 Am. St. Rep. 401; and 2 Perry on Trusts, § 726). A court of equity will carry out the expressed general charitable purpose of the donor by the use of means other than those specified, when such means have become impracticable or impossible of use. But in such cases there is a general or comprehensive charitable purpose set forth in the will or inferable from its provisions, beyond which the court will not go in its substitution. Brown v. Condit, 61 Atl. 1055, 1057, 70 N. J. Eq. 440.

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DAILY

DAILY NEWSPAPER

The court will not presume that a paper was published "daily" from the mere fact that the word "daily" is a part of the name of the paper. Fox v. Wright, 91 Pac. 1005, 1006, 152 Cal. 59.

Under the general rule that, in the absence of direction to the contrary, a notice required by law to be published must be given in the English language and in a newspaper printed in that language, and under Baltimore Charter, § 14 (Laws 1898, p. 274, c. 123), providing that in contracting for public work, unless otherwise provided for in that article of the charter, proposals for bids shall be advertised in two or more daily newspapers published in the city, a publication in one German and one English newspaper is invalid; that sections 43 and 49 (pages 294, 297) expressly authorize the publication in German newspapers of notices of the sale of property for taxes, indicating a legislative intent to require publication of notices under section 14 in English newspapers, rather than an intent to embrace a German newspaper within the term "daily newspaper." Bennett v. City of Baltimore, 68 Atl. 14, 15, 106 Md. 484, 14 Ann. Cas. 419.

A newspaper published every day in the week, except Sundays and Mondays, was a "daily paper," within a city charter provision requiring publication of legal advertising of the city in a daily paper printed and published in the city. Fairhaven Pub. Co. v. City of Bellingham, 98 Pac. 97, 51 Wash. 108, 16 Ann. Cas. 420.

A newspaper issued every day of the week, except Sunday, is a "daily newspaper," within a statute requiring notice of foreclosure sales to be published in daily newspapers; the term "daily newspaper" being employed in such statute in contradistinction to the term "weekly," "semiweekly," or "triweekly" newspaper. Wilson v. Petzold, 76 S. W. 1093, 116 Ky. 873.

DAM

See Milldam; Power Dam.

A "dam" is as much an artificial mechanism as a pump, when applied to diversion of water from a stream or a disturbance of the natural order of things. Garvey Water Co. v. Huntington Land & Imp. Co., 97 Pac. 428, 432, 154 Cal. 232.

A "dam" is a structure composed of wood, earth, or other material, erected in and usually extending across the entire channel at right angles to the thread of the stream, and intended to retard the flow of water by the barrier, or to retain it within the obstruction. Morton v. Oregon Short Line Ry. Co., 87 Pac. 151, 153, 48 Or. 444, 7 L. R. A. (N. S.) 344, 120 Am. St. Rep. 827.

"A 'dam' is the work or structure raised to obstruct the flow of the water in a river," or "a barrier to prevent the flow of liquid, especially a bank of earth, or wall of any kind, as of masonry or wood, built across a water course, to confine and keep back flowing water." Penobscot Log Driving Co. v. West Branch Driving & Reservoir Dam Co., 66 Atl. 542, 545, 102 Me. 263 (quoting and adopting Webster's Dict; 12 Cyc. p. 1193).

Mills' Ann. St. § 2272, makes the owners of reservoirs liable for all damages from leakage or overflow of the waters or by floods caused by breaking of the embankments. Laws 1899, c. 126, § 9, provides that none of its provisions shall relieve the owner of any such reservoir from the payment of damages caused by the breaking of the embankments thereof, but in the event of any such reservoirs overflowing or the embankments, dams, or outlets breaking or washing out, the owners thereof shall be liable for all damages occasioned thereby. Held, that the owners of reservoirs are liable absolutely for all damages from leakage or overflow of the water, or by floods caused by the breaking of an embankment, and they are not relieved from such liability by the fact that they have omitted nothing that human skill and foresight could suggest in the construction and maintenance of the reservoir to render it absolutely safe, and their liability is the same, even if they have used a natural hillside as a part of the restraining wall and it washes out, as the words "embankment" and "dam" must be construed as including barriers. Garnet Ditch & Reservoir Co. v. Sampson, 110 Pac. 79, 48 Colo. 285.

DAMAGE—DAMAGES

See Actual Damages; Compensatory Damages; Consequential Damages; Direct Damages; Double Damages; Enhanced Damages; Exemplary Damages; General Damages; Gross Damages; Incidental Damages; Individual Damage; Irreparable Damages; Land Damages; Liquidated Damages; Nominal Damages; Nonpecuniary Damages; Pecuniary Damages; Permanent Damage; Proximate Damage; Punitive Damages; Remote Damages; Sounding in Damages; Special Damages; Speculative Damages; Stipulated Damages; Temporary Damages; To the Damage; Uncertain Damages; Unliquidated Damages; Vindictive Damages; Wet and Country Damage.

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All damages, see All.
Mitigation of damages, see Mitigate—Mitigation.
Other damages, see Other.
Temperate damages, see Temperate.

Damages in general legal acceptation means compensation for the loss incurred or the injury sustained in the given case. Myhra v. Chicago, M. & P. S. Ry. Co., 112 Pac. 939, 942, 62 Wash. 1; North Coast R. Co. v. A. A. Kraft Co., 115 Pac. 97, 102, 65 Wash. 250.

"Damages" is "the value in money of what is lost or withheld; the estimated money equivalent for detriment or injury sustained; that which is given or adjudged to repair a loss." Cincinnati, N. O. & T. P. Ry. Co. v. Falconer (Ky.) 97 S. W. 727, 728 (quoting Cent. Dict.).

"Damage" is but the measure in money for a detriment which has occurred in the past, and which may with certainty be said will occur in the future (Civ. Code, § 3283). Heilbron v. Superior Court of Sacramento County, 90 Pac. 706, 707, 151 Cal. 271.

"Damages" means compensation for the loss suffered or the injury sustained, and are not to be awarded unless based on something more substantial than guess, assumption, or speculation. Jones v. Nelson, 112 Pac. 88, 89, 61 Wash. 167.

"Damages" are either general or special. Hoskins v. Scott, 96 Pac. 1112, 1114, 52 Ore. 271.

"Damages" are allowed as compensation which the law affords to persons whose rights have been invaded. Actual damages are for actual losses, and the amount of such losses may sometimes be anticipated, and the extent of a possible future loss, to be paid in the event of a breach of contract, may be agreed on in advance, where there is difficulty in determining the extent of the loss. St. Louis & S. F. R. Co. v. Gaba, 97 Pac. 435, 437, 78 Kan. 432.

In an action of negligence for injuries received from an explosion, "damages" are of two kinds: "Compensatory," such as make the wrong to be whole as of the time of the injury, or "punitive," where the tortious act is aggravated by evil motive, malice, violence, oppression, or fraud. The probable loss of profits to plaintiff which might have been earned except for the injury depends on so many contingencies that such damages are termed "speculative" and are not recoverable. James McNeil & Bro. Co. v. Crucible Steel Co. of America (Pa.) 56 Atl. 1067, 1070, 1071.

The primary object of damages is compensation to the injured party, which should be for the natural and proximate result of the wrong done; and the general rule aims to give compensation for the loss sustained and to put the party in as nearly the same condition as he would have been had the contract been performed. Prestwood v. Carlton, 50 South. 254, 262, 162 Ala. 327.

"Damages," briefly defined, means compensation for the legal injury. Jemo v. Tourist Hotel Co., 104 Pac. 820, 823, 55 Wash. 595, 30 L. R. A. (N. S.) 926, 19 Ann. Cas. 1199.

Attorney's fees

As used in Rev. St. 1892, § 1724, par. 1, providing that the plaintiff in replevin may have judgment for his damages caused by the taking and detention, the word "damages" is not sufficiently comprehensive to embrace the attorney's fees, incurred by the plaintiff in prosecuting his action. Gregory v. Woodberry, 43 South. 504, 505, 53 Fla. 566.

A bond given by a contestant in a will contest on an appeal from an adverse judgment of the county court, conditioned on his performing whatever judgment may be rendered against him and on his paying all "damages" which the executor has sustained by reason of the appeal, does not authorize a recovery of attorney's fees paid by the executor in successfully resisting the appeal. Williams v. Fidelity & Deposit Co. of Maryland, 93 Pac. 1119, 1120, 42 Colo. 118, 15 Ann. Cas. 722.

Debt

An indebtedness incurred—a liability to pay—is a "damage." Although the court had no jurisdiction to enjoin a prosecuting attorney from prosecuting for a crime, attorney's fees incurred in procuring the dissolution of the injunction and in defeating the action were "damages" within the terms of the undertaking given on the granting of the injunction. Littleton v. Burgess, 91 Pac. 832, 835, 16 Wyo. 58, 16 L. R. A. (N. S.) 49 (citing Noble v. Arnold, 23 Ohio St. 265).

Exemplary damages

The term "damages" is defined in Bouvier's Law Dictionary as: "The indemnity recoverable by a person who has sustained an injury. The sum claimed as such indemnity by plaintiff in his declaration; and the term includes not only compensatory, but also exemplary or punitive or vindictive and double or treble, damages." Under the constitutional provision that justices' courts shall not have jurisdiction when the demand exceeds $300, a judgment for $396, treble damages for withholding possession of premises, and for $100 rent due, is beyond the jurisdiction of the court. Fitchett v. Henley, 104 Pac. 1060, 1065, 31 Nev. 326.

Injury distinguished

There is a wide distinction between "damage" and "injury." They bear the same relation to each other as cause and effect. An injury in its legal sense is misconduct, and damage is the legal term ap-

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plied to the loss resulting from misconduct. Carroll v. Rye Tp., 101 N. W. 894, 897, 13 N. D. 458.

While the verbs "to injure" and "to damage" are nearly synonymous, "injure" and "damage" are not always legally synonymous, as there may be damnum absque injuria. Seaboard Air Line R. Co. v. Smith, 60 S. E. 353, 354, 3 Ga. App. 644.

Injury synonymous

The word "damaged," in section 23, Customs Administrative Act June 10, 1890, forbidding allowance for damages to imported goods in the estimation of and liquidation of duties thereon, is used in the sense of impairment or injury. Lawder v. Stone, 23 Sup. Ct. 79, 83, 187 U. S. 281, 47 L. Ed. 178.

In discussions of the character of damages for which a party guilty of negligence resulting in an injury is liable, the term "injury" must be understood as synonymous with "damages." Johnson v. Atlantic Coast Line R. Co., 53 S. E. 362, 365, 140 N. C. 574.

The words, "or damage," in a statute requiring claims against a municipality for damages arising from a defective street or sidewalk to be presented within 90 days after the happening of such injury or damage, relate to the damages that arise immediately after the injury to the party or to his property, and not to such as may be sustained by a third person as a secondary result, both caused by the original injury. We are firmly of the opinion that it was not the intention of the Legislature to include within the statute secondary claims or damages arising out of death which are suffered by third persons by reason of such death. Brown v. Salt Lake City, 93 Pac. 570, 573, 33 Utah, 222, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004 (citing and adopting McKeigue v. Janesville, 31 N. W. 298, 68 Wis. 50; Pye v. Mankato, 38 N. W. 621, 38 Minn. 536; Moran v. City of St. Paul, 56 N. W. 80, 54 Minn. 279; Dawes v. City of Great Falls, 77 Pac. 309, 31 Mont. 9; Maylone v. City of St. Paul, 42 N. W. 88, 40 Minn. 406).

In discussions of the property owner's right to compensation for property damaged, text-writers and adjudicated cases use the words "damaged," "injured," and "injuriously affected" as meaning substantially the same thing. The term as used in constitutional provisions requiring compensation to be made for property "taken or damaged" should be liberally construed in favor of the individual whose property is affected. As used in Const. 1902, art. 4, § 58, providing for the awarding of damages, if any, to adjacent property not taken, they were intended to enlarge the rights to compensation. They embrace and give a remedy for impairment of property by noise, smoke, dust, and cinders arising from the lawful operation of a railroad and were not intended to cover merely such damages as would have previously formed the basis of an action. Tidewater Ry. Co. v. Shartzer, 59 S. E. 407, 409, 107 Va. 562, 17 L. R. A. (N. S.) 1053.

Loss synonymous

"Damage" means loss. Compensation would be inadequate that did not cover the loss sustained. For delay of a carrier in delivering freight, there may be recovered not only such damages as normally result therefrom, but such as result from special circumstances known to the carrier at the time of the contract. Louisville & N. R. Co. v. Mink, 103 S. W. 294, 295, 126 Ky. 337.

It is not error for the court in its instructions to use the words "loss" and "damage" interchangeably. Turner v. Woodward, 51 S. E. 762, 123 Ga. 866.

Penalty distinguished

There is a marked technical distinction in the law between "damages" and penalty. Bouvier, in his Law Dictionary, says "damages" are based on the idea of a loss to be consummated; a damage to be made good. A sum in which a wrongdoer is mulcted simply as punishment for his wrong, and irrespective of any loss caused thereby, is a fine or penalty rather than "damages." The word as used in Rev. St. 1909, § 8523, providing that operators of automobiles who failed to use the highest degree of care shall be liable in damages, means "damages" and not penalty. Nicholas v. Kelley, 139 S. W. 248, 250, 159 Mo. App. 20.

Rents and profits

"While in some cases the profits to be accounted for are spoken of as damages, yet in no case that has been presented is it held that damages, as distinct from or additional to profits, can be decreed in equity in a copyright case, as in patent cases. While the word 'damages' is used in decrees, it is used synonymously with 'profits.' Confusion can be avoided by omitting the word 'damages,' since the word 'profits' is more accurate, and sufficient." Social Register Ass'n v. Murphy, 129 Fed. 148.

The word "damages," in Civ. Code, § 2452, declaring that the sale of a thing not the property of the seller may give rise to "damages," has the same meaning as in other sections of the Code, and therefore includes loss of profits not speculative or uncertain in their nature. Jefferson Sawmill Co. v. Iowa & Louisiana Land Co., 48 South. 428, 431, 122 La. 983.

Where, in a suit for unlawful detainer, the court's conclusions of law were that $400 rents should be awarded plaintiff, there was no impropriety in designating the amount as "damages" in the judgment; as Civ. Code, § 3281, declares that every person who suffers detriment from the unlawful act of an-

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other may recover compensation therefor in money, which is called "damages." Keyes v. Moy Jin Mun, 68 Pac. 476, 477, 136 Cal. 129.

Total loss included

Laws 1899, p. 261, c. 131, authorizing the condemnation of land for private irrigation ditches, declares (section 6, p. 262) that in case the owner of the land fails to appear, the court shall impanel a jury to determine the value of the land occupied and the damages; and section 7, p. 263, provides the same procedure where the defendants appear. Held, that the word "damages," as so used, includes damages to the whole tract, in addition to the value of the land actually taken. Weed v. Goodwin, 78 Pac. 36, 37, 36 Wash. 31.

For breach of contract

The damages which are described in Rev. Codes 1899, § 4978, declaring that for the breach of an obligation arising from contract the measure of damages, except when otherwise expressly provided by the Code, is the amount which will compensate the party aggrieved for all the detriment approximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, are the damages which are the natural consequences of a breach of contract, and the statute authorizes compensation for all detriment which follows as a natural and proximate consequence of the breach, and prohibits a recovery for damages which are not natural and proximate consequences. In an action for damages for the breach of a contract to thresh grain, the loss of grain by exposure to storms is a remote, and not a proximate, consequence of the breach, and will not sustain a recovery, in the absence of any special or exceptional circumstances. Hayes v. Cooley, 100 N. W. 250, 251, 13 N. D. 204.

"Damages" is the sum awarded by way of compensation to make whole the person who suffers, and in breach of contract they are such as arise in the natural course of things or such as may reasonably be supposed to have been contemplated by the parties when making the contract, as the probable result of its breach. Kimball Bros. Co. v. Citizens' Gas & Electric Co., 118 N. W. 891, 895, 141 Iowa, 632.

For infringement of patent

In patent nomenclature, what the infringer makes is "profits," and what the owner of the patent loses is "damages." Diamond Stone-Saving Mach. Co. of New York v. Brown, 166 Fed. 306, 92 C. C. A. 224.

"Damages," as used in a decree finding an infringement of a copyright and "assessing damages," is synonymous with "profits," as no recovery beyond the gains and profits realized from the infringement may be had in such case. Social Register Ass'n v. Murphy, 129 Fed. 148.

"Damages," under the patent laws, refer to what plaintiff has lost, and "profits" to what the defendant has earned, by the unlawful use of the patented invention. A contract between the owners of two patents covering similar inventions, by which joint licenses were to be issued at the request of the second party, who was to recover a share of the license fees for the use of the patent of the first party, and also of the "damages" payable from infringers of such patent, does not entitle him to share in the sum recovered by a suit in equity, as "profits" realized by an infringer, where no "damages" were allowed. Wooster v. Trowbridge, 115 Fed. 722, 728.

The word "damages," in Rev. St. § 4900, providing that no damages shall be recovered for an infringement of a patent except on proof that defendant was notified of the infringement, and continued after such notice to make, use, or vend the article so patented, includes profits, and neither damages nor profits are recoverable except for infringement after such notice was given. Lorain Steel Co. v. New York Switch & Crossing Co., 153 Fed. 205, 208 (citing Lowell Mfg. Co. v. Hogg, 70 Fed. 787).

In Rev. St. § 4900, which provides that, where a patentee has failed to mark the patented articles as therein required in any suit for infringement, "no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement" and continued to infringe after such notice, the word "damages" is used as meaning all sums which the complainant would be entitled to recover and includes profits. Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co., 159 Fed. 154, 155.

For injunction

"Damages," as used in an injunction bond, binding the signers to pay costs and damages, did not include attorneys' fees for the opposite party. Jones v. Rountree, 74 S. E. 1096, 1097, 11 Ga. App. 181.

In Code Civ. Proc. § 611, providing that the bond on an application to enjoin an action for money only must secure all the damages awarded against the party restrained in the action in which the injunction issued, the word "damages" means those which the enjoined party may sustain by reason of the injunction under section 623, providing for the ascertainment of such damages by the court, by a referee, or by a writ of inquiry, and does not include a recovery on an equitable counterclaim for foreclosure of a chattel mortgage interposed in the injunction suit, in which defendant is the actor and occupies the position of plaintiff. W. H. Brace Co. v. Kraft, 89 N. E. 1093, 1094, 196 N. Y 468.

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For obstruction of highway

Mills' Ann. St. § 3960, forbidding any one to flow waste water on a highway so as to damage the same, the word "damage" includes all those obstructions which make it inconvenient or dangerous for travel. This section was intended to and did supplant section 1357, forbidding any person to obstruct or injure any highway so as to render it "inconvenient or dangerous." Eaton v. People, 70 Pac. 426, 427, 30 Colo. 345.

For personal injury

"Damages" for a personal injury is such sum as will compensate the party for the injury sustained. The deprivation of the party's ability to care for himself is an element to be considered in assessing the damages. Kline v. Santa Barbara Consol. Ry. Co., 90 Pac. 125, 128, 150 Cal. 741.

Civ. Code, § 3333, provides that the "damages" to be awarded in an employé's action for injuries shall be the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. An instruction that the jury might award such sum as would fairly and fully compensate plaintiff for any injuries received did not authorize an award according to any feeling the jury might have, nor suggest anything else than that they must exercise their judgment from all the evidence in the case as to what the proper amount of damages should be. Hersberger v. Pacific Lumber Co., 88 Pac. 587, 590, 4 Cal. App. 460.

An instruction that the jury should add whatever amount plaintiff would be entitled to for pain and suffering to such sum as they should find he was entitled to for damages was not prejudicial to defendant, where it was clear from the entire charge that the court used the word "damages" to mean such damages as resulted from plaintiff's impaired and diminished earning capacity. Macon, D. & S. R. Co. v. Joyner, 59 S. E. 902, 904, 129 Ga. 683.

If a car containing passengers is stopped while in transit, and the passengers are directed by the conductor to change to another car, which is on a track parallel to the first, and if, while they are so doing, the employés of the company put out the lights of the first car, and cause it to jerk suddenly, resulting in injury to a passenger who is in the act of making the change, this would be an "injury resulting from the running of the cars" of the company, within the meaning of the statute, and would also be a "damage done by a person in the employment and service of the company," so as to raise the statutory presumption of negligence against it. Georgia Ry. & Electric Co. v. Reeves, 51 S. E. 610, 611, 123 Ga. 697.

For taking property

The compensation that must be made on the discontinuance of streets under Laws 1895, c. 1006, authorizing the discontinuance of streets, and providing for the payment of damages, is "damages" within the act, and the payment of compensation is absolutely necessary. In re Mayor, etc., of City of New York, 52 N. Y. S. 588, 597, 28 App. Div. 143.

The legal vacation by a city of streets and alleys is not a taking or "damaging without compensation." Scrutchfield v. Choctaw, O. & W. R. Co., 88 Pac. 1048, 1050, 18 Okl. 308, 9 L. R. A. (N. S.) 496 (quoting and adopting definition given in City of East St. Louis v. O'Flynn, 10 N. E. 395, 119 Ill. 200, 59 Am. St. Rep. 795).

That there is a distinction, in regard to property taken for public use, between "compensation" (for property actually taken) and "damages" (to the remainder of it), is indicated by Code 1896, § 1718, providing merely that the compensation must not be reduced because of benefits. Town of Eutaw v. Botnick, 43 South. 739, 740, 150 Ala. 429.

Under a statute providing that, where a city shall establish a grade requiring any cut or fall in a street belonging to it, the damages arising from the making of the grade may be ascertained as therein provided, the word "damages" is used in its proper sense, and includes consequential damages, and is not limited to damages for actual trespass upon private property in the construction of the improvement. Fletcher v. City of Seattle, 88 Pac. 843, 844, 43 Wash. 627.

Code 1902, § 1414, as amended by Act Feb. 9, 1906 (Laws 1906, p. 10, c. 12), provides that, when damage is done to adjacent lands by the establishment of a cemetery as provided for in the preceding sections, the owners of lands damaged may recover from the municipality or person establishing the cemetery, etc. Held, that the word "damaged" is used in the same sense that it is in Const. 1902, § 58, prohibiting the passage of laws whereby private property may be damaged for public use without just compensation, as meaning damage to the corpus of the property, and hence the owner of adjacent farm land could not recover damages because the land was rendered less desirable for residence purposes, or because of personal annoyance or discomfort in its use, by reason of the establishment of a cemetery. Lambert v. City of Norfolk, 61 S. E. 776, 777, 108 Va. 259, 17 L. R. A. (N. S.) 1061, 128 Am. St. Rep. 945.

"The word 'damage' embraces more than the mere physical taking of property and is not restricted to cases where the owner is entitled to recovery as for a tort at common law." A leasehold is such an estate as that if, in the construction by the municipal authorities of a city of a public improvement in one of its streets, the estate of one holding such an interest in real property be damaged, he may sustain an action. Pause v.

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City of Atlanta, 26 S. E. 489, 491, 98 Ga. 92, 58 Am. St. Rep. 290.

"Damages" caused abutting owners by a temporary interference with their right of access to their property made necessary by the construction of a public improvement do not constitute damage to property not taken within the meaning of the Constitution. An owner cannot recover such damages from a city under an ordinance requiring a railroad company to elevate its tracks by reason of which a switch track connecting with the premises was disconnected during the progress of the work, although under the ordinance the city assumed all damages incident to the work, the term "damages" as used therein creating no new liability, but the ordinance simply determined as between the city and the railroad company which should pay the damages to which the owner would be entitled without the ordinance. Chicago Flour Co. v. City of Chicago, 90 N. E. 674, 676, 243 Ill. 268.

" 'Damages' and 'compensation' are sometimes used interchangeably to represent the purchase money paid for rights acquired by the eminent domain. But it is better to let 'compensation' stand for purchase money and 'damages' for indemnity for a trespass. Whatever confusion there may be in the use of terms, the difference between compensation and damages is frequently expressed in the rule that they shall not be ascertained in a single proceeding or suit." Abernathy v. South. & W. Ry. Co., 63 S. E. 180, 185, 150 N. C. 97 (quoting Randolph, Em. Dom. § 222).

The term "damages to the owner," in St. 1898, § 1848, providing that in condemnation proceedings there shall be appraised the value of the land proposed to be taken and the damages that will be suffered by the owner by reason of the taking, means the diminution of the value of the land not taken, by direct injury thereto as to the whole ownership therein, legal and equitable. Stamnes v. Milwaukee & S. L. R. Co., 109 N. W. 100, 101, 131 Wis. 85.

The measure of damages to abutting property being the difference in its value just before and after the change, abutting property, not taken, is not "damaged" within the statute, where it is worth no less after the improvement than before, whether the interest be that of tenant or owner. City of Detroit v. Detroit United Ry., 120 N. W. 600, 603, 156 Mich. 106.

DAMAGE BY THE ELEMENTS

See Elements.

DAMAGE FOR PUBLIC USE

A railroad's interference with a property owner's right to ingress and egress by means of a street on which his property abuts is "damage" within Const. Wash. art. 1, § 16, providing that no private property shall be taken or damaged for public or private use without just compensation. Idaho & W. N. R. R. v. Nagle, 184 Fed. 598, 600, 106 C. C. A. 578.

As used in Const. art. 1, § 17, providing that no personal property shall be taken, damaged, or destroyed for public use without adequate compensation, the word "damaged" does not require railroads to condemn rights incidentally invaded, as a condition precedent to the exercise of right granted to it by a city to use a street. Settegast v. Houston, O., L. & M. P. R. Co., 87 S. W. 197, 200, 38 Tex. Civ. App. 623.

Const. 1902, § 58, provides that the Legislature shall not enact any law whereby private property shall be taken or damaged for public uses without just compensation. Held, that the provision, in so far as it relates to property damaged, merely provides a new right of action, and, as the word "damaged" is neither enlarged nor restricted by the Constitution, it is used with its common-law meaning, not damage to the feelings, tastes, or sentiments, but physical damage to the corpus or to some right of property appurtenant thereto. Lambert v. City of Norfolk, 61 S. E. 776, 777, 108 Va. 259, 17 L. R. A. (N. S.) 1061, 128 Am. St. Rep. 945.

The word "damaged," in Const. art. 6, § 13, providing that private property, shall not be taken for public use or damaged without compensation, means legal damages, and one making a reasonable use of his property is not liable for any damages suffered by any other person flowing from such use, and the power of eminent domain vested in a person or corporation does not lessen or increase his or its rights or liabilities in regard to payment of damages suffered through the exercise of such power beyond what they would be, if he or it took the damaged property without the exercise of such power, except that for the taking or damaging he or it may be required to respond before the taking or damaging. Hyde v. Minnesota, D. & P. Ry. Co., 136 N. W. 92, 97, 29 S. D. 220, 40 L. R. A. (N. S.) 48.

"When soil is removed from its natural position by one owner and the soil of an adjoining owner is thereby permitted to fall, such result is not a consequential damage, but a direct injury. * * * It is true that the word 'damaged' has been held to mean such damages as were recoverable at common law between individuals; but, in view of the rule that the carrying away of land by its own weight is not consequential damage, but is an actual infringement and 'taking of property,' we think the same rule should apply where the land is carried away by means of water which is released in a public street by any means which would amount to an actual 'taking' and a resulting damage." And hence where land is carried away by means of water which is released in a public street through the operations of

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certain railroads in constructing a tunnel under the street, the damage so occasioned is an actual infringement and "taking of property," within the Constitution, declaring that private property shall not be "damaged" for public use without just compensation. Farnandis v. Great Northern R. Co., 84 Pac. 18, 20, 21, 41 Wash. 486, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027.

Where a city in condemnation proceedings acquired the right to lower the grade of property abutting on a street to 77 feet below the average level of abutting property, and to slope such property back from the street to prevent the soil from sliding into the street, the construction of the slope was not a taking of the abutting property, but merely a "damaging" thereof, within Const. art. 1, § 16, providing that no private property shall be taken or damaged for public use without just compensation, and Act March 9, 1893 (Ballinger's Ann. Codes & St. § 775), entitled "An act to enable cities to exercise the right of eminent domain for the taking and damaging of land and property for public purposes." Compton v. Seattle, 80 Pac. 757, 759, 38 Wash. 514.

Where an owner continues in the use and enjoyment of his property and property rights after the completion of a public improvement to the same extent and for the same purpose as before, his property has not been "taken" within Const. art. 1, § 22, providing that private property shall not be taken or damaged for public use without compensation, and it cannot be "damaged" within that provision except by the invasion of a theoretical legal right. Salt Lake City v. East Jordan Irr. Co. (Utah) 121 Pac. 592, 596.

The word "damaged," in the Missouri Constitution declaring that private property shall not be taken or "damaged" for public use without just compensation, includes damage to adjoining property from the establishment or the change of a grade of a street or alley; but it excludes damage by the cracking and falling of the walls of buildings from the removal of lateral support. The damage to a four-story brick building and its contents by the laying of a sewer in an adjoining alley below the plane of the foundation of the building, after the owner knew in time to prop and protect his building that the sewer was to be laid, and that there was danger that it would cause his building to crack and settle, whereby the lot in its natural state would not have been caused to settle or crumble, but whereby the building was cracked, and it and its contents were injured to the amount of tens of thousands of dollars, is damnum absque injuria, and the owner is not entitled to compensation therefor. Johnson v. St. Louis, 172 Fed. 31, 40, 96 C. C. A. 617, 18 Ann. Cas. 949.

In discussing the meaning of the word "damaged" as used in the constitutional provision that private property shall not be damaged for public use without just compensation, the court says: "I cannot agree with defendant's counsel that the Constitution of 1875 contemplates only such a direct and necessary damage as would in effect be only a taking of property, or that the damage there contemplated must be such as necessarily and inevitably flows from the passage of an ordinance or law providing for the public work. On the contrary, I believe the provision in question was intended to have a practical and real meaning—was intended to provide a remedy for all damages proximately resulting to property from the doing of work for public use. Such is the plain and ordinary signification of the language employed." Johnson v. City of St. Louis, 137 Fed. 439, 441.

The ownership of a lot abutting on a street carries with it as property the right of unimpaired access and egress, and whatever impairs that right and causes a depreciation in the value of the lot constitutes damage within the meaning of Const. art. 1, § 17. Powell v. Houston & T. C. R. Co., 135 S. W. 1153, 1155, 104 Tex. 219.

Consequential injury

The words "or damaged," as used in a constitutional provision that property shall not be taken or damaged for public use without just compensation, do not entitle a property owner to an injunction to prevent the improvement of a street until mere consequential damages to his property are ascertained and paid. Clemens v. Connecticut Mut. Life Ins. Co., 82 S. W. 1, 3, 184 Mo. 46, 67 L. R. A. 362, 105 Am. St. Rep. 526.

Under a constitutional provision providing that no private property shall be taken or "damaged" without just compensation, the word "damaged" does not give a right of action where the injuries would have been, in the absence of the word, damnum absque injuria in an action against a natural person or private corporation. A property owner may recover damages under such provision for injuries resulting from the operation of a railroad, such as the jarring of his property, the casting of cinders and emission of smoke thereon, which physically affects the property itself, but cannot recover damages for the ringing of bells, sounding of whistles, rumbling of trains, and similar noises, and the emission of smoke, gases, and odors, incident to the proper operation of the road, nor for excavating through and obstructing streets near his property which he uses in common with the general public, although to a greater extent, but which are not adjacent to such property. Smith v. St. Paul, M. & M. Ry. Co., 81 Pac. 840, 842, 843, 844, 39 Wash. 355, 70 L. R. A. 1018, 109 Am. St. Rep.

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889 (citing the definition in Aldrich v. Metropolitan Co., 63 N. E. 155, 195 Ill. 456, 57 L. R. A. 237; and City of Chicago v. Union Stockyards & Transit Co., 45 N. E. 430, 164 Ill. 224, 35 L. R. A. 281).

The word "damage," as used in Const. art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, means every loss or diminution of what is a man's own, occasioned by the fault of another, whether this result directly to the thing owned, or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto—that is, if an injury not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public work exists, be inflicted—then such property may be said to be damaged. A property owner is entitled to recover from a railroad which constructs its yards so near plaintiff's residence as that the noise, smoke, cinders, and gas from the operation by defendant of its locomotives injuriously affects the plaintiff's property. Missouri, K. & T. Ry. Co. of Texas v. Calkins (Tex.) 79 S. W. 852, 853.

Where the line of a commercial railroad is constructed along a street near plaintiff's residence block in a city, the jarring of the earth of respondent's lots, the casting of soot and cinders thereon, the emission of smoke physically injuring property, constitute "damage" within Const. Wash. art. 1, § 16, providing that property shall not be taken or damaged for public use without just compensation. Idaho & W. N. R. R. v. Nagle, 184 Fed. 598, 601, 106 C. C. A. 578.

One can recover for the vibrations, noises, smoke, etc., produced by the operation of trains, which by causing annoyance and discomfort depreciate the value of his property, since Const. art. 1, § 17, provides that no person's property shall be "taken, damaged, or destroyed," for, or applied to, a public use without adequate compensation made, unless by consent of such person. Novich v. Trinity & B. V. Ry. Co., 101 S. W. 476, 477, 45 Tex. Civ. App. 664.

Where the city established an alleyway without a culvert or drain, which caused surface water to back up on plaintiff's premises, it is liable under the direct provisions of Const. § 242, which allows compensation for property injured or destroyed, as well as that taken, for a public use. Ewing v. City of Louisville, 131 S. W. 1016, 1017, 140 Ky. 726, 31 L. R. A. (N. S.) 612.

As injure

The change in Const. 1869, art. 5, § 14, made in 1902, so as to prohibit any law whereby property shall be taken or damaged for public uses without just compensation by inserting the words "or damaged," was intended to enlarge the right to compensation and to give a remedy for every physical injury to property whether by noise, smoke, gases, vibrations, or otherwise. The words "damaged," "injured," and "injuriously affected," when used in this connection, are generally regarded as equivalents. Tidewater Ry. Co. v. Shartzer, 59 S. E. 407, 408, 409, 107 Va. 562, 17 L. R. A. (N. S.) 1053.

The word "damaged," as used in a constitutional provision that no person's property shall be taken, damaged, or destroyed for public use without adequate compensation, applies to injury suffered by particular property or a right only in common with other property or rights in the same community or section by reason of the existence of the public work, and does not authorize a recovery where no damage is done to property except such as is suffered by the same community or section by reason of the general fact that the public work exists. Houston & T. C. R. Co. v. Powell (Tex.) 125 S. W. 330, 331 (citing Gulf, C. & S. F. Ry. Co. v. Fuller, 63 Tex. 467; Gainesville, H. & W. Ry. Co. v. Hall, 14 S. W. 259, 78 Tex. 169, 9 L. R. A. 298, 22 Am. St. Rep. 42).

DAMASK

See Cotton Table Damask.

DAMN RASCAL

The term "damn rascal" is opprobrious and is one of the strongest expressions to convey the idea of moral turpitude. Smith Bros. & Co. v. W. C. Agee & Co. (Ala.) 59 South. 647, 649.

DAMNUM

See Damage—Damages.

There is a distinction between "damnum" and "injuria." The former means only harm, hurt, loss, damage; while the latter comes from "in," against, and "jus," right, and means something done against the right of the party, producing damage, and has no reference to the fact of the amount of damage. King v. Lamborn, 186 Fed. 21, 28, 108 C. C. A. 123.

DAMNUM ABSQUE INJURIA

An injury to plaintiff not flowing from the wrongful act of any one is "damnum absque injuria." Brooks v. Cedar Brook & S. C. R. Imp. Co., 19 Atl. 87, 82 Me. 17, 7 L. R. A. 460, 17 Am. St. Rep. 459.

Where a parol license to construct a dam and an irrigation ditch on one's land is

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revoked by the licensor granting a railroad right of way across the land to the extent that the license is interfered with by the construction of the railroad as authorized by the grant, any injury to the licensee resulting from such construction is "damnum absque injuria." Archer v. Chicago, M. & St. P. R. Co., 108 Pac. 571, 575, 41 Mont. 56, 137 Am. St. Rep. 692.

"The right to damages constituting a legal cause of action requires the concurrence of two things: That the party claiming them has suffered an injury; and that there is some person who is legally answerable for having caused it. If one suffers an injury for which no one is liable, it gives no legal claim for damages. It is 'damnum absque injuria.'" Again: "Where there has been no violation of a right, the situation is described as 'damnum absque injuria,' in which circumstances a recovery is not permitted no matter to what extent plaintiff may have sustained damages." Brunson v. Southwestern Development Co., 104 S. W. 593, 597, 7 Ind. T. 209 (quoting and adopting definitions in Suth. Dam. [3d Ed.] § 3; Wats. Dam. § 2).

Where each party is equally innocent of a mistake as to facts with reference to which they act, and there is no concealment of facts which the other party had a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is "damnum absque injuria." Cohen v. Numsen, 65 Atl. 432, 433, 104 Md. 676.

"A channel or other depression in the ground forming the bank of a river through which water escapes and flows from the river only at times of high water does not constitute a natural water course, and obstructing the flow of water therein from the river, to the injury of another, is 'damnum absque injuria.'" Cole v. Missouri, K. & O. R. Co., 94 Pac. 540, 542, 20 Okl. 227 (quoting Singleton v. Atchison, T. & S. F. Ry. Co., 72 Pac. 786, 67 Kan. 284; Abbott v. Kansas City, St. J. & C. B. R. Co., 83 Mo. 272, 53 Am. Rep. 581).

When, under the provisions of the Maine Milldam Act, a milldam has been legally erected across a nonnavigable river, and the location of such dam is neither illegal nor wrongful, and such dam has been constructed in a suitable, skillful, and proper manner, and is in no way defective or inadequate for the purpose for which it was constructed, and the owners of such dam have neither unreasonably, negligently, nor wantonly discharged the head of water accumulated by such dam, but by reason of such dam the current or flow of such river has been deflected towards the shore, thereby causing injury to a highway along the bank, such damage is the "damnum absque injuria" of the common law. Inhabitants of Durham v. Lisbon Falls Fiber Co., 61 Atl. 177, 180, 100 Me. 238.

The rule of "damnum absque injuria" requires that an injury occurring from a slight defect in a city street be charged to the carelessness of the traveler or to unavoidable mischance, rather than to the treasury of the city. Gastel v. City of New York, 86 N. E. 833, 834, 194 N. Y. 15, 128 Am. St. Rep. 540, 16 Ann. Cas. 635.

Every man has the right to the actual use and enjoyment of his own property, and if, while in such actual use and enjoyment and without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is "damnum absque injuria"; for the rightful use of lands by its owner may cause damage to another without any legal wrong. Where defendants operated a coal mine near a tributary of a stream, and pumped water from its mine and conveyed it by pipe 75 feet and emptied it into a drain from which the water flowed naturally into the stream, rendering it unfit for plaintiff's purposes and injurious to the boiler in his mill, the defendant was liable. H. B. Bowling Coal Co. v. Ruffner, 100 S. W. 116, 118, 117 Tenn. 180, 9 L. R. A. (N. S.) 923, 10 Ann. Cas. 581.

Mere consequential injuries to an owner of property claimed to have been damaged by a public improvement, arising from discomfort, disturbance, injury to the business, and the like, remain, as before, "damna absque injuria"—particular sacrifices which society has the right to inflict for the public good. The true question is whether the causes complained of have substantially damaged the value of the property by diminishing its market value for rental or sale. Helmer v. Colorado Southern, N. O. & P. R. Co., 47 South. 443, 444, 122 La. 141 (citing McMahon v. St. Louis, A. & T. R. Co., 6 South. 640, 41 La. Ann. 827).

The question of admiralty jurisdiction over a tort occurring partly on land and partly on water is determined by the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action; otherwise it would be "damnum absque injuria." Hermann v. Port Blakley Mill Co., 69 Fed. 646, 651.

If the Legislature, acting within constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot as a general rule be wrongful. If damage results as a consequence of its being done, it is "damnum absque injuria." Lund v. St. Paul, M. & M. Ry. Co., 71 Pac. 1032, 1034, 31 Wash. 286, 61 L. R. A. 506, 96 Am. St. Rep. 906.

The injuries resulting to the estate below from the act of the proprietor of the estate above in discharging into a natural drain the waste oil and salt water proceeding from the wells sunk on his premises is not "damnum absque injuria." McFarlain v.

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Jennings-Heywood Oil Syndicate, 43 South. 155, 156, 118 La. 537 (citing Civ. Code, art. 660).

Incidental damage resulting from the proper exercise of functions for which defendant is not responsible is "damnum absque injuria." City of Newark v. Hatt, 71 Atl. 330, 331, 77 N. J. Law, 48 (citing Marcus Sayre Co. v. Newark, 45 Atl. 985, 60 N. J. Eq. 361, 367).

"An innocent person upon an accusation of crime may be arrested and ruined in his career, and the damage he thus sustains is 'damnum absque injuria,' unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risk of such a damage by being a member of an organization or society, and his compensation for such risk may be found in the general welfare which the society is organized to promote." Pleasants v. Smithe, 43 South. 475, 476, 90 Miss. 440, 9 L. R. A. (N. S.) 173, 122 Am. St. Rep. 317 (quoted and adopted from Davis v. Soc. for Prevention of Cruelty to Animals, 75 N. Y. 362).

"Damnum absque injuria" is a loss for which the law provides no remedy. Where a brick manufacturing plant constitutes a nuisance to an adjoining landowner, causing damage to his crops by escaping gases from the kilns, the use is not damnum absque injuria. Powell v. Brookfield Pressed Brick, etc., Mfg. Co., 78 S. W. 646, 649, 104 Mo. App. 713.

Any incidental damages resulting to members of the public, from the exercise of a lawful privilege granted for the public good, beyond that caused to their property against which they are protected by the Constitution, is to be regarded as "damnum absque injuria," which must be borne because the work which inflicts it is authorized by law for the general welfare. St. Louis, S. F. & T. R. Co. v. Shaw, 92 S. W. 30, 99 Tex. 559, 6 L. R. A. (N. S.) 245, 122 Am. St. Rep. 663.

Where a railroad is constructed and maintained along a highway in front of a man's land, he may recover damages for such obstruction or impairment of his rights and easement in the public highway as constitute damages peculiar to himself, and independent of such damages as he sustained in common with the public, but he cannot recover damages for those general inconveniences which he is subjected to in common with the public. He can recover for such damages as are not "damnum absque injuria." Smith v. Southern Pac. R. Co., 79 Pac. 868, 146 Cal. 164, 106 Am. St. Rep. 17.

The damages from lawful acts inspired by malice and bad motive is in the eye of the law "damnum absque injuria." Standard Oil Co. v. Doyle, 82 S. W. 271, 273, 118 Ky. 662, 111 Am. St. Rep. 331.

Injury to surface water or springs by mining, either from adjoining lands or from underneath the surface of the particular land, is "damnum absque injuria" when the mining is done in a competent and workmanlike manner. Weaver v. Berwind-White Coal Co., 65 Atl. 545, 548, 216 Pa. 195.

DAMNUM PRÆDICTUM ET MALUM SECUTUM

"Verbal expressions by a person contemplating crime are sometimes thrown out voluntarily and purposely, but in so obscure and intangible a form as to amount to nothing more than mere general intimations. They are, in fact, parts of a system of preparation, but of the most preliminary kind, intended to explore the way for more direct action in the future. The criminal ventures no further than to hint at or obscurely allude to the act he has in contemplation. But, notwithstanding the art which may be employed, they frequently fail of their intended effect, from the mere want of the art to conceal it. Their essential clumsiness is sometimes manifest, and the result of their utterance is the very reverse of that intended, namely, to fix attention upon the party uttering them, and thus to establish between him and the event alluded to the very connection he seeks to avoid. Hence, when the event comes to happen, the expression anticipating it is at once remembered. There is what the civilians would call 'damnum prædictum et malum secutum'—a very pregnant and reasonable ground of suspicion. On this account, expressions of this kind often become important, as elements of circumstantial evidence, constituting a material link in the chain of precedent circumstances tending to fix a crime charged upon the party accused of its commission." On trial for arson, evidence that defendant and his co-indictee were at the store which was burned, after business hours, and some time before the burning; that defendant was seen prowling about the place, taking note of localities and objects; that, in conversation with different persons, he made covert threats, verbal intimations, and declarations of intention, so-called—is admissible, as tending to connect defendant with the burning. State v. Crawford, 12 S. W. 354, 355, 99 Mo. 74 (quoting and adopting definition in Burrill, Circ. Ev. [3d Ed.] 333–335).

DANCE HALL

An open-air dancing pavilion in a private amusement park conducted for profit is not a "dance hall," within New Orleans City Charter, § 21, as amended by Act No. 99 of 1904, providing that the city council shall not grant any privilege for the opening of any barroom, saloon, concert saloon, or dance hall, except upon the written consent of a majority of the property holders within a

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certain radius. Israel v. City of New Orleans, 58 South. 850, 851, 130 La. 980.

Rev. Laws 1905, § 4936, provides that one who permits any person under the age of 21 years to be or remain in a dance house owned, kept, and managed by him shall be guilty of a misdemeanor but does not define a "dance house." Held, that the term must be construed, in accordance with its ordinary usage, as a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation. State v. Rosenfield, 126 N. W. 1068, 1069, 111 Minn. 301, 29 L. R. A. (N. S.) 331, 137 Am. St. Rep. 557.

DANCING ACADEMY

See Public Dancing Academy.

DANGER

See Apparent Danger; Appearance of Danger; Averting Danger; Great Danger; Imminent and Apparent Danger; Imminent Danger; Intrinsic Danger; Knowledge of Danger; Manifest Danger; Patent Danger; Real Danger; Reasonable Danger; Seeming Danger; Unavoidable Danger; Unnecessary Danger; Unnecessary Exposure to Danger.

Appreciation of danger, see Appreciate—Appreciation.

Exposure to obvious danger, see Exposure.

Exposure to unnecessary danger, see Exposure.

Obvious dangers, see Obvious Risks.

A railroad track is a place of constant and almost imminent "danger," as a man in possession of his natural faculties must presumptively know. Beach v. Southern Ry. Co., 61 S. E. 664, 665, 148 N. C. 153.

In a special finding of a jury, that when defendant shot plaintiff the "danger" to defendant's father was not such as to induce a person exercising reasonable and proper judgment to interfere in order to prevent the consummation of such injury, the word "danger" meant "apparent danger," and hence was a finding against defendant's claim that he acted in the reasonable belief that his aid was necessary to prevent injury to his father, although in fact there was no real danger. Sloan v. Pierce, 85 Pac. 812, 813, 74 Kan. 65.

DANGERS OF NAVIGATION

The phrases "dangers of the sea" and "dangers of navigation" and "perils of the seas" do not indicate any different intent as used in exceptions in bills of lading, and all are treated as convertible terms. The exception, however, does not embrace losses flowing from culpable or negligent stowage of cargo or other improper acts of the master which are proximate causes of loss. Baxter v. Leland, 2 Fed. Cas. 1048, 1049, 1 Abb. Adm. 348.

Inevitable dangers

"Dangers of navigation" or "perils of the sea," as used in bills of lading or concerning shipping, mean only those dangers which are inevitable, and do not excuse the vessel from liability for loss caused by negligence. Pettyjohn v. Oregon Coal & Navigation Co., 113 Pac. 438, 440, 58 Or. 392.

DANGERS OF THE SEA

See Perils of the Sea.

DANGEROUS

See Manifestly Dangerous; Palpably Dangerous; Unsafe and Dangerous.

The word "dangerous," as applied to appliances furnished by a master to his servant, means not reasonably safe. Rigsby v. Oil Well Supply Co., 108 S. W. 1128, 1131, 130 Mo. App. 128.

Where a pedestrian sued for injuries sustained by his coming in contact with the tongue of a wagon left in a city street at night, an instruction that, if the street, by reason of the existence of the wagon and tongue thereon, was rendered "dangerous and unsafe," etc., was not objectionable as imposing a greater duty on the city than the law required; the words "dangerous and unsafe" being equivalent to a statement that the street was not thereby "reasonably safe." Hall v. City of St. Joseph, 146 S. W. 458, 461, 163 Mo. App. 214.

DANGEROUS AGENCY

"Railroad torpedoes" are loaded with some high explosive, and with a sufficient amount thereof to cause a loud explosion; and they are "dangerous agencies," as respects the liability of the railroad company for injuries to children caused by their explosion. Euting v. Chicago & N. W. R. Co., 92 N. W. 358, 359, 116 Wis. 13, 60 L. R. A. 158, 96 Am. St. Rep. 936.

DANGEROUS ALLUREMENT

A reservoir owned by a waterworks company, without circumstances making it especially hazardous or enticing to children, is not a dangerous allurement, and the owner thereof is under no more obligation to infant trespassers in respect thereto than to adults. Akron Waterworks Co. v. Swartz, 28 Ohio Cir. Ct. R. 627, 633.

DANGEROUS CALLING

Where defendant contracted with a city to furnish water for fire and other purposes, it did not thereby enter into a "public calling" in any sense different from the public duty to supply the city with water with which it could combat fire; nor was the water company's business a "dangerous calling," so as to impose upon it a duty to prop-

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erty owners within the city to furnish proper fire pressure so that for mere nonfeasance property owners damaged could recover against it in tort. German Alliance Ins. Co. v. Home Water Supply Co., 174 Fed. 764, 769, 99 C. C. A. 258.

DANGEROUS CONDITION

Any dangerous condition, see Any.

A horse race upon a street is not a defect or want of repair therein, or a dangerous condition thereof, for which the city is liable to a traveler upon the street struck by one of the horses. Marth v. City of Kingfisher, 98 Pac. 436, 442, 22 Okl. 602, 18 L. R. A. (N. S.) 1238.

DANGEROUS DEVICE

An automobile is an ordinary vehicle of pleasure and business and is not necessarily a "dangerous device," being no more dangerous per se than a team of horses and a carriage, or a gun, sailboat, or motor launch. Cunningham v. Castle, 111 N. Y. Supp. 1057, 1061, 127 App. Div. 580.

DANGEROUS EMBANKMENT

Where plaintiff was injured by the overturning of her sleigh while passing through a cut in a highway, caused by alleged defective banks sloping to the wrought surface of the highway, such cut was not a "dangerous embankment and defective railing" within Laws 1893, p. 47, § 1, providing that towns shall be liable for damages happening to a person traveling upon a dangerous embankment and defective railing on any highway by reason of any defect rendering it unsuitable for travel. Miner v. Town of Hopkinton, 60 Atl. 433, 434, 73 N. H. 232.

Under Laws 1893, p. 47, authorizing actions against towns for injuries by defects in a bridge, culvert, or sluiceway, or dangerous embankments and defective railings, the steps leading from a sidewalk to the crosswalk over a street is not a "dangerous embankment" for which railings must be provided. Wentworth v. Town of Pittsfield, 62 Atl. 218, 219, 73 N. H. 358.

DANGEROUS ESTABLISHMENT

Any other dangerous establishment, see Any Other.

DANGEROUS EXPOSURE

"Dangerous exposure," as affecting the responsibility for so exposing a vessel or its tackle that it is liable to injure another vessel, means an exposure that is clearly liable to receive or inflict injury in the ordinary chances, mistakes, or hazards of navigation, such as are to be reasonably apprehended as liable to arise. The Overbrook, 142 Fed. 950, 952, 74 C. C. A. 120 (quoting and adopting the definition in The Mary Powell, 31 Fed. 622; Id., 36 Fed. 598).

DANGEROUS INSTRUMENT

See Turntable.

DANGEROUS INSTRUMENTALITY

A team of mules, drawing a wagon partially loaded with lumber, and driven by a negro boy 17 years old, is not a "dangerous instrumentality," so as to render the owner of the team liable for the death of a boy 10 years old, riding in the wagon at the invitation of the driver, caused by the running away of the team, irrespective of whether the invitation of the driver was within the scope of his employment. Dover v. Mayes Mfg. Co., 72 S. E. 1067, 1070, 157 N. C. 324.

DANGEROUS IN THEMSELVES

"An attempt has been made in a very few illogically reasoned cases to draw a distinction between instrumentalities 'dangerous in themselves,' and those dangerous by reason of improper use, and confine the master's liability to cases due to mismanagement of the former class alone. An analysis will show that the distinction is more imaginary than real, and too refined to be of any practical benefit as a method of determining legal responsibility. The argument has a degree of plausibility when limited to agencies inherently dangerous, even when most carefully handled, such as dynamite and similar substances, as distinguished from those of like character, such as gasoline, naphtha, and the like, only dangerous when proper precautions are not observed; but the sophistry of the argument becomes apparent and refutes itself when we come to the consideration of dangerous engines, machinery, or appliances. No appliance is dangerous of itself, but practically every appliance may become dangerous by improper use. * * * No appliance when at rest is dangerous in itself. It is by operation alone that it becomes capable of causing injury." Whether a railroad tricycle speeding along the track was a dangerous instrumentality, within the rule holding the master liable for injuries caused by a servant in the use of a dangerous instrumentality, was a question for the jury. Barmore v. Vicksburg, S. & P. R. Co., 38 South. 210, 215, 85 Miss. 426, 70 L. R. A. 627, 3 Ann. Cas. 594.

DANGEROUS MACHINERY

A conveyor hoist in a tool factory consisted of pans on which tools were placed for transportation up and down, moving at the rate of about one foot per second. It was perfectly safe to operate so long as the person using it did not place some portion of his body inside the conveyor shaft between the pans, and keep it there for a sufficient length of time to allow the succeeding pans to strike him. Held, that such conveyor was not a "dangerous machine" as distinguished from an ordinary elevator or other moving machine in a factory, so as to render a master liable for injuries to a minor servant under 18 years of age while negligently operating the conveyor under Labor

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Law (Laws 1897, c. 415) § 81, as amended by Laws 1899, c. 192, providing that no male person under the age of 18 years shall be permitted to operate or assist in operating dangerous machinery of any kind. Gallenkamp v. Garvin Mach. Co. (N. Y.) 99 N. E. 718, 720; Id., 86 N. Y. Supp. 378, 380, 91 App. Div. 141.

Plaintiff, an oiler of machinery on a coal dock, was injured by his hand becoming caught in a grooved cable wheel while oiling it with a swab attached to a stick, and during such operation, under ordinary conditions, his hand would not come closer to the set screws and shaft than from 12 to 15 inches. Held, that such wheel and screw were not so located as to be dangerous to employés in the discharge of their duty within St. 1898, § 1636j, requiring it to be securely guarded or fenced. Gulland v. Northern Coal & Dock Co., 132 N. W. 755, 756, 147 Wis. 391.

A set screw attached to a revolving shaft in such a position that it may be dangerous to employés necessarily about the machinery renders the machinery dangerous, within St. 1898, § 1636j, providing that the machinery therein specified, when so located as to be dangerous to employés in the discharge of their duty, must be securely guarded or fenced. Monahan v. Fairbanks-Morse Mfg. Co., 132 N. W. 983, 986, 147 Wis. 104.

Whether a machine was dangerous depended upon whether, in the ordinary course of operation, danger to the operator was to be reasonably anticipated; and hence, in an action for personal injuries, the exclusion of evidence that a machine had been in operation about 1½ years without accident, and also that for more than 20 years the defendant had been using some 20 similar machines without accident, was error. Bachmann v. Little, 137 N. Y. Supp. 699, 701, 152 App. Div. 811.

DANGEROUS OCCUPATION

The operation of a freight elevator is a "dangerous occupation," within the meaning of Pub. Acts 1901, p. 157, No. 113, § 3, providing that no child under 16 years of age shall be employed at an employment whereby its life or limb is endangered. Braasch v. Michigan Stove Co., 118 N. W. 366, 367, 153 Mich. 652, 20 L. R. A. (N. S.) 500.

Gen. St. 1909. §§ 5095, 5098, relating to employment of persons under 16 years of age in dangerous places and providing a penalty for its violation, an employé less than 16 years old injured at such an occupation may recover damages, though the statute does not in terms give a right of action. An occupation is dangerous within such statute whenever there is reason to anticipate injury to the person engaged in it, whether from the inherent character of the work or the manner in which it is carried on, though the danger may be eliminated by due care by the employé. Casteel v. Pittsburg Vitrified Paving & Building Brick Co., 112 Pac. 145, 146, 83 Kan. 533

A 15 year old boy, employed in a sawmill where shafts, saws, pulleys, and other machinery driven by steam was operated, was engaged in a "dangerous occupation," within the meaning of the statute requiring permits from school superintendents in order to entitle one to employ a child of school age to work at a dangerous occupation. Jacobson v. Merrill & Ring Mill Co., 119 N. W. 510, 511, 107 Minn. 74, 22 L. R. A. (N. S.) 309.

DANGEROUS PROXIMITY

Allegations of the complaint, in an employé's action for personal injuries from unguarded cogwheels in a rolling mill, that plaintiff and other employés were required to work near the wheels, and that, at the time of the accident, plaintiff was directed to do work requiring him to be very near them, sufficiently declared that the employés were required to work in "dangerous proximity" to the unguarded cogwheels. King v. Inland Steel Co., 96 N. E. 337, 339, 177 Ind. 201.

DANGEROUS SITUATION

A "dangerous situation" is one from which danger or accident may be reasonably apprehended, not may possibly happen. Hancock v. New York Cent. & H. R. R. Co., 91 N. Y. Supp. 601, 605, 100 App. Div. 161.

DANGEROUS WEAPON

See Assault with Dangerous or Deadly Weapon.

"A 'dangerous weapon' is one likely to produce death or do great bodily harm." In Bish. St. Crimes (3d Ed.) § 320, it is said that the phrase is a milder term than "deadly weapon." While it is more correct to use the statutory word "dangerous" than the word "deadly," the use of the word "deadly" in the charge to the jury in a homicide case does not constitute an error of which the accused can complain. Clemons v. State, 37 South. 647, 650, 48 Fla. 9.

"A 'dangerous weapon' is one likely to produce death or great bodily injury, * * * or perhaps it is more accurately described as a weapon which, in the manner it is used or attempted to be used, endangers life or inflicts great bodily harm." The mere pointing of an unloaded pistol at another does not constitute the crime of assault with a dangerous weapon. One who, within shooting distance of another, points at him a pistol apparently loaded, and believed to be loaded by the person at whom it is pointed, commits a criminal assault, although the pistol is not in fact loaded. Price v. United States, 156 Fed. 950, 952, 85 C. C. A. 247, 15 L. R. A. (N. S.) 1272, 13 Ann. Cas. 483 (quoting and adopting the definition in United States v. Williams, 2 Fed. 64).

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A "dangerous weapon" is any weapon dangerous to life as actually used. State v. Edmunds, 104 N. W. 1115, 1117, 20 S. D. 135 (citing And. Law Dict. 1110).

Hatchet

Where accused struck his wife several times on the head with a hatchet, causing wounds from which she did not recover for considerable time, and a physician testified that the wounds were all serious, and that the hatchet in the hands of a strong man like accused was a weapon with which a person could be killed, it was sufficiently shown to be a "dangerous weapon." Stanton v. State (Tex.) 151 S. W. 808, 809.

Pistol

"An empty revolver merely pointed at a person and not used to strike with is not a 'dangerous weapon,' however much the person at whom it is pointed may be in fear. A loaded revolver pointed at a person within shooting distance is a dangerous weapon as a matter of law." Lipscomb v. State, 109 N. W. 986, 988, 130 Wis. 238.

A loaded revolver is a "dangerous weapon," within the meaning of Pen. Code, § 189, defining manslaughter in the first degree as a homicide committed without a design to effect death by a person in the heat of passion by the means of a "dangerous weapon." People v. Granger, 79 N. E. 833, 834, 187 N. Y. 67.

DARDANARII

Under the Roman law persons who monopolized grain and other produce of the earth were called "dardanarii." State v. Eastern Coal Co. (R. I.) 70 Atl. 1, 4.

DARK BAY

An indictment for obtaining credit under false representations by mortgaging a "dark bay" mule is not sustained by proof that the mule was a "mouse-colored" mule. Berrien v. State, 9 S. E. 609, 83 Ga. 381.

DASH

An instruction, in an action against a railroad for personal injuries resulting from the frightening of plaintiff's team at a crossing, that if defendant's train dashed out from behind box cars on the track in view of plaintiff's team, and made unnecessary noise by the escape of steam, defendant failed to exercise ordinary care, was objectionable as being an instruction on the weight of the evidence, the word "dash" meaning to draw with violence or haste; to rush with violence; to strike violently; to shatter. Missouri, K. & T. Ry. Co. of Texas v. Burk (Tex.) 146 S. W. 600, 603.

DATE

See From Date; Future Date; On Demand After Date.
Maturity date, see Maturity.
Such date, see Such.

Where a benefit certificate, executed as a substitute for the original certificate bearing the date of the original certificate, stipulated that it should be invalid on the suicide of a member within three years from the date of the certificate, the date referred to the time specified in the original certificate, the word "date" indicating the time fixed; and hence the suicide of the member more than three years from the date of the original certificate did not invalidate the substituted certificate. Wood v. Brotherhood of American Yeoman, 126 N. W. 949, 950, 148 Iowa, 400.

As day, month, and year

The term "date," as used in a statute requiring an instrument to be dated, means the day, month, and year, and giving the year alone is insufficient. In re Price's Estate, 112 Pac. 482, 483, 14 Cal. App. 462.

Under statute requiring holographic will to be "dated" by testator, such a will is sufficiently dated which gives the day, month, and year, though not the place of execution. Stead v. Curtis, 191 Fed. 529, 537, 112 C. C. A. 463.

As referring to fraction of day

"The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has limited the 'day' to a few hours of business. This and whatever other rules have been adopted by consent, and merely for the convenience of commercial men, are departures from the common-law doctrine." Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 581, 585, 6 L. Ed. 166.

Of arrival

In rules of a railroad company requiring the payment of demurrage on cars where more than a stated number of days elapse "between the date of arrival of each car and date released," the phrase "date of arrival" must be construed in its ordinary sense, as meaning the date on which the car in fact arrives at its point of destination, and not the date on which the consignee receives notice of such arrival, and "date released" as meaning the date when the car becomes again available for use by the company. Hite v. Central R. Co. of New Jersey, 171 Fed. 370, 372, 96 C. C. A. 326.

Of bankruptcy

Bankr. Act July 1, 1898, c. 541, § 1, subd. 4, 30 Stat. 544, defines a bankrupt as a person against whom an involuntary petition has been filed, and subdivision 10, 30 Stat. 544, defines the terms "date of bankruptcy," "time of bankruptcy," or "commencement of

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proceedings," or "bankruptcy," with reference to time, to mean the date when the petition is filed. Section 8, 30 Stat. 549, declares that the death of a bankrupt shall not abate the proceedings. Held, that the death of a bankrupt after the filing of an involuntary petition against him, though prior to service, does not abate the proceedings. Shute v. Patterson, 147 Fed. 509, 510, 78 C. C. A. 75 (citing In re Hicks, 107 Fed. 910; Scheuer v. Smith & Montgomery Book & Stationery Co., 50 C. C. A. 312, 112 Fed. 406).

Of commencement of action

Where a petition for mandamus to compel the restoration of petitioner's name to the pay roll as a policeman stated no cause of action, and after adverse rulings on precisely similar petitions in other cases was withdrawn, and an amended petition filed, the date of filing of the amended petition was to be taken as the "date of the commencement of the action" for the purpose of determining whether petitioner was guilty of laches. Kenneally v. City of Chicago, 77 N. E. 155, 162, 220 Ill. 485.

Of deed

The "date" of a deed is the date of its acknowledgment. Northern Coal & Coke Co. v. Bates, 143 S. W. 13, 15, 146 Ky. 624.

Of finding

The "date of the finding" of an indictment is the date of its return and presentation to the court. State v. Peloquin, 76 Atl. 888, 889, 106 Me. 358.

Of issue

" 'Date of issue,' when applied to notes, bonds, etc., of a series, ordinarily means the arbitrary date fixed as the beginning of the term for which they run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. * * * It was a fair contract. There can be no wrong done if the term of some of the bonds in the hands of the purchasers is something less than twenty years." Wright v. East Riverside Irr. Dist., 138 Fed. 313, 324, 70 C. C. A. 603 (quoting and adopting Yesler v. City of Seattle, 25 Pac. 1014, 1 Wash. 308).

Of notice

Under an insurance certificate providing that assessments should be paid within 30 days from the "date of the notice," the notice does not mean the printed paper merely, but the information thereby conveyed to the insured, and the "date of the notice" is not the date of the paper, but, when sent by mail, is the date on which it was or should have been received by insured in the due and regular course of the mails. Ferrenbach v. Mutual Reserve Fund Life Ass'n, 121 Fed. 945, 947, 59 C. C. A. 307.

Of patent

Choctaw-Chickasaw Supplemental Agreement July 1, 1902, c. 1362, 32 Stat. 643, § 16, provides that "all lands allotted to members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year; one-fourth in acreage in three years and the balance in five years, in each case from date of patent." Allotments to members of the Choctaw and Chickasaw Tribes were made under what is known as the Atoka Agreement, embodied in Curtis Act June 28, 1898, c. 517, 30 Stat. 495, and such Supplemental Agreement. The Curtis Act provided that patents to the allottees should be jointly executed and delivered by the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, and the Supplemental Agreement made no change in that respect. There was no provision in either of the agreements, as there was in those with the Creeks and Cherokees, requiring the patents to be approved by the Secretary of the Interior. Held, that in view of the provision of Act March 3, 1893, c. 209, 27 Stat. 645, authorizing generally allotments in severalty of the lands of the Five Civilized Tribes, that upon such allotment the reversionary interest of the United States in the lands allotted "shall be relinquished and shall cease," there was no necessity for such approval to operate as a relinquishment of that interest, and that the "date of patent" referred to in said section 16 of the Supplemental Agreement, from which the periods of restriction were to run, was the date when the patent was signed by the second of the two chief executives of the tribes. In re Lands of Five Civilized Tribes, 199 Fed. 811, 817.

Of subscription

A railroad proposed that a city subscribe for certain of its stock to aid in the construction, on condition that the road be completed to a certain point within 24 months "from the date of the subscription." After an election resulting in favor of the proposition, a resolution of the city council was passed August 15, 1901, directing the mayor to subscribe for the stock, but no subscription was actually made until April 15, 1902. Held, that the subscription was not completed until the latter date, from which the time within which the railroad was bound to complete its line began to run, and not from the date of the passage of the resolution. Red River Furnace Co. v. Tennessee Cent. R. Co., 87 S. W. 1016, 1020, 113 Tenn. 697.

Of will

The Century Dictionary defines the verb "date," "to mark with a date, as a letter or writing." Held, that an olographic will, defined by Civ. Code, § 1277, as one that is entirely written, dated, and signed by the hand of the testator himself, is not rendered invalid by the fact that the date therein written is erroneous, and not the date on which the will was actually written. In re Fay's

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Estate, 78 Pac. 340, 341, 145 Cal. 82, 104 Am. St. Rep. 17.

DATE RELEASED

A coal company contracted with a railroad company for the carriage of coal from the mines to tidewater, where the coal was loaded on vessels. When cars arrived at tidewater, they were placed in the railroad company's yards until a vessel of the shipper was ready to load, when it registered at the railroad company's pier and such company placed it in a berth and ran the cars out on the pier and dumped the coal into the vessel as a part of the transportation. There was delay at times in the arrival of the vessel and placing it in the berth. The schedule of rules respecting charges filed by the railroad company with the Interstate Commerce Commission required the payment of demurrage when there was an average detention of cars for more than five days, computed on the basis of the time between the date of arrival of each car and "date released." The date of arrival meant the time of the arrival of the car in the yards and not upon the pier, nor the time when notice of arrival was given the shipper's agent, and "date released" did not mean date when the car was unloaded, but the date when the shipper's vessel was registered at the pier as ready to load. Hite v. Central R. of New Jersey, 171 Fed. 370, 374, 375, 96 C. C. A. 326.

DATUM

See City Datum; Town Datum; Village Datum.

DAUGHTER

See Stepdaughter.

The word "daughter," as used in Code, § 4936, declaring intercourse with a daughter to be incest, indicates relationship without reference to whether it is legitimate or not. State v. Goodsell, 116 N. W. 605, 606, 138 Iowa, 504.

The word "daughters" is not a technical, legal term, to which a fixed and determined meaning must be given regardless of the sense in which it is employed, but is flexible and subject to construction, to give effect to the intention of the testator. Connor v. Gardner, 82 N. E. 640, 644, 230 Ill. 258, 15 L. R. A. (N. S.) 73.

DAY

See Calendar Day; Clear Days; Election Day; First Day of the Term; From Day to Day; Law Day; Rainy Days; Return Day; Secular or Business Day; Sunday; Weather Working Day; Working Days.

Every day, see Every.

Successive days, see Successive.

Under section 79 of the election statute, prohibiting the sale of intoxicating liquor on an election day, the word "day" includes as well the hours before the opening and after the closing of the polls as those during which the same are open. Aimo v. People, 122 Ill. App. 398, 400.

Under section 33, Tariff Act July 24, 1897, c. 11, 30 Stat. 213, prescribing that "on and after the day" when the act went into effect the duties provided by the act should be applicable to goods previously imported for which no entry has been made, the word "day" refers to the time or moment when the act took effect; and merchandise imported on that day would not escape the application of the act, unless it was also entered before the act became effective. Hartwell Lumber Co. v. United States, 128 Fed. 306, 308; United States v. Edwin S. Hartwell Lumber Co., 142 Fed. 432, 435, 73 C. C. A. 548.

An acrobatic performer's contract provided that she would receive $300 at the end of each "week" after the last performance on Saturday for services rendered, to be performed at such theaters and such other places and on such "days" as might be determined by plaintiff. Held, that it was no objection to the enforcement of such contract by injunction that it provided for exhibitions on Sunday, since, if such exhibitions were prohibited, the words "days" and "week" as used in the contract would be construed to mean week days only. Keith v. Kellermann, 169 Fed. 196, 201.

The "days" referred to in the Louisiana statute providing that the accused shall be served with a copy of the information two "days" before the trial are not required to be "judicial days." State v. Baudoin, 40 South. 239, 115 La. 837.

As calendar day

Ordinarily a contract by the day means the calendar day, or hours of a calendar day ordinarily used. Collins v. Carlin, 106 N. Y. Supp. 235, 236, 121 App. Div. 524.

Laws 1905, p. 161, c. 103, § 3, in relation to the sale of school lands, provides that the envelope in which a purchaser makes his bid shall be preserved by the commissioner of the land office without being opened until the day following the date when the land comes on the market. Held, that the word "day" does not mean the next calendar day, but the next day on which the land office is required to be open; and where the next calendar day was a legal holiday, it was proper to make the opening on the day following. Fessenden v. Terrell, 98 S. W. 640, 100 Tex. 273.

The word "day," as used in St. 1898, § 2454, as amended by Laws 1903, p. 81, c. 45, limiting the compensation of the county judge to $5 per day for each day actually engaged in matters not appertaining to probate business, means a calendar day, and he cannot, by working over hours, entitled himself

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to more than the per diem allowance for one calendar day. Hoffman v. Lincoln County, 118 N. W. 850, 852, 137 Wis. 353.

The term "three days," in Const. art. 4, § 12, providing that if any bill presented to the Governor is not returned to the house in which it originated within three days, Sundays excepted, it shall become a law, was not employed to denote in all cases three calendar days. It denotes a period which cannot end except upon a day when the house to which the provision refers is or has been in session. State ex rel. Town of Norwalk v. Town of South Norwalk, 58 Atl. 759, 760, 77 Conn. 257.

As from midnight to midnight

Unless the contrary is fixed by statute, a "day" extends over the 24 hours from one midnight to the next midnight. State v. Richardson, 109 N. W. 1026, 1029, 16 N. D. 1.

Rev. St. 1899, § 3011, provides for the punishment of licensed dramshop keepers who keep open on the day of any general election. In a prosecution of a dramshop keeper for opening at 6 o'clock p. m., after the polls were closed on a day of general election, held, that under Rev. St. 1899, § 4160, requiring words and phrases to be taken in their usual sense, "the day" consisted of 24 hours, commencing and terminating at midnight, although the polls are to be open only from 7 o'clock a. m. until 6 o'clock p. m., or until sundown, as provided by section 6991. State v. Meagher, 101 S. W. 634, 635, 124 Mo. App. 333.

A "day" constitutes 24 hours, extending from midnight to midnight. Muckenfuss v. State, 116 S. W. 51, 52, 55 Tex. Cr. R. 229, 20 L. R. A. (N. S.) 783, 131 Am. St. Rep. 813, 16 Ann. Cas. 768.

A legal day commences at 12 o'clock midnight, and continues until the same hour the following night. Cheek v. Preston, 72 N. E. 1048, 1049, 34 Ind. App. 343.

As indivisible point of time

"The law does not take notice of a part of a 'day.' Its division of time into days is to allot, say, 24 hours to the day; each day ending at midnight. So a day in law may be very much less than 24 hours. It may, of course, be less in fact than one hour, or even one minute. Where time is an element of a fact, its beginning is deemed to have been coincident with the first moment of the day of the event. * * * Hence one born on June 9, 1883, at 11:59 p. m., is deemed in law to have been born on the first moment of that day. By like rule, on the first moment of June 8, 1904, he has encompassed 21 complete years, although, as a matter of fact, we see that he lacks 47 hours and 58 minutes of having done so." Erwin v. Benton, 87 S. W. 291, 294, 120 Ky. 536, 9 Ann. Cas. 264.

The word "days," as used in Pol. Code, § 1192, as amended in 1901, providing that certificates of party nominations may be filed not less than 20 days before the day of election, refers to a day as a unit of time and not as an aggregation of a certain number of hours, minutes, or seconds. A certificate of party nominations offered for filing on October 17th, containing the names of persons to be voted for at an election on November 6th, was in time. Cosgriff v. Board of Election Com'rs of City and County of San Francisco, 91 Pac. 98, 99, 151 Cal. 407.

Sunday excluded

Where a charter provided that after one idle day the charterer had 10 "days" to load, and that for every day's detention thereafter he should pay demurrage, he was entitled to 11 "days" to load, including Sundays, holidays, or stormy days, and likewise where a charter party provided that the charterer, after one idle day, should have 10 "working days" to load, before demurrage should be charged, he was entitled to 11 days, excluding Sundays and holidays, but not stormy days. Hughes v. J. S. Hoskins Lumber Co., 136 Fed. 435, 436 (citing Pedersen v. Eugster, 14 Fed. 422; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650; Hagerman v. Norton, 105 Fed. 996, 46 C. C. A. 1).

As twenty-four hours

Where a verdict was returned on May 31st, but judgment was not rendered until the following day, the judgment was not invalid under L. O. L. § 201, providing that judgment, when upon a question of fact, shall be entered the day given; the statute merely being designed to create a lien as soon as possible, and the expression "day" evidently meaning within 24 hours after verdict. Casner v. Hoskins (Or.) 128 Pac. 841, 850.

The word "day," as used in Const. § 72, providing that if any bill shall not be returned by the Governor within five days, Sundays excepted, after it shall have been presented to him, etc., it shall become a law, means a full day of 24 hours. Carter v. Henry, 39 South. 690, 691, 87 Miss. 411, 6 Ann. Cas. 715.

An order in term time setting a motion for a new trial for hearing in vacation keeps the term open, so far as the case is concerned, until the expiration of the day to which the hearing is adjourned, during all of the 24 hours of which the court has jurisdiction of the motion and can grant any proper order relative thereto. Cole v. Illinois Sewing Mach. Co., 66 S. E. 979, 980, 7 Ga. App. 338.

Under Code Civ. Proc. § 189, providing that defendant may within "twenty-four hours" from the time the replevin undertaking is given, except to the sufficiency of the sureties, the exceptions must be taken within 24 hours from the time the undertak-

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ing is given, and defendant is not entitled to the entire "day" after that on which the undertaking is given to except thereto. Barton v. Shull (Neb.) 97 N. W. 292, 293.

As working day

The word "day" ordinarily means 24 hours, from midnight to the following midnight; but the Legislature may designate a different period of time as a day for particular purposes, as in the statute providing that 8 hours of labor between the rising and setting of the sun shall constitute a legal day's work, when there is no special contract or agreement to the contrary, under which statute the word "day," in contracts of employment to which the statute applies, would mean 8 hours. People v. Keating, 93 N. E. 95, 96, 247 Ill. 76.

Rev. St. 1899, § 2586, provides that eight hours shall constitute a day's labor for all "coal miners and laborers," etc. Section 2587 declares that the word "day," in all contracts between any owner, lessee, or operator of any mine with any such miner or laborer, shall mean eight hours, and section 2589 declares that any owner, lessee, or operator, his or its agent, employés, or servants violating any of the provisions of the chapter, shall be fined, etc. Held, that the words "employé" or "servants," used in section 2589, should be construed to mean employés or servants of the mine owner occupying positions of "agents," and not to include miners and laborers, so that a miner was not subject to punishment under the penal provision for working more than eight hours a day. State v. Thompson, 87 Pac. 433, 15 Wyo. 136 (citing Holden v. Hardy, 18 Sup. Ct. 383, 390, 169 U. S. 366, 398, 42 L. Ed. 780).

DAY AFORESAID

A count, alleging that the right of action sued on accrued on the "day aforesaid," referring to a day set out in a preceding count, which specified a number of different days, was bad. Opdycke v. Easton & A. R. Co., 52 Atl. 243, 68 N. J. Law, 12.

DAY ASSIGNED

Under 24 Del. Laws, p. 652, c. 244, § 12, providing that, when the "day assigned" for holding a Court of Oyer and Terminer shall be when the petit jury is in attendance on the Superior Court or Court of General Sessions, such jury shall constitute a part of the panel of the petit jurors to attend the Court of Oyer and Terminer, the regular panel of 40 petit jurors in attendance on the Superior Court or Court of General Sessions at the time a trial is had in the Court of Oyer and Terminer must serve as part of the panel of the petit jurors of that court; the words "day assigned" meaning every day fixed by the judges for holding that court, whether by precept or by adjournment from time to time. Sigerella v. State (Del.) 74 Atl. 1081, 1084, 1 Boyce, 157.

DAYBREAK

Daybreak is the dawn or first appearance of light in the morning. Sullivan v. Chicago City Ry. Co., 167 Ill. App. 152, 159.

DAY BY DAY

A provision of a charter party that the charterer shall pay demurrage "day by day" for detention of the vessel through his default does not require the owner to demand demurrage at the end of each day, but means one day after another or running days. Washington Marine Co. v. Rainier Mill & Lumber Co., 198 Fed. 142, 147.

DAY DURING THE TERM

Rev. St. 1899, § 4407, provides that a partition sale shall take place during some day of the term of the court and be governed by the rules for the sale of realty under execution, and section 3197 requires the officer to expose realty for sale under execution on some day during the term of the circuit court. Held, that the words "some day during the term," in section 4407, meant a day when the court was in actual session for transacting business, so that, where the court adjourned from the 9th to the 13th of October, a partition sale could not be made on the 12th. Davidson v. I. M. Davidson Real Estate & Investment Co., 125 S. W. 1143, 1151, 226 Mo. 1, 136 Am. St. Rep. 615.

DAY IN COURT

By his "day in court" to which a party is entitled before he shall be personally bound is meant that the party shall be duly cited to appear and be afforded an opportunity to be heard. Old Wayne Mut. L. Ass'n v. McDonough, 27 Sup. Ct. 236, 239, 204 U. S. 8, 51 L. Ed. 345.

It is a rule as old as the law that no one shall be personally bound until he has had his "day in court," by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and never can be upheld where justice is justly administered. An infant two months old cannot be divested of real estate, in which he owns fee-simple title, by a judicial proceeding to which he was not a party, and of which he had no notice, and in which he was not represented by guardian or otherwise. Crapster v. Taylor, 87 Pac. 1138, 1140, 74 Kan. 771 (quoting Galpin v. Page, 18 Wall. [85 U. S.] 350, 21 L. Ed. 959).

The expression "day in court" means the opportunity of a defendant to resist enforcement of a claim, and, being guaranteed under the constitutional inhibition of taking property without due process of law, Ky. St. 1903, § 2971, providing that the board of school trustees may, without any proceeding, take possession of corporate realty which has es-

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cheated under the five-year period of limitation of the Constitution, is invalid. Louisville School Board v. King, 107 S. W. 247, 254, 127 Ky. 824, 15 L. R. A. (N. S.) 379.

DAY MESSAGE

A message was transmitted at night from a night message blank, which was changed to "day message," which the telegraph operator testified meant to transmit at once. No information was given the receiving office of the change, and no effort was made to deliver until the office hours next day. Held, that the telegraph company was liable for punitive damages, though an effort was made to deliver the following day during office hours, and, if such delivery had been made, the addressee could not have attended the funeral of his mother. Bolton v. Western Union Telegraph Co., 57 S. E. 543, 546, 76 S. C. 529.

DAY'S NOTICE

Where the power of sale in a mortgage requires "twenty days' notice of such sale in some one of the public newspapers printed in said city of Providence," a notice of sale to be held August 12th, published July 22d, 25th, 29th, August 1st, 5th, 8th and 11th, in a daily paper printed in Providence, is not sufficient. The "twenty days' notice" is to be continuous in the paper selected for 20 days. The use of the word "days" suggests to the ordinary mind a continuous daily notice, if it be in a daily paper. Washington v. Bassett, 10 Atl. 625, 626, 15 R. I. 563, 2 Am. St. Rep. 929.

DAYS OF GRACE

"Days of grace" by common acceptation and in the absence of statute came to be recognized as an absolute postponement of payment of a commercial paper, so that payment could not be demanded or suit maintained thereon within that time. Payment during the grace days was deemed performance of the contract to pay on the stipulated previous due day. Taylor v. Provident Savings Life Assur. Soc., 134 Fed. 932, 935.

DAY'S PAY

The term "day's pay," as shown by the evidence in an action for services in the rescue and floating of a barge under a contract on the basis of "day's pay," means the reasonable charge for the use of men and wrecking material in the prosecution of the work. Merritt & Chapman Derrick & Wrecking Co. v. Tice, 103 N. Y. Supp. 333, 334, 118 App. Div. 123.

DAY'S WORK

Rev. St. c. 82, § 36, establishing the rule that a "day's work" shall be 10 hours' actual labor unless the contract stipulates for a longer time, 10 hours constitute a legal "day's work" in a gristmill where labor is hired at a per diem compensation, without specifying the length of time of a day's work. Bachelder v. Bickford, 62 Me. 526, 527.

Laws Mont. 1905, c. 50, § 1, providing that eight hours shall constitute a "day's work" on municipal work, etc., in ore mills, smelters, and mines, and section 2, providing for the punishment of any one violating any of the provisions of section 1, prohibits the employment of laborers more than eight hours a day, and does not contemplate punishing those who fail to work that long. State v. Livingston Concrete Bldg. & Mfg. Co., 87 Pac. 980, 981, 34 Mont. 570, 9 Ann. Cas. 204.

DAYTIME

"Daytime" means any time from 30 minutes before sunrise to 30 minutes after sunset. Grant v. Hass, 75 S. W. 342, 343, 31 Tex. Civ. App. 688.

Under the statute fixing and defining "daytime" as including 30 minutes before sunrise, evidence that witness found a burglar in a room at about 10 or 15 minutes past 5 a. m. on a day in August, when the sun rose at about 18 minutes past 5 o'clock, was sufficient to justify submission of a count charging entry in the daytime. Long v. State, 127 S. W. 208, 211, 58 Tex. Cr. R. 209, 21 Ann. Cas. 405.

DE BENE ESSE

See Appearance De Bene Esse.

The right of an examination de bene esse should not be extended beyond the cases of a single witness, the age of 70, and dangerous illness to a prisoner charged with a capital felony. Anonymous, 19 Ves. 321. See, also, Abraham v. Newton, 8 Bing. 274, 275; Brown v. Southworth (N. Y.) 9 Paige, 351, 353; Hall v. Stout, 4 Del. Ch. 269, 273.

The jurisdiction which courts of equity exercise to perpetuate testimony is open to great objections: First, it leads to a trial on written depositions, which is much less favorable to the cause of truth than the viva voce examination of witnesses. But what is still more important, inasmuch as those written depositions can never be used until after the death of the witnesses, and are not indeed published till after the death of the witnesses, it follows, whatever perjury may have been committed in those depositions, it must necessarily go unpunished. And this testimony has therefore this infirmity: that it is not given under the sanction of the penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that courts of equity do not entertain bills to perpetuate testimony, generally, for the purpose of being used upon future occasion, unless where it is absolutely necessary to prevent a failure of justice. If it be possible that the matter in question can, by the party who files the bill,

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be made the subject of immediate judicial investigation, no such suit is entertained; but if the party who files the bill can by no means bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or when he is himself in possession), there courts of equity will entertain such a suit, for otherwise the only testimony which could support the plaintiff's title might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event. It is therefore ground of demurrer to a bill to perpetuate testimony, generally, that it is not alleged by the plaintiff that the matter in question cannot be made by him the subject of present judicial investigation; but courts of equity do not merely entertain jurisdiction to take or preserve testimony, generally, to be used on a future occasion, where no present action can be brought, but also to take and preserve testimony, in special cases, in aid of a trial at law, where the subject admits of present investigation. At law, no commission to examine witnesses who are abroad, for the purpose of being used at the trial, can go without the consent of the adverse party. Courts of equity will, upon a bill filed, grant such commission without the consent of the adverse party. So courts of equity will entertain a bill to preserve the testimony of aged and infirm witnesses, to be used at the trial at law, if they are likely to die before the time of trial can arrive; and will even entertain such a bill to preserve the testimony of a witness who is neither aged nor infirm, if he happen to be the single witness to support the case. Angell v. Angell, 1 Sim. & S. 83, 89.

The power of the court to appoint, on the application of plaintiff residing in a foreign country, a commissioner to take his testimony de bene esse under P. L. 1900, pp. 375, 376, §§ 45, 46, authorizing the taking of the testimony of a witness or party de bene esse before a commissioner appointed by the court on notice, is not limited by P. L. 1902, p. 459, providing that where a material witness or a party is absent from the state the court in its discretion, on such terms as it may direct, may issue a commission, and the court appointing a commissioner to take the testimony of a party on notice may not impose terms; the phrase "de bene esse" meaning provisionally, referring to the right to offer the evidence depending on the absence of the witness at the time of trial. Baelde v. San Domingo Imp. Co. (N. J.) 83 Atl. 485, 487.

A deposition de bene esse relating to a criminal charge under an order of the General Sessions previous to any indictment found in that court or sent there for trial is extrajudicial and void. People v. Restell (N. Y.) 3 Hill, 289, 294.

To entitle a party to maintain a bill to take testimony de bene esse, plaintiff must aver: First, that there is a suit pending in which the testimony of the witnesses named will be material; second, that the suit is in such condition that the depositions cannot be taken in the ordinary methods prescribed by law, and that the aid of the court of equity is necessary to perpetuate the testimony; third, the facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined, that the court may see that they are material to the controversy; fourth, the necessity for taking the testimony, and the danger that it may be lost by delay. Richter v. Jerome, 25 Fed. 679, 680.

DE FACTO

"De facto" means in law by fact; from, arising out of, or founded in fact; in fact, in deed; in point of fact; actually; really. McCahon v. Leavenworth County Com'rs, 8 Kan. 437, 442 (quoting and adopting Burrill, Law Dict.).

DE FACTO CORPORATION

Although a private corporation may not have complied with all the statutory requirements, it is a "de facto corporation." Conley v. Daughters of the Republic of Texas (Tex.) 151 S. W. 877, 883.

A "corporation de facto" is one where there is a charter or some law under which a corporation with the powers assumed might lawfully be created and a user of the rights claimed to be confirmed by such charter or law, or where there has been a bona fide attempt to organize a corporation under the charter or an enabling statute. Where there was a bona fide effort to comply with the law relative to the creation of school districts, and the people affected acquiesced therein and elected a board of education which exercised all the functions pertaining to the corporation, it was a corporation de facto. Board of Education v. Berry, 59 S. E. 169, 172, 62 W. Va. 433, 125 Am. St. Rep. 975.

A corporation cannot act simultaneously in the dual capacity of corporation de jure and a corporation de facto, so a corporation de jure cannot in the character of a corporation de facto exercise powers not granted to it by its charter. Boca & L. R. Co. v. Sierra Valleys Ry. Co., 84 Pac. 298, 303, 2 Cal. App. 546.

In order that there be a de facto corporation, two things are essential: First, there must be a law under which the corporation might lawfully be created; and, second, user. Chicago Open Board of Trade v. Imperial Bldg. Co., 136 Ill. App. 606, 612.

Any actual organization of a municipality in ostensible possession and the actual exercise of municipal powers is a "de facto corporation." City of Salem ex rel. Roney

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v. Young, 125 S. W. 857, 859, 142 Mo. App. 160.

In order to constitute a corporation de facto, there must be a valid charter or law under which the corporation might be formed, a bona fide attempt to incorporate under such charter or law, colorable compliance with the charter or law, and the exercise or user of corporate powers. Such a corporation cannot exist where a de jure corporation of the kind which it purports to be is not authorized by statute, or where the statute under which it purports to exist is unconstitutional and void. Clark v. American Canal Coal Co., 73 N. E. 727, 729, 35 Ind. App. 65.

It is held to be essential to the existence of a "de facto corporation" that there be: First, a valid law under which a corporation with the powers assumed, might be incorporated; second, a bona fide attempt to organize a corporation under such law; and, third, an actual exercise of corporate power. The lack of any one of these elements will defeat the claim. Farmers' Mutual v. Reser, 88 N. E. 349, 351, 43 Ind. App. 634.

It is essential to the existence of a "de facto corporation" that four conditions should exist: First, a valid law under which a corporation with the powers assumed might exist; second, a bona fide attempt to organize as a corporation under that law; third, a colorable or apparent compliance with the requirements of the law; fourth, user of the corporation powers. If the general railroad law, under which an attempt was made to organize a corporation, did not give the right to build the road which it was organized to build, the corporation would not be de facto for the purpose of employing attorneys, or any other purpose. Gillette v. Aurora Ry. Co., 81 N. E. 1005, 1009, 228 Ill. 261.

Generally, where there is an attempt in good faith to incorporate under a law authorizing incorporation, and corporate functions are exercised, there is a corporation de facto, and its legality can only be questioned in a direct proceeding by the state, and cannot be questioned collaterally or by one dealing with it as a corporation; but to constitute a de facto corporation there must be a law authorizing its incorporation. Imperial Bldg. Co. v. Chicago Open Board of Trade, 87 N. E. 167, 170, 238 Ill. 100.

Before there can be a de facto corporation, there must be a valid law under which a corporation may be formed, a bona fide attempt to incorporate under it, and an actual exercise of corporate powers. Jennings v. Dark, 92 N. E. 778, 782, 175 Ind. 332.

A municipal corporation, created by an unconstitutional law, is a "de facto corporation," and, so long as the state does not terminate its existence by direct proceedings by the attorney general, it may exercise through its officers the powers conferred on it as completely as if it were created by a valid law, and public policy requires obedience from its citizens. Lang v. City of Bayonne, 68 Atl. 90, 92, 74 N. J. Law, 455, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961.

A "de facto corporation" exists where the law authorizes such corporation and where the company has made an effort to organize under that law and is transacting business in the corporate name. If there has been an honest attempt of the corporators to organize a corporation under the laws of the state and all the necessary steps have been taken, except that the final certificate has not been recorded by the recorder of deeds, and the necessary officers are elected who proceed to the transaction of business as a corporate body, there is a corporation de facto. A warehouse company which obtains a certificate from the Secretary of State in due form and from that time does business as an incorporated company, carrying on a general storage business, issuing warehouse certificates signed by the president and secretary, and procures and uses a seal and receives notice from the Secretary of State as to the affidavit concerning trusts, and receives the customary notice as to the annual report to be filed, and fills out and returns in due course the documents required by such notices, and sends the statement required by law to a state board of equalization, and, in short, does everything that the law requires from the time the certificate was received by the Secretary of State, except the recording of the certificate as required by Hurd's Rev. St. 1905, p. 497, c. 32, § 4, is a "de facto corporation." Marshall v. Keach, 81 N. E. 29, 31, 227 Ill. 35, 118 Am. St. Rep. 247, 10 Ann. Cas. 164 (citing American Trust Co. v. Minnesota & N. W. R. Co., 42 N. E. 153, 157 Ill. 641; Bushnell v. Consolidated Ice Mach. Co., 27 N. E. 596, 138 Ill. 67; 1 Cook, Stock, Stockh. & Corp. [3d Ed.] § 234).

Members of three informal mutual telephone associations tentatively adopted articles of incorporation and elected officers and directors, but a few days later laid the articles on the table. The proposed directors contracted with an existing telephone company for joint operation of the lines. Subsequently, dissension among the members having arisen, defendant and another proposed director failed to act further, and the board attempted to fill their places. The reorganized board levied an assessment for incorporation and operating expenses, which defendant and 10 others of the 13 members on one line refused to pay. Afterwards, articles of incorporation were filed by one member from each of two of the lines and two from the third. The articles did not purport to include nor recognize by name as members all persons who previously attempted to act as directors, and did not ratify their action. Held, that the assessment may not be sustained as against defendant, on the theory

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that there was a de facto corporation. Middle Branch Mut. Tel. Co. v. Jones, 115 N. W. 3, 4, 137 Iowa, 396.

Under Pub. Acts 1903, No. 232, which provides for the incorporation of companies for manufacturing and mercantile purposes, and requires that, before such corporation shall commence business, the president shall cause the articles of association to be recorded in the office of the Secretary of State and the county clerk of the county in which the company is to have its domicile, the filing of such articles is a simple inhibition, and, as no penalty is prescribed and no declaration made that acts done thereunder shall be void, a corporation may be a corporation de facto, though the articles are filed with the Secretary of State only, and business transacted at that time will bind the corporation as such and those doing business with it. A de facto corporation exists when there is shown the existence of a charter or law under which a corporation with the powers assumed might lawfully be created and used thereunder. Newcomb-Endicott Co. v. Fee, 133 N. W. 540, 542, 167 Mich. 574.

Where the proceedings to organize a reclamation district were entirely regular in form, except for the insufficiency of the publication of the petition for its formation, under the rule defining a de facto corporation as one which exists where a number of persons have organized and acted as a corporation, have conducted their affairs to some extent by the methods and through the officers usually employed by corporations, and have assumed the appearance, at least, of a legal corporate body, the reclamation district had a de facto existence. Reclamation Dist. No. 765 v. McPhee, 109 Pac. 1106, 1108, 13 Cal. App. 382.

There can be no "de facto corporation" unless the statute authorizes the formation of a de jure corporation. State v. Stevens, 92 N. W. 420, 421, 16 S. D. 309.

Where there has been an attempt by incorporators in good faith to comply with the law as to the filing of certificates of incorporation, and a certificate has been filed in one or more of the places required by law, and there has been user of the corporate name, the corporation is a "de facto corporation"; but some of the statutory steps must be taken in an attempt to comply with the law. Stevens v. Episcopal Church History Co., 125 N. Y. Supp. 573, 579, 140 App. Div. 570.

Transaction of business by the promoters of a corporation as a corporation before the corporation was legally authorized to do so makes it a "de facto corporation" and was a matter for which the state alone could call it to account. Western Inv. Co. v. Davis, 104 S. W. 573, 581, 7 Ind. T. 152, 15 Ann. Cas. 1134.

A corporation is one de jure if its organization is effected in substantial conformity to the statutes, and a corporation de facto if a purpose is indicated to accept such statutes, but the organization is not in substantial conformity thereto. Mackay v. New York, N. H. & H. R. Co., 72 Atl. 583, 586, 82 Conn. 73, 24 L. R. A. (N. S.) 768.

"The requisites to constitute a 'corporation de facto' are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise." Whipple v. Tuxworth, 99 S. W. 86, 89, 81 Ark. 391 (citing Tulare Irrigation Dist. v. Shepard, 22 Sup. Ct. 531, 185 U. S. 1, 46 L. Ed. 773; Clark, Corp. 90; Finnegan v. Noerenberg, 53 N. W. 1150, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552; Stout v. Zulick, 7 Atl. 362, 48 N. J. Law, 599; Eaton v. Walker, 43 N. W. 638, 76 Mich. 579, 6 L. R. A. 102; Swartwout v. Michigan Air Line R. Co., 24 Mich. 393; McFarlan v. Triton Ins. Co. [N. Y.] 4 Denio, 392; Spring Valley Waterworks v. City of San Francisco, 22 Cal. 434; Mackall v. Chesapeake & O. Canal Co., 94 U. S. 308, 24 L. Ed. 161; 3 Cook, Corp. [4th Ed.] § 637).

DE FACTO DEPOSITARY

Where a bank is named as a depositary of city funds, and tenders a bond reciting that the bank has been duly designated as a depositary, and then for a number of years the funds of the city are deposited in the bank in reliance upon the bond, and thereafter there is a default in the conditions of the bond, the bank will be deemed to be at least a "de facto depositary," and the sureties will be held liable although the steps prescribed by law in making the designation of the depositary may not have been strictly followed. Snattinger v. City of Topeka, 102 Pac. 508, 510, 80 Kan. 341.

DE FACTO DISSOLUTION

A "de facto dissolution" of a corporation means that dissolution which takes place in substance and in fact, in the case of corporations organized for pecuniary gain, when the corporation, by reason of insolvency, or for other reason, suspends all its operations and goes into liquidation. Youree v. Home Town Mut. Ins. Co. of Warrensburg, Mo., 79 S. W. 175, 176, 178, 180 Mo. 153.

DE FACTO JUDGE

A person acting and recognized by the public as judge of the district court of a county in a new district, before the law establishing such new district has become operative, by appointment of the Governor, under the erroneous belief that the new district was already in existence, is "judge de facto," and his acts in that capacity valid as to third persons and the public. State v. Ely, 113

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N. W. 711, 715, 16 N. D. 569, 14 L. R. A. (N. S.) 638.

DE FACTO JURY

That certain members of a grand jury which returned an indictment were not assessed on the last assessment roll of the county on property belonging to them does not make such members any the less "de facto" grand jurors of a de jure grand jury. Kitts v. Superior Court of Nevada County, 90 Pac. 977, 980, 5 Cal. App. 462.

Under B. & C. Comp. §§ 117–123, abolishing a challenge to the panel, defining a challenge as an objection to an individual juror, either peremptory of for cause, and declaring that a challenge for cause is either that the juror is disqualified from serving in any action or that he is disqualified from serving in the particular action on account of bias, a litigant cannot object to jurors summoned in the manner prescribed by law and accepted by the court as legal jurors, on the ground that the law is unconstitutional, for a jury, though selected in pursuance of a void law, is selected under color of law and is a de facto jury, and, where the particular jurors so drawn are competent and qualified, a challenge cannot be interposed. State v. Ju Nun, 97 Pac. 96, 97, 53 Or. 1.

DE FACTO NOTARY

See De Facto Officer.

DE FACTO OFFICE

A de facto office cannot exist except in case of revolution, a complete overturning of constitutional authority, and usurpation of all power of government by occupants exercising a force superior to the constitutional authorities, and there cannot be under the Constitution a de facto office. Coquillard Wagon Works v. Melton, 125 S. W. 291, 292, 137 Ky. 189.

DE FACTO OFFICER

A "de facto officer" is one who is in possession of an office, discharging his duties under color of authority. In re Krickbaum's Contested Election, 70 Atl. 852, 854, 221 Pa. 521; Chandler v. Starling, 121 N. W. 198, 201, 19 N. D. 144.

A person to be a "de facto officer" of a corporation must hold the office under some appearance or color of right. Potomac Oil Co. v. Dye, 113 Pac. 126, 129, 14 Cal. App. 674.

A "de facto officer" is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Howard v. Burke, 93 N. E. 775, 777, 248 Ill. 224, 140 Am. St. Rep. 159.

An office is occupied de facto when it is held by one under an appointment or election giving color of title, though the appointment or election be invalid. State ex rel. Comstock v. Hempstead, 78 Atl. 442, 444, 83 Conn. 554, Ann. Cas. 1912A, 927.

"A 'de facto officer' is one who is in office, who is recognized by the public as an officer, whose acts are acquiesced in by the public, and yet who has no legal right to the office." State ex rel. Rife v. Hawes, 76 S. W. 653, 656, 177 Mo. 360.

An "officer de facto" is one who has the reputation of being the officer he assumes to be, and yet is not an officer in law. Bedingfield v. First Nat. Bank, 61 S. E. 30, 32, 4 Ga. App. 197.

A "de facto officer" is one who is surrounded with the insignia of officer, and seems to act with authority. Jay v. Board of Education of City of Emporia, 26 Pac. 1025, 1026, 46 Kan. 525.

"A 'de facto officer' is one who, though not authorized by law to act in the official capacity he assumes, yet claims to be so authorized, and in fact does act as an officer." Huston v. Anderson, 78 Pac. 626, 630, 145 Cal. 320.

A mere claim to be a public officer and the exercise of the office will not constitute one an officer de facto, for there must be at least a fair color of title or acquiescence on the part of the public. Howard v. Burke, 93 N. E. 775, 777, 248 Ill. 224, 140 Am. St. Rep. 159.

An "officer de facto" is defined to be one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised under color of a known election or appointment, void because the officer was not eligible; such eligibility being unknown to the public. Kitts v. Superior Court of Nevada County, 90 Pac. 977, 980, 5 Cal. App. 462.

"An 'officer de facto' is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or appointment by, or

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pursuant to, a public unconstitutional law before the same is adjudged to be such." Usher v. Western Union Telegraph Co. (Mo.) 98 S. W. 85, 99 (quoting and adopting the definition in State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409); Henry v. Commonwealth, 103 S. W. 371, 372, 126 Ky. 357 (quoting and adopting definition in Mechem, Pub. Off. § 318); Oakland Paving Co. v. Donovan, 126 Pac. 388, 391, 19 Cal. App. 488; Heard v. Elliott, 92 S. W. 764, 765, 116 Tenn. 150 (quoting and adopting definition in State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409).

An "officer de facto" is one whose acts, though not those of a legal officer, the law upon principles of policy and justice will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be. The clerk of a school district not appointed at a legal or special meeting of the board, as he should have been, but who was for a number of years recognized by the board as clerk, and whose official acts were adopted by the board which knowingly permitted the county officers and the general public to deal with him as a legal officer, was an "officer de facto." State ex rel. Morehead v. Cartwright, 99 S. W. 48, 50, 122 Mo. App. 257 (quoting and adopting Usher v. Western Union Tel. Co., 98 S. W. 84, 122 Mo. App. 98).

An "officer de facto" is "one who acts under color of title, which color can only be given by a power having authority to fill the office." Village Law, Laws 1897, p. 386, c. 414, § 68, provides that the board of water commissioners shall be appointed by the board of trustees, and section 43 provides that certain offices, not including water commissioners, shall be elective and the rest appointive, except that the offices of clerk and street commissioner may be made elective by adoption of a proposition to that effect. A village adopted a proposition to make the office of water commissioner elective, and elected a water commissioner, who assumed to act as such. Such commissioner did not hold office under color of title, so as to make him an officer de facto. Village of Canaseraga v. Green, 88 N. Y. Supp. 539, 542 (quoting People v. Albertson [N. Y.] 8 How. Prac. 363).

To constitute a "de facto officer" "there must either be some appointment or election which might be supposed to be valid or possible, such an occupation of the office, without dispute and with general acquiescence, as would reasonably lead to the inference that such an authority existed, although not at the time known." Where a city charter requires the approval of the common council of the appointment of an officer, he is neither a de jure or a de facto officer, though appointed by the mayor, where he holds office despite the council's refusal to approve his appointment. Beresford v. Donaldson, 103 N. Y. Supp. 600, 606, 54 Misc. Rep. 138 (citing Williams v. Boynton, 42 N. E. 184, 147 N. Y. 433; Hand v. Deady, 29 N. Y. Supp. 633, 78 Hun, 76).

In the absence of any color of appointment or election, a mere intruder, to be treated as a "de facto officer," must have acted as such under such circumstances of reputation or acquiescence as are calculated to induce people, without inquiry, to submit to or invoke his action in the supposition that he is in truth an officer, and mere proof of his performance of the act concerning which a controversy arises is not sufficient proof of his authority to perform it. Buck v. Hawley & Hoops, 105 N. W. 688, 689, 129 Iowa, 406.

The essential to the creation of an "officer de facto" is that his incumbency should not be legal, but that it should be exercised by some election or appointment, attempted as of legal right, but invalid for want of power in the appointing body, or because of a defect in the election, and an officer so elected or appointed actually in possession of the office exercising its functions and acting under "color of title," which means an apparent right to the office, is an "officer de facto." Coquillard Wagon Works v. Melton, 125 S. W. 291, 292, 137 Ky. 189.

An "officer de facto" has been defined as one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law. The better and more modern view, however, is that no color of election or appointment is needed to constitute one an officer de facto. The true principle seems to be that there must be either some color of election or appointment or else an exercise of the office and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment. While a "de facto officer" may be one who holds under color of election or appointment not altogether regular, there is still another class who may be de facto officers without regard to any election or appointment; that is, one who exercises the duties of an office for a length of time and acquiescence on the part of the authorities and of the public. In such cases the incumbent, regardless of his induction, may be considered a "de facto officer." The whole doctrine is founded on policy and necessity in order to protect the public and individuals, where they may become involved in the official acts of persons discharging the duties of an office without being lawful officers. A "de facto officer" may be such under the following circumstances: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as are calculated

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to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumes to be. Second, under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise; such ineligibility, want of power, or defect being unknown to the public. Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such. Ex parte Tracey (Tex.) 93 S. W. 538, 542; Butler v. Phillips, 88 Pac. 480, 481, 38 Colo. 378, 12 Ann. Cas. 204 (quoting and adopting definition in State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409).

Const. art. 6, § 22, as amended by Sess. Laws 1901, p. 111, provides for the election in each county of a judge of a county court. Denver City Charter adopted March 29, 1904, increased the number of judges of the county of Denver to two and changed the time of the election. Held that, though the charter provision was unconstitutional, a county judge elected thereunder was "an officer de facto," and his judicial act therefore valid. Butler v. Phillips, 88 Pac. 480, 481, 38 Colo. 378, 12 Ann. Cas. 204.

A "de facto officer" is one who has a colorable right or title to the office accompanied by possession. It must originate in some kind of election or appointment to the office claimed, or, being an intruder or usurper, it must arise from the fact that he has exercised official functions under such circumstances and for so long a time, without interference, as to justify belief that he has been elected or appointed. Galveston, H. & S. A. Ry. Co. v. Quinn (Tex.) 100 S. W. 1036, 1038.

To constitute an officer de facto, he must have a presumptive or apparent right to exercise the office, resulting from either full and peaceable possession of the powers of such office, or reasonable color of title, with actual use of the office. State v. Messervy, 68 S. E. 766, 768, 86 S. C. 503.

A "de facto officer" is one who actually performs the duties of the office with apparent right, under claim or color of appointment or election, and it is immaterial that the appointing power could not give him good title to the office, or that the statute under which he claims to hold the office is unconstitutional. Lavin v. Board of Com'rs of Cook County, 92 N. E. 291, 295, 245 Ill. 496.

A "de facto officer" must be in fact the officer and must be entitled to actual possession and control of the office. If the officer de jure is in possession and is also the officer de facto, no other person can be an officer de facto for that office, as two persons cannot be officers de facto for the same office at the same time. McCahon v. Leavenworth County Com'rs, 8 Kan. 437, 442 (citing Boardman v. Halliday [N. Y.] 10 Paige, 223, 232; Morgan v. Quackenbush [N. Y.] 22 Barb. 72, 80).

A "de facto officer" is one who, by some color of right, is in possession of an office and for the time being performs his duties with public acquiescence, though having no right in fact. A member of the bar appointed by the Governor, without authority, to try a cause on the disqualification of the resident judge, is not a "judge de facto." Oates v. State, 121 S. W. 370, 381, 56 Tex. Cr. R. 571 (quoting and adopting Cooley, Const. Lim. p. 751).

While there can be no such thing as a de facto office, there may be a "de facto officer," whose apparent right arises out of action taken by the electorate or the appointing power under the supposed authority of an unconstitutional law before the same is declared unconstitutional. Where a city charter authorized three justices of the peace, and an amendatory act provided for only one, a justice elected under the latter statute, even though it was unconstitutional, was a "de facto officer" whose right to the office could not be collaterally attacked. Thompson v. Couch, 108 N. W. 363, 364, 144 Mich. 671 (citing Mechem, Pub. Off. §§ 318, 327; Walcott v. Wells, 24 Pac. 367, 21 Nev. 47, 9 L. R. A. 59, 37 Am. St. Rep. 478).

A person assuming the duties of supervisor of roads by virtue of a void election by the fiscal court, and discharging the duties of the office with the acquiescence of the court, even after the office had been declared vacant and another supervisor elected, is an "officer de facto." Henry v. Commonwealth, 103 S. W. 371, 372, 126 Ky. 357.

The office of commissioner to make an assessment for reclamation purposes is created by statute, and is a de jure officer, and, when one who is appointed, qualifies and participates in the performance of the duties of the commissioners, he acts under color of office and is a de facto officer, and as such his acts are valid; an "officer de facto" being one whose acts the law, upon principles of policy and justice, will hold valid as far as they involve the interests of the public and third persons where he holds under color of a known appointment, void because the officer is not eligible, such ineligibility being unknown to the public. Reclamation Dist. No. 70 v. Sherman, 105 Pac. 277, 284, 11 Cal. App. 399.

A person who is actually in possession of an office under color of title, by authority of those having power to elect, and who is performing its functions, is a "de facto officer," whose acts cannot be impeached in any pro-

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ceeding in which he is not a party. Rosetto v. City of Bay St. Louis, 52 South. 785, 786, 97 Miss. 409.

One who was elected sheriff and qualified by filing his official oath and bond and entered upon the discharge of the duties of such office and exercised the functions thereof was a "de facto officer." Sprague v. Brown, 40 Wis. 612, 617.

Though the provisions of the city charter under which one was appointed to act as police justice were invalid, he was the police justice "de facto," whose right to exercise the office could not be determined in a collateral proceeding. State v. Bartlett, 35 Wis. 287, 288, 293.

A statute creating an office with prescribed duties has the force of law until condemned as unconstitutional by the courts, and in the meantime the incumbent is an "officer de facto" and his acts are as potent so far as the public is concerned as are the acts of any de jure officer. Lang v. City of Bayonne, 68 Atl. 90, 92, 74 N. J. Law, 455, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961.

One who has been commissioned as notary, and has taken the oath of office, and has been acting as notary for many years, and has the reputation of being such in the community in which he lives, but who has failed to file his oath of office in the offices of the Secretary of State and of the clerk of court, and has also failed to renew his bond every five years, as required by law, is a notary "de facto"; and acts passed before him have the same validity as acts passed before a notary de jure. The position of a notary public is an "office," and, where a person holds a commission as a notary and acts as one and has the reputation of being a notary public, he is a "notary public, de facto." Davenport v. Davenport, 41 South. 240, 241, 116 La. 1009, 114 Am. St. Rep. 575.

A "de facto officer" is one who, though not a holder of a legal office, is actually in possession of it, under some color of title, or under such conditions as indicate the acquiescence of the public in his actions. Where the mayor of a city appointed three persons to constitute the examining and trial board of the police department created by Rev. Codes Mont. § 3304 et seq., providing that the mayor shall nominate, and with the consent of the council appoint, three residents to constitute a board, and the persons appointed qualified, they were "de facto officers" from the time of their appointment by the mayor and their qualification, and the fact that subsequently the mayor submitted the appointments to the council for approval, and that the council refused to approve the appointments, was immaterial. State ex rel. Buckner v. City of Butte, 109 Pac. 710, 712, 41 Mont. 377.

A jury commissioner regularly appointed by the court and otherwise qualified, but who has failed to take and subscribe the oath prescribed by Code 1899, c. 116, § 3 (Code 1906, § 3703), is notwithstanding, a de facto officer, and a motion to quash the venire and discharge the panel on that ground is properly denied. State v. Medley, 66 S. E. 358, 359, 66 W. Va. 216, 18 Ann. Cas. 761.

"To constitute a person an 'officer de facto' there must be some facts, circumstances, or conditions which would reasonably lead persons, who have relations or business with the office, to recognize him as the lawful incumbent and submit to or invoke his official action, without inquiry as to his title." Where a de jure chief of police is, pending suit on charges against him in the district court, wrongfully suspended by order of the judge thereof at chambers, which order is later set aside and the suit dismissed, and where the city pays a chief of police de facto, during his incumbency, the salary provided by law, the officer de jure after obtaining possession of the office cannot recover from the city the salary for the same period. Stearns v. Sims, 104 Pac. 44, 46, 24 Okl. 623, 24 L. R. A. (N. S.) 475.

The officer in possession of the office of city treasurer, and who under the orders of the council pays out city money to settle claims, and is thus recognized as the acting officer, is the "de facto officer," though a third person assumes to perform the duties of the office, without recognition of his right by the municipal authorities; and a payment by the city of the salary of the office to the de facto officer relieves it from liability therefor, though the third person is the de jure officer. Walters v. City of Paducah (Ky.) 123 S. W. 287, 288.

Under Pol. Code 1895, § 223, the official acts of a person while holding a commission as a public officer are valid as the acts of a "de facto officer," though he is absolutely ineligible to hold any civil office whatever in the state. Wright v. State, 52 S. E. 146, 124 Ga. 84 (citing Smith v. Bohler, 72 Ga. 546; Hinton v. Lindsay, 20 Ga. 746; Pool v. Perdue, 44 Ga. 454).

"An 'officer de facto' is one who executes the duties of an office under some color of right—some pretense of title—either by election or appointment." "A person actually in office by some right or title—not a mere usurper or intruder—although not legally appointed or elected thereto, or qualified to hold the same, is still an 'officer de facto,' or in fact." Where, in an election contest for the office of alderman, the contestee was unseated and the contestant seated and qualified and entered on the discharge of his duties, he was a "de facto officer," being in actual possession of the office under election or permission, and exercising its duties under color of right. City Council of City of

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Cripple Creek v. People ex rel. Ferguson, 75 Pac. 603, 604, 19 Colo. App. 399 (quoting and adopting definitions given in Hooper v. Goodwin, 48 Me. 79, 80; In re Ah Lee, 5 Fed. 899, 6 Sawy. 410; Jeffords v. Hine, 11 Pac. 351, 2 Ariz. 162).

Though the returns on the warrants for an election of mayor and aldermen are defective, the persons chosen mayor and aldermen who proceed to organize and to perform their respective duties as such under color of title, and claim of right, with the acquiescence of the citizens, are "de facto officers." Stuart v. Inhabitants of Ellsworth, 75 Atl. 59, 61, 105 Me. 523.

Persons claiming to be public officers while in possession of an office ostensibly exercising its functions lawfully and with the acquiescence of the public are "de facto officers." Town of Susanville v. Long, 77 Pac. 987, 988, 144 Cal. 362.

A "de facto officer" may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is thus found openly in the occupation of a public office and discharging his duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title and may safely act upon the assumption that he is a rightful officer. Bonds signed by one claiming to act as the mayor of a city after his successor had qualified, but before he entered upon the duties of his office, and during a period in which the outgoing mayor and the common council were continuing to hold meetings as city officials without any protest or question being made in respect to their right to do so, cannot be held invalid on the ground that they were not signed by the legal mayor, since it is sufficient in that respect if they were signed by the mayor de facto. Waite v. Santa Cruz, 22 Sup. Ct. 327, 334, 184 U. S. 302, 46 L. Ed. 552.

De jure office required

There cannot be a "de facto officer" unless there is a corresponding office in existence. Bystanders who take upon themselves to open the poll before the order fixed by law for opening the poll has arrived cannot be said to be de facto commissioners. Until the hour comes for the election to be held, there cannot be said to be an election. But even if bystanders so acting before the hour of the opening of the polls could be held to be de facto commissioners in a case where the voter had been induced by appearances to believe that they had authority to receive his vote, they cannot be so held in the case of a voter who had himself appointed the commissioners and moreover had actual knowledge of who the regular commissioners were. Lower Terrbonne Refining & Mfg. Co. v. Police Jury of Parish of Terrebonne, 40 South. 443, 445, 115 La. 1019, 112 Am. St. Rep. 291.

There may be a "de facto officer," though no de jure office exists, as in de facto municipal corporations or de facto courts. A de facto court is a "competent court" or a "legally constituted court" within the meaning of the habeas corpus statute. The legal existence of a court organized and created under color of law cannot be questioned in habeas corpus sent out by one convicted before it. State ex rel. Bales v. Bailey, 118 N. W. 676, 678, 106 Minn. 138, 19 L. R. A. (N. S.) 775, 130 Am. St. Rep. 592, 16 Ann. Cas. 338.

The law recognizes no one, even as an "officer de facto," who fills an alleged public office that has no existence under any constitutional provision, or by virtue of any color of legislative enactment. An "officer de facto" is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in law. Bedingfield v. First Nat. Bank, 61 S. E. 30, 33, 4 Ga. App. 197 (citing Herrington v. State, 29 S. E. 931, 103 Ga. 319, 68 Am. St. Rep. 95).

Where there is an existing legal office, one who assumes to fill the office and acquires the reputation of being the officer he assumes to be will be an "officer de facto," although there may be some irregularities in his appointment, election, or qualification which would be fatal to his title in a direct proceeding. City of Chicago v. Burke, 80 N. E. 720, 723, 226 Ill. 191 (citing Barlow v. Stanford, 82 Ill. 298; Leach v. People, 12 N. E. 726, 122 Ill. 420; Samuels v. Drainage Com'rs, 17 N. E. 829, 125 Ill. 536).

Hold over

A person in possession of a city office by virtue of holding over, and under a declaration of election made by the common council as the board of canvassers, is a "de facto officer," notwithstanding the existence of a bona fide dispute between him and a claimant as to the title to the office, and the claimant is not justified in attempting to take possession of the office by violence. Blain v. Chippewa Circuit Judge, 108 N. W. 440, 445, 145 Mich. 59.

The acting official who had received an appointment as deputy auditor during the previous term and continued to hold over is a "de facto officer." Board of Com'rs of Ramsey County v. Sullivan, 102 N. W. 723, 724, 94 Minn. 201.

Officer de jure distinguished

The only difference between an "officer de jure" and an "officer de facto" is that the former cannot be removed from his office in a proceeding instituted directly for that purpose, while an officer de facto may be; but until a de facto officer is removed in such a

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proceeding his acts are as valid as the acts of a de jure officer. Commonwealth v. Wotton, 87 N. E. 202, 203, 201 Mass. 81.

Where an alleged de facto board of directors of a private corporation was not in the actual exercise of its functions, and had not been recognized by the public, or by those having dealings with the corporation as a legitimate board of directors, and had not been performing generally the duties of a board of directors, it was not a de facto board, and had no rights. Technically speaking, the term "de facto officer" applies only to a public officer, and then usually only to an office having a physical existence and property. A de facto officer must be one publicly exercising the functions of an office, and actually in possession of it. The expressions "officer de facto" and "officer de jure" have in many instances been applied to directors and other managing agents of private corporations, but they do not possess the relation of officers to it, or to the public; their status being rather agents of their principal. Umatilla Water Users' Ass'n v. Irvin, 108 Pac. 1016, 1020, 56 Or. 414.

DE FACTO PRESIDENT OF SENATE

Where the President of the Senate continued to preside over that body while acting as Governor, but no vacancy in that office was declared and no effort was made to supplant him, he was a "de facto President of the Senate," and his acts in attesting bills were valid, even if his right to so act was suspended while acting as Governor. Simon v. State, 111 S. W. 991, 992, 86 Ark. 527.

DE FACTO STEWARD

"A 'steward de facto' is no other than he who has the reputation of being such steward, and yet is not a good steward in point of law," just as "an officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." Bedingfield v. First Nat. Bank, 61 S. E. 30, 32, 4 Ga. App. 197.

DE JURE

DE JURE CORPORATION

De facto corporation distinguished, see De Facto Corporation.

A corporation is one de jure if its organization is effected in substantial conformity to the statutes, and a corporation de facto if a purpose is indicated to accept such statutes, but the organization is not in substantial conformity thereto. Mackay v. New York, N. H. & H. R. Co., 72 Atl. 583, 586, 82 Conn. 73, 24 L. R. A. (N. S.) 768.

A "corporation de jure" is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in a quo warranto proceeding. Board of Education v. Berry, 59 S. E. 169, 172, 62 W. Va. 433, 125 Am. St. Rep. 975.

DE JURE OFFICER

De facto officer distinguished, see De Facto Officer.

Where a city charter requires the approval of the common council of the appointment of an officer, he is not a "de jure officer," though appointed by the mayor, where he holds office despite the council's refusal to approve his appointment. Beresford v. Donaldson, 103 N. Y. Supp. 600, 606, 54 Misc. Rep. 138.

Where an alleged de facto board of directors of a private corporation was not in the actual exercise of its functions, and had not been recognized by the public, or by those having dealings with the corporation as a legitimate board of directors, and had not been performing generally the duties of a board of directors, it was not a de facto board, and had no rights. Technically speaking, the term "de facto officer" applies only to a public officer, and then usually only to an office having a physical existence and property. A de facto officer must be one publicly exercising the functions of an office, and actually in possession of it. The expressions "officer de facto" and "officer de jure" have in many instances been applied to directors, and other managing agents of private corporations, but they do not possess the relation of officers to it, or to the public; their status being rather agents of their principal. Umatilla Water Users' Ass'n v. Irvin, 108 Pac. 1016, 1020, 56 Or. 414.

DE MINIMIS NON CURAT LEX

Where a judgment is for $1,000, a contention on appeal that it should be reduced to the extent of $17.70 involves the maxim of "De minimis non curat lex." Brady v. Ranch Min. Co., 94 Pac. 85, 86, 7 Cal. App. 182.

Under the maxim "de minimis non curat lex," a judgment will not be reversed for errors operating to the appellant's prejudice only in the sum of 76 cents. Hopkins v. Kitts, 94 Pac. 201, 202, 37 Mont. 26.

Where it is claimed that there is a defect in title because some points of the stone constituting the adjoining wall projected over the line of the lot from one to two inches, the maxim "de minimis non curat lex" can be applied. Ungrich v. Shaff, 105 N. Y. Supp. 1013, 1015, 119 App. Div. 843.

DE NOVO

See Hearing De Novo; Trial De Novo.

"De novo" means fresh; anew. Estes v. Denver & R. G. R. Co., 113 Pac. 1005, 1008, 49 Colo. 378.

An appeal from an assessment by the tax appeal court, on the ground of unfair valuation and inequality, was taken to the Baltimore city court under Baltimore City

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Charter, § 170, as amended by Acts 1908, c. 167, which provides that a person or city appealing to the Baltimore city court shall have a trial by the court, sitting without a jury, which shall hear the case de novo, and without declaring the acts of the appeal tax court void for any reason if notice has been given, shall assess or classify the property anew, and in the absence of evidence to the contrary shall affirm the assessment. Held, that the effect of the words "de novo" was that the assessment should be made de novo or anew, and that the duty of opening and closing was on the petitioner. City of Baltimore v. Hurlock, 78 Atl. 558, 560, 113 Md. 674.

DE SON TORT

See Executor De Son Tort; Guardian De Son Tort.

DEAD

DEAD BODY

As property, see Property.

DEAD CABOOSE

An unattached caboose is known in railroad parlance as a "dead caboose." Edington v. St. Louis & S. F. R. Co., 102 S. W. 491, 492, 204 Mo. 61.

DEAD DRUNK

See Drunk.

DEAD ENGINE

An engine having no steam is called a "dead engine," and one with steam is a "live engine." Turner v. Atchison, T. & S. F. Ry. Co., 111 Pac. 433, 83 Kan. 315.

DEAD OIL

The article known as "carbolineum," or "carbolineum Avenarius," which consists of "dead oil" modified by the action of chlorine gas, is dutiable under the provision in paragraph 15, Schedule A, § 1, c. 11, Tariff Act of July 24, 1897, 30 Stat. 152, for "preparations of coal tar, not colors or dyes and not medicinal, not specially provided for," and is not dutiable under the provision for "chemical compounds," in paragraph 3 of said act (30 Stat. 151), or free of duty as "dead or creosote oil," under paragraph 524 of said act (Free List, § 2, c. 11, 30 Stat. 197). Downing v. United States, 123 Fed. 1000, 1001.

DEAD RENT

A minimum royalty provided for in leases for mining purposes is called in England "dead rent." Robinson v. Kistler, 59 S. E. 505, 507, 62 W. Va. 489.

DEAD ROLLER

The rollers of an edger used in a sawmill which bear down on the lumber and hold it firm on the saws are called "dead rollers." Trigg v. Ozark Land & Lumber Co., 86 S. W. 222, 223, 187 Mo. 227.

DEADMAN

As person, see Person.

An appliance used in raising poles, which consists of a round piece of timber 12 feet in length and 3½ inches in diameter, having a crotch or saddle attached to the top or end to receive and hold the pole in place in the process of raising or lowering it, is called a "deadman." Sandquist v. Independent Telephone Co., 80 Pac. 539, 38 Wash. 313.

"Deadmen" are appliances, like crutches on which a telegraph pole which is being lowered is permitted to rest while the men are changing their position and taking a new hold. Orr v. Southern Bell Telephone & Telegraph Co., 44 S. E. 401, 402, 132 N. C. 691.

DEADEN TIMBER

The phrase "deaden timber," as used in a logging contract, means to circle the tree with a cut deep enough to interrupt the flow of the sap and thereby kill the tree. Des Allemands Lumber Co. v. Morgan City Timber Co., 41 South. 332, 334, 117 La. 1.

DEADENED WIRE

In stringing telephone wires, the wires are said to be "deadened" when they do not go beyond a pole that is fastened to that arm. Maryland Telephone & Telegraph Co. v. Cloman, 55 Atl. 681, 682, 97 Md. 620.

DEADLY WEAPON

See Assault with Dangerous or Deadly Weapon.

Other deadly weapon, see Other.

A "deadly weapon" is any weapon which is likely, from the use made of it at the time, to produce death or do great bodily harm. It is said that the term "dangerous weapon" is a milder term than "deadly weapon," yet otherwise of the same meaning. Clemons v. State, 37 South. 647, 649, 48 Fla. 9 (quoting 2 Bish. New Cr. Law, § 680, and Bish. St. Crimes, § 320).

A "deadly weapon" is a weapon likely to produce death. State v. Brooks (Del.) 84 Atl. 225, 227.

A deadly weapon is such a weapon as is likely to produce death when used by one person against another; and, if death is produced by the use of a deadly weapon, the provocation to reduce the killing from murder to manslaughter must be great. State v. Cephus (Del.) 67 Atl. 150, 151, 6 Pennewill, 160.

A "deadly weapon" is one likely to produce death or great bodily injury, and the manner in which it is used in the particular instance may enter into the question whether it is deadly. State v. Dunn, 120 S. W. 1179, 1182, 221 Mo. 530.

A "deadly weapon," within the rule that, where a killing was done with a deadly weap-

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on, malice is presumed, is such a weapon as is likely to produce death, when used by one person against another. State v. Miele (Del.) 74 Atl. 8, 9, 1 Boyce, 33.

A weapon may or may not be deadly according to its size and the manner of its use. Smith v. State, 135 S. W. 152, 153, 61 Tex. Cr. R. 349.

Baseball bat

A baseball bat is not, per se, a "deadly weapon." Crow v. State, 116 S. W. 52, 53, 55 Tex. Cr. R. 200, 21 L. R. A. (N. S.) 497.

Brick

Whether a brick is a "deadly weapon" is a question for the jury, in a prosecution for assault with such an instrument. State v. Sims, 31 South. 907, 80 Miss. 381.

Buggy trace

Some weapons are per se deadly, and others, owing to the violence and manner of use, become deadly. In the latter class of cases, where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to the jury with proper instructions. So far as defendant is concerned, there is no error in submitting to the jury the question whether his assault on his wife was with a "deadly weapon"; he being very strong, large, and robust, she being very frail and weak, and sick at the time of the assault, and he having violently assaulted her with a buggy trace 2½ feet long. State v. Archbell, 51 S. E. 801, 139 N. C. 537.

Club or stick

"A club may or may not be a 'deadly weapon' (within the meaning of Pen. Code 1895, art. 334, providing punishment for rudely displaying a pistol or other 'deadly weapon,' etc.). It was the evident purpose of the Legislature to confine the deadly weapons mentioned to pistols, guns, or weapons of like character, usually understood to be deadly," and a hickory club a little longer than an ordinary walking stick, weighing 11 ounces, is not a "deadly weapon," within the purview of the statute. Fuller v. State, 87 S. W. 832, 48 Tex. Cr. R. 300.

A heavy wooden stick is not ex vi termini a deadly weapon or a deadly instrument, within Pen. Code, § 245, subjecting to punishment every person committing an assault with a deadly weapon. People v. Perales, 75 Pac. 170, 171, 141 Cal. 581.

A stick 2½ to 3 feet long and about an inch in diameter is not as a matter of law a "deadly weapon." Renow v. State, 120 S. W. 174, 175, 56 Tex. Cr. R. 343.

Gun

A gun fired for the purpose of frightening is not necessarily a "deadly weapon." Angel v. State, 74 S. W. 553, 554, 45 Tex. Cr. R. 135.

An instruction defining a "deadly weapon" to be a gun within carrying distance is erroneous when applied to a state of facts which show that defendant's gun was loaded with squirrel shot, and that at the time of the shooting the parties were from 125 to 200 yards apart, it not being possible that a serious injury could have been inflicted by the discharge of the defendant's gun at such a distance from the party alleged to have been assaulted. Scott v. State, 81 S. W. 952, 953, 46 Tex. Cr. R. 315.

Hands and feet

A person's hands and feet are not "deadly weapons," within the meaning of the law, and, where death results unintentionally from their use in an assault, the result is not murder but involuntary manslaughter. Thomas v. Commonwealth (Ky.) 86 S. W. 694, 695.

Knife

A knife is not necessarily a "deadly weapon." Burris v. State, 58 S. E. 545, 2 Ga. App. 418.

A knife having a blade 2⅝ inches long is a deadly weapon. Baker v. State (Tex.) 81 S. W. 1215, 1216.

An ordinary pocketknife with a three-inch blade is not per se a "deadly weapon." Henderson v. State, 115 S. W. 588, 590, 55 Tex. Cr. R. 170.

A knife with a blade 2½ or 3 inches long, not in any respect bent or injured, was, in the hands of deceased, a stalwart man, a "deadly weapon." Hudson v. State, 129 S. W. 1125, 1127, 59 Tex. Cr. R. 650, Ann. Cas. 1912A, 1324.

An instruction that a knife is a "deadly weapon" is correct. Johnson v. State, 130 N. W. 282, 284, 88 Neb. 565, Ann. Cas. 1912B, 965.

A penknife may or may not be a deadly weapon. If the weapon is such that from the manner of its use it is likely to produce death, it is of course a deadly weapon. State v. Roan, 97 N. W. 997, 998, 122 Iowa, 136.

An ordinary pocketknife is not necessarily a deadly weapon, and in this case it was a question of fact for the jury whether the pocketknife, if they believed one was used, was a deadly weapon. Clemons v. State, 128 Pac. 739, 741, 8 Okl. Cr. 452.

A pocketknife is a "deadly weapon," within Code 1906, § 1110, providing that if any person, having or carrying any dirk, dirk knife, sword, sword cane or any deadly weapon, the carrying of which concealed is prohibited, shall, in the presence of three or more persons, exhibit the same in a rude, angry, or threatening manner, not in necessary self-defense or shall in any manner unlawfully use the same in any fight or quarrel, on con-

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viction he shall be fined, etc. State v. Ware (Miss.) 59 South. 854.

Pistol

A loaded pistol is a deadly weapon. Ewing v. Commonwealth, 111 S. W. 352, 355, 129 Ky. 237.

A pistol, used as a firearm, is a "deadly weapon." Hartfield v. State, 134 S. W. 1180, 1182, 61 Tex. Cr. R. 515.

In a prosecution for homicide, the court properly charged that a pistol was a deadly weapon, from the use of which malice would be presumed in the absence of rebutting evidence, and that when the killing was malicious no conviction could be had for any offense less than murder. Heningburg v. State, 45 South. 246, 247, 153 Ala. 13.

Whenever a pistol is used as a firearm, it is per se a "deadly weapon," and it is therefore unnecessary for the court in such a case to define "deadly weapon." Lofton v. State, 128 S. W. 384, 386, 59 Tex. Cr. R. 270.

A pistol is a deadly weapon with which an aggravated assault may be committed. Pace v. State (Tex.) 79 S. W. 531, 533.

A pistol used in striking another is a "deadly weapon," within St. § 1166, providing for the punishment of any one who shall willfully and maliciously "strike" another with a knife, sword, or "other deadly weapon," with intent to kill. Riggs v. Commonwealth (Ky.) 33 S. W. 413, 414.

Whether a person pointing a cocked pistol at another in an angry and threatening manner is guilty of assault with a "deadly weapon" depends on whether or not the pistol was loaded, where accused was not within striking distance of the other party. Territory v. Gomez (Ariz.) 125 Pac. 702, 42 L. R. A. (N. S.) 975.

Rock

A "deadly weapon" is one which, in the manner used, is likely to produce death or serious bodily injury. Such term does not per se include a rock, in the absence of proof of its size or character. Taft v. State (Tex.) 97 S. W. 494, 496.

Shotgun

A shotgun used as a firearm is a "deadly weapon." Deneaner v. State, 127 S. W. 201, 202, 58 Tex. Cr. R. 624.

Where, in a prosecution for aggravated assault, it was shown that accused fired at prosecutor with a double-barreled shotgun, and there was no question but that the assault was made with a gun, and that in the manner of its use it was a deadly weapon, the court could properly assume such fact, and charge that an assault becomes aggravated when committed with a gun; the same being a deadly weapon. Kosmoroski v. State, 127 S. W. 1056, 1058, 59 Tex. Cr. R. 296.

Where, in a homicide case, the weapons used were a shotgun and six-shooter of 45 caliber, and the court in its charge on murder in the first degree defined a "deadly weapon" as a weapon reasonably sufficient to accomplish death by the mode of its use, the failure to define a "deadly weapon" in the charge on murder in the second degree was not reversible error. Wheeler v. State, 121 S. W. 166, 167, 56 Tex. Cr. R. 547.

Steel screw-driver

Where the weapon used by the defendant in a homicide case, a steel screw-driver, was of such a nature that defendant was able to drive it through the skull of an adult with one hand, at a single blow, and where the weapon was introduced at the trial, although no description of it is preserved by the evidence, an instruction telling the jury, as a matter of law, that it was a "deadly weapon," is properly given. State v. Belfiglio, 134 S. W. 508, 232 Mo. 235.

Whip

Where the buggy of deceased accidentally came in collision with that of defendant, they being strangers, and deceased, angered at his buggy being smashed, followed defendant and brought about the difficulty by seizing the head of defendant's horse on his not heeding deceased's profane order to stop, whereupon defendant struck and killed him, an instruction on aggravated assault should be given, under Pen. Code, arts. 714, 719; evidence merely that death resulted from the blow, and that it was struck with a "stick" or "the butt end of a blacksnake whip," not being necessarily conclusive that the instrument was a "deadly weapon." Coleman v. State, 90 S. W. 499, 501, 49 Tex. Cr. R. 82.

DEAL—DEALING

See Cessation of Dealings; Continuous Dealings; Mutual Dealings.

The term "deal" is not a technical term and has no peculiar or local signification, and, where no extrinsic facts appear to create ambiguity, evidence as to its meaning is inadmissible. First Nat. Bank of Greenfield v. Coffin, 38 N. E. 444, 162 Mass. 180, 182.

An agreement by defendant, a broker, that if he ever got a deal in plaintiff's office he would divide commissions with him, referred to transactions involving the sale or exchange of property; the word "deal" being defined by Webster as "an arrangement to attain a desired result by a combination of interested parties." Reynolds v. Pray, 127 N. W. 50, 51, 148 Iowa, 213.

"Dealings," as used in Code 1891, p. 728, § 6, providing that "an action by one partner against his copartner for a settlement of the partnership accounts * * * may be brought until the expiration of five years

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from a cessation of the dealings in which they are interested together, but not after," embraces any act done after the dissolution of the partnership in winding it up, such as the collection or payment of debts due to or by the firm. Smith v. Zumbro, 24 S. E. 653, 657, 41 W. Va. 623 (quoting Sandy v. Randall, 20 W. Va. 247).

Gen. St. c. 181, § 25, providing that the Supreme Court may order service of any process upon persons out of the state for the purpose of dealing with any property, relation, or person within the state according to law, contemplates a "dealing" with the person, if not judicially, at least directly, and not incidentally and as a means to some ulterior end which does not concern the person, and does not warrant an order for such service on a husband, sued with his wife, who is in the state, in order that he may take the body of the wife on execution. Kelly v. Denniston, 13 R. I. 128.

Contract distinguished

See Contract.

As buy or sell as a business

"To 'deal' in a commodity is to negotiate or make bargains in respect of that commodity, to traffic therein as buyer or seller, or otherwise engage in mutual intercourse, or transactions in respect thereto. The purpose being to accomplish a change from one to another of interest in, or title to, property, to deal in stock, cattle, and horses, therefore, is to engage in the business of buying and selling such property with the object of gain." Wilson v. Delaney, 113 N. W. 842, 843, 137 Iowa, 636 (citing 13 Cyc. p. 285; Webst. Dict.; Cent. Dict.; 2 Words and Phrases, p. 1897).

As traffic

Revisal 1905, § 2112, establishes the method by which a married woman may become a registered free trader, and section 2113 declares that a married woman, having complied therewith, shall be a free trader and authorized to contract and deal as a feme sole. Held, that the words, "contract and deal," in their primary acceptation, refer to the ordinary bargains and trades incident to some business enterprise, the word "deal" being defined to mean, to traffic, to transact business, to trade, and that neither of such words included a conveyance of real estate, and hence a married woman, though a free trader within the statute, could not convey her separate land, without joinder by her husband and acknowledgment, as prescribed by Revisal 1905, § 952. Council v. Pridgen, 69 S. E. 404, 406, 153 N. C. 443.

Dealing in futures

The transaction termed "dealing in futures" is one whereby one person agrees to sell a commodity at a certain time in the future for a certain price, the other party agreeing to pay such price, with knowledge that the first party has none of the commodity to deliver at the time, but with the understanding, that when the time arrives for delivery, settlement is to be had in differences, the purported buyer to pay the difference between the market price and the agreed price if the market price is less than the agreed price, and the purported seller to pay such difference if the market price is higher than the agreed price. Henry Hentz & Co. v. Booz, 70 S. E. 108, 110, 8 Ga. App. 577.

Pub. Laws 1889, c. 221, makes void contracts for the sale of articles therein named for future delivery, where it is not intended that the articles shall be actually delivered, but only that the difference between the contract price and the market value at the time stipulated shall be paid. Under Pub. Laws 1905, c. 538, providing that it shall be unlawful to open or establish an office for "dealing in futures," as forbidden by the act of 1889, the business forbidden is that usually described as the business of running a bucket shop. A purchase for actual delivery of necessary commodities required in the ordinary course of business, and not for wagering or gambling on the fluctuations of the market, does not constitute a dealing in futures. State v. McGinnis, 51 S. E. 50, 51, 138 N. C. 724.

An instruction that a person "dealing in futures on margins" (that is, conducting an establishment where persons are permitted to come together and buy or sell commodities with an agreement for future delivery), when it is not in good faith intended to deliver the commodities, when the understanding of the parties is to receive or pay the difference between the agreed price and the market price at the time of settlement, would be guilty of maintaining a gaming house was not error. Anderson v. State, 58 S. E. 401, 402, 2 Ga. App. 1.

Dealing in grain

Where the owner of a gristmill, and who sold grain at retail, on a sale of the business agreed with the purchaser not to in any "way, form, or manner" deal in grain within 10 miles of the mill for a term of years, it was a breach of the contract for him, as a traveling salesman, thereafter to sell grain at wholesale within the territory in question. Clark v. Britton, 79 Atl. 494, 76 N. H. 64.

DEALER

See Itinerant Dealer; Junk Dealer; Liquor Dealer; Retail Dealer; Retail Liquor Dealer; Wholesale Dealer.

A person whose business is to buy and sell is a "dealer." State v. Silverman, 70 Atl. 1076, 1077, 1078, 75 N. H. 50.

"Dealers" are the middlemen between the manufacturers or producers and consumers. Commonwealth v. Vetterlein, 63 Atl. 192, 193, 214 Pa. 21 (quoting Commonwealth v. Campbell, 33 Pa. 380).

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A "dealer" is one whose business it is to buy and sell merchandise, goods, and chattels, as a merchant, storekeeper, or broker; the term being synonymous with "trader." State v. Rosenbaum, 68 Atl. 250, 251, 80 Conn. 327, 15 L. R. A. (N. S.) 288, 125 Am. St. Rep. 121.

A "dealer" is a trader or one whose business is to buy and sell. The term is broader than shopkeeper, which is a term limited to one who keeps a shop for the sale of goods, one who sells goods in the shop or by retail, in distinction from a merchant or one who sells by wholesale. State v. Cohen, 63 Atl. 928, 929, 73 N. H. 543 (citing Cent. Dict.; State v. Canney, 19 N. H. 135, 137).

In the most restricted sense, a "dealer" is one who takes profit in the distribution of goods and wares to the trade, in addition to the manufacturer's profit. Chattanooga Plow Co. v. Hays, 140 S. W. 1068, 1069, 125 Tenn. 148.

"Dealer," in the popular and therefore the statutory sense of the word, is not one who buys to keep or makes to sell but one who buys to sell again. He stands immediately between the producer and the customer and depends for his profit, not upon the labor he bestows upon his commodities, but upon the skill and foresight with which he watches the markets. Commonwealth v. Vetterlein, 63 Atl. 192, 193, 214 Pa. 21 (quoting Norris v. Commonwealth, 27 Pa. 494).

In Acts Sp. Sess. 25th Leg. c. 18, subd. 35, providing that every person dealing in lightning rods shall pay an annual tax of $36 to the state and $18 to the county, and that every person canvassing for the sale of lightning rods shall pay an annual tax of $100 to the state and $50 to the county, the word "dealer" is used in the sense of one who buys and sells at his place of business, and one who pays the dealer's tax is not authorized to make sales by canvassing, so that the act is not in violation of Const. art 8, §§ 1, 2, providing that taxation shall be equal and uniform upon the same class of subjects. Camp v. State, 135 S. W. 146, 147, 61 Tex. Cr. R. 229.

The word "dealer" generally applies to one who buys and sells—a trader. But where a municipal ordinance declares that "any merchant, billiard table or tenpin alley keeper, or other dealer, who shall keep open doors on the sabbath day," shall be subject to a punishment prescribed, the word "dealer" is to be construed in connection with the words preceding it. So construed it would include one who operated a "penny arcade" or place where a number of machines were kept for profit, each of which, by a mechanical arrangement, exhibited pictures to a person who dropped a penny into a slot. Fichtenberg v. City of Atlanta, 54 S. E. 933, 126 Ga. 62.

Where accused was licensed as a dealer in junk in M., and, though he had no place of business in A., and no license to deal in junk in that town, bought junk there for cash, carried it to M., and there sold it in the course of his business in M., he was a "dealer" in A., within Pub. St. 1901, c. 124, § 4, providing that any dealer in such articles without a license, in any town having adopted the provisions of the act, shall be fined, etc.; the word, "dealer" not being used in a restricted sense, which would require an act of selling, as well as purchase, but sufficiently describing one who bought with the intention of selling again. State v. Silverman, 70 Atl. 1076, 1077, 1078, 75 N. H. 50.

Manufacturer

A manufacturer of agricultural implements is not a "dealer" or "merchant," within Acts 1909, c. 479, § 3, and Assessment Act 1907 (Acts 1907, c. 602) §§ 8, 26, 27, providing for taxation of dealers and merchants; sales being made only to jobbers and commission men, and the only profit taken being for manufacturing the articles sold. Chattanooga Plow Co. v. Hays, 140 S. W. 1068, 1069, 125 Tenn. 148.

A manufacturer of acetylene gas lighting systems who sells through soliciting agents is not a "merchant" or "dealer" within Kirby's Dig. § 516, which provides that section 513, which makes void notes given in ordinary form for the price of patented machines, etc., shall not extend to merchants and dealers who sell patented things in the usual course of business; the words "merchant" and "dealer" meaning persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade. C. B. Ensign & Co. v. Coffelt (Ark.) 145 S. W. 231, 234.

Under the provisions of the following section 16, c. 5106, Laws of 1903: "That all wholesale dealers in fresh meats packed or refrigerated shall pay to the state a license tax of one hundred dollars in each county and for each place of business"—the word "dealer" does not comprehend a person who merely buys a commodity in one form and converts it by his skill and labor into an entirely different commodity, and then sells it, such, for example, as one who buys lumber, with which he manufactures furniture or any other useful commodity that he sells, cannot be termed a "dealer in lumber." The true meaning of the word "dealer," as it is used in this statute, is one who habitually and constantly as a business deals in and sells any given commodity; and a "wholesale" dealer therein comprehends one who sells in large or wholesale quantities, as contradistinguished from one who sells in small lots at retail. Florida Packing & Ice Co. v. Carney, 41 South. 190, 192, 51 Fla. 190 (citing Goodwin v. Clark, 65 Me. 280; Commonwealth v. Gormly, 34 Atl. 282, 173 Pa. 586; Overall v. Bezeau, 37 Mich. 506).

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The term "manufacturer," in its ordinary acceptation, denotes one who, through his skill and labor, shapes or combines material into a new product, and where a firm merely ordered from a foreign manufacturer a given quantity of waists of a certain pattern, a sample of which had been previously furnished them by the manufacturer, the firm was merely a "dealer" and not a manufacturer." Remy, Schmidt & Pleissner v. Healy, 126 N. W. 202, 203, 161 Mich. 266, 29 L. R. A. (N. S.) 139, 21 Ann. Cas. 74.

The words "merchants" and "dealers," according to common understanding, mean something different from the word "manufacturers." The former are generally employed to designate persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade; the latter to designate those engaged in the business of making or producing articles for use or sale. Union County Nat. Bank, Liberty, Ind., v. Ozan Lumber Co., 179 Fed. 710, 715, 103 C. C. A. 584.

Merchant

The words "dealers" and "merchants" mean something different from the word "manufacturers" and are generally employed to designate persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade. A corporation contracting to make and deliver a patented log loader, and doing so, and taking notes therefor, it not a "merchant" or "dealer," within Kirby's Dig. Ark. §§ 513-516, requiring negotiable notes taken by any seller in payment for a patented machine to be on a printed form stating specified facts. Union County Nat. Bank, Liberty, Ind., v. Ozan Lumber Co., 179 Fed. 710, 715, 103 C. C. A. 584.

Partner

Where a statute prohibited a merchant and dealer in spirituous liquors from keeping open his place of business on Sunday for the purpose of traffic and sale, a member of a firm engaged in the sale of spirituous liquors was a "dealer," within such statute, and was amenable in his individual capacity. Morris v. State, 89 S. W. 832, 833, 48 Tex. Cr. R. 562.

Dealer in intoxicating liquors or spirits

To render one who "sells or offers for sale" malt liquors subject to special tax as a "dealer in malt liquors," under Rev. St. § 3244, his ownership of such liquors is not essential. Western Express Co. v. United States, 141 Fed. 28, 30, 72 C. C. A. 516.

Under Comp. Laws 1897, § 5379, as amended by Pub. Acts 1903, p. 83, No. 62, requiring the payment of a tax on the business of selling or keeping for sale at retail intoxicating liquors, and section 5380 providing that retail dealers of spirituous or intoxicating liquors, etc., shall include all persons who sell by the drink to any person or persons, one who sells a single drink is a retail "dealer" engaged in the business and liable to prosecution for selling without having paid the tax. People v. Wilcox, 115 N. W. 973, 974, 152 Mich. 39.

Revisal 1905, § 3524, provides that when a dealer in intoxicating drinks makes a sale either directly or indirectly, or gives away such drinks, to any unmarried person under the age of 21 years, knowing him to be such, he shall be guilty of a misdemeanor, and any person who keeps on hand intoxicants for the purpose of sale or profit shall be considered a dealer. A firm's agent took a minor's order for a case of whisky, which was shipped to the town of the minor's residence, and draft for the price with bill of lading attached was sent to defendant bank for collection, and the cashier, also a defendant, was informed by the minor's uncle that he was a minor and unmarried, but thereafter surrendered the bill of lading to the minor when he paid the draft. Held, that neither defendant nor its cashier was a "dealer" in intoxicants within the statute, and hence could not be convicted thereunder. Spencer v. Fisher (N. C.) 76 S. E. 731, 733.

Dealer in milk

Rev. St. § 4200—11, providing that no dealer in milk shall sell, exchange, or deliver, or have in his custody or possession with intent to sell, milk from which the cream or part thereof had been removed, unless in a conspicuous place on the vessel from which the milk is sold is placed the words "skimmed milk," distinctly marked, the word "dealer" includes a person who sells milk obtained from his own cows as well as one who buys and sells milk. Guilder v. State, 26 Ohio Cir. Ct. R. 221, 222.

Dealer in oil

One who acquires, possesses, handles, and sells oil may properly be said to deal in oil, whether he has bought it to sell again or not, within Acts 29th Leg. p. 358, c. 148, entitled "An act for the levy and collection of a tax on individuals," etc., owning, operating, managing, or controlling for profit the business of wholesale "dealers" in coal oil, etc. Texas Co. v. Stephens, 103 S. W. 481, 486, 100 Tex. 628.

Dealer in oleomargarine

Plaintiff was a grocer who, before the passage of Act. Cong. Aug. 2, 1886, c. 840, 24 Stat. 209, had sold oleomargarine, but ceased handling it thereafter; but, having two or three customers who desired it at their request and for their accommodation he sent orders in their respective names to the manufacturer for 10-pound packages at a time to be shipped to each customer in his care. They were shipped to a local branch

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house, addressed and billed to the customers, and the branch house left the packages at plaintiff's store, and plaintiff delivered them, with other groceries, and the customers returned the bills to him, and he remitted to the manufacturer each month, charging the customers with the cash sent, and plaintiff made no profit out of the transaction. Held, that plaintiff was not a "dealer in oleomargarine"; the transaction not being a sale by him. Tucker v. Grier, 160 Fed. 611, 616, 87 C. C. A. 513.

Dealer in secondhand goods

As secondhand man, see Secondhand Man.

DEATH

See At Death; Civil Death; Contemplation of Death; Effect Death; Immediate Death; In Case of Death; Instantaneous Death; Preventive Death; Punitive Death; Sole Cause of Death; Take Effect at My Death; Their Death; Transfer in Contemplation of Death.

Accidental death, see Accident—Accidental.

Death simply, see Simply.

Person causing death, see Cause (verb).

Presumption of death, see Presumption of Fact.

Wrongful death as personal injury, see Personal Injury.

See, also, Die; Die Before; Die by His Own Hand; Die During Sixty Days; Die in Consequence of Violation of Law; Die in Performance of Duty; Die Leaving Children; Die Leaving No Children; Die Leaving No Issue; Die Leaving No Lawful Issue Surviving; Die Leaving No Living Issue; Die Leaving No Surviving Issue; Die Without Children; Die Without Heirs; Die Without Issue; Die Without Lawful Issue Surviving; Die Without Leaving Issue.

Testator devised all his property to his wife for life, and provided in the succeeding clause that, in case of the death of testator and his wife "at the same time," he bequeathed his estate to his sons and daughters in specified proportions; the portions bequeathed to the daughters to be free from the control of their husbands. Held, that the word "death" was used to mean the state of being dead, and not the act of dying, and hence, the wife having survived testator and died, his children were entitled to take under the will. Sanger v. Butler, 101 S. W. 459, 461, 45 Tex. Civ. App. 527.

DEATH DUTY

"'Death duties' are an exaction to be paid to the state upon the occasion of death and the consequent transfer of ownership in the property of the decedent, through the intervening custody and administration of the law, to the persons designated by the law, through the statutes regulating wills, descents, and distribution." Appeal of Nettleton, 56 Atl. 565, 568, 76 Conn. 235.

"The system of 'death duties' prevailing in England and that adopted by Congress, leaving out of view the differences in rates and the administrative provisions, were substantially identical and of a threefold nature; that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a succession duty charged against each interest in real property." The general revenue law (Laws 1902, c. 3), imposing a tax on inheritances and legacies, imposes a tax on the right of the beneficiaries to take and not on the right of the decedent to give. In re Macky's Estate, 102 Pac. 1075, 1077, 46 Colo. 79, 23 L. R. A. (N. S.) 1207 (quoting and adopting definition in Knowlton v. Moore, 20 Sup. Ct. 747, 178 U. S. 41, 44 L. Ed. 969).

A "death duty," as used in Gen. St. 1902, §§ 2367, 2377, imposing "death duties" on the estates of deceased persons, is an exaction by the state to be collected from the property left by a deceased person while it is in its custody, prescribed upon the occasion of his death and the subsequent devolution of his property, by the force of its laws. Under that statute making the tax payable by the administrator but containing no other express provisions for the collection and payment of the duties, the duties are payable, by necessary implication, from property or the proceeds of property not applied to the satisfaction of debts and administration expenses. Appeal of Hopkins (Conn.) 60 Atl. 657, 658, 659.

DEATH PENALTY

As cruel and unusual punishment, see Cruel and Unusual Punishment.

DEBAUCH

A female is "debauched" when, by arts and blandishments, she is deceived, corrupted, and drawn aside from the right path, and she is carnally known. Every illicit connection is not "seduction." It cannot be said that a female is drawn aside from the path of virtue unless she is honestly pursuing that path when approached. If her mind is corrupt and polluted by lewd thoughts, and she is ready to submit to improper embraces, as opportunity offers, from her own lustful propensity, and without any arts or blandishments of him with whom she has sexual intercourse, in such case she cannot be said to be seduced by the party with whom she has improper sexual relations. State v. Fogg, 105 S. W. 618, 623, 206 Mo. 696.

Seduce distinguished

Rev. St. 1889, § 3486, provided that any person who should, "under promise of

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marriage, seduce and debauch any unmarried female of good repute should be punished." This section was amended by Acts 1897, p. 106, entitled "An act to amend section 3486, chapter 47, article 2, of the Revised Statutes of Missouri of 1889, relating to the seduction of unmarried females under 18 years of age," and changed the section, so as to provide that any person who should, under promise of marriage, seduce or debauch any unmarried female, etc., should be punished. Held, that the words "seduce" and "debauch," though ordinarily not synonymous, were used in such section synonymously, and that the word "or" must be construed to mean "and," in order to bring the offense defined within the title, so that an instruction that the jury could convict, if they believed prosecutrix was either seduced "or" debauched by defendant under promise of marriage, was erroneous. The word "seduce," when used alone, usually implies the offense of inducing an unmarried woman, under or by promise of marriage, to surrender her chastity; while the word "debauch," ordinarily imports the deflowering of a woman, whether with or without her consent, and, if with her consent, whether that consent was obtained by promise or persuasion, or followed from her own desires. State v. Long, 141 S. W. 1099, 1101, 238 Mo. 383.

DEBENTURE

See Entitled to Debenture.

The word "debenture" does not of itself import a secured indebtedness. Barton Nat. Bank v. Atkins, 47 Atl. 176, 180, 72 Vt. 33.

A "debenture" is a certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer, for drawback of duties on merchandise imported and exported by him, provided the duties on the said merchandise shall have been discharged prior to the time aforesaid. W. H. Thomas & Son Co. v. Barnett, 135 Fed. 172, 175 (quoting and adopting definition in Bouv. Law Dict.).

DEBT

See Community Debt; Contract Debts; Contracting a Debt; Creation of New Debt; Dischargeable Debt; Existing Debt; Firm Debts; Funded Debt; Imprisonment for Debt; Judgment Debt; Just Debts; Lawful Debt; Mutual Debts; Ordinary Debt; Partnership Debt; Pay All My Just Debts; Pre-Existing Debt; Promise to Pay Debt of Another; Right, Debt, or Duty; Simple Contract Debt; State Debts; Unsecured Debt.

All debts, see All.
All other debts, see All Other.
Discharge of debt, see Discharge.
Evidence of debt, see Evidence of Indebtedness.

"A 'debt' is defined as 'that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to or perform for another; that which one is obliged to do or suffer.'" Bonhoff v. Wiehorst, 108 N. Y. Supp. 437, 441 (quoting and adopting the definition in Imperial Dictionary, and citing Latimer v. Veader, 46 N. Y. Supp. 823, 20 App. Div. 426).

"Debts" are a species of intangible property following the domicile of the owner for the purposes of taxation. Ellis v. People, 65 N. E. 428, 429, 199 Ill. 548.

"Between two persons mutually indebted, the balance is the 'debt.'" First Nat. Bank of Sharon v. City Nat. Bank of Kansas City, 76 S. W. 489, 490, 102 Mo. App. 357 (quoting with approval from Commercial Bank of Albany v. Hughes [N. Y.] 17 Wend. 101).

The word "debt" has several recognized meanings. Any financial obligation is a "debt" in a broad and general sense; but, where the term is used technically and restrictively, it implies an ascertained amount, and sometimes, as well, a foundation in contract. Henley v. Myers, 93 Pac. 168, 170, 76 Kan. 723, 17 L. R. A. (N. S.) 779 (citing 2 Words and Phrases, pp. 1891, 1892; 8 Words and Phrases, p. 7628).

A "debt," in its general sense, is a specific sum of money which is due or owing from one person to another, and denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. Trask v. Livingston County, 109 S. W. 656, 660, 210 Mo. 582, 37 L. R. A. (N. S.) 1045.

The word "debts" includes every claim and demand upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action (Code Civil Procedure New York, § 2514). In re Gall, 74 N. E. 875, 877, 182 N. Y. 270.

A debtor having but one "debt" and no assets to which the trustee can take title, may become a voluntary bankrupt under section 4, Bankr. Act July 1, 1898, c. 541, 30 Stat. 547, which provides that any person who has "debts," except a corporation, shall be entitled to the benefits of the act; section 1, subd. 29, providing that words importing the plural number may be applied to and mean only a single person or thing. In re Schwaninger, 144 Fed. 555, 557.

The orphans' court, authorized by statute to order a sale of lands of a decedent for the payment of his debts when the personalty is

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insufficient for that purpose, may not order a sale of the real estate of a testator to pay the debts and funeral expenses of his wife, notwithstanding his will, devising his estate to his wife for life and at her death and the payment of the wife's debts and funeral expenses to a daughter; the word "debts" referring to the debts of decedent alone. Morris v. Dorsey, 77 Atl. 44, 46, 77 N. J. Eq. 460.

Const. art. 13, § 1, permits provision, except in case of credits secured, for a deduction from credits of debts due to bona fide residents. Pol. Code, § 3617, subd. 3, provides that a mortgage, or other obligation by which a debt is secured, when land is pledged, shall, for the purposes of taxation, be deemed an interest in the land so pledged, and by subdivision 6 the term "credits" means those solvent debts not secured owing to the person assessed, and the term "debt" means those unsecured liabilities owing by the person assessed to bona fide residents and section 3628, provides that, in assessing solvent credits not secured, a reduction shall be made of debts due bona fide residents, and section 3650, subd. 15, provides that in entering assessments containing solvent credits, subject to deduction, the assessor must enter in the proper column the value of debts and deduct them therefrom. Const. art. 13, § 4, provides that a mortgage, or other obligation by which a debt is secured, shall, for the purpose of taxation, be deemed an interest in the property affected. Pol. Code, § 3627, contains the same provision. Held, that a collateral security of credits by a loan on personalty was not a mortgage, etc., or "other obligation by which a debt is secured," within Const. art. 13, § 4, that section applying only to liens on land; nor was it a "mortgage or trust deed," within section 1, so that the person assessed on such credits was entitled to have his debts deducted therefrom; and Pol. Code, § 3629, subd. 6, directing the assessor to require each person assessed to show separately all solvent credits unsecured, is not applicable, not referring to the assessor's duty in making the assessment, but only prescribing the form of the taxpayer's return for the assessor's information. Bank of Willows v. Glenn County, 101 Pac. 13, 14, 155 Cal. 352.

Administration expenses

Rev. Codes, § 4799, provides that, on insolvency, all property, real or personal, without any distinction between them, is chargeable for the payment of debts except as otherwise provided, and section 7546 declares that all a decedent's property shall be chargeable with his debts, the expenses of the administration, and the allowance to the family, except as otherwise provided in the Code and in the Civil Code. Held, that the exceptions referred to homesteads set apart and allowances made for the support of the family pending administration, and that, with these exceptions, all of the decedent's property was equally liable for the payment of debts, using the term in its general sense, to include debts, family allowances, expenses of administration accrued and to accrue. Plains Land & Improvement Co. v. Lynch, 99 Pac. 847, 850, 38 Mont. 271, 129 Am. St. Rep. 645.

Advancements

Though an advancement is not a "debt" in any sense, testator may nevertheless impose such conditions on his devise to the beneficiary advanced as he sees proper and as are not unlawful. Montgomery's Trustee v. Brown, 121 S. W. 472, 475, 134 Ky. 592.

An "advancement" differs from a "debt" in that there is no enforceable liability on the part of the child to repay during the lifetime of the donor or after his death except in the way of suffering a deduction from his distributive share. Duckett v. Gerig, 79 N. E. 94, 95, 223 Ill. 284.

Alimony

Alimony is not due and payable as debt, damages, or penalty, but is an award on consideration of equity and public policy, founded on the obligation growing out of the marriage relation, that the husband must support his wife, which obligation continues after legal separation without her fault. Fickel v. Granger, 93 N. E. 527, 528, 83 Ohio, 101, 32 L. R. A. (N. S.) 270, 21 Ann. Cas. 1347.

An allowance of alimony is not a "debt," within the constitutional provisions forbidding imprisonment for debt, and may be enforced by attachment for contempt, and not alone by fieri facias and process of sequestration. Adams v. Adams (N. J.) 83 Atl. 190, 192.

Rev. St. 1899, § 2926, provides for an allowance of alimony and maintenance, and declares that the court may award execution for the collection thereof or enforce judgment by any lawful means in accordance with the practice of the court. Section 2927 gives a general lien on realty; and section 4327a declares that no property shall be exempt from execution or garnishment on a decree for alimony or maintenance. Held, that a decree allowing alimony or maintenance was a "decree for a debt," which was therefore not enforceable by imprisonment in contempt proceedings under section 4685, declaring that no person shall be arrested, held to bail, or imprisoned on any mesne process or execution, founded on any civil action whatsoever, and Const. art. 2, § 16, prohibiting imprisonment for noncompliance with an order for the payment of a "debt." Ex parte Kinsolving, 116 S. W. 1068, 1071, 135 Mo. App. 631.

A discharge in bankruptcy does not bar the collection of arrears in alimony and allowance for the support of minor children, due under a decree in an action for divorce, since such liability, although fixed by a de-

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cree which is beyond the power of the court to alter or amend, because it did not reserve any right of subsequent modification or amendment, is not a "debt" within the meaning of Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562, providing for the proving of debts which are a fixed liability as evidenced by a judgment. Wetmore v. Markoe, 25 Sup. Ct. 172–175, 196 U. S. 68, 49 L. Ed. 390, 2 Ann. Cas. 265.

A wife's claim for support of herself and children pendente lite granted under Rev. St. 1895, art. 2985, authorizing the allowance of temporary alimony is not a "debt," within the constitutional provision prohibiting imprisonment for debt. Ex parte Davis, 111 S. W. 394, 395, 101 Tex. 607, 17 L. R. A. (N. S.) 1140.

The claim of a divorced wife under a decree for alimony in gross is a "debt" of the estate of her former husband, within Rev. Laws, c. 144, § 9, providing that the court may order the property of absentees to be applied to the discharge of such "debts" as may be proved against them. Purdon v. Blinn, 78 N. E. 462, 463, 192 Mass. 387.

Amount due bank

Neither a board of relief nor the superior court on appeal from its action could deduct from a taxpayer's list of taxable property a debt due a bank; the debt not being within Gen. St. 1902, § 2349, authorizing deduction of the amount of a debt when the amount can be added to the creditor's list. Cheney v. Town of Essex, 76 Atl. 1098, 1100, 83 Conn. 493.

Bailment distinguished

See Bailment.

Chose in action

The terms "chose in action" and "debt" are synonymous. A "chose in action" is the right of a creditor to be paid, while a "debt" is the obligation of the debtor to pay. "As said by Prof. Minor: 'The chose in action, or right of the creditor, is a personal right which adheres to him wherever his situs may be. It may for some purposes be his legal situs (or domicile), for others, his actual situs. Just as, in the case of tangible chattels, though the title thereto follows the owner, and its transfer will be regulated by the law of the owner's situs, yet this transferee's ability to enforce that title may be in the exceptional cases determined by a different system of law, should the chattels be actually situated elsewhere. So, also, in the case of debts, though the right to enforce them follows the owner (the creditor), and his transfer is therefore to be governed by the law of his situs; yet his or his transferee's ability to enforce that right may depend upon another jurisdiction and system of law, if he has to resort to another state to sue the debtor.'" Smead & Powell v. D. W. Chandler & Co., 76 S. W. 1066, 1068, 71 Ark. 505, 65 L. R. A. 353.

Claim synonymous

The word, "claim," as used in the bankruptcy act providing for appeals from a judgment allowing or rejecting a debt, or claim of $500 or over, means a "debt." Where a creditor holding a note given by a bankrupt firm, signed as surety by a member of the firm, also bankrupt, having proved the debt against the firm estate, also filed it as an individual debt against the estate of the surety, the only question determined by an order allowing such claim was that it was a provable debt against the individual estate of the partner, and such order was reviewable only by appeal under the Bankruptcy Act; the amount allowed being over $500. In re Mueller, 135 Fed. 711, 714, 68 C. C. A. 349.

While the word "claim" is used in its signification of the demand or assertion of a right in Bankr. Act, § 2, subd. 11, 30 Stat. 554, c. 541, in respect of "all claims of bankrupts to their exemptions," it is also used in many parts of the act as referring to "debts" presented for proof against estates in bankruptcy. Holden v. Stratton, 24 Sup. Ct. 45, 46, 191 U. S. 115, 48 L. Ed. 116 (citing Hutchinson v. Otis, 23 Sup. Ct. 778, 190 U. S. 552, 555, 47 L. Ed. 1179, 1180; In re Whitener, 105 Fed. 180, 44 C. C. A. 434; In re Columbia Real Estate Co., 112 Fed. 645, 50 C. C. A. 406).

The use of the word "claim" in the preamble of Laws 1907, c. 244, which provides for a liquidation of a claim against the state, does not show that the Legislature did not intend to recognize the claim as a debt or obligation, since the term "debt" is of large import, and includes all which is due to a person under any form of obligation or promise, and which in its enlarged sense covers any kind of a just demand. Hanly v. Sims, 94 N. E. 401, 404, 175 Ind. 345.

Compensation for appropriation of private property

The statutory liability of a city to pay damages for the taking of land for highway purposes pending a petition for assessment thereof by a jury is not a debt within St. 1909, c. 490, pt. 1, § 4, cl. 2, declaring that personal property for purposes of taxation shall include debts due the person to be taxed more than he is indebted or pays interest for Powers v. City of Worcester, 97 N. E. 95, 96, 210 Mass. 471.

Conditional, uncertain, contingent, or future obligation

A sum payable on a contingency is not a "debt," nor does it become a "debt" until the contingency happens. Where a city contracted on June 5, 1900, for the installation of police and fire alarm telegraph systems, for which the city agreed to pay a monthly rent at a specified rate for five years, with the

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right to purchase each at a price specified, and no liability could accrue against the city until after the commencement of the succeeding fiscal year, the fact that at the time the contracts were made there was no money in either of the funds designated for the payment of the indebtedness which might accrue, and that no sinking fund was provided for, did not render the contracts invalid, under Const. art. 11, § 18, prohibiting cities from incurring indebtedness for any purpose exceeding in any year the income and revenue provided for that year, and Sacramento City Charter, § 25, subd. 22, declaring that in no case shall a liability be created or a warrant be drawn against any fund beyond the actual amount of money existing in the fund, with which to meet the same; there being no proof that sufficient money would not be paid into the funds specified to meet the liability under the contracts before they should accrue. Doland v. Clark, 76 Pac. 958, 960, 143 Cal. 176.

Under a provision of the articles of incorporation of a building and loan association that "no stock shall be transferred unless all debts due the association are first paid," the association did not, as against a transferee of stock from a shareholder, have a prior claim for unliquidated damages arising from such shareholder's defalcation while an officer of the association; the term "debts" in this connection not including unliquidated claims by way of damages for a tort. Jewell v. Nuhn (Iowa) 138 N. W. 457, 458.

Under Membership Corporations Law, § 11, which provides that the directors of membership corporations shall be liable for debts of the corporation contracted during their term of office and payable within one year or less from the date it was contracted, if an action on an unsatisfied judgment against the corporation is brought against the directors within one year of its return, a contingent liability, or a liability for breach of an executory contract, is not a "debt," and a debt is "contracted" only when the contingency upon which it is to arise occurs, and, where a lease for one year is executed by the directors of a membership corporation at a yearly rental payable monthly in advance, no debt is "contracted" for monthly installments of rent maturing after their term of office has expired. Dunn v. Neustadtl, 129 N. Y. Supp. 161, 163, 72 Misc. Rep. 1.

The right of attachment to secure the payment of a "debt not yet due" is "confined to cases where, in addition to other requisites, there is an existing debt, although not exigible—debitum in præsenti, solvendum in futuro— an existing, absolute liability to pay at a future time, and does not embrace cases of prospective and conditional liability"; nor will an attachment lie where the debt is unliquidated and its amount uncertain, and hence ought not to serve as the basis of a positive oath. E. Sondheimer Co. v. Richland Lumber Co., 46 South. 806, 809, 121 La. 786 (citing Cross, Plead. p. 281).

A claim is sufficiently certain as a "debt" or "demand," under the attachment laws of Texas (Sayles' Ann. Civ. St. 1897, art. 186 et. seq.), where the petition alleges an undertaking to pay the reasonable value of certain plans prepared by plaintiff, and the affidavit to the petition states that the defendant is indebted to him in the sum of $1,050, and in the prayer for the attachment plaintiff alleges that the debt, interest, and costs will amount to the sum of $1,000. Hall v. Parry, 118 S. W. 561, 565, 55 Tex. Civ. App. 40.

"Debt," prior to the adoption of the Code, was an action for the recovery of a sum certain, and hence would not lie to recover damages for breach of covenants in a deed. Hayden v. Patterson, 88 Pac. 437, 438, 39 Colo. 15.

Rev. St. 1909, §§ 6704, 6711, subjects a homestead to levy of execution on all causes of action existing at the time of its acquisition, which is the date of the filing of the homestead deed in the proper office for the record of deeds. Defendant who, in June, 1903, promised to marry plaintiff, and set February 24, 1904, for the wedding, purchased a farm in October, 1903, and filed his deed for record February 11, 1904, and six days later married another woman, and in March occupied the farm as his homestead, and a judgment against him in plaintiff's action for breach of marriage promise was obtained in May following. Held, that while the word "debt," as used in the homestead law, extended its operation to include indebtedness arising out of money obligations not due, a "debt" was an unconditional promise to pay a fixed sum at some specified time, differing from a contract to be performed in the future upon a condition precedent which might never happen; that the term "cause of action" meant matter for which an action might be brought, and accrued when a person first had the right to bring an action; that, even though the property did not become a homestead until after the cause of action upon which process was founded had accrued, plaintiff's cause of action did not accrue when the promise of marriage was made; and hence that the homestead was not subject to execution on her judgment. Sperry v. Cook, 152 S. W. 318, 321, 247 Mo. 132.

Corporate stock

At common law, corporate shares were not subject to attachment or levy, not being considered as a chattel or "debt." Fowler v. Dickson (Del.) 74 Atl. 601, 605, 1 Boyce, 113 (citing Foster v. Potter, 37 Mo. 525).

Owners of a majority of the stock of a railroad company sold their holdings under an agreement to pay off all indebtedness of the company and deposited the proceeds of the stock to be paid out in discharge of such

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indebtedness on vouchers issued by the directors; the surplus remaining to be divided between them in proportion to their several holdings. Held, that the sum which a stockholder had paid for his stock was not a debt of the company, and the directors had no authority to allow and pay a claim therefor as against another stockholder. Jackson v. White, 188 Fed. 775, 779, 110 C. C. A. 481.

Costs

Costs of prosecution are not a "debt," within Const. 1890, § 30, which prohibits imprisonment for debt. Ex parte McInnis, 54 South. 260, 261, 98 Miss. 773.

The word "debt," as used in Bankr. Act July 1, 1898, c. 541, § 64b, subd. 5, referring to debts owing by the bankrupt, refers only to such debts as are based upon contract, express or implied, or to personal obligations for the payment of money imposed upon the bankrupt by statute. Therefore a claim for taxable costs incurred in good faith by a creditor of a bankrupt in an attachment suit to recover a provable debt, which attachment was rendered void by subsequent bankruptcy proceedings, is not a "debt." In re The Copper King, 143 Fed. 649, 650.

Counsel fees

An order of a court of bankruptcy, allowing expenses incurred by a bankrupt's trustee for counsel fees, is not one allowing a "debt or claim" against the estate, within the meaning of Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553, and appealable thereunder, but is an administrative order over which the Circuit Court of Appeals is given jurisdiction to superintend and revise by section 24b, and such mode of review is exclusive. W. J. Davidson & Co. v. Friedman, 140 Fed. 853, 72 C. C. A. 553.

Demand distinguished

See Demand.

Fine

A fine for a misdemeanor is not a "debt" due the state. Hall v. Coleman, 75 S. E. 1132, 138 Ga. 734.

A fine imposed for a violation of a city ordinance is not a debt within the meaning of the constitutional provision forbidding imprisonment for debt. Peterson v. State, 112 N. W. 306, 310, 79 Neb. 132, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651.

While it is true that a fine and costs in criminal actions are "debts," they are also a part of the punishment imposed as a result of the conviction and judgment, and imprisonment at hard labor for nonpayment is not unconstitutional as being imprisonment for a debt. State v. Morgan, 53 S. E. 142, 144, 141 N. C. 726 (citing 11 Cyc.; In re Sanborn, 52 Fed. 583).

Funeral expenses

In a proceeding to collect a collateral inheritance tax under a statute providing that reasonable funeral expenses are included within the term "debts" which the statute requires to be deducted, a finding that the amount to be expended for the erection of a tomb was reasonable cannot be reviewed, where the record does not show how much was reserved for that purpose. Morrow v. Durant, 118 N. W. 781, 783, 140 Iowa, 437, 23 L. R. A. (N. S.) 474, 17 Ann. Cas. 850.

Interest

The term "debt" embraces interest as well as principal, and "interest," in the absence of an express agreement, is a mere incident of the debt, and may be recovered as damages for its detention. Central Bank & Trust Corp. v. State, 76 S. E. 587, 589, 139 Ga. 54.

In determining whether a "debt" will be created by a proposed issue of municipal bonds in excess of the limit authorized by law, the interest reserved is not to be taken into account and added to the principal. Interest becomes a part of the debt, or a debt at all, only when it is earned. Carlson v. City of Helena, 102 Pac. 39, 44, 39 Mont. 82, 17 Ann. Cas. 1233.

Judgment

A "judgment," for most purposes, is to be regarded as a new "debt." It destroys by merger the original cause of action, substituting a new obligation for the old. The real asset which the owner of the judgment possesses is not the record of the judgment but the debt which it evidences, and, this being true, there is no logical reason for the view that, in fixing the location of property for the purposes of administration, a distinction should be made between a simple contract debt and a judgment debt. Though differently evidenced, both are contract debts, belong to the same species of intangible property, and should be governed by the same principles. Miller v. Hoover, 97 S. W. 210, 212, 121 Mo. App. 568 (citing 1 Freem. Judgm. [4th Ed.] § 217; Swancy v. Scott, 9 Humph. [28 Tenn.] 327).

Every "judgment" is for most purposes to be regarded as a new "debt"; the chief and perhaps the only exception being in cases when the technical operation of the doctrine of merger would produce manifest hardship. This new debt is not in general affected by the character of the old one. Though the cause of the action may have arisen from a tort, the judgment therefore is not any the less a contract or in the nature of a contract. Mayor, etc., of City of Anniston v. Hurt, 37 South. 220, 222, 140 Ala. 394, 103 Am. St. Rep. 45 (quoting 1 Freem. Judgm. § 217; 1 Cyc. p. 79).

A judgment against a surety on a supersedeas bond is a "debt" contracted at the date of the approval of such bond, within the meaning of that clause of the timber culture law which provides that land acquired under such law shall not be liable for the satis-

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faction of any debt contracted before the issuance of the final certificate thereof. Leman v. Chipman, 117 N. W. 885, 886, 82 Neb. 392.

Judgment for tort

A judgment in tort is not a "debt" within Const. art. 1, § 24, providing that no person shall be imprisoned for debt except in cases of fraud. Ex parte Berry, 67 S. E. 225, 85 S. C. 243, 20 Ann. Cas. 1344.

In Code 1906, § 909, making a stockholder liable to a certain extent for the "debts" of the corporation contracted during the ownership of the stock, the word "debts" should be construed according to its common and usually understood significance, and so construed would not include damages awarded for commission of torts, as a judgment for infringement of patent. Avery & Sons v. McClure, 47 South. 901, 903, 906, 94 Miss. 172, 22 L. R. A. (N. S.) 256, 19 Ann. Cas. 134.

The word "debts," in Rev. Laws 1902, c. 149, § 2, authorizing the executor, who is a residuary legatee, to give a bond conditioned on the payment of all "debts" and legacies of testator, etc., embraces a judgment against an executrix on a claim founded on the fraud of testator. Lothrop v. Parke, 88 N. E. 666, 667, 202 Mass. 104.

A judgment against a street railway company, in an action for tort for injuries received by plaintiff while a passenger on a car, is not a debt for which the directors may be made liable, under Rev. Laws, c. 112, § 19, providing that the directors of a street railway company shall be jointly and severally liable to the extent of its capital stock for all "debts and contracts" until the whole amount of such capital stock shall have been paid in and a certificate filed, etc. The term neither includes torts nor judgments for torts. Savage v. Shaw, 81 N. E. 303, 195 Mass. 571, 122 Am. St. Rep. 272, 12 Ann. Cas. 806 (citing Child v. Boston & Fairhaven Iron Works, 137 Mass. 516, 50 Am. Rep. 328; Heacock v. Sherman, 14 Wend. [N. Y.] 58; Chase v. Curtis, 5 Sup. Ct. 554, 113 U. S. 452, 28 L. Ed. 1038; Leighton v. Campbell, 20 Atl. 14, 17 R. I. 51, 9 L. R. A. 187; Bohn v. Brown, 33 Mich. 257; Cable v. McCune, 26 Mo. 371, 72 Am. Dec. 214; Cable v. Gaty, 34 Mo. 573, 86 Am. Dec. 126; Doolittle v. Marsh, 9 N. W. 54, 11 Neb. 243).

Legacy

A legacy is not a debt within the meaning of Civ. Code 1895, § 3355, par. 1, authorizing a widow, under certain circumstances, to pay the debts of her husband's estate and take possession of the same. Harrell v. Harrell, 51 S. E. 283, 284, 123 Ga. 267.

As legal obligation

The essence of a "debt" is a legal liability on the part of one person to pay money to another at some time, which liability is enforceable by a judicial action. Kidd v. Puritana Cereal Food Co., 122 S. W. 784, 788, 145 Mo. App. 502.

A "debt" is money due upon a contract, without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower should be liable to be sued therefor. Campbell v. State ex rel. Brett, 99 Pac. 778, 784, 23 Okl. 109.

The word "debt," in Laws 1893, p. 200, c. 100, authorizing executors and administrators to compromise or compound any debt or claim owing by the estate of their testator or intestate, includes every claim and demand on which a judgment for a sum of money, or directing the payment of a sum of money, could be recovered in an action. In re Gilman's Estate, 87 N. Y. Supp. 128, 129, 92 App. Div. 462.

The legal acceptation of the word "debt" is not limited to the idea of a determinate sum of money due on an express agreement, but applies to obligations imposed by law or quasi contracts, as well as to obligations arising from contracts, express or implied. The word is also defined as meaning all that is due a man under any form of obligation or promise. In practice it means a form of action which lies to recover a sum certain, and it lies whenever the sum due is contained or ascertained in such a manner as to be readily reduced to a certainty without regard to the manner in which the obligation was incurred or is evidenced. Morgan's Louisiana & T. R. & S. S. Co. v. Stewart, 44 South. 138, 143, 119 La. 392 (quoting definition in Grey v. Bennett, 3 Metc. [44 Mass.] 522).

Legislative investigation expenses

A resolution providing for a legislative investigation and the expenses thereof does not create a "debt" within Const. art. 8, § 8, relating to the passage of laws creating a state debt; the term "debt" being used to refer to matters mentioned in section 6, and not to ordinary legislative expenses. State ex rel. Rosenhein v. Frear, 119 N. W. 894, 896, 138 Wis. 173.

As liability

See Liability.

Liability for breach of contract

Court and Practice Act 1905, § 984, provides that after the settlement of an estate, and after two years from the notice of qualification of administrator, the heirs shall be liable for all debts for which suits could not have been brought against the personal representative. Sections 985 and 987 give a creditor holding a contingent claim, the right of action on which did not accrue during the period within which an action could be brought against the personal representative, a right to sue in equity all persons so liable. Held, that a demand for breach of a covenant for quiet enjoyment constitutes a "debt," within section 984, which must be recovered by a

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suit in equity under section 987. Hebert v. Handy, 72 Atl. 1102, 1103, 1104, 29 R. I. 543.

A covenant of warranty is not considered a debt until broken. McKillop v. Burton's Adm'r, 74 Atl. 78, 80, 82 Vt. 403.

Liability for corporate debts

The liability of a corporation as principal to a surety upon its note is a debt, falling under the direct provisions of Kirby's Dig. § 859, making the president and secretary of a corporation liable for all debts contracted during the period of neglect or refusal to file the report of the financial condition of the corporation, as required by section 848. Under the provisions of Kirby's Dig. § 859, which makes the president and secretary of a corporation liable for its debts incurred during any period of neglect or refusal to file a financial report according to section 848, the liability of its officers is confined to debts incurred during the period of neglect or refusal, but not to debts renewed during that time. Therefore the president and secretary of a corporation who failed to file the report required were not liable to a surety on a note of this corporation, where the contract of suretyship had been entered into previous to their neglect. Griffin v. Long (Ark.) 131 S. W. 672, 674, 35 L. R. A. (N. S.) 855.

Under Business Corporation Law (Laws 1892, c. 691, § 6, taken from Laws 1875, p. 763, c. 611, § 34), providing that stockholders of a full liability corporation shall be severally and individually liable for the corporate debts, and Stock Corporation Law (Laws 1892, c. 688, § 55, taken from Laws 1875, c. 611, § 25), providing that no stockholder shall be personally liable for any corporate debt not payable within two years from the time it is contracted, the liability of a corporation as an assignee of a lease, stipulating for the rent payable quarterly in advance, is a "contingent liability," which only ripens into a debt as the rent falls due, and therefore is not a "debt," within the meaning of the statutes. Sanford v. Rhoads, 99 N. Y. Supp. 407, 408, 113 App. Div. 782 (citing Garrison v. Howe, 17 N. Y. 458; Gold v. Clyne, 31 N. E. 980, 134 N. Y. 262, 17 L. R. A. 767; Whitney Arms Co. v. Barlow, 68 N. Y. 34).

Liability for tort

An action against real estate brokers for deceit in selling land is governed by Rev. St. 1895, art. 3354, requiring actions for a "debt," not evidenced by a written contract, to be brought within two years, and not by article 3358, requiring actions other than for the recovery of land, for which no limitation is otherwise prescribed, to be brought within four years. Gordon v. Rhodes & Daniel, 116 S. W. 40, 41, 102 Tex. 300.

A liability arising out of a tortious act is not a "debt" or "debt contract," within Rev. St. U. S. § 2296, exempting a homestead from liability for "debts." Shelby v. Zeigler, 98 Pac. 989, 998, 22 Okl. 799.

The term "debt," in Rev. Codes 1899, § 5352, subd. 6, provides that the plaintiff may have the property of the defendant attached when the debt upon which the action is commenced was incurred for property obtained under false pretenses, means a debt which has been assented to by the defendant, and an attachment cannot be had in an action to recover damages for tort. Sonnesyn v. Akin, 97 N. W. 557, 560, 12 N. D. 227.

A judgment entered by a state court in New York on a general verdict for plaintiff in an action for breach of promise of marriage, although seduction is also alleged, is one on contract, and does not create a debt for a willful and malicious injury or for seduction of an unmarried female within Bankr. Act July 1, 1898, c. 541, § 17a (2). 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798, which excepts such debts from those dischargeable in bankruptcy, especially since under the law of the state the plaintiff could not maintain an action in tort for her own seduction, and the court may, on the bankruptcy of the defendant, under section 11 of the act, stay proceedings for the enforcement of such judgment. In re Warth, 196 Fed. 571, 574.

In Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565, providing that mutual debts between the estate of a bankrupt and a creditor shall be set off against each other and the balance only allowed or paid, the word "debts" should be construed to include a right of action against the creditor for injury to the bankrupt's property, which passed to the trustee under section 70a (6), although unliquidated. In re Harper, 175 Fed. 412, 424.

As a liquidated demand

The "debts" which may be proved under Bankr. Act July 1, 1898, § 63, subd. "a," 30 Stat. 562, c. 541, are fixed liabilities, as evidenced by a judgment or an instrument in writing absolutely owing, whether payable immediately or not, and claims for unliquidated damages are not generally provable. Brown & Adams v. United Button Co., 149 Fed. 48, 50, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, 9 Ann. Cas. 445.

The word "debt," within Code 1858, § 2203, which authorizes administration upon the estate of a nonresident in a county where a debtor resides, means a fixed or specific sum due by contract, and does not include unliquidated damages recoverable for tort. Louisville & N. R. Co. v. Herb, 143 S. W. 1138, 1141, 125 Tenn. 408.

The term "debt" does not include a claim for unliquidated damages. Claims for damages against the assignor of a claim for rent for delay in performing a contract to repair, for negligence in the performance thereof, for water and gas furnished, for injury to defendant's business, being mere

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unliquidated damages and not "debts," are not available under Rev. St. 1899, § 4487, providing that, if two or more persons are mutually indebted in any manner and one of them commences an action against the other, one "debt" may be set off against the other, though such "debts" are of a different nature. Scarritt Estate Co. v. J. F. Schmelzer & Sons Arms Co., 86 S. W. 489, 490, 110 Mo. App. 406 (citing Bolden v. Jensen, 69 Fed. 745, 746; In re Adams, 12 Daly, 454; Watson v. McNairy, 1 Bibb [4 Ky.] 356; Lindsay v. King, 23 N. C. 401; Dowling v. Stewart, 3 Scam. [4 Ill.] 193; Baum v. Tonkin, 1 Atl. 535, 110 Pa. 569; Powell v. Oregonian R. Co., 36 Fed. 726, 2 L. R. A. 270).

Unliquidated demands against plaintiff pleaded by defendant in an action on a note constituted a counterclaim but not a "debt" subject to set-off under Rev. St. 1909, § 1866, and verdict for plaintiff is not an adjudication of defendant's demands. Thayer-Moore Brokerage Co. v. Campbell, 147 S. W. 545, 549, 164 Mo. App. 8 (citing 2 Words and Phrases, p. 1864).

In Rev. Laws, c. 159, § 3, cl. 8, authorizing suits to reach, in payment of a debt, property fraudulently conveyed, the word "debt" is not used in its technical sense, but includes ordinary contract obligations, although the amount due has not been definitely ascertained. Woodbury v. Sparrell Print, 73 N. E. 547, 548, 187 Mass. 426.

An attachment could not be sued out under Rev. St. 1899, § 366, subd. 14, authorizing an attachment where the debt sued for was fraudulently contracted by the debtor, in aid of an action for money had and received by defendant under land contracts which plaintiff was induced to make by defendant's false and fraudulent representations as to the value and location of the land; there being no "debt" within the meaning of the statute. Steele v. Brazier, 123 S. W. 477, 480, 481, 139 Mo. App. 319.

Kirby's Dig. Ark. § 848, requires the president and secretary of every corporation to file annual reports, and section 859 provides that, if the president or secretary of any such corporation neglects or refuses to do so, they shall be liable for all debts of the corporation contracted during the period of such negligence or refusal. Held that, since the word "debt" means an obligation resting on one person to pay or perform something that is due to another, the state or condition of being indebted to another, and includes all that is due by one person to another in any form of obligation or promise, the term, as used in such section, was not limited to obligations certain, arising from an express agreement, but included as well corporate obligations consisting of unliquidated damages for breach of contract. Proctor-Gamble Co. v. Warren Cotton Oil Co., 180 Fed. 543, 547.

As money

See Money.

Money in bank

"Accounts," "claims," and "debts" belonging to a mercantile business are not ordinarily used to embrace money in bank, but to designate the accounts, claims, and debts against customers. Wyatt v. Norris, 66 S. E. 1016, 1017, 66 W. Va. 667.

Note

Webster's International Dictionary defines "debt" to be "that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another or to perform for his benefit; thing owed; obligation; liability." After a note has been transferred by the payee, there is no debt due the payee from the maker. Commonwealth v. Morton, 140 S. W. 685, 686, 145 Ky. 521.

A gift of the donor's note in her lifetime, without consideration, was not such a "debt" against her estate as would justify the sale of her real estate to pay it. Dacy v. Goll, 90 N. E. 179, 242 Ill. 606.

Obligation distinguished

Rev. Codes 1899, § 5047, relating to attachment, defines "debtor" as one who, by reason of an existing obligation, has or may become liable to pay money to another, whether such liability is certain or contingent, and, so defined, the term "debtor" has its usual signification (that is, one from whom a debt is due), using the word according to its common meaning. Section 3762 defines an "obligation" as a legal duty by which a person is bound to do or not to do a certain thing. The sections quoted make it plain that the Legislature has broadened the common meaning of the words "debtor" and "creditor" so as to include all persons from whom or to whom obligations are due, whether arising from contract or imposed by law; but none of these provisions define the term "debt" or furnish ground for the contention that "debt" and "obligation" are synonymous. It will be conceded that the common and ordinary meaning of the term "debt," in legal acceptation of the term, is an obligation resting upon contract, either express or implied. Under the statutory definitions of a debtor, it is not necessary to owe a debt. It is sufficient if one owes an obligation imposed by law. Every debt, however, is an obligation, but every obligation is not a debt. "Obligation" is the broader term; "debt" the narrower. The term "obligation" includes all debts. The term "debt" does not include all obligations, but only that particular kind of obligations known as debts. The statement, therefore, that the Legislature has specifically defined the term "debt," and that the term "debt" is synonymous with the word "obligation," is not sustained by the statute. Section 5352, subd. 6, providing that plaintiff

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may have the property of the defendant attached when the "debt" on which the action is commenced was incurred for property obtained under false pretenses, applies only when the action is commenced upon a debt which has been assented to by the defendant, and does not apply in actions to recover damages for torts. Sonnesyn v. Akin, 97 N. W. 557, 560–563, 12 N. D. 227.

As an obligation ex contractu

A "debt" is generally defined as a sum of money due by certain and express agreements founded upon an express or implied contract to pay a certain amount at a certain time. Morril v. Bentley, 130 N. W. 734, 740, 150 Iowa, 677.

The word "debt" is of large import, including not only debts of record or judgment and debts by specialty, but also obligations arising under simple contract to a very wide extent, and in the popular sense includes all that is due to a man under any form of obligation or promise. A contract between plaintiff and his agent provided for advances to the agent to be repaid from commissions to be earned, and that the agent should remain in the employment so long as he was in "debt" to plaintiff. Held, that the use of the word "debt," with reference to advances, implied no different mode of repaying than that provided for by the terms of the contract, and did not import personal liability. Arbaugh v. Shockney, 72 N. E. 668, 669, 34 Ind. App. 268 (citing Bouvier's Law Dict.).

The words "debt or debts," as used in a provision in a contract between a life insurance society and an agent to the effect that the society may offset against any claims for commissions under the contract any debt or debts due at any time by the agent to the society, apply only to such debts as arise out of the relation created by the contract, and do not entitle the society to offset against renewal premiums due thereunder advances made to the agent after the relation had ceased and the agent's rights under the contract had been assigned to a third person, of which the society had notice. Campbell v. Equitable Life Assur. Soc., 130 Fed. 786, 787.

In a broad and general sense, a debt is whatever one owes. In a purely technical sense, it is that for which an action of debt will lie—a sum of money due by certain and express agreement. A debt is not a contract, but it may be the result of a contract. Hornbeck v. State ex rel. Davidson, 71 N. E. 916, 917, 33 Ind. App. 609.

Judicial definitions of the term "debt" must be read in connection with the facts out of which their necessity arose, and in a broad sense a "debt" is whatever one owes. In a purely technical sense, it is that for which an action for debt would lie; a sum of money due by certain and express agreement. A "debt" is not a contract, but it may be the result of a contract. Strong v. Ross, 71 N. E. 916, 917, 33 Ind. App. 586.

A "debt" is something due from one person, the debtor, to another called the creditor, and may be created by simple contract, or evidenced by specialty or judgment, according to the nature of the obligation giving rise to it. Summit Silk Co. v. Kinston Spinning Co., 70 S. E. 820, 823, 154 N. C. 421, Ann. Cas. 1912A, 897.

" 'Debts' are obligations for the payment of money, founded on contract, express or implied." New Jersey v. Anderson, 27 Sup. Ct. 137, 140, 203 U. S. 483, 51 L. Ed. 284 (quoting Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197).

Penalties

An action to recover a penalty for violating an ordinance is a civil action, though commenced by affidavit and warrant, and the penalty imposed is not a "debt," within the meaning of the Constitution, so as to prohibit its enforcement by arrest and imprisonment; and hence an ordinance requiring licenses to run certain vehicles, including automobiles, was not unconstitutional for imposing a penalty of fine and imprisonment for noncompliance therewith. City of Chicago v. Morell, 93 N. E. 295, 296, 247 Ill. 383.

The liability of a bankrupt for the statutory penalty for cutting trees, imposed by Code Ala. 1907, § 6035 et seq., is not a "debt" founded upon an implied contract, which can be proved against his estate in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 63a (4), 30 Stat. 562. In re Southern Steel Co., 183 Fed. 498, 500.

Since the word "debt" may embrace a penalty recoverable by civil action, an action on a liquor dealer's bond for selling liquor to a minor is not an action founded on a contract in writing, but an action for a debt not so evident, and is therefore barred after two years by Sayles' Ann. Civ. St. 1897, art. 3354, subd. 4. Hillman v. Gallagher (Tex.) 120 S. W. 505, 506.

As property

See Personal Property; Property.

As provable debt

"Debt," as used in the Bankruptcy Act, includes any debt, demand, or claim provable in bankruptcy. Brake v. Callison, 129 Fed. 201, 203, 63 C. C. A. 359.

The word "debt," as used in Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565, relating to the setting off of debts against a bankrupt, includes any debt provable in bankruptcy; and a debt is provable, whether due or not at the time of bankruptcy. Germania Savings Bank & Trust Co. v. Loeb, 188 Fed. 285, 289, 110 C. C. A. 263.

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Nothing is within the purview of the provisions of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, relating to preferences except with reference to debts which may be proved for a dividend, but, on the other hand, anything which may be proved is within the purview of such provisions. Clarke v. Rogers, 183 Fed. 518, 522, 106 C. C. A. 64.

Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 547, provides that the net proceeds of the partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts; that if any surplus remains of property of any partner, it shall be added to the partnership assets and be applied to the payment of partnership debts, and vice versa; section 1, par. 11, declares that the term "debt" means any debt, demand, or claim provable in bankruptcy; section 63a(1) declares that debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest on such as were not then payable and did not bear interest; and section 63a (5) authorizes the allowance of provable debts reduced to judgment after the filing of the petition in bankruptcy, "less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments." Held, that where the estate of an individual bankrupt partner was more than enough to pay his individual debts, but the individual estates of both partners and the partnership property was insufficient to pay partnership debts, the claim of an individual creditor for interest accruing after the filing of the bankruptcy petition was not a "debt" which the creditor was entitled to have paid out of the partner's individual assets as against partnership creditors. In re Chandler, 184 Fed. 887, 888, 107 C. C. A. 209.

The term "debt" is defined in Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544, to include any debt, demand, or claim provable in bankruptcy. Prior to the filing of an involuntary bankruptcy petition the bankrupt made an assignment of his claim on insurance policies, constituting his sole assets, and the assignee rendered valuable services in attempting to collect the claims. On a trustee in bankruptcy being appointed, the assignee turned over to him the policies, with all proofs and claims, subject to a lien for allowances for the expenses incurred, and the trustee in bankruptcy subsequently settled the claims with the insurance companies. The claim of the assignee for expenses and services was not a debt. In re Levitt, 126 Fed. 889, 891.

The liability of a bankrupt indorser of commercial paper, which did not become absolute until after the filing of a petition, is a "debt" within Bankr. Act July 1, 1898, c. 541, § 1, subd. 11, 30 Stat. 544. In re Philip Semmer Glass Co., 135 Fed. 77, 78, 67 C. C. A. 551.

"Debt" is defined as a sum of money due by certain and express agreement, as by bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the amount is fixed and specific, and does not depend on any subsequent valuation to settle it. 3 Bl. Comm. 154. Since the separate property of a married woman residing in Florida, under the laws of that state, is liable in equity for her business obligations, where she is engaged in business on her own account, though not a free trader, such obligations constitute "debts" within Bankr. Law, § 1 (Act July 1, 1898, c. 541, 30 Stat. 544) declaring the term "debt" to include any debt, demand, or claim provable in bankruptcy, and section 63, 30 Stat. 562, declaring that debts of a bankrupt may be proved and allowed against his estate which are founded on an open account, or on a contract, express or implied. MacDonald v. Tefft-Weller Co., 128 Fed. 381, 385, 63 C. C. A. 123, 65 L. R. A. 106.

Refunds

The sum authorized to be refunded by an ordinance providing for the refunding of money previously paid by persons for paving in front of their property, according to the front foot rule, is not a "debt," within the meaning of Const. art. 11, §§ 5, 7, providing that no debt shall be created by any city, unless at the same time provision be made for payment by the creation of a sinking fund, etc., and such an ordinance is not unconstitutional. City of Houston v. Stewart, 87 S. W. 663, 665, 99 Tex. 67.

Salary of public officer

The word "debt," used in the San Antonio city charter, providing that any debt contracted by any officer, the payment of which has not been previously provided for by ordinance, shall be void, etc., has no reference to the salaries of officers and employés, provision for the appointment of which is made in the charter, and the pay of policemen and firemen is not a debt created by any officer of the city, but is one that arises from their appointment in a legal way, on the performance of the duties of their positions. City of San Antonio v. Beck (Tex.) 101 S. W. 263, 265.

Securities distinguished

The lien which arises by operation of law on the execution of a deed to secure a debt is a legal entity distinct from the debt itself, securing the payment of the debt not only by affording evidence of its existence, but by providing for its payment, the terms "debt"

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and "security" not being synonymous. McIntire v. Garmany, 70 S. E. 198, 199, 8 Ga. App. 802.

A contract of guaranty is to be strictly construed, and a guaranty executed to a bank of the payment of any "debt" which a corporation may "contract or become liable for to said bank" cannot be enlarged to render the guarantor liable on guaranties by the corporation of collateral notes pledged by it to the bank, which guaranties did not constitute debts of the corporation, but were merely executory contracts, on which its liability was contingent. National Bank of Commerce of Kansas City, Mo., v. Rockefeller, 174 Fed. 22, 30, 98 C. C. A. 8.

Set-off

A set-off is a "debt" due defendant from plaintiff. Ashland Coal & Coke Co. v. Hull Coal & Coke Corp., 68 S. E. 124, 128, 67 W. Va. 503.

As stock

See Stock (In Corporation Law).

Surety's claim for contribution

A claim by one surety against another for contribution becomes a "debt" only on payment by the former in excess of his share, and therefore, where such excessive payment is made after the issuance of a patent to the latter under the homestead act, the land is not exempt under Rev. St. U. S. § 2296, providing that lands acquired under the act shall not be liable to the satisfaction of any "debt" contracted prior to the issue of the patent therefor. Shoemake v. Stimson, 47 Pac. 218, 219, 16 Wash. 2.

Tax

Taxes are not "debts" in the ordinary sense of that word. Hecox v. Teller County, 198 Fed. 634, 635, 117 C. C. A. 338.

A tax is not founded upon a contract, express or implied, and is not a "debt," within the statute of limitations. Bradford v. Storey, 75 N. E. 256, 257, 189 Mass. 104.

A tax is not a debt founded on contract, but is an impost levied by the government operating in invitum. State ex rel. George v. Dix, 141 S. W. 445, 446, 159 Mo. App. 573.

A "tax" is not a debt of the person charged or a judgment against him, but is a contribution or demand in a sum fixed by law enforceable in a prescribed method, and of a salable and transferable nature, and a sale of the right to receive a tax, and of its lien, does not affect their character or their relation to the taxpayer or his property. Gautier v. Ditmar, 97 N. E. 464, 467, 204 N. Y. 20, Ann. Cas. 1913C, 960.

A common-law assignment for creditors, which recited that it was executed by assignors as copartners and the assignee and both the firm and individual creditors, does not require a city or its tax collector to assent in writing to the assignment to become entitled to its benefits in the collection of a tax; the word "creditor" signifying one holding a contractual obligation against another, and a tax not being a "debt," though Rev. Laws 1902, c. 13, §§ 32, 33, and chapter 159, § 3, cl. 7, give to a tax collector the right of a creditor in the collection of taxes. City of Boston v. Turner, 87 N. E. 634, 635, 201 Mass. 190.

A tax is not ordinarily regarded as a "debt." Where a county diverts to its own treasury a part of the money it has collected on taxes levied by a city, no statute of limitation runs against an action by the city to recover the amount so wrongfully withheld. City of Osawatomie v. Board of Com'rs of Miami County, 96 Pac. 670, 672, 78 Kan. 270, 130 Am. St. Rep. 369, 16 Ann. Cas. 403.

A "debt" is a sum of money due by contract, express or implied, and is thus distinguished from a tax, which is a charge on persons or property to raise money for public purposes and operates in invitum. Georgia R. & Banking Co. v. Wright, 53 S. E. 251, 262, 124 Ga. 596.

"A 'tax' is a charge imposed by the Legislature for the purpose of revenue. It is not founded on contract and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the state." Bailies v. City Council of City of Des Moines (Iowa) 102 N. W. 813 (quoting and adopting definition in Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197, and citing 2 Words and Phrases, p. 1883).

Taxes are "debts" due to the government, which property owners have no more right to withhold than a private debt. Mariner v. City of Milwaukee, 131 N. W. 442, 443, 146 Wis. 605.

A tax is generally defined as a burden imposed by legislative authority to raise money for public purposes. In its essential characteristics it is almost universally held not to be a debt or in the nature of a debt; the distinction being that a tax does not rest on contract, while a debt does. Hanson v. Franklin, 123 N. W. 386, 388, 19 N. D. 259.

A tax is not strictly a "debt." It lacks the nature of a debt in that, though for a sum certain, it is not founded upon any agreement or assent of the person or persons against whom it is assessed, but is a burden for public purposes imposed in invitum. As an obligation or duty created by statute to pay money, however, it is quasi contractual, although there may be difficulty as to the remedy for its enforcement in a given case. In re United Button Co., 140 Fed. 495, 502.

While taxes are not in a strict sense "debts," they are so denominated in the Bankruptcy Act. Section 17 of that act (Act July 1, 1898, c. 541, 30 Stat. 550) being as

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follows: "'Debts' Not Affected by a Discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides," etc. And section 64, 30 Stat. 563, being as follows: "Debts Which Have Priority. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors," etc. And section 1, 30 Stat. 544, declares that the word "debt" shall include any debt, demand, or claim provable in bankruptcy. A tax provable in bankruptcy is within the latter definition. In re William F. Fisher & Co., 148 Fed. 907, 912.

"Debt," as used in Const. art. 7, § 7, par. 1, providing that the debt thereafter incurred by any county, municipal corporation, or political division of the state shall not exceed 7 per cent. of the assessed value of all taxable property therein, and that no county, municipality, or division shall incur any new debt except for a temporary loan or loans to supply casual deficiencies on revenue not to exceed one-fifth of 1 per cent. of the assessed value of taxable property therein without the assent of two-thirds of the qualified voters, but that any city, the debt of which does not exceed 7 per cent. of the assessed value of taxable property at the time of the adoption of the Constitution, may be authorized to increase the amount of the debt 3 per cent. on the assessed valuation, means: (1) The word "debt" is not to be construed, in its broad and unrestricted sense, of a liability by one person to pay money or other thing of value to another. (2) A liability for current expense can be incurred by a municipal corporation for any one year, provided there is, at the time of incurring the liability a sufficient sum in the treasury of the city which may lawfully be appropriated to the payment of the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year; and such a transaction would not create a "debt," within the meaning of that word as it is used in the Constitution. (3) It was the purpose of the Constitution to provide a system of finance for subordinate public corporations, under which there should be each year contracts made for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year; that is, that each year's expenses should be paid by taxes levied during the year, and no item of expense was to be paid except out of the taxes levied during the year in which the contract for such expense was made. (4) Any liability which was not to be discharged by money already in the treasury, or by taxes to be levied during the year in which the contract under which the liability arose was made, is a "debt," within the meaning of the Constitution and cannot be incurred without the preliminary sanction of a popular vote unless it be for a temporary loan to supply casual deficiencies of revenue. Butts County v. Jackson Banking Co., 60 S. E. 149, 150, 129 Ga. 801, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244 (quoting and adopting the definition in City Council of Dawson v. Dawson Waterworks Co., 32 S. E. 913, 106 Ga. 713).

Const. 1901, § 224, provides that no county shall become indebted in an amount, including present indebtedness, greater than 3½ per cent. of the assessed value of the property therein. Section 215 prohibits any county from levying a greater rate of taxation in any one year than one-half of 1 per cent. on the value of taxable property therein, provided that, to pay any debt thereafter created to erect public buildings, it may levy special taxes not exceeding one-fourth of 1 per cent., when authorized by law. Pursuant to Code 1907, §§ 133–139, authorizing the levy and collection of a special tax to erect public buildings, a county adopted resolutions levying a special courthouse tax of one-fourth of 1 per cent. for the years 1909–1917, not to exceed a certain aggregate sum with interest thereon, as represented by county warrants provided for in the contract with the contractor, and provided that the resolution should constitute a continuing contract and should not be repealed so long as any of the warrants and interest thereon remained unpaid. The contract with the contractor provided for the levy of such a special courthouse tax and for the issue of warrants with interest coupons attached; it being agreed that no debt shall be thereby created by the county but, instead, an assignment of the proceeds of the special tax levy for the years stated. The principal of the aggregate amount agreed to be levied for all the years, added to the existing indebtedness of the county, would exceed 3½ per cent. of the assessed valuation of the county property. Held, that section 215 could only operate within the limitation fixed by section 224, and, in view of the purpose of the latter section, which was to prevent the creation of unnecessary debts, the contract for the erection of the courthouse created a "debt" within section 224, and hence was void as exceeding the limitation contained therein. Hagan v. Commissioners' Court of Limestone County, 49 South. 417, 423, 160 Ala. 544, 37 L. R. A. (N. S.) 1027.

A tax is not a debt, nor in the nature of a debt. It is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. Peter v. Parkinson, 93 N. E. 197, 199, 83 Ohio, 36, Ann. Cas. 1912A, 751.

A tax is a "debt" due to the taxing power, for which an action of debt will lie.

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Schermerhorn's Ex'x v. Commonwealth, 60 S. E. 65, 66, 107 Va. 707.

A "tax," in the ordinary sense, is not a "debt"; it does not involve an element of contractual obligation and is not enforceable by ordinary remedies for the collection of debts, without statutory authorization in that regard. State v. Chicago, M. & St. P. R. Co., 108 N. W. 594, 608, 128 Wis. 449.

While, for the purposes of allowance and classification, a tax may be treated as a "debt" under the administration act, yet the executor of a trustee, who has accounted for the trust fund and turned it over to a new trustee, and to whom the tax was not presented for allowance and classification, cannot be held personally liable for the amount of the tax. State v. Mississippi Valley Trust Co., 108 S. W. 97, 101, 209 Mo. 472.

"A 'tax,' in its essential characteristics, is not a 'debt,' nor in the nature of a 'debt.' A 'tax' is an import levied by authority of government upon its citizens, or subjects, for the support of the state. It is not founded on contract or agreement. It operates in invitum. A 'debt' is a sum of money due by certain and express agreement. It originates in and is founded upon contracts, express or implied." United States v. Chamberlin, 156 Fed. 881, 884, 84 C. C. A. 461, 13 Ann. Cas. 720 (quoting and adopting the definition in City of Camden v. Allen, 26 N. J. Law, 398).

Gen. St. 1902, § 2407, providing that taxes shall become a debt due from the persons against whom assessed, simply provides a remedy for the collection of taxes by ordinary action, and does not change the character of a tax which is a public burden imposed by law on the individual for public purpose, and is not a debt in the ordinary sense, and is not within section 1110, limiting actions for debt. Town of Cromwell v. Savage, 82 Atl. 972, 973, 85 Conn. 376.

Taxes upon the property of the assignor are not "debts" from which he may be discharged under chapter 385, Laws 1889 (1 Sanb. & B. St. §§ 1702*o*–1702u). In re Assignment of Riddell, 67 N. W. 1135, 1136, 93 Wis. 564.

Laws 1907, p. 1682, c. 721, § 1, subd. 3, providing for the refund to taxpayers of the excess of school taxes judicially determined excessive, is not unconstitutional as imposing upon one person the debt of another, since taxes are not to be regarded as debts within the constitutional prohibition relating thereto, and, even if they were, the statute merely adjusts the debt, in that it returns to the "debtor" the excess paid by him over what was due from him, and merely provides for an abatement of the excessive portion of the tax, and not for a donation or gift. People ex rel. Eckerson v. Board of Education, etc., of School Dist. No. 1 of Haverstraw, 110 N. Y. Supp. 769, 774, 126 App. Div. 414.

"While taxes are not, strictly speaking, debts, yet they are obligations or liabilities," and, where a testator by will directed payment of all funeral expenses and "debts" out of his personal estate as soon as practicable and gave the balance of the personal estate to his wife, the intention was to include all obligations and liabilities against the estate of every character, including taxes. Penn's Ex'r v. Penn's Ex'r, 87 S. W. 306, 307, 120 Ky. 557.

"Taxes levied or imposed by the state are not 'debts' in the ordinary acceptation of that term, so as to make them bear interest under the general interest laws of the state." State v. Mut. Life Ins. Co. of New York, 93 N. E. 213, 223, 42 L. R. A. (N. S.) 256.

DEBT (Action of)

An action of "debt" lies whenever a statute gives a right to recover damages, reduced pursuant to its provisions to a certain sum, if no other specific remedy is provided. Bigelow v. Cambridge & C. Turnpike Corp., 7 Mass. 202, 204.

An action for money, recoverable as damages for fraud, is an action for a "debt," as that word is used in Rev. St. 1895, art. 3354, subd. 4, requiring actions for a debt, not evidenced by a written contract, to be brought within two years. Gordon v. Rhodes & Daniel, 116 S. W. 40, 42, 102 Tex. 300.

The common-law action of "debt" lies only for the recovery of money or its equivalent in sum certain, or that can be readily rendered certain by mathematical computation, and will not lie to recover damages and breach of contract unless such damages have been fixed and liquidated by prior agreement or judgment between the parties. United States v. Alcorn, 145 Fed. 995, 1000.

By common-law procedure, the appropriate form of an action at law to recover an amount due upon a judgment is an action of "debt." Such an action lies for the recovery of a fixed and definite sum due upon a contract, whether it be a contract of record, like a judgment, or a contract by specialty, or a simple contract. In such a form of action, therefore, the plaintiff must declare on a contract and must claim the amount alleged to be due on the contract. It differs from an action of "assumpsit" in that the latter is for recovery of damages for the nonperformance of a parol or simple contract. Du Bois v. Seymour, 152 Fed. 600, 602, 81 C. C. A. 590, 11 Ann. Cas. 656.

The words "action of debt" in Rev. St. 1895, art. 3106, providing that, where usurious interest shall be received or collected, the person paying the same or their legal repre-

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sentatives may by "action of debt" recover double the amount of the interest so received or collected, do not refer to the action technically known at common law as an "action of debt," but an action to recover the penalty for receiving usury is in the nature of an action of debt, and must be brought in the county of defendant's residence. Wartman v. Empire Loan Co., 101 S. W. 499, 501, 45 Tex. Civ. App. 469.

By action of "debt," as used in Rev. St. 1895, art. 3106, providing for the recovery of a penalty for receiving usury, the Legislature did not mean to require that the action be technically that action known as such at common law, for the reason that we have no forms of action. An action under that statute is not an action of tort, but is an action of "debt," or in the nature of "debt." Wartman v. Empire Loan Co., 101 S. W. 499, 501, 45 Tex. Civ. App. 469 (quoting and adopting Rosetti v. Lozano, 70 S. W. 204, 96 Tex. 57).

DEBT ACCRUING TO TERRITORY

Taxes due the territory of Oklahoma prior to statehood, on account of omitted property, constituted a debt accruing to the territory, under the schedule to Const. § 3 (Bunn's Ed. § 452), and the Legislature of the state may make a provision for the recovery thereof by the state. Anderson v. Ritterbusch, 98 Pac. 1002, 1007, 22 Okl. 761.

DEBT AGAINST ESTATE

A "debt against an estate" ordinarily contemplates a debt owed by the deceased, but a "claim against an estate" is not so restricted and within a refunding bond given by an heir may include funeral expenses, current taxes, etc., and the lawful expenses of administration, including a commission for the administrator. Callaway v. Title Guaranty & Trust Co., 111 S. W. 905, 906, 132 Mo. App. 466.

DEBT BY SPECIALTY

A "debt by specialty" is a sum of money due or acknowledged to be due by deed or instrument under seal. Hudson Trust Co. v. Boyd, 84 Atl. 715, 80 N. J. Eq. 267.

DEBT CONTRACTED

The terms "liability incurred" and "debt contracted" are equally familiar. When the subject of liabilities is brought to the attention, they occur to the mind with equal readiness, and when contrasted their significations are clear and definite. If an act provided that lands should be exempt from every liability incurred, there could be no doubt that they would be free from all liabilities, both from those arising out of contracts and from those arising out of torts. Brun v. Mann, 151 Fed. 145, 155, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

Where a company agreed in writing not under seal to cut and remove a specified number of feet of timber each year for five years, the title only vested in the company so fast as the timber was severed from the land and there was no absolute "debt contracted" within the meaning of section 20, relating to the provisions of section 14, and debts contracted by corporations not complying with section 14. Cady v. Sanford, 53 Vt. 632, 636.

Plaintiff contracted on September 27, 1909, for the construction of a heating plant by a corporation of which defendants were directors, and work was commenced about November 15, 1909, and was completed and final payment of the price made on May 23, 1910, and plaintiff sued the company on March 31, 1911, for damages for constructing the plant and recovered judgment, and execution was returned unsatisfied. Pub. Acts 1907, No. 137, § 12, provides that any director of a corporation failing to file a report within the time prescribed, who has neglected to join in such report, shall be liable for all the debts of the corporation contracted since the filing of the last report. Held, that the directors were not liable to plaintiff for the amount of the judgment against the corporation because they did not file the annual report for the year 1910, since the liability of the corporation for failure to perform the contract was incurred when the directors were not in default in filing the report, so that the judgment was not a "debt contracted" since the filing of the last report within the statute. Weber v. Draper, 136 N. W. 596, 598, 170 Mich. 550.

The liability to testator's estate of his surviving partner for assets thereof, which he collected and for which he never accounted, is not a "debt contracted with decedent" in his lifetime, or with his executor, within Code 1896, § 239, providing for setting off debts so contracted against the distributive share of such debtor. Noble v. Tait, 37 South. 278, 279, 140 Ala. 469.

Judgment for tort

A judgment for damages, in an action in tort, is not a "debt contracted," within Rev. St. U. S. § 2296, which provides that no land acquired under the provisions of the homestead law shall in any event become liable to the satisfaction of any "debt contracted" prior to the issuance of the patent therefor. Shelby v. Ziegler, 98 Pac. 989, 994, 22 Okl. 799.

A judgment against a physician for the unskillful treatment of an injury, though it was alleged he promised careful treatment, is not a debt by contract, within Const. 1874, art. 9, § 2, exempting property from seizure on process from any court on debt by contract. Miller v. Minturn, 83 S. W. 918, 919, 73 Ark. 183.

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Obligation ex delicto

"The words 'debts contracted,' as used in the Constitution of Michigan (article 16, § 2), relating to the exemption of homesteads from liability, are words of large import and include all kinds of claims arising not only on contract but in tort." In re Harper, 175 Fed. 412, 424.

"The ordinary signification of the term 'debt contracted' includes neither a liability for a wrong done nor a judgment for damages caused thereby." Brun v. Mann, 151 Fed. 145, 156, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

DEBT CREATED BY FRAUD

A judgment, based on a debt fraudulently created, is a "debt created by fraud" of a bankrupt within Rev. St. U. S. § 5117, which provides that bankruptcy shall not discharge such debts. Young v. Grau, 14 R. I. 340, 341.

Defendant sold sheep on which plaintiff had a lien and applied the proceeds thereof to his own purposes. Held, that this was a "debt created by fraud," within section 5117, Rev. St. U. S., relating to discharge in bankruptcy. Darling v. Woodward, 54 Vt. 101, 103.

DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER

An oral agreement whereby one of the parties agrees with the other to pay his debt to a third person is not invalid as a promise to answer for the "debt, default, or miscarriage of another." Fosha v. Prosser, 97 N. W. 924, 926, 120 Wis. 336.

DEBT DUE

See Due (In Commercial Law); Due in the Same Right; Due or To Become Due; Due the Public.

DEBT INCURRED AFTER APPROPRIATION EXHAUSTED

Second-Class Cities Law, § 79, made any expenditure or the incurring of any debt by a city officer or department in excess of the amounts appropriated for the fiscal year then current unlawful and not binding on the city. Laws 1910, c. 254, § 1, authorizes the city of Yonkers to create a funded debt by the sale of bonds to the amount of $40,000 and to apply the proceeds to the payment of any debts and expenses of the city incurred during the fiscal years 1908 and 1909 remaining unpaid after appropriations applicable thereto had been exhausted. Section 2 required claims for such debts and expenses to be audited as other claims. Prior to 1910 an officer of a department, after the exhaustion of all moneys appropriated to the department, incurred a debt for feed for the horses used in the department. This claim was duly audited, but the comptroller refused to pay it. Held that the claim was for a "debt incurred after appropriations" applicable to the payment thereof "had been exhausted," and was within Laws 1910, c. 254, though under Second-Class Cities Law, § 79, no debt incurred beyond the appropriation could be a debt of the city in a strict legal sense. People ex rel. Wiffler v. Miller, 124 N. Y. Supp. 368, 369, 68 Misc. Rep. 445.

DEBT MATURING IN THE YEAR

The resolution of commissioners of a courthouse district, levying a tax "for the purpose of paying the debts and interest of the said district maturing in the year 1911," specifies distinctly the purpose for which the tax is levied, as required by Const. § 180; "debts," as modified by "maturing in the year 1911," being used in the sense of current expenses incurred during the year in maintaining the courthouse. Streine v. Commissioners of Campbell Courthouse Dist., 149 S. W. 928, 931, 149 Ky. 641.

DEBT OF ANOTHER

See Promise to Answer for Debt, Default, etc.

Where a grantee of land assumes as a part of the consideration for the conveyance a mortgage debt of the grantor, such debt is not the "debt of another" within the statute of frauds, but becomes the grantee's debt, who becomes personally liable therefor on his contract, whether it be in writing or by parol. Southern Indiana Loan & Savings Inst. v. Roberts, 86 N. E. 490, 491, 42 Ind. App. 653.

DEBT OF COUNTY

See Indebted—Indebtedness.

DEBT OF FIDUCIARY CHARACTER

A "debt of a fiduciary character," under U. S. Comp. St. 1901, p. 3428, as amended by U. S. Comp. St. Supp. 1907, p. 1026, excepting from debts released by a discharge in bankruptcy those created by fraud, embezzlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary character, applies only to technical trusts, such as those arising from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like. Young v. Clark, 93 Pac. 1056, 1058, 7 Cal. App. 194.

DEBT OF MUNICIPALITY

See Indebted—Indebtedness.

DEBT OF RECORD

See, also, Judgment.

Any demand against a corporation, which has been merged in a judgment, becomes a "debt of record." Henley v. Myers, 93 Pac. 168, 170, 76 Kan. 723, 17 L. R. A. (N. S.) 779.

A "debt of record" is a sum of money which appears to be due by the evidence of a court of record. Hudson Trust Co. v.

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Boyd, 84 Atl. 715, 80 N. J. Eq. 267 (citing 2 Words and Phrases, p. 1891).

"While some courts of other states hold that there can be no action on a judgment of a justice of the peace as they are not 'debts of record,' this court has sustained action on them when regular and final." Deck v. Wright, 116 S. W. 31, 32, 135 Mo. App. 536.

DEBT OF STATE

See Indebted—Indebtedness.

DEBT OF TOWN

See Indebted—Indebtedness.

DEBT OR DEMAND

An unliquidated claim for damages for a tort on behalf of a ward is not within St. § 2030, providing that a guardian may compound a "debt or demand" owing to the ward. Manion v. Ohio Val. Ry. Co., 36 S. W. 530, 531, 99 Ky. 504 (citing And. Law Dict., "Claim," "Demand").

Under Code 1907, § 5859, a "debt or demand not sounding in damages merely" is one which, when the facts on which it is based are established, the law is capable of measuring accurately by a pecuniary standard. In an action for rent, damages for failure to repair according to a contract may be set off as not sounding in damages merely. Donnelly v. House, 49 South. 324, 325, 160 Ala. 325.

DEBT OWED

A "debt owed" may not be a debt due, but the phrase "the debt at that time owed by the state of Pennsylvania," in a trust agreement under which one deposited money in trust to be accumulated for the benefit of the state of Pennsylvania until the fund so accumulated should be equal to the debt at that time owed by the state, when it should be paid over to the treasurer of the state to discharge the debt, means the principal of the debt, whether due or not due, and where the amount deposited was $2,000, and the indebtedness of the state at the time was $40,000,000, the state took no vested interest in the fund, since it was to receive the benefit of the fund only on a contingency which might never happen, or might happen at some indefinite time in the future in excess of the limitation of the rule against remoteness or accumulations, and the trust is void, and the fund recoverable by the personal representative of the settlor after his death. Russell v. Girard Trust Co., 171 Fed. 161, 166.

Money due the state of Minnesota for binding twine manufactured by the state in its penitentiary and sold is a "debt," and a debt owing to the state within the meaning of Rev. Laws Minn. 1905, §§ 4618, 4633, which gives priority in distributing the estate of insolvents to "debts owing to the United States and to the state." In re Western Implement Co., 166 Fed. 576, 581; In re Mercer, 171 Fed. 81, 96 C. C. A. 185.

DEBTOR

See Execution Debtor; Joint Debtors; Judgment Debtor.
Discharge of debtor, see Discharge.
Solvent debtor, see Solvency—Solvent.

As expressly defined by Civ. Code, § 3429, a "debtor" is one who, through an existing obligation, is or may become liable to pay money to another, whether such liability be certain or contingent. Calkins v. Howard, 83 Pac. 280, 281, 2 Cal. App. 233.

However defined, the word "creditor" is correlative of "debtor." Hebert v. Handy, 72 Atl. 1102, 1104, 29 R. I. 543.

A "debtor" is one who owes a debt; he who may be constrained to pay what he owes. Morgan's Louisiana & T. R. & S. S. Co. v. Stewart, 44 South. 138, 143, 119 La. 392 (Civ. Code, art. 2132).

Plaintiff deposited a check with defendant bank for collection as plaintiff's agent. Defendant forwarded it to the F. bank for collection, with the instruction, "Remit New York exchange." The F. bank remitted the proceeds of the collection by its own draft on a New York bank, which the New York bank, at direction of the receiver of the F. bank, who in the meantime had been appointed, refused to pay. Held, that the F. bank was liable as trustee for the money collected; there being no authorization by defendant that its relation should be changed to that of "debtor," so that defendant was not liable. Holder v. Western German Bank, 136 Fed. 90, 92, 68 C. C. A. 554.

Where the affidavit in poor debtor proceedings names two debtors, the word "debtor," used in the certificate authorizing the arrest, may be construed as "each said debtor." Stearns v. Hemenway, 37 N. E. 766, 767, 162 Mass. 17.

The word "debtor," as employed in Rev. Code, § 4380, disqualifying a juror who stands in the relation of debtor to either party, means one who is liable on a contract, either express or implied, or by operation of law, to respond to another, either in the present or at some future date. Hall v. Chattin, 106 Pac. 1132, 1133, 17 Idaho, 664.

The word "debtor," in Code Civ. Proc. S. D. 1903, § 346, limiting exemptions to a debtor who is the head of a family, and a single person who is not the head of a family, does not include a partnership within section 363, authorizing a partnership to claim one exemption of $750 out of firm property, and the latter section is inoperative. In re Novak, 150 Fed. 602, 603.

The word "debtor," as used in Chicago, R. I. & P. R. Co. v. Sturm, 19 Sup. Ct. 797, 174 U. S. 710, 43 L. Ed. 1144, where the court says: "The essential service of foreign at-

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tachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do this he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the 'debtor.' He and he only has something in his hands"—means the garnishee, the one owing the debt sought to be subjected by attachment. Pennsylvania R. Co. v. Rogers, 44 S. E. 300, 304, 52 W. Va. 450, 62 L. R. A. 178.

Rev. Codes 1899, § 5047, relating to attachment, defines "debtor" as one who, by reason of an existing obligation, has or may become liable to pay money to another, whether such liability is certain or contingent, and, so defined, the term "debtor" has its usual signification (that is, one from whom a debt is due), using the word according to its common meaning. Section 3762 defines an "obligation" as a legal duty by which a person is bound to do or not to do a certain thing. The several sections quoted make it plain that the Legislature has broadened the common meaning of the words "debtor" and "creditor" so as to include all persons from whom or to whom obligations are due, whether arising from contract or imposed by law; but none of these provisions define the term "debt" or furnish ground for the contention that "debt" and "obligation" are synonymous. It will be conceded that the common and ordinary meaning of the term "debt," in legal acceptation of the term, is an obligation resting upon contract, either express or implied. Under the statutory definitions of a debtor, it is not necessary to owe a debt. It is sufficient if one owes an obligation imposed by law. Every debt, however, is an obligation, but every obligation is not a debt. "Obligation" is the broader term; "debt" the narrower. The term "obligation" includes all debts. The term "debt" does not include all obligations, but only that particular kind of obligations known as debts. The statement, therefore, that the Legislature has specifically defined the term "debt," and that the term "debt" is synonymous with the word "obligation," is not sustained by the statute. Section 5352, subd. 6, providing that plaintiff may have the property of the defendant attached when the "debt," on which the action is commenced, was incurred for property obtained under false pretenses, applies only when the action is commenced upon a debt which has been assented to by the defendant and does not apply in actions to recover damages for torts. Sonnesyn v. Akin, 97 N. W. 557, 560–563, 12 N. D. 227.

DEBTOR AND CREDITOR

The relation of banker and depositor is that of "debtor and creditor"; as soon as the deposit is received it becomes the money of the bank, and the bank is a debtor to the depositor for that amount. It is in no sense a trustee, and the rule of reasonable care has no application in respect of moneys so received by the bank, and it is bound absolutely to pay or discharge the liability like any other obligation it owes. Fricano v. Columbia Nat. Bank, 103 N. Y. Supp. 189, 191, 118 App. Div. 567.

Where a banker selected as county depositary received as such the funds of the county, the relation between the depositary and the county was that of debtor and creditor, the depositary not being a public officer having charge of public funds. Henry County v. Salmon, 100 S. W. 20, 201 Mo. 136.

The deposit of money in a savings bank creates the relation of "debtor and creditor" between the depositor and the bank. The transaction between a depositor and a bank is really a loan of money and not a deposit in the strict legal sense of the term. The bank borrows the money, becomes the owner of it, and is charged with a contractual obligation to repay an equal amount at a future time in accordance with the terms of the banker's contract. Schippers v. Kempkes (N. J.) 67 Atl. 1042, 1043.

DECALCOMANIA

"Decalcomania," as defined by the Century Dictionary, is the practice or process of transferring pictures on marble, porcelain, glass, wood, and the like, while, as defined by the Standard Dictionary, it is the process of transferring prints from paper and making them adhere to the glass, porcelain, or the like. "Decalcomania" paper is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 400, 403, 30 Stat. 188, 189, as lithographic prints or printed matter, being commercially a distinct article from either, but falls under the provision of "surface-coated papers * * * printed," under paragraph 398, 30 Stat. 188. United States v. O. G. Hempstead & Son, 159 Fed. 290, 291.

DECEASE

See Previous Decease.

DECEASED CHILD

Any deceased child, see Any.

The language of a will must be construed with reference to the time of the testator's death; and in a will providing for the distribution of the income from trust property, and on the happening of a certain contingency the corpus of such property, among the testator's children, the issue of any deceased child taking by representation the share which his, her, or their parent would have taken, if living, the words "deceased child," in the absence of language indicating a contrary intention, refer only to a child dying

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before the testator. Patton v. Ludington, 79 N. W. 1073, 1076, 103 Wis. 629, 74 Am. St. Rep. 910.

DECEASED PERSON

See Estate of Deceased Person.
As person, see Person.

DECEDENT

As person, see Person.
Transactions with decedents, see Transaction.

DECEDENT'S ESTATE

Assets of decedent's estate, see Assets.
Interest in, see Interest.

DECEIT

See Action for Deceit or Fraud.
See, also, Fraud; Invidious Machinations.

"'Deceit' consists in leading a man to damage by willfully or recklessly causing him to believe and act on a falsehood." Haines v. Franklin, 87 Fed. 139, 141.

"'Deceit' is actual fraud, and, where the apparent consent of one party to a contract has been induced by the actual fraud of the other, the contract is voidable." Beare v. Wright, 103 N. W. 632, 634, 14 N. D. 26, 69 L. R. A. 409, 8 Ann. Cas. 1057.

Duress and "deceit" are simply different methods by which fraud is consummated. The same remedies are available to the injured party. Neibuhr v. Gage, 108 N. W. 884, 887, 99 Minn. 149.

A fraud, within the contemplation of the law, is such act as would justify a rescission of a contract on its discovery, the elements of which are said to be "that where one makes a false representation of a material fact, knowing it to be false, with the intent to induce the person to whom it is made to rely on it, and this person does rely on it, is deceived, and pecuniarily damaged, it is "deceit" which will avoid the contract. First Nat. Bank of Wellington v. Person, 111 N. W. 730, 731, 101 Minn. 30.

A person's false swearing that he was not served with summons and complaint, and obtaining others to corroborate his statement, whereby he obtained an order or mandate from the court which stayed the opposite party from proceeding under the judgment, is a "deceit" within Code Civ. Proc. § 14, empowering courts of record to punish by fine and imprisonment a party to an action or special proceeding for any deceit or abuse of a mandate or proceeding of the court. Dollard v. Kovonsky, 113 N. Y. Supp. 793, 797, 61 Misc. Rep. 392.

False representations to a married woman as to title to property which her husband had formerly owned, and as to the disposition of the proceeds of its sale, which induced her to believe that her husband was to receive one-half of such proceeds, when in fact he was to receive nothing, were material representations and sufficient to constitute an inducement leading her to release her dower interest in the property, and, as such, afforded grounds for an action of "deceit," although she did not expect to directly receive any money herself in consideration for such release. Garry v. Garry, 72 N. E. 335, 187 Mass. 62.

Where a vendor makes false representations as to material facts relating to the property sold, having at the time knowledge that his statements are false or what the law regards as equivalent to such knowledge, and intending that the purchaser shall rely upon them as an inducement to the purchase, he is liable in an action of deceit where the purchaser relies thereon to his damage. White Sewing Mach. Co. v. Bullock (N. C.) 76 S. E. 634, 636.

Under Wilson's Rev. & Ann. St. 1903, § 14, art. 1, c. 15, par. 743, defining actual fraud by a party to a contract, as the suggestion as a fact of that which is not true, by one who does not believe it to be true, or the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, and defining "deceit" as the suggestion as a fact of that which is not true by one who does not believe it to be true, or the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true, a party is guilty of fraud and "deceit" where, with intent to induce another to enter into a contract, he makes a positive assertion which is material in a manner not warranted by his information, or where he is not shown to have had reasonable grounds for believing it to be true, where the assertion so made is not true, even though believed by the party making it. In such case the definite assertion as a fact of that which is untrue concerning that of which the party has no knowledge is tantamount to the assertion of something which the party knows to be untrue. Garvin v. Harrell, 113 Pac. 186, 188, 27 Okl. 373, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744.

The mere fact that a director, who knows that his bank is insolvent, takes no action to close the bank or announce its insolvency does not make him liable for "deceit" to persons who have extended credit after the bank became insolvent on the assumption that it was solvent. Hart v. Evanson, 105 N. W. 942, 944, 14 N. D. 570, 3 L. R. A. (N. S.) 438.

To constitute deceit and fraud by the use of language, the language need not affirm the existence or nonexistence of something which is untrue. It is sufficient if

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the language of one party misleads the other as to the existence of a fact and induces him to contract. Marietta Fertilizer Co. v. Beckwith, 61 S. E. 149, 151, 4 Ga. App. 245.

"Deceit," in the law, has a broad significance. Any device or false representation by which one man misleads another to his injury, and fraudulent misrepresentations by which one man deceives another to the injury of the latter, are deceit. Where a person is induced to change her status from that of an unmarried to that of a married woman, with all of the duties and obligations pertaining to the changed relationship, if this result is accomplished by deceit, she has, within the law, been deceived; she has been induced to do that which, but for the false practice, she would not have done, and has been led to change her position in most vital respects—respects which may affect her financially, as certainly as they affect her social and domestic status. People v. Chadwick, 76 Pac. 884, 886, 143 Cal. 116 (citing And. Law Dict.).

To constitute actionable deceit, representations must be false to defendant's knowledge, be made with intent to deceive, must deceive, and result in injury from reliance thereon. Remmers v. Remmers, 117 S. W. 1117, 1121, 217 Mo. 541.

"Fraud," within the contemplation of the law, is such as will justify rescission of a contract upon its discovery, the elements of which are said to be that where one makes a false representation of a material fact, knowing it to be false, with intent to induce a person to whom it is made to rely on it, and this person does rely on it, and is deceived, and pecuniarily damaged, it is "deceit" which will avoid the contract. First Nat. Bank of Wellington v. Person, 111 N. W. 730, 731, 101 Minn. 30 (quoting and adopting definition in Riggs v. Thorpe, 69 N. W. 891, 67 Minn. 217).

Rev. Codes, § 5072, providing that one who willfully deceives another with intent to induce him to alter his position to his injury is liable for the resulting damages, and section 5073, defining "deceit" by subdivision 4, including a promise made without any intention of performing it, are declaratory of existing rules of law, and a party to a contract, who proves that the adverse party entered into the contract without any intention of performing his part of it, or without any intention of performing any one or more of the provisions therein made by him as to a material matter, is entitled to damages for the deceit. Kelly v. Ellis, 104 Pac. 873, 874, 39 Mont. 597.

A declaration alleging that defendant, fraudulently intending to damage and ruin plaintiff and bring upon her pain and suffering of mind and body, paid his attentions to her as a suitor; that he fraudulently represented that, though he was married, the marriage was void; that plaintiff, relying on his representations, entered into the marriage relation with him, lived with him for years as his wife, and had children by him; that she desired a public ceremony, and that he promised to have the same performed; that thereafter defendant refused to keep the promises, and on obtaining a divorce from the former wife married another woman, and deserted plaintiff and refused to support her and her children—is not in seduction or for breach of promise to marry but sets up a good cause of action for fraud and "deceit." Sears v. Wegner, 114 N. W. 224, 226, 150 Mich. 388, 14 L. R. A. (N. S.) 819.

In order to maintain an action for "deceit," the statement relied on must have been false, must have been made with actual or constructive knowledge of its falsity, and must have actually misled or deceived. Southern Exp. Co. v. Fox & Logan, 115 S. W. 184, 185, 131 Ky. 257, 133 Am. St. Rep. 241.

Rev. St. 1899, § 8528, as amended by Acts 1905, p. 215, authorizing the Board of Dental Examiners to revoke the license of any dentist for "fraud, deceit, or misrepresentation" in the practice of dentistry, is not invalid for uncertainty because the quoted words have a well-defined meaning in law and in common use; the word "fraud" meaning an intentional perversion of truth to induce another in reliance on it to part with some valuable thing belonging to him, or to surrender a legal right, the word "deceit" meaning any trick or contrivance used to defraud another to his injury, and the word "misrepresentation" meaning untrue, improper, or unfaithful representation, such as a false statement of account, or as a misrepresentation of one's motives. The words "gross violation of professional duties" in Rev. St. 1899, § 8528, as amended by Acts 1905, p. 215, authorizing the revocation of the license of a dentist for "fraud, deceit, or misrepresentation in the practice of dentistry, or for gross violation of professional duties," are used to cover offenses similar to and belonging to the same general class as those denounced by the words "fraud, deceit, or misrepresentation," so that the statute is not invalid for uncertainty on the ground that the words "gross violation of professional duties" have no well-defined meaning. State ex rel. Williams v. Purl, 128 S. W. 196, 201, 202, 228 Mo. 1.

A complaint in an action by a wife for damages for the separation of herself from her husband, which alleges that the separation was caused by her harsh and cruel treatment of him, that her attitude and conduct toward him were induced by false statements knowingly made to her by defendant concerning her husband, with the intent to

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cause a separation between the wife and her husband, and that, when she discovered the falsity of the representations and the intent of defendant, she sought for her husband, but was unable to ascertain his whereabouts, though stating no cause of action for the abduction or enticement of the husband from the wife, states a cause of action for deceit within Civ. Code, §§ 1708, 1709, providing that every one must abstain from infringing on any of the right of another, and that one who willfully deceives another with intent to induce him to alter his position to his injury is liable for the resulting damages, and within the general rule that an action for deceit lies where a party has made a false representation of a material fact susceptible of knowledge, knowing it to be false, or not having sufficient knowledge to warrant the representation, with intent to induce the person to whom it is made to rely on it, and to do or refrain from doing something to his pecuniary injury, when such person, acting with reasonable prudence, is thereby deceived and injured, and the mere fact that the conduct of the wife was the direct cause of the separation did not relieve defendant from liability. Work v. Campbell, 128 Pac. 943, 945, 164 Cal. 343, 43 L. R. A. (N. S.) 581.

"Deceit" exists within the meaning of Philippine Island Code, art. 1269, providing there is deceit when, by words or insidious machinations on the part of one of the contracting parties, the other is induced to execute a contract which without them he would not have made, where the party who obtains the consent does so by means of concealing or omitting to state material facts with intent to deceive, by reason of which omission or concealment the other party was induced to give a consent which he would not otherwise have given. Strong v. Repide, 29 Sup. Ct. 521, 524, 213 U. S. 419, 53 L. Ed. 853.

As personal injury

See Personal Injury.

DECEIVE

DECEPTION

"Deception," as used in the statute (Rev. St. § 3718a) conferring jurisdiction on justices of the peace in cases of violation of the law to prevent adulteration and deception in the sale of dairy products and drugs and medicines, means deception because of, or the result of, adulteration and deception caused by the imitation and counterfeiting of the natural products of food, such as cheese, butter, and all artificial counterfeit foods and drinks, so that the sale of a well-known patent medicine by its ordinary name was not within the act, though it contained morphine and was not marked poison. State v. Marvin, 5 Ohio Dec. 593–595; Marvin v. State, 7 Ohio Dec. 204, 207–209.

DECENT—DECENCY

See Openly Outrage Public Decency.

DECENT ACCESS

See Safe and Decent Access.

DECENT BURIAL

The determination as to how a corpse shall be dressed for burial and the quality of the coffin and the box in which it is to be placed, as well as the depth of the grave, are matters for those who have the burial in charge, so that what is a "decent," "proper," or "respectable" burial will vary with the financial or social standing of the deceased and his relatives, the customs of the community, and the rules of religious, social, and political organizations to which he may have belonged. Seaton v. Commonwealth, 149 S. W. 871, 872, 149 Ky. 498, 42 L. R. A. (N. S.) 211.

DECIDUOUS PLANT

"'Evergreen,' used as an adjective, means 'always green; verdant throughout the year' (Cent. Dict.); or 'retaining greenness or verdure throughout the year; not deciduous' (Stand. Dict.). As a noun the word is defined as 'a plant that retains its verdure through all seasons, as the pine and other coniferous trees, the holly, laurel, holm oak, ivy, rhododendron, and many others' (Cent. Dict.). In the provision for 'evergreen seedlings,' the word is doubtless used by way of contrast with 'deciduous,' as indicated in the provision for 'fruit and ornamental trees, deciduous and evergreen.'" A deciduous plant is one which loses its leaves, etc., every year, especially in the autumn. In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170, the provision for "evergreen seedlings" is not restricted to such evergreen plants as the conifers and box, but extends to those that retain their verdure or greenness throughout the year; and seedlings of rhododendrons and laurels, that remain green constantly are included in said provision. United States v. Ouwerkerk, 153 Fed. 916, 917.

DECISION

See Final Decision; Judicial Decision; Retroactive Decision.
Announcement as rendition of judgment, see Rendition of Judgment.
Per curiam decision, see Per Curiam.
Short form decision, see Short Form.
See, also, Decree; Judgment.

The by-laws of an association formed to aid its members in the collection of their debts and to settle disputes between its members and between members and others, provided that, where correctness of accounts between members and others was disputed and

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a settlement refused in consequence, unless the debtor should arbitrate as provided for members, the matter might be referred by the creditor member to the executive committee, who should determine the action of the association, and its decision as to the justice or otherwise of the claim, so far as the member of the association as such was concerned, should be final. Held, that where the claim of a member against one who was not a member was referred to the executive committee, and a hearing was had, and the committee on advice of its counsel dismissed the claim, there was a "decision as to the justice or otherwise of the claim," within the by-laws, and mandamus to compel further action will be denied. People ex rel. Huber Co. v. Manufacturers' & Dealers' Protective Ass'n, 104 N. Y. Supp. 575, 577, 54 Misc. Rep. 332.

Of city engineer

A contract by a city for the construction of sewers provided that if, in the course of the work, the city became dissatisfied therewith, it might proceed to complete the work, and the expense in doing so should be allowed to it by the contractors in accordance with the decision of the city engineer, from whose decision there should be no appeal. The contingency occurred, and the city did some work in the premises and then relet the contract for completion. Held, that the report by the city engineer in office on the final completion of the work to the mayor, showing an estimate of the amount of work done and material furnished by the contractor to whom the work was relet, and showing on its face that it referred only to the relations of the city and such contractor, was not a "decision" of the engineer, within the meaning of the first contract. Such report was not sufficient to constitute a "decision" within the meaning of the first contract, as it did not deal with the entire work, including that done by the city, but related only to the work by the subsequent contractor. City of San Antonio v. L. A. Marshall & Co. (Tex.) 85 S. W. 315, 316.

Of commissioners

An award of commissioners in eminent domain proceedings is neither a verdict, a report, nor a "decision," within the meaning of Code Civ. Proc. § 1235, which provides that where final judgment is rendered for a sum of money granted by a verdict, report, or decision, interest on the sum awarded must be computed by the clerk and included in the amount of the judgment. In re Pine's Stream & East Meadow Stream in Town of Hempstead, 114 N. Y. Supp. 681, 684, 129 App. Div. 929.

Of county commissioners

The word "decision," as used in Burns' Ann. St. 1901, § 6754, providing that any person aggrieved by any "decision" of the board of commissioners may appeal therefrom to the circuit court, and section 7859, providing that from any decision of such commissioners shall be allowed an appeal to the circuit court, means judicial decisions only; that is, decisions that involve some judicial act. It includes a decision of the board of county commissioners finding that a majority of the landowners have signed the petition for a road. Ross v. Becker, 81 N. E. 478, 479, 169 Ind. 166.

Of referee

Under Code Civ. Proc. § 1228, providing that, where the whole issue is one of fact which was tried by a referee, the report stands as a decision of the court, and section 1229, providing that in an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, on a referee's report as prescribed in section 1228, the terms "decision of the referee" and "findings of the referee" mean the referee's decision and findings as to matters of fact, actually referred to him by the order of the court, and limit the subject of the report to the issues raised by the pleadings. To any other extent, his findings are not the findings of a referee within the statute, and the court will render a judgment agreeably to the actual determination of the facts upon which the referee was authorized to pass. Bowe v. Bowe, 106 N. Y. Supp. 608, 610, 55 Misc. Rep. 403.

DECISION (Of Court)

The decision on a motion to amend the declaration is not a "decision, ruling, or finding," within the meaning of Court & Practice Act 1905, § 481, providing that a party aggrieved by a "decision, ruling, or finding" of the court upon an issue of fact or matter of law may except thereto. Hebert v. Handy, 67 Atl. 325, 326, 28 R. I. 330.

The "decision" referred to in Code Civ. Proc. § 1033, declaring that the party in whose favor judgment is rendered and who claims costs must deliver to the clerk and serve on the adverse party within five days after the verdict or notice of the decision of the court memorandum of costs, means a judgment entered on a motion, and, where the court rendered judgment on a motion of nonsuit, cost bill filed five days after the judgment was signed is within the time prescribed. In re Purcell's Estate, 128 Pac. 932, 938, 164 Cal. 300.

Dismissal of appeal

Where an appeal bond given under Rev. St. § 2042, contained the statutory condition that the appellant would prosecute the appeal to a decision, a dismissal of the appeal is a "decision" within the purview of the bond. Hill v. Keller, 139 S. W. 523, 524, 157 Mo. App. 710.

As finding of facts and conclusion of law

The word "decision," as used in Rev. Codes, § 4434, as added by Laws 1911, c. 119,

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relating to the record wherein a desire to procure a review on appeal of the sufficiency of the evidence to sustain the verdict or decision, includes the trial court's findings of fact and conclusions of law where a case is tried to the court. Buster v. Fletcher, 125 Pac. 226, 229, 22 Idaho, 172.

"Decision," as used in Rev. Codes, § 4439, authorizing a new trial because of the insufficiency of the evidence to justify the verdict or other decision, or that it is against the law, and as used in the section providing for notice of intent to move for a new trial, means the findings of fact and conclusions of law of the court, and not the judgment; and the motion for a new trial must be directed to the decision, and not to the judgment. Caldwell v. Wells, 101 Pac. 812, 813, 16 Idaho, 459.

Under Gen. St. 1901, § 4756, providing that an application for new trial shall be made within three days after the verdict or decision was rendered, the word "decision" refers to or includes the announcement by the court of the determination of the issues submitted to it in a cause tried without a jury. Brubaker v. Brubaker, 86 Pac. 455, 74 Kan. 220.

Findings synonymous

Though a motion for a new trial because "the finding and judgment of the court is not sustained by the evidence" and "is contrary to law" might have been overruled because of its form, yet, where it was granted the defect in form is not available on appeal. "The court could have concluded, the trial having been by the court, that the word 'finding' in the motion was equivalent to the word 'decision,' and, having done so, the court might have treated the word 'judgment' as surplusage." Balph v. Magaw, 70 N. E. 188, 189, 33 Ind. App. 399 (citing Rodefer v. Fletcher, 89 Ind. 563; Rosenzweig v. Frazer, 82 Ind. 342; Christy v. Smith, 80 Ind. 573; Wilson v. Vance, 55 Ind. 384; Gates v. Baltimore & O. S. W. Ry. Co., 56 N. E. 722, 154 Ind. 338).

The term "decision," as used in Burns' Ann. St. 1901, § 568, authorizing a new trial on the ground that the verdict or decision is not sustained by the evidence or is contrary to law, necessarily includes a special or a general finding; the words "decision" and "finding" being substantially synonymous. Wolverton v. Wolverton, 71 N. E. 123, 125, 163 Ind. 26 (citing Weaver v. Appleton, 46 N. E. 642, 147 Ind. 304, 306; Gates v. Baltimore & O. S. W. Ry. Co., 56 N. E. 772, 154 Ind. 338, 342; Weston v. Johnston, 48 Ind. 1, 2; Wilson v. Vance, 55 Ind. 394, 396; Christy v. Smith, 80 Ind. 573, 577; Rodefer v. Fletcher, 89 Ind. 563, 564).

Under a statute authorizing a new trial on the ground that the decision of the court is not sustained by sufficient evidence, specifications for a new trial that the "special findings" specified were not sustained by sufficient evidence, were without the issues, and were contrary to law, and that the court erred in not finding certain facts specified, were insufficient, since by the "decision" of the court referred to in the statute is meant "the special finding," when one has been required. Major v. Miller, 75 N. E. 159, 161, 165 Ind. 275.

Under Burns' Ann. St. 1901, § 568, cl. 6, specifying as grounds for a new trial that the verdict or "decision" is not sustained by the evidence, an assignment that the findings of the court are not supported by the evidence is sufficient; the word "decision" being employed in the statute in the sense of finding when the case has been tried by the court. Parkison v. Thompson, 73 N. E. 109, 112, 164 Ind. 609, 3 Ann. Cas. 677.

Findings distinguished

The "decision of the court" is the announcement by the court of its judgment and is distinct from the findings. Under Practice Act, § 486 (Comp. Laws, § 3581), requiring a party in whose favor judgment is rendered, and who claims his costs, to deliver a cost bill to the clerk within two days after the verdict or "decision of the court," the decision is the announcement by it of its judgment and is distinct from the findings. Linville v. Scheeline, 93 Pac. 225, 227, 30 Nev. 106 (citing Elder v. Frevert, 3 Pac. 237, 18 Nev. 278; Robinson v. Benson, 10 Pac. 441, 19 Nev. 331; State ex rel. Hoppin v. Cheney, 52 Pac. 12, 24 Nev. 222; Robinson v. Kind, 59 Pac. 863, 25 Nev. 261; Sholes v. Stead, 2 Nev. 108; Howard v. Richards, 2 Nev. 128, 90 Am. Dec. 520; California State Telegraph Co. v. Paterson, 1 Nev. 150).

Where proposed findings were submitted by the attorney for each defendant, and the court, instead of noting on the margin the disposition of each proposed statement, as required by Code Civ. Proc. § 1023, signed both proposed findings at the end thereof, no other decision being signed, the two separate sets of findings did not constitute a "decision," which is a condition precedent to the entry of judgment, as provided by section 1022. Edinger v. McAvoy, 119 N. Y. Supp. 327, 134 App. Div. 869.

Judgment synonymous

The word "decision," as used in Sess. Laws 1901, c. 81, § 40, providing that any person aggrieved by any decision of any probate court of any county in this territory may appeal to the district court, etc., means the same as "judgment" as used in Comp. Laws 1897, § 3305, providing for appeals from justices of the peace to the district court by the person aggrieved by the judgment rendered by a justice. Gentz's Estate v. Galles, 93 Pac. 702, 703, 14 N. M. 341 (citing 13 Cyc. p. 427; 1 Bouvier [Rawle's Revision] 517).

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Judgment distinguished

"It is true that in an abstract sense there is a shade of difference between the import of the word 'decision' and the word 'judgment.'" But a motion for a new trial on the ground that the judgment is not sustained by sufficient evidence is a substantial statement of the grounds for new trial authorized by Rev. St. 1890, § 5305, cl. 6, that the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law. Buckeye Pipe-Line Co. v. Fee, 57 N. E. 446, 447, 62 Ohio, 543, 78 Am. St. Rep. 743 (citing Abb. Law Dict. 351; Freem. Judgm. § 2; Whart. Law Dict. 235, 437).

The word "decision," in Gen. St. 1909, § 3624, providing that appeals may be taken where there shall be a final decision of any matter arising under the jurisdiction of the probate court, is of broader signification than "judgment." A decision of a probate court denying the application of an interested party for an order requiring the administrator to make an additional inventory of property, claimed to belong to the estate, but omitted from the inventory on file, is a final "decision" of a matter arising under the jurisdiction of that court, and an appeal may be taken therefrom. Dobson v. Holmes, 112 Pac. 131, 132, 83 Kan. 476.

"A 'decision' is in some respects like the verdict of a jury; it affords a proper basis upon which a judgment may be entered, but is not itself a judgment." Where the trial court filed an order adjudging that plaintiff recover from defendant a certain sum stated, and directed that defendant pay such amount to the clerk within 60 days from the filing of the order, and on default thereof directed the clerk to enter judgment for such sum at the expiration of 60 days, and to issue execution therefor, and the clerk merely entered a recital of the judgment in the judgment docket, but did not make any entry of the judgment in the record book, there was no judgment sufficient to sustain an appeal. Kennedy v. Citizens' Nat. Bank of Knoxville, 93 N. W. 71, 72, 119 Iowa, 123.

As law

See Law.

Opinion distinguished

Under Rev. Civ. St. 1911, art. 1955, providing that a plaintiff may take a nonsuit before the jury retires, and, on trial by the judge, before decision is announced, the term "decision" is not equivalent to "opinion," and, though the court in a case tried without a jury expressed an opinion indicating that he intended to render a decision in favor of the defendants, the plaintiffs would not be precluded thereby from having a nonsuit. Kidd v. McCracken (Tex.) 150 S. W. 885, 887 (citing 2 Words and Phrases, p. 1901).

Under a statute providing that, on the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk, and that, in giving the decision, the facts found and the conclusions of law shall be separately stated, and judgment on the decision shall be entered accordingly, there is no "decision" till the making of the written findings, so that where the court orally gave an opinion, to the effect that judgment would go for defendant, and then, on plaintiff moving for judgment notwithstanding such opinion, entering written findings and conclusions on which judgment is rendered for plaintiff, it did not review and reverse its decision. Russell v. B. Schade Brewing Co., 95 Pac. 327, 328, 49 Wash. 362.

Suppression of depositions

Where, after plaintiff has announced readiness for trial, defendant's motion to suppress depositions taken by the plaintiff is sustained, the ruling is a "decision of the court on the trial," within Code 1896, § 614, so that plaintiff may take a nonsuit with bill of exceptions, and appeal from the ruling. Scheidegger v. Terrill, 39 South. 172, 173.

DECISION AGAINST LAW

See Against Law.

DECISION AND DECREE ALLOWING FINAL ACCOUNT

A decree in a probate proceeding, reading, "It is ordered, adjudged, and decreed that the said final account of said administrator be, and the same is, settled, allowed, and affirmed," is a "decision and decree allowing a final account" of an administrator, within Comp. Laws 1900, § 3041, which authorizes an appeal from such a decision and decree. Bowman v. Bowman, 76 Pac. 634, 636, 27 Nev. 413.

DECISION IN WRITING

A "decision in writing," as used in Code Civ. Proc. §§ 1010, 1021, requiring that on the trial of an issue of law by the court its "decision in writing" shall be filed, was not complied with by an order overruling a demurrer and directing an interlocutory judgment, though such order was sufficient to support the interlocutory judgment. Vincent v. Stearns, 93 N. Y. Supp. 482, 483, 47 Misc. Rep. 95.

DECISION OCCURRING ON THE TRIAL

The ruling on a demurrer to the evidence is a "decision occurring on the trial"; and, in order to enable the Supreme Court to review such ruling, it is necessary that a motion for a new trial be filed within the time prescribed by law. Ardmore Oil & Milling Co. v. Doggett Grain Co., 122 Pac. 241, 32 Okl. 280.

DECK HAND

As laborer, see Laborer.

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DECLARATION

See Dying Declarations.
As res gestæ, see Res Gestæ.

DECLARATION (In Pleading)

A "declaration" is the specification in methodical and legal form of the circumstances which constitute the plaintiff's cause of action, and in making the specification of circumstances it is not sufficient to state mere conclusions of law, nor to state the result or conclusion of fact arising from circumstances not set forth in the declaration; nor is it sufficient to make a general statement of facts, which admits of almost any proof to sustain it. Campbell v. Walker (Del.) 76 Atl. 475, 477, 1 Boyce, 580.

DECLARATION OF HOMESTEAD

As conveyance, see Conveyance.

DECLARATION OF TRUST

A trust in favor of the church is declared by the entry in the books of a bank on the opening of an account by L., "M. Church subject to the order of L., trustee, $500," though it appears that L. intended to revoke the trust and use the money if she needed it. Littig v. Vestry of Mt. Calvary Protestant Episcopal Church, 61 Atl. 635, 636, 101 Md. 494.

The trustees of a church society adopted a resolution directing its treasurer to pay a specified sum toward a building, providing that an individual who had purchased the lots for the building should convey them to the church to be held by it until there was a legally incorporated church to take and hold the property. The official board of another church society adopted a report that the donation of the lots and the specified sum should be accepted with thanks. Held, that the action of the official board was not a "declaration of express trust" within the statute of frauds (Hurd's Rev. St. 1909, c. 59, § 9), especially since the individual did not convey the property to the latter church in trust, and since its official board was not by law enabled to declare a trust. Marie M. E. Church of Chicago v. Trinity M. E. Church of Chicago, 97 N. E. 262, 265, 253 Ill. 21.

The one thing necessary to give validity to a "declaration of trust"—the indispensable thing—is that the donor or grantor, or whatever he may be called, shall have absolutely parted with the interest which has been his up to the time of the declaration; shall have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest. A mere savings bank deposit made by an intestate in her own name as trustee for another, who was a mere friend over which deposit intestate exercised complete control during her life, was insufficient to establish a trust. Nicklas v. Parker, 61 Atl. 267, 268, 69 N. J. Eq. 743 (quoting Stevenson v. Earl, 55 Atl. 1091, 1092, 65 N. J. Eq. 721, 725, 103 Am. St. Rep. 790, 1 Ann. Cas. 49).

"A 'declaration of trust,' without more, is not a contract. It is the act by which an individual acknowledges that property the title to which he holds in his own name in fact belongs to another, for whose use he holds it." Where a syndicate was formed for the purchase of land, and the title was conveyed to a disinterested party, who executed notes for the unpaid balance of the land in his own name, and at the same time prepared a declaration of trust to each one of the members of the syndicate, providing that each member should, when due, pay his proportionate share of the unpaid purchase money, and such declaration of trust was given to such members, and retained by them, they are bound by such declaration, though they may not have read it or informed themselves of its contents. Porter v. Woods, 39 S. W. 794, 797, 138 Mo. 539 (citing Bouv. Law Dict. 418).

Where land was conveyed to the trustees of a church "on condition" that the religious society should always bear a certain name; that no instrumental music should be used in the church, etc., there being no words whereby either party bound itself to the other for doing or not doing a particular thing, or for the existence or nonexistence of a particular state of facts and for breach whereof the party bound should be answerable in damages, and there being no words of determination or reverter, the instrument would be regarded as a declaration of trust. MacKenzie v. Trustees of Presbytery of Jersey City, 61 Atl. 1027, 1030, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227 (citing Woodruff v. Woodruff, 16 Atl. 4, 44 N. J. Eq. 349–354, 1 L. R. A. 380; 2 Pars., Cont. *511; 4 Kent's Comm. *132; Woodruff v. Trenton Water Power Co., 10 N. J. Eq. 489, 492, 507, 508; Bouv. Law Dict.; Mills v. Davison, 35 Atl. 1072, 54 N. J. Eq. 659, 662, 664, 665, 35 L. R. A. 113, 55 Am. St. Rep. 594; Mutual Benefit Life Ins. Co. v. Rector, etc., of Grace Church, 32 Atl. 691, 53 N. J. Eq. 413; 3 Com. Dig.; Tyssen, Char. Bequests, 508; Tudor, Char. Trusts, 50; Sohier v. Trinity Church, 109 Mass. 1.; Episcopal City Mission v. Appleton, 117 Mass. 326; Stanley v. Colt, 5 Wall. [72 U. S.] 119, 18 L. Ed. 502; 2 Blackst. Comm. *156; Litt. Tenures, § 331; Southard v. Central R. Co. of New Jersey, 26 N. J. Law, 13; McKelway v. Seymour, 29 N. J. Law, 321; Litt. Tenures, §§ 330, 331; Den ex dem. Smith v. Trustees of Presbyterian Church of Lawrence, 20 N. J. Law, 551, 555; Grigg v. Landis, 21 N. J. Eq. 494, 501, 502, 511, 512; Morris v. Kettle, 34 Atl. 376, 378, 56 N. J. Eq. 826, 831; Bird v. Hawkins, 42 Atl. 588, 589, 593, 58 N. J. Eq. 229, 230, 243).

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DECLARATORY ACT

A "declaratory act" is a declaration of what the law was, is, and shall be hereafter taken, and operates to settle the law retrospectively. Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95, 97 (quoting and adopting the definition in Ex parte Poulson, 19 Fed. Cas. 1206).

DECLARATORY STATUTE

"A 'declaratory statute' is one which is passed in order to put an end to doubt as to what is the common law or the meaning of another statute and which declares what it is and ever has been." State v. Wirt County Court, 59 S. E. 981, 982, 63 W. Va. 230.

DECOCTION

The terms "beverage," "liquid mixture," or "decoction," as used in Ky. St. 1903, § 2557a, making the sale at retail of a beverage, liquid mixture, or decoction, which produces intoxication, unlawful in a territory wherein the sale of intoxicating liquor is prohibited, are used interchangeably, each synonymous with the other. Commonwealth v. Jarvis & Williams, 86 S. W. 556, 557, 120 Ky. 334.

DECORATED CHINA

Construing the provision for china decorated and china not decorated, in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, pars. 95, 96, 30 Stat. 156, held, that merely adding a color to white china for utilitarian purposes does not make decorated china, and that china and cooking serving dishes of which the sloping undersides are irregularly colored brown in order to conceal smoke and finger marks, and without decorative effect, are dutiable as undecorated china under the latter paragraph. G. W. Thurnauer & Bro. v. United States, 159 Fed. 122, 86 C. C. A. 86.

DECORATED EARTHENWARE

Earthenware, to which a single color glaze has been added, is, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 96, 30 Stat. 156, not only "decorated," but "stained," within the meaning of the paragraph. United States v. L. Straus & Co., 168 Fed. 569, 570.

DECOY

As entice

The word "decoy" means to lead into danger by artifice, to allure into a net or snare, to entice, to entrap, to allure (Webster's Dict.). As used in Pen. Code 1895, § 110, relating to the offense of enticing and decoying away children against the will of parents, it is qualified by the word "entice" and partakes of the meaning of that word, but even if a conviction under the statute had to depend on the word "decoy" alone it would be authorized, if defendant carried a boy of 15 years of age away against the will and without the consent of his parents and substituted his control for that of the parents, it may be said that the boy's tender years would most likely lead him into danger, lure him into snares, and entrap him in the meshes of vice and crime when deprived of that parental care. Arrington v. State, 59 S. E. 207, 208, 3 Ga. App. 30.

DECREE

See Consent Decree; Final Decree or Judgment; Interlocutory Decree; Judicial Decree; Money Decree.
See, also, Judgment.

The father of the child in question by his alleged second marriage had previously married, and he and his wife parted and lived apart. It was not shown that either of them procured a divorce, but he afterwards ran away with another woman, and they subsequently came back to the neighborhood where his former wife resided and to her knowledge lived together openly and notoriously as man and wife and discharged all of the duties of that relation toward each other until he died. Rev. St. 1909, § 342, provides that the issue of all marriages "decreed null in law or dissolved by divorce shall be legitimate." Held, that the word "decreed" was substantially equivalent to the word "deemed," which was used in the statute as it formerly stood, and, under the statute as construed, the children begotten by the husband of his alleged second wife were legitimate. Nelson v. Jones, 151 S. W. 80, 84, 245 Mo. 579.

As color of title

See Color of Title.

Decisions and orders included

Pub. Acts 1907, p. 497, No. 340, § 2, provides that in chancery cases an appeal shall be taken within 40 days after filing of the decree. Held, that the word "decree" includes an order overruling a demurrer, and an appeal therefrom must be taken within 40 days from its filing, and not within 40 days from expiration of the time given to answer. Bliss v. Tyler, 121 N. W. 292, 156 Mich. 640.

The word "decree" in Acts 1907, p. 497, No. 340, § 2, providing that one aggrieved by the decree of a court in chancery may claim an appeal, includes an order overruling a demurrer. Moody v. Macomber, 120 N. W. 358, 359, 156 Mich. 76.

In legal parlance, the order of the court which apparently finally determines the rights of the parties in the action or suit is spoken of as the "judgment or decree,"

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whether it is valid, voidable or void. Schlarb v. Castaing, 97 Pac. 289, 291, 50 Wash. 331.

"An order that may be deemed a 'decree' is defined in B. & C. Comp. § 547, as one which in effect determines the action or suit, so as to prevent a judgment or 'decree' therein." Sears v. Dunbar, 91 Pac. 145, 147, 50 Or. 36.

As decree in cases of admiralty and maritime jurisdiction

"Judgments" or "decrees," as used in 2 Stat. 244, c. 40, authorizing appeals from "judgments or decrees" in the District Court of the United States, mean "decrees and judgments in cases of admiralty and maritime jurisdiction only." United States v. Wonson, 28 Fed. Cas. 745, 746, 1 Gall. 5.

Discharge in bankruptcy

A discharge in bankruptcy is nothing more than a "decree" or "judgment" of the federal court by which it is granted, and must be proved, when offered in evidence, in the same manner as any other judgment or decree; and hence, where such discharge was merely certified by the clerk of the court, instead of being attested by the clerk, together with a certificate of a judge, chief justice, or presiding magistrate, as required by Shannon's Code, § 5580, it was properly excluded. Hamon v. Foust (Tenn.) 150 S. W. 418.

As judgment

See Judgment.

Judgment distinguished

See Judgment.

DECREE FOR ALIMONY

A "decree for alimony" is an unalterable, definite, and fixed judgment for money. Nixon v. Wright, 109 N. W. 274, 146 Mich. 231, 10 Ann. Cas. 547.

DECREE FOR DIVORCE

Under Comp. Laws 1897, § 8686, providing wives with property and maintenance from their husband's estates when neglected or deserted, etc., or when the husband has committed any offense sufficient to entitle the wife to a decree of divorce or separation, where a bill of complaint was in form substantially a bill for absolute divorce, except the prayer, which was for an allowance for separate maintenance, coupled with a prayer for general relief, the decree thereon for separate maintenance for life was a decree of separation, formerly called "a mensa et thoro," and was a "decree for divorce." Horning v. Horning, 127 N. W. 275, 276, 162 Mich. 130.

A "decree of divorce" is a proceeding in rem and terminates a marriage. Being a judgment in rem, it has extraterritorial force and is binding and conclusive on the parties to the cause, although one of them was at the time it was granted a nonresident of the state in which the divorce was granted. Stuart v. Cole, 92 S. W. 1040, 1041, 42 Tex. Civ. App. 478.

DECREE OF DISMISSAL

A "decree of dismissal," without more, is a decree that the court has jurisdiction and that there are no merits in the case, and it is reviewable by the Circuit Court of Appeals. Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 612, 73 C. C. A. 260.

DECREE OF DISTRIBUTION

A "decree of distribution" is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the rights of the parties to a proceeding, and, upon its entry, their rights are thereafter to be exercised by the terms of the decree. Sjoli v. Hogenson, 122 N. W. 1008, 1012, 19 N. D. 82.

DECREE PRO CONFESSO

A decree "pro confesso" on a cross-bill is not within rule 19 of the rules of practice in equity in the federal courts, providing that when the bill is taken "pro confesso" the court may proceed to a decree at any time after the expiration of 30 days from and after the entry of the order to take the bill "pro confesso," and that such decree shall be deemed absolute unless the court shall at the same term set aside the same, etc.; but such decree is within rule 1, providing that the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing pleadings and making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to hearing all causes on their merits, and hence the decree may be vacated on motion after the adjournment of the term. Blythe Co. v. Bankers' Inv. Co., 81 Pac. 281, 282, 283, 147 Cal. 82.

A "pro confesso" against a defendant authorizes no other decree against the defendant than the allegations of the bill show he is entitled to; so that in a suit by a tenant in common of lands against her cotenants for partition, and for recovery of her share of the rental value thereof, the bill, alleging merely that the premises had been in the use and occupation of certain two of the cotenants, does not authorize a personal judgment against the other cotenants for complainant's share of the rents, or a decree giving her a lien therefor on their interests in the land. Austin v. Barber, 41 South. 265, 266, 88 Miss. 553.

DECREPIT

Where decedent's widow testified that her husband was 5 feet 11 inches tall, weighed 147 pounds, was "real stout," and about 60 years of age, the court erred in charging that, if deceased was aged and decrepit, that would furnish a basis for a conviction of ag-

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gravated assault; the word "decrepit," as used in Pen. Code 1895, art. 601, declaring an assault aggravated if made on a decrepit person, meaning one who is disabled, incapable, or incompetent, from either physical or mental weakness or defects, so as to render him comparatively helpless in a personal conflict with one possessed of ordinary health and strength, and not merely a person broken down with age, and wasted or worn with infirmities of old age, etc. Little v. State, 135 S. W. 119, 121, 61 Tex. Cr. R. 197.

DEDI

The words "dedi," "concessi," and "demisi," when used in a conveyance of real estate, import and make a conveyance in law. Headley v. Hoopengarner, 55 S. E. 744, 747, 60 W. Va. 626.

When deeds were introduced and the warranty was either express or was implied from the word of grant, "dedi," neither the heir nor the assign of the grantee could take advantage of the warranty unless expressly named. But while this was so as to warranty, it was not so as to certain covenants; and chiefly among these were the covenants for title, the benefits of which passed with the land to the heir or the assign, though not expressly named. Wiggins v. Pender, 44 S. E. 362, 364, 132 N. C. 628, 61 L. R. A. 772 (quoting Rawle, Cov. [5th Ed.] p. 292, §§ 203, 204).

DEDICATION

See Implied Dedication; Statutory Dedication; Way Opened and Dedicated to Public Use.

A dedication is the devotion or giving of property for some proper object and in such manner as to conclude the owner. Hough v. Porter, 95 Pac. 732, 51 Or. 318; (1909) Id., 98 Pac. 1083, 1091, 51 Or. 318.

It is not necessary to a valid "dedication" of property for street purposes that the property should be within the limits of the city to which the dedication was made at the time of the making thereof. City of Meridian v. Poole, 40 South. 548, 549, 88 Miss. 108.

To constitute a "dedication" there must be an intention to appropriate the land to the use and benefit of the public, and acts and declarations of the landowner indicating such intention must be unmistakable and decisive in their character. A dedication is not required to be made by deed or other writing, but may be accomplished by acts or verbal declarations. It may be express or implied and may be brought about in every conceivable way by which the intention of the owner can be manifested, but such manifestation must be unequivocally and satisfactorily proved. Town of West Point v. Bland, 56 S. E. 802, 804, 106 Va. 792 (citing Harris' Case, 20 Grat. [61 Va.] 833, 837; Talbott v. Richmond & D. R. Co., 31 Grat. [72 Va.] 688, 689; Buntin v. City of Danville, 24 S. E. 830, 93 Va. 200, 204; Gate City v. Richmond, 33 S. E. 615, 97 Va. 337).

"Dedication of a road as a public highway" is the setting it apart by the owner of the land for the use of the public. People v. Myring, 77 Pac. 975, 976, 144 Cal. 351.

"Dedication" is a gift of land for a way, and an acceptance of the gift by the public, either by some express act of acceptance, or by strong implication arising from obvious, convenient, or frequent and long-continued use, repairing, lighting, or other significant acts of persons competent to act for the public. Cleveland, C., C. & St. L. Ry. Co. v. Christie (Ind.) 100 N. E. 299, 301 (quoting and adopting definition in 2 Words & Phrases, p. 1912).

As an appropriation for a public use

Dedication is an appropriation of land by its owner to the public use. Bellenot v. City of Richmond, 61 S. E. 785, 108 Va. 314.

Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the free exercise and enjoyment of such use. Bartlett v. Harmon, 78 Atl. 842, 844, 107 Me. 451; Northport Wesleyan Grove Campmeeting Ass'n v. Andrews, 71 Atl. 1027, 1030, 104 Me. 342, 20 L. R. A. (N. S.) 976.

Dedication is the intended appropriation of land by the owner for some proper public use, reserving to himself no rights inconsistent with the full exercise and enjoyment of such use. Brown v. Dickey, 75 Atl. 382, 385, 106 Me. 97.

"Dedication" is the setting apart of land for public use and may be established by showing that the owner has platted ground, representing streets, alleys, and other improvements thereon, and has sold land upon the faith of such plats. East Atlanta Land Co. v. Mower, 75 S. E. 418, 422, 138 Ga. 380.

"Dedication is the deliberate act by which the owner of real property, without remuneration, devotes the fee or an easement therein to the use of the public." Where a city, with power to purchase and hold real estate for the use of the city, purchases land for a valuable consideration, it takes an absolute title, though the deed recites that it is understood that the premises are deeded to the city for city hall purposes only. City of Huron v. Wilcox, 98 N. W. 88, 89, 17 S. D. 625, 106 Am. St. Rep. 788.

Land is held to be dedicated when it is set apart by the owner for a public use. A dedication may be either express or implied. It is express when there is an express manifestation on the part of the owner of his purpose to devote the land to the par-

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ticular public use, as in the case of a grant evidenced by writing. It is implied when the acts and conduct of the owner clearly manifest an intention on his part to devote the land to the public use. Culmer v. Salt Lake City, 75 Pac. 620, 621, 27 Utah, 252 (citing Schettler v. Lynch, 64 Pac. 955, 23 Utah, 305, 313).

There is no such thing at common law or by virtue of any provision of our statutes as the "dedication" of property to private person or corporation; "dedication" must be made to the public. Pittsburgh, C., C. & St. L. Ry. Co. v. Warrum (Ind.) 82 N. E. 934, 937 (citing Lake Erie & W. R. Co. v. Whitham, 40 N. E. 1014, 155 Ill. 514, 28 L. R. A. 612, 46 Am. St. Rep. 355; McWilliams v. Morgan, 61 Ill. 89; Washb. Easem. 205; Watson v. Chicago, M. & St. P. Ry. Co., 48 N. W. 1129, 46 Minn. 321).

As either express or implied

Dedication is the appropriation or gift by the owner of land or an easement therein for the use of the public, and it may be express, where the appropriation is formally declared, or by implication arising by operation of law from the owner's conduct and the facts and circumstances of the case. McKinney v. Duncan, 118 S. W. 683, 684, 121 Tenn. 265.

Land is "dedicated" when it is set apart by the owner for a public use. The dedication may be either express or implied. It is express when there is an express manifestation on the part of the owner of his purpose to devote the land to the particular public use, as in the case of a grant evidenced by writing. It is implied when his acts and conduct manifest an intention to devote the land to the public use. To make the dedication complete, there must be not only an intention on the part of the owner to set apart the land for the use and benefit of the public, but there must be an acceptance by the public. Where the use of an alley was practically confined to parties owning or occupying property within a portion of a block through which the alley passed, and the expense of keeping it open and in repair was borne by them, there was no dedication. Culmer v. Salt Lake City, 75 Pac. 620, 621, 27 Utah, 252 (citing Schettler v. Lynch, 64 Pac. 955, 23 Utah, 305, 313).

"Dedications are classified into express and implied. * * * To constitute a 'dedication' of either class, confessedly there must be an intention to 'dedicate,' animus dedicandi, on the part of the owner of the property, and an acceptance by the public, or by some authorized person or body acting for and in its behalf. * * * Being a voluntary donation, it will not be presumed; but the clearest intention to do so must be shown. And if the use by the public is merely permissive, 'as existing by the toleration of the owner, and in subordination to, or recognition of, an implied license from him, the right will not mature into a title by prescription, but is revocable at pleasure.' And so, too, the user of the public must be of such character as to exclude the private rights of the owner. He must be shown to have abandoned his proprietary rights in and to the land; otherwise, the use of it by the public, not inconsistent with those exercised by him, must be regarded as permissive only, and not adverse." Attorney General v. Lakeview Land Co., 39 South. 303, 143 Ala. 291 (citing Irwin v. Dixion, 9 How. [50 U. S.] 10, 30, 13 L. Ed. 25; Jones v. Bright, 37 South. 79, 140 Ala. 268).

As requiring both intention to dedicate and acceptance

There can be no "dedication" unless there is an acceptance by the public. McLean Llewellyn Iron Works, 83 Pac. 1082, 1083, 2 Cal. App. 346; Gillespie v. Duling, 83 N. E. 728, 730, 41 Ind. App. 217; Moragne v. City of Gadsden, 54 South. 518, 170 Ala. 124.

"'Dedication' rests primarily upon intention, express or implied." Brown v. Oregon Short Line R. Co., 102 Pac. 740, 742, 36 Utah, 257, 24 L. R. A. (N. S.) 86; Shanline v. Wiltsie, 78 Pac. 436, 437, 70 Kan. 177, 3 Ann. Cas. 140 (quoting State v. Adkins, 21 Pac. 1069, 42 Kan. 203).

Any act which clearly indicates the intention of the owner to set apart lands for use as a public highway is a sufficient "dedication," no particular form of dedication being necessary. Carter v. Barkley, 115 N. W. 21, 22, 137 Iowa, 510.

To establish a public street by dedication, the proof as to the offer of dedication and acceptance must be unequivocal. To establish a public street by dedication, there must be intention on the part of the owner to dedicate the land to the public for street purposes, and an acceptance by the public. City of Princeton v. Gustavson, 89 N. E. 653, 655, 241 Ill. 566.

To constitute a common-law dedication of land for a street, there must be an intention to dedicate and an acceptance and user by the public. Vance v. Village of Pewamo, 126 N. W. 978, 981, 161 Mich. 528.

The acceptance of a dedication may appear by acts showing an intent to receive the same. Miller v. Commissioners of Highways of Town of Jonathan Creek, 125 Ill. App. 431, 434, 435.

A "dedication" of land for public use rests on the intention or assent of the owner. Before there can be a valid dedication, there must have been an actual intention clearly indicated by deliberate and unequivocal words or acts to dedicate the property to the public. Columbia & P. S. R. Co. v. Seattle, 74 Pac. 670, 673, 33 Wash. 513 (cit-

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ing Lewis v. City of Portland, 35 Pac. 256, 25 Or. 133, 22 L. R. A. 736, 42 Am. St. Rep. 772).

To constitute a dedication of private property for a public use, the owner must have intended to absolutely and irrevocably set it apart for that purpose. Heilbron v. St. Louis Southwestern R. Co. of Texas, 113 S. W. 610, 613, 52 Tex. Civ. App. 575.

In order to constitute a dedication at common law, it is essential: (1) That there be an intention on the part of the proprietor of the land to dedicate the same to public use; (2) that there be an acceptance thereof by the public; and (3) that the proof of these facts be clear, satisfactory, and unequivocal. The vital and controlling principal is the animus donandi, and, whenever this is plainly and unequivocally manifested on the part of the owner of the soil, either by formal declaration or by acts from which it may fairly be presumed, such as should equitably estop him from denying such an intention, the dedication, so far as the owner is concerned, is complete. * * * To make a sufficient dedication the proprietor of the soil must devote the portion thereof intended for public use to such use, and, on the part of the public, it must be accepted and appropriated to that use. A dedication is not an act of omission to assert a right, but is the affirmative act of the donor resulting from an active, and not a passive, condition of the owner's mind on the subject. A mere nonassertion of right does not establish a dedication unless the circumstances establish a purpose or intention to donate the use to the public. Stacy v. Glen Ellyn Hotel & Springs Co., 79 N. E. 133, 134, 223 Ill. 546, 8 L. R. A. (N. S.) 966 (citing City of Chicago v. Chicago, R. I. & P. Ry. Co., 38 N. E. 768, 152 Ill. 561; Marsh v. Village of Fairbury, 45 N. E. 236, 163 Ill. 401; Alden Coal Co. v. Challis, 65 N. E. 665, 200 Ill. 222); Falter v. Packard, 76 N. E. 495, 496, 219 Ill. 356 (quoting and adopting definition in City of Chicago v. Borden, 60 N. E. 915, 190 Ill. 430).

"To make a sufficient dedication, the proprietor of the soil must devote the portion thereof intended for public use to such use, and, on the part of the public, it must be accepted and appropriated to that use. The acts on the part of the donor and the public of an intention to dedicate, accept, and appropriate the lands to public use, where the dedication is relied upon to support some right, must be clear. A dedication is not an act of omission to assert a right, but is the affirmative act of the donor, resulting from an active, and not a passive, condition of the owner's mind on the subject. A mere nonassertion of right does not establish a dedication unless the circumstances establish a purpose or intention to donate the use to the public." International & G. N. R. Co. v. Cuneo, 108 S. W. 714, 716, 47 Tex. Civ. App. 622.

To constitute a "dedication" it is not always necessary that the intent to dedicate should actually exist in the mind of the landowner, who must be presumed to have intended what his conduct indicates; there must also be acceptance which may be implied, and where the use of the way as a highway is beneficial to the public, and it has been used for a highway for a considerable period with the assent of the landowner, and other land has been purchased and improvements made thereon by persons believing the way to be a highway, under circumstances known to the owner of the way, reasonably calculated to create such belief, and material injury would ensue to such persons if the landowner were permitted to close the way, the intent to dedicate and the acceptance of the donation will be implied, as between such persons, if the facts be such as under the established principles of law would ordinarily create an estoppel in pais. Acceptance may be shown by public use without any public work on the road. No specific length of time is necessary to constitute a valid "dedication." McClaskey v. McDaniel, 74 N. E. 1023, 1027, 37 Ind. App. 59.

A "dedication" of land for a public street is only complete upon an acceptance, which may be manifested in various ways. An express acceptance may be shown by some order, resolution, or action of the public authorities made and entered of record, or it may be implied by acts of the public authorities recognizing the existence of the street and treating it as a public way; but the proof of acceptance must be unequivocal, clear, and satisfactory. The acceptance may follow the offer to dedicate at once, but need only be within a reasonable time and before a withdrawal of the offer. People v. Johnson, 86 N. E. 676, 677, 237 Ill. 237.

The "dedication" of land to any public use is essentially a matter of intention. The principle of dedication rests largely upon the doctrine of estoppel in pais and, while there are general rules applicable to general lines of conduct by the owner, each case must, as a rule, be decided upon its own facts. Evidence that deeds, containing no reference to a park dedicated to the public, described lots conveyed by reference to an unrecorded plat, purported copies of which showed a tract reserved as a public square near the lots, none of the copies of the plat introduced in evidence being identified as the one to which the reference was made, or as having been in the possession of the grantor, was insufficient to show an offer to dedicate to the public the tract reserved as a park. Canton Co. v. City of Baltimore, 66 Atl. 679, 680, 106 Md. 69, 11 L. R. A. (N. S.) 129.

"Dedication" is established by proof of an act of dedication, and an intent to dedi-

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cate without reference to the period of public use. Davis v. Town of Bonapart, 114 N. W. 896, 898, 137 Iowa, 196.

The throwing of a strip open to the public as a part of a street cannot of itself amount to a "dedication" so as to bind a municipality, unless it performs some act of acceptance. Downing v. Coatesville Borough, 63 Atl. 696, 214 Pa. 291, 384.

Acceptance by the public of a "dedication" of a road for a highway may be express or implied. Public use for a long time, with the consent of the landowner, is sufficient acceptance, and the fact that the road has not been worked by public authorities does not prevent the acceptance. Gillespie v. Duling, 83 N. E. 728, 730, 41 Ind. App. 217.

As manifested by deed

The platting of a tract of land upon a map by the owner thereof, showing a street thereon, and the retaining of such map in the possession of such owner, and the making of deeds by reference thereto, by bounding the land described in the conveyances as upon such street, coupled with the subsequent marking out, crowning, and repairing of such street by such owner and grantor, is evidence of a "dedication" of such street to the public, and when accompanied by public user, or the acceptance by the municipality, by repairing or working such street, the dedication is conclusive as against such dedicator and all claiming through or under him. Board of Com'rs of Town of Keyport v. Freehold & A. H. R. Co., 65 Atl. 1035, 1036, 74 N. J. Law, 480.

The "dedication" of the streets and alleys in a plat of land is complete when the plat is filed for record and lots sold with reference to said plat, and a formal acceptance of such streets and alleys by the public authorities is not necessary. Boise City v. Hon, 94 Pac. 167, 168, 14 Idaho, 272.

A sale of lots according to a plan showing them to be on a street is a "dedication" of the street which cannot be revoked by the vendors. Garvey v. Harbison-Walker Refractories Co., 62 Atl. 778, 213 Pa. 177; In re South Western State Normal School, 62 Atl. 908, 909, 213 Pa. 244.

A sale of lots by reference to a plat constitutes a good dedication, even if the dedication by the plat itself has been incomplete. Kansas City & N. Connecting R. Co. v. Baker, 82 S. W. 85, 88, 183 Mo. 312.

It is a well-settled doctrine that where the owner of land, which has been laid off, mapped, and platted into blocks, lots, and streets as an addition to a city by a map placed on the public records, sells and conveys the lots or blocks by deeds referring to the map in the description thereof, it constitutes dedication to the public of such streets, and the rights in such streets become thereby vested in such purchasers and in the public. City of Corsicana v. Anderson, 78 S. W. 261, 263, 33 Tex. Civ. App. 596.

Where an owner of land sold a lot according to a map, which showed, adjoining the lot sold, two narrow strips marked "Lot A" and "Lot C," the unexecuted intention of the owner to make these strips private alleys for the use of the purchaser of lots, does not constitute a "dedication" of the strips as private alleys. Shultz v. Redondo Imp. Co., 105 Pac. 118, 120, 156 Cal. 439.

There seems to be no dispute that conveying property by bounding it on a street, which has actual form, and is in use for obtaining access to abutting premises, is evidence of an offer to dedicate under the rule that public highways may be created by "dedication" through offer and acceptance. Where a deed to city property named two streets as a part of the boundary and conveyed to their respective centers, there was a "dedication" to the public of the portions of such streets adjoining the property. Palmer v. East River Gas Co., 101 N. Y. Supp. 347, 349, 115 App. Div. 677.

Where the owners of land plat part of it into lots, blocks, and streets, and make and distribute blueprints thereof, showing the adjoining land as a park, and sell part of the lots on the representation that the park is a public park, and with their acquiescence citizens use it, and it is recognized generally as a public park for many years, there is an irrevocable dedication of it. Lueders v. Town of Tenino, 95 Pac. 1089, 49 Wash. 521.

As manifested by making or filing of map or plat

The filing of a map of property, showing the streets laid out thereon by the owner, works a complete "dedication" of such streets to the public. Van Duyne v. Knox Hat Mfg. Co., 64 Atl. 149, 151, 71 N. J. Eq. 375.

No particular form or ceremony is necessary in the "dedication" of land to public use if the assent of the owner of the land be shown and the fact of use for the purposes intended by the dedication. If the owner of land lay out a town and put a plot of plan of the streets on record or exhibit such plot and sell lots, it is evidence of actual dedication of such streets to public use according to the plan. State v. Southard (Del.) 66 Atl. 372, 373, 6 Pennewell, 247.

The marking of vacant lots on a plan for a park system dedicated to the public as "15x60" did not imply dedication thereof, the use of the lots not being adapted to any public purpose, so that the obstruction of them would work harm, inconvenience, or danger to the public, and they not being a part of the park system. Brown v. Dickey, 75 Atl. 382, 384, 106 Me. 97.

License distinguished

See License.

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Parol dedication

A dedication of an easement to a public use may be by parol. Halley v. Scott County Fiscal Court (Ky.) 78 S. W. 149, 150.

Prescription distinguished

"Dedication" and "prescription" are distinguishable, in that "dedication" is established by proof of an act of dedication and an intent to dedicate without reference to the period of public use, while long user is an essential element of "prescription." Davis v. Town of Bonaparte, 114 N. W. 896, 898, 137 Iowa, 196.

As presumed from acts of owner

The acts and declarations of an owner, to constitute a "dedication" of land for a street, must be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intent to permanently abandon land to the specific public use; and where he does so an estoppel in pais operates against him. New York Cent. & H. R. R. Co. v. Village of Ossining, 126 N. Y. Supp. 517, 518, 141 App. Div. 765; Town of Harper's Ferry v. Kaplon & Bro., 52 S. E. 492, 493, 58 W. Va. 482 (citing Pierpont v. Town of Harrisville, 9 W. Va. 215; Boughner v. Town of Clarksburg, 15 W. Va. 394; Miller v. Town of Aracoma, 5 S. E. 148, 30 W. Va. 606; Yates v. Town of West Grafton, 11 S. E. 8, 33 W. Va. 507; Hast v. Piedmont & C. R. Co., 44 S. E. 155, 52 W. Va. 396).

As presumed from user

A dedicated way must be duly adopted and accepted by the town in order to make it such; mere user by the public not being sufficient. Bacon v. Boston & M. R. R., 76 Atl. 128, 136, 83 Vt. 421.

Where complainant opened an extension of a street to tidewater, paved it, and permitted the city to use and drain it without material obstruction for a period of 20 years, there was a "dedication" of the property as a street. Canton Co. of Baltimore v. Mayor, etc., of City of Baltimore, 65 Atl. 324, 325, 104 Md. 582.

Where the complaint in a suit to abate a nuisance on a highway alleged that the strip of land was duly laid out as a highway, and both parties introduced, without objection, evidence of the laying out or establishing of the highway, its user and dedication, a judgment granting relief would not be disturbed merely because the court found that the strip had been used as a highway since a designated date, and that since such date it had been a duly dedicated highway; the term "dedication" being used to define the right arising from the user shown and found. People v. Quong Sing (Cal. App.) 127 Pac. 1052, 1055.

Where a tract of land bounded upon one side by a highway and upon the opposite side by a river had been purchased, and the purchasers had built a hotel upon the tract, and opened a road through the land in front of the hotel from the said highway to the river, which road was used for more than 20 years by such of the public as wished, not merely to visit the hotel, but to go to the river for a variety of purposes, and this use was in nearly in all instances without permission, and in all instances without interference, held, that a verdict finding a "dedication" of such road to the use of the public would not be set aside. Dover Tp., Ocean County, v. Brackenridge, 67 Atl. 689, 75 N. J. Law, 204.

Of subject of copyright

A "dedication" of a subject of a copyright implies an abandonment of the incorporeal hereditament as contrasted with a mere license to the public which implies a mere reservation of its enjoyment. The test is whether there is or is not such a surrender as permits the absolute and unqualified enjoyment by the public or the members thereof to whom it may be committed. Werckmeister v. American Lithographic Co., 134 Fed. 321, 325, 69 C. C. A. 553, 68 L. R. A. 591.

DEDUCE

DEDUCTION OF FRAUD

"A 'deduction of fraud' may be made not only from deceptive or false representations and circumstances, which may be trivial in themselves, but decisive evidence in the case of a fraudulent design." Lindley v. Kemp, 76 N. E. 798, 800, 38 Ind. App. 355 (quoting and adopting 2 Kent, 484).

DEDUCT

See May Deduct.

DEDUCTIONS

A statute provides that in assessing bank shares the assessor shall allow all the "deductions" and exemptions granted by law from the value of other taxable property owned by individuals, etc. Held that, if the intent was to allow the valuation of the bank stock to be reduced by deducting from the assets of the bank such securities as were exempt from taxation, the word "deductions" was inappropriate. Lippincott v. Lippincott, 66 Atl. 113, 114, 74 N. J. Law, 439.

DEED

See Bond for Deed; Donation Deed; Estoppel by Deed; Executed Deed; Good and Effectual Deed; Good and Sufficient Deed; Good Deed; Good Warranty Deed; Inclusive Deed; Pretended Deed; Proper Deed; Quitclaim Deed; Satisfactory Deed; Seisin in Deed; Trust Deed; Unregistered Deed; Voluntary Deed; Water Deed; With the Deed.

Date of deed, see Date.

Deed, mortgage, or otherwise, see Otherwise.

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Party in deed, see Party.
Recital in deed, see Recital.
Tender of, see Tender.

Comp. St. Neb. 1885, c. 73, § 46, defines a deed to be any instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned. Burns v. Cooper, 140 Fed. 273, 281, 72 C. C. A. 25.

The necessary elements of a valid deed are competent parties, a lawful subject-matter, a valuable consideration, apt words of conveyance and proper execution. Morison v. American Ass'n, 65 S. E. 469, 470, 110 Va. 91.

A deed of conveyance is not merely evidence of a gift or other grant. It is the gift or grant itself, and ipso facto operates to transfer or convey the title of the property described to the grantee. Alferitz v. Arrivillage, 77 Pac. 657, 658, 143 Cal. 646.

A deed of conveyance is a contract of conveyance, and the grantor will not be permitted to say that it is not. Wishart v. Gerhart, 78 S. W. 1094, 105 Mo. App. 112.

Civ. Code 1895, § 3599, provides that a deed to lands in this state must be in writing, signed by the maker, attested by at least two witnesses and delivered to the purchaser or some one for him, and be made on a valuable or good consideration, and a seal is not essential. Atlanta, K. & N. R. Co. v. McKinney, 53 S. E. 701, 703, 124 Ga. 929, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215.

One who signs, seals, and delivers a deed, though not named therein as a grantor, is still bound as a grantor, and the "deed" is operative as a conveyance of his estate. Sterling v. Park, 58 S. E. 828, 829, 129 Ga. 309, 13 L. R. A. (N. S.) 298, 121 Am. St. Rep. 224, 12 Ann. Cas. 201.

A "deed of conveyance" is a sealed writing, signed by the party to be charged, which evidences the terms of the contract between the parties whereby the title to real property is transferred from one to the other inter vivos. Test Oil Co. v. La Tourette, 91 Pac. 1025, 1029, 19 Okl. 214.

"Technically, the use of the word 'deed' does not necessarily import a conveyance." Sanders v. Riedinger, 51 N. Y. Supp. 937, 30 App. Div. 277, 284. Its primary meaning was an instrument consisting of three things —writing, sealing, and delivering. 2 Bl. Com. 295. And hence, where testator created a trust for the benefit of his children and provided that on the death of the longest liver of his two daughters his executor should sell the property and distribute one-fifth to the appointees of testator's daughter by deed or will, the use of the word "deed" did not import a conveyance during the lifetime of the donee of the power. Farmers' Loan & Trust Co. v. Kip, 104 N. Y. Supp. 1092, 1094, 120 App. Div. 347.

A deed by a widow as the legal representative of her husband, which recites that, in consideration of an advancement to an heir of the part due him, to be deducted from the interest due him as an heir, in the final settlement of the estate, the tract conveyed is inventoried at a specified sum per acre and accepted by the heir as grantee on that valuation, and which grants a tract described, and which contains a general warranty clause, and which provides that, on the failure of title, the heir need not account for the value of the land in the final partition of the estate, is a deed within Rev. St. 1895, art. 3342, giving title to one holding under a deed for five years. Glasscock v. Dimmitt (Tex.) 141 S. W. 822, 824.

An instrument, duly attested, delivered to the grantee, and under which he went into possession, stating a grantor has "donated, granted, and conveyed unto E. for and during her natural life, and at her death to a little girl, nine years old, by the name of M., and in fee simple," certain property (describing it), reserving to the grantor the right to sell and convey the lands and lot if he chooses so to do, is a deed. Hamilton v. Cargile, 56 S. E. 1022, 1023, 127 Ga. 762 (citing Daniel v. Veal, 32 Ga. 589; White v. Hopkins, 4 S. E. 863, 80 Ga. 154).

The owner of property including a mortgaged lot conveyed it in trust, the trustee agreeing to pay the owner's debts and convey the remainder to any person whom the owner might designate by written instrument or will, and afterwards the owner by warranty deed conveyed the lot. On the owner's death, the trustee, as executor, brought interpleader, making parties the grantee and the heirs, who demanded conveyance of the lot to them. The heirs alleged undue influence, and the grantee claimed that it was the trustee's duty to execute to him a deed of the premises free of all incumbrances; the incumbrance in question being named and described in the pleading. The Supreme Court, in reversing a judgment for the heirs, remanded the cause with directions "to enter judgment directing the trustee to deed the property in dispute to the defendant" grantee. The trustee at the time was in possession of the mortgage by purchase with trust funds with the consent of the heirs. Held, that the mandate required an effective deed conveying the lot and not a mere quitclaim conveying nothing but the equity of redemption after payment of the incumbrance; the word "deed" in such a case, where a party asserts in his pleadings the right to a deed clear of incumbrance, meaning an effective deed. Itzel v. Winn, 124 N. W. 1033, 1035, 1036, 141 Wis. 645.

Blackstone defines a "deed" as a "writing sealed and delivered by the parties." Anderson's Law Dictionary adopts the above definition and says: "This comprehensive meaning includes any writing under seal, as

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a bond, lease, mortgage, agreement to convey realty, etc." as used in a statute providing that no "conveyance of land or contract to convey, or lease of land, for more than three years shall be valid against creditors or purchasers for a valuable consideration except from the registration thereof provided no purchase from any donor, or lessor shall avail to pass title" as against any unregistered deed executed prior to a certain date, the word is used in its board generic sense and has the same scope as the words "conveyance of land" or "contract to convey or lease of land," as used in the statute. McNeill v. Allen, 59 S. E. 689, 690, 146 N. C. 283.

Comp. St. 1903, c. 73, § 46, defines the term "deed" to embrace every instrument in writing by which any real estate or interest therein is created, alienated, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or less. Section 12 provides that every officer who shall take the acknowledgment of any deed shall indorse a certificate thereof, signed by himself, on the deed. Section 4 provides that the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed is executed and acknowledged by both husband and wife. The acknowledgment by both husband and wife of an instrument whereby it is sought to convey or incumber a homestead is an essential step in the due execution of such instrument, which acknowledgment should appear from the instrument itself, in the form of a certificate of the officer before whom the acknowledgment was taken. Solt v. Anderson, 99 N. W. 678, 679, 71 Neb. 826.

The ordinary signification of the word "deed" is given by the Century Dictionary as that which is done, acted, performed, or accomplished. Abbott's Law Dictionary says "deed" is somewhat used in jurisprudence in its general vernacular sense of an act, something done; more frequently it has a technical meaning denoting (1) a written instrument under seal, and (2) more specifically a conveyance. In the first and broader of these meanings, deed includes all varieties of sealed instruments. The words "deed of release" in Civ. Code, § 5845, providing that an entry of satisfaction of a mortgage in the margin of a record shall have such effect, means simply the release of the mortgaged property from the lien of the mortgage. Swain v. McMillan, 76 Pac. 943, 945, 30 Mont. 433.

An instrument reciting that the grantor, for and in consideration of love and affection and $1 in hand paid, conveys and warrants to the grantee certain described real estate and that the grantor reserves to himself and wife the use and occupation of the lands as their homestead for and during their natural lives and during the life of the survivor of them, and also all the rents, issues, and profits thereof during their natural lives and during the life of the survivor of them, it being expressly understood and agreed by and between the parties that the grantee, who was the grandson of the grantors, should live with the grantors as a son, aid, assist, and care for the grantors in sickness and old age as a son, and, at the death of the survivor of the grantors, the title and interest in the lands should vest absolute in the grantees but not before, is a "deed." Venters v. Wickens, 79 N. E. 946, 948, 224 Ill. 569 (citing Shackleton v. Sebree, 86 Ill. 616; Harshbarger v. Carroll, 45 N. E. 565, 163 Ill. 636; Bowler v. Bowler, 52 N. E. 437, 176 Ill. 541).

The war revenue act (Act Cong. June 13, 1898, c. 448, 30 Stat. 448, provides that any person having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property exceeding $10,000 in actual value passing after passage of the act, either by will or the intestate laws of any state or territory, or any personal property transferred by "deed, grant, bargain, sale or gift," made to take effect in possession or enjoyment after the death of the grantor or bargainer, etc., shall be subject to a tax. Held, that the words, "by deed, grant, bargain, sale or gift," as used in such act, referred to transfers without consideration only operative by way of gift. Blair v. Herold, 150 Fed. 199, 202.

Assignment of mortgage

Where the mortgagee of lands in the state died out of the state, and his foreign executors, who had not qualified in the state, executed a "deed" for the premises, their deed amounted to no more than an assignment of the debt and mortgage, and did not deprive the executors of the right to sell under the power of sale in the mortgage. Scott v. Blades Lumber Co., 56 S. E. 548, 549, 144 N. C. 44.

As color of title

See Color of Title.

Contract

A "deed" is a contract between the grantor and grantee, although the grantee does not sign it. In re Millers' & Manufacturers' Ins. Co., 106 N. W. 485, 493, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144.

"Deeds" are contracts, and, when courts can ascertain from the deed itself the intent of the grantor, the deed will be construed so as to give that intent effect, and that intent will be carried out "as the mass of mankind would view it," and not in accord with the technical definition of the words. The rule that deeds must be construed most strongly against the grantor cannot be invoked to defeat the intent of the grantor, which fairly appears from the instrument as a whole. Negaunee Iron Co. v.

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Iron Cliffs Co., 96 N. W. 468, 473, 134 Mich. 264.

Ballinger's Ann. Codes & St. § 410, requires the county auditor to procure such books for records as the business of the office requires. Section 411 makes it his duty to record separately in books "deeds, grants and transfers of real property," and all other papers or writings required by law to be recorded. Section 4535 provides that all deeds, mortgages, and assignments of mortgages shall be recorded in the office of the county auditor, etc. Section 4536 provides that every instrument in writing, purporting to convey or incumber real property which has been recorded in the proper office, shall import notice to third parties. Held, that contracts for the sale of real estate are included within the meaning of the words "deeds, grants and transfers of real property," so as to authorize their record and make the record notice to subsequent purchasers. Under Ballinger's Ann. Codes & St. § 410, requiring the county auditor to procure such books for record as the business of the office requires, and, in view of the uniform custom throughout the state, to record all instruments affecting the title to real estate in deed records, those creating an incumbrance against real estate in mortgage records, and those evidencing title to personal property in miscellaneous records, the recording of an executory contract for the sale of real estate in miscellaneous records does not import notice. Bernard v. Benson, 108 Pac. 439, 441, 58 Wash. 191, 137 Am. St. Rep. 1051.

As conveyance by way of gift

The word "deed," in War Revenue Act June 13, 1898, c. 448, 30 Stat. 448, imposing a tax on any person in charge of property transferred by deed, grant, bargain, sale, or gift, made to take effect in possession or enjoyment after the death of the grantor, refers to transfers without consideration and operative by way of gift. Blair v. Herold, 150 Fed. 199, 202.

Delivery and acceptance essential

Blackstone defines a "deed" to be a writing sealed and delivered by the parties. Delivery is not only essential, but it is the final act that consummates the deed. Seibel v. Higham, 115 S. W. 987, 990, 216 Mo. 121, 129 Am. St. Rep. 502.

A "deed" placed in escrow, which was never delivered, but was recorded by the escrow holder in violation of the terms of the escrow agreement, has no effect as a "deed." Knapp v. Nelson, 92 Pac. 912, 913, 41 Colo. 447.

While a deed is defined as a written instrument signed, sealed and delivered, and it is essential to its validity that there should be a delivery, it is not essential that such delivery should consist of an actual, manual transfer thereof to the grantee. Graham v. Suddeth, 133 S. W. 1033, 1034, 97 Ark. 283.

Easement

The creation of an easement of a right of way by grant is within the terms of the statute requiring the record of every "deed of conveyance" of or for any lands, tenements, or hereditaments. Dahlberg v. Haeberle, 59 Atl. 92, 93, 71 N. J. Law, 514.

Lease

The word "deed," in Act May 28, 1715 (1 Smith's Laws, p. 94), providing for the acknowledgment and recording of deeds, included not only "conveyances of lands, tenements, and hereditaments" in the strict technical senses of that phrase, but also leases exceeding 21 years, and any deed intended to grant any estate for life or years, even though the latter is but a chattel interest subject to sale on execution. St. Vincent's Roman Catholic Congregation of Plymouth v. Kingston Coal Co., 70 Atl. 838, 839, 221 Pa. 349.

The word "deed," in common usage, means a conveyance of real estate. The word "deed," in a clause stipulating that the parties will by any deed thereafter executed prohibit any drilling for oil or gas on land, includes only a deed of conveyance, and not a lease. Test Oil Co. v. La Tourette, 91 Pac. 1025, 1029, 19 Okl. 214.

Mortgage

Absolute deed as mortgage, see Mortgage.

Under Rem. & Bal. Code, § 8746, providing that deeds, which include mortgages, shall be signed by the party bound thereby, it is not a requisite of a valid mortgage that it be subscribed as distinguished from signed by the party bound thereby. American Savings Bank & Trust Co. v. Helgesen, 116 Pac. 837, 841, 64 Wash. 54, Ann. Cas. 1913A, 390.

Necessity of words of grant

An instrument cannot be given the effect of a conveyance unless it contains words of grant. The use of the word "deed" by witnesses is a mere conclusion of the witnesses, and it cannot be presumed that a written instrument was a deed of conveyance, at least without proof that it contained sufficient words of grant. Capell v. Fagan, 77 Pac. 55, 58, 30 Mont. 507, 2 Ann. Cas. 37.

Under Gen. Laws 1896, c. 202, § 19, declaring the use of the word "grant" not necessary to convey tenements and hereditaments, corporeal or incorporeal, and section 11, providing that any form of conveyance in writing, duly signed and delivered by the grantor, conveys to the grantee the right and title of the grantor in the estate conveyed, whether absolute or limited, and section 4, providing that any instrument purporting to convey land is a "deed," although without seal, an agreement between the father and

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daughter providing that the daughter continue to live in certain premises and make it a home for her sister, who lived with her, without becoming a tenant, until further agreement between the parties, contained words sufficient to convey a life estate to the daughter; technical words of grant not being necessary. Disley v. Disley, 75 Atl. 481, 484, 30 R. I. 366.

As patent

See Patent.

Sealed instrument implied

A release by deed is a release by a written instrument under seal. Jackson v. Security Mut. Life Ins. Co., 84 N. E. 198, 200, 233 Ill. 161.

Under the common law of Maine and Massachusetts a written instrument without a seal is not a deed, and cannot convey land in fee. Brown v. Dickey, 75 Atl. 382, 385, 106 Me. 97.

A "deed" is a writing under seal. Under Real Property Law (Laws 1896, c. 547) § 208, providing that a conveyance of land should be subscribed at the end, a seal is not required to convey real estate in fee. Leask v. Horton, 79 N. Y. Supp. 148, 39 Misc. Rep. 144.

A "deed" in its broadest meaning includes all varieties of sealed instruments; while in its secondary and more common meaning signifies a writing under seal, conveying real estate. Malsby v. Gamble, 54 South. 766, 772, 61 Fla. 310 (citing 2 Words and Phrases, p. 1919).

Tax deed

A tax deed is a "deed," within Rev. St. 1895, art. 3342, providing that every suit to recover real estate as against any person enjoying peaceable and adverse possession thereof, etc., and claiming under deeds duly registered, shall be instituted within five years, etc., and will support a plea of limitations of five years without proof of prerequisites necessary to authorize the sale of the land for taxes. Lamberida v. Barnum (Tex.) 90 S. W. 698, 700.

The word "deed" in the statute relating to tax deeds does not mean a deed conforming in all things with the statutory form, but was used in its ordinary popular sense, namely, an instrument purporting to convey the land pursuant to a tax sale, and which, when tested by the common-law requirements, would on its face have been sufficient for that purpose, even though void either by reason of extrinsic facts, or by reason of nonconformity with the statutory form. Beggs v. Paine, 109 N. W. 322, 325, 15 N. D. 436.

Warranty of title imported

The tender of a deed without covenants or warranty is a sufficient performance of an agreement to give a "deed" for the premises. Ellis v. Burden, 1 Ala. 458, 467.

Will distinguished

The test whether a writing is a will or deed is the animus testandi, and, where the maker of an instrument intends a disposition which is in legal effect testamentary, the writing made will be held a will; but if he merely intends to convey a present estate or interest the instrument is a "deed." Belgarde v. Carter (Tex.) 146 S. W. 964, 965.

In determining whether an instrument be a "deed" or will, the main question is: Did the maker intend any estate or interest whatever to vest before his death and upon the execution of the paper? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, a will. And it is immaterial whether he calls it a will or a deed. The instrument will have operation according to its legal effect. McLain v. Garrison, 89 S. W. 284, 39 Tex. Civ. App. 431 (citing Gillham v. Mustin, 42 Ala. 366; Trawick v. Davis, 5 South. 83, 85 Ala. 345).

Where an instrument contained the usual words of conveyance, having premises, habendum, tenendum, reddendum, condition, warranty, and covenants, and was not authenticated as a will, but was acknowledged as a deed, it must be accepted as a deed, the grant being in the present tense, for a will is as instrument which vests no present interest, but only appoints what is to be done after the death of the maker. Taylor v. Purdy, 151 S. W. 45, 46, 151 Ky. 82.

A deed in which the grantor's wife joined, which stipulates that the "grantors * * * reserve the use * * * of said premises for * * * their natural lives and the title of said grantees * * * shall become absolute only on the death of" the grantor and wife, is a "deed," and not a "will"; the quoted clause only reserving a life estate in the grantor and wife. White v. Willard, 83 N. E. 954, 957, 232 Ill. 464.

Testator and wife executed warranty deeds conveying their real property to their sons and sons-in-law which were delivered to W. to be delivered to the grantees after the death of the wife. On the same day testator executed a will reciting that he and his wife had sold their real estate to their heirs and deeded the same to them, with instructions that the wife should have one-half of the crop annually raised on certain of the property, etc. Held, that such deeds were not testamentary in character, but were operative of their own force independent of the will. Schillinger v. Bawek, 112 N. W. 210, 213, 135 Iowa, 131.

An instrument conveying land, "in consideration of the sum of $1 and other valuable considerations that" the defendant "shall

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look after my welfare and business when so required to do," "to take effect and be of force after my death," is not a will, but a deed of a remainder interest. Rogers v. Rogers, 43 South. 434, cause on suggestion of error conditionally reinstated Id. 946 (citing Baum v. Lynn, 18 South. 428, 72 Miss. 932, 30 L. R. A. 441).

A paper in the form of a deed, attested as a deed, and delivered to a named grantee, conveying certain property, together with all the rights and privileges thereunto belonging, "at my death forever in fee simple," is not testamentary. Kytle v. Kytle, 57 S. E. 748, 749, 128 Ga. 387.

"The general characteristics which distinguish 'deeds' from wills have been repeatedly declared; yet no definite, uniform test has been stated by which to determine the character and operation of each particular instrument, and none can well be. The intention of the maker is the ultimate object of inquiry—whether it was intended to be ambulatory and revocable, or to create rights and interests at the time of execution which are irrevocable. If the instrument cannot be revoked, defeated, or impaired by the act of the grantor, it is a deed; but if the estate, title, or interest is dependent on the death of the testator—if in him resides the unqualified power of revocation—it is a will." An instrument on its face purporting to be a deed, though there was evidence that the grantor told the draftsman that he wished to make a will, in the absence of any other proof from which a contrary intention could be inferred, is a "deed," provided there has been a valid delivery. Griswold v. Griswold, 42 South. 554, 555, 148 Ala. 239, 121 Am. St. Rep. 64 (citing Crocker v. Smith, 10 South. 258, 94 Ala. 295, 16 L. R. A. 576; Jordan v. Jordan, 65 Ala. 306).

To constitute a "will," the instrument must be one which is not by its terms sufficient to convey a present interest in the property, and the provision in a deed reserving to the grantors and the survivor of them the use and occupation of the premises, and providing that the full title and enjoyment thereof "shall only become operative on the death of the survivor of the grantors," does not change the nature of the instrument to that of a will, as a present interest passed by delivery of the deed. In re McIntyre's Estate, 120 N. W. 587, 588, 156 Mich. 240.

A will is "an instrument by which a person makes a disposition of his property to take effect after his decease, which is in its own nature ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession of enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument." Consequently in an instrument whereby a husband conveys to his wife all his property, stipulating that the same shall be void during the husband's life, and then to become effective on his death, without court process of any kind, is a "deed," and not a "will." In re Hall's Estate, 84 Pac. 839, 840, 149 Cal. 143.

The rule is that if a paper passes no interest in the lifetime of the maker, whatever may be its form, if it is operative only upon his death, it is a "will," and to be effective must be probated. On the other hand, the object of all construction is to arrive at the intention of the parties, and their intention, where it is apparent on the face of the papers will be carried into effect, if it can be fairly done under its terms. The law favors the vesting of estates, and it prefers a construction of an instrument that will give it some effect, to one which will give it no effect. A deed to the grantor's wife and son recited that it was executed in order that the grantees might be provided for after the grantor's death; "that is, at the time of the death of the first party" the wife "is to have and to hold for life the property, and at her death the property is the property of" the son, "to have and to hold to him and his heirs forever." Held, that there was a present grant, with reservation of a life estate in the grantor, and not a testamentary disposition. Ecklar's Adm'r v. Robinson (Ky.) 96 S. W. 845, 846.

"A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is, in such case, produced by the express terms, and does not result from the nature of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A. in fee, the effect upon usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A. in fee, and yet the case fully illustrates the distinction in question, for in the former instance A., immediately on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation." Nor does the fact that a deed of trust contains a full power of revocation render the instrument testamentary. Robb v. Washington & Jefferson College, 78 N. E. 359, 361, 185 N. Y. 485 (quoting and adopting definition in Jarman, Wills, p. 17).

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An instrument from a husband to his wife containing apt words of conveyance and directing her to hold the property on certain trusts for the grantor, the trustee, and the grantor's children, and reserving a right to direct conveyances by the trustee to others and a power to revoke the entire instrument, was a "deed" and not a "testament." "To determine the character of an instrument as to its being a will or a 'deed,' it is necessary to ascertain the intention of the maker from the whole instrument read in the light of surrounding circumstances. If the intention at the time of the execution of the instrument was to convey a present estate, though the position be postponed until after his death, it is a 'deed'; but if the intention was that it should not convey any vested right or interest, but should be revocable during his life, it is a will." Cribbs v. Walker, 85 S. W. 244, 245, 74 Ark. 104 (quoting and adopting definition in Bunch v. Nicks, 7 S. W. 563, 50 Ark. 357).

DEED OF BARGAIN AND SALE

See Bargain and Sale.

DEED OF RELEASE

The words "deed of release," as used in Civ. Code, § 3845, providing that an entry of satisfaction of a mortgage in the margin of a record shall have such effect, means simply the release of the mortgaged property from the lien of the mortgage. Swain v. McMillan, 76 Pac. 943, 945, 30 Mont. 433.

DEED OF SALE

The informal instruments executed by the tax collector under Act No. 42, 1871, § 62, are known in the law of tax sales as "certificates of sale" in contradiction of "deeds of sale." Gauthreaux v. Theriot, 46 South. 892, 898, 121 La. 871, 126 Am. St. Rep. 328 (citing Cooley, Tax'n [3d Ed.] p. 992).

DEED OF TRUST

See Trust Deed.
As incumbrance, see Incumbrance.
As lien, see Lien.

DEEM

As adjudge or determine

One meaning of "deem" is to "adjudge." Town of Checotah v. Town of Eufaula, 119 Pac. 1014, 1017, 31 Okl. 85. The word is so used in a statute which provides that any officer having authority to close an insolvent bank or to prevent the receipt of deposits, who does not exercise such authority, shall be "deemed" to have assented to the receipt of deposits. Ex parte Smith, 111 Pac. 930, 938, 33 Nev. 466; Ex parte Griffin, 111 Pac. 939, 33 Nev. 490.

The father of the child in question by his alleged second marriage had previously married, and he and his wife parted and lived apart. It was not shown that either of them procured a divorce, but he afterwards ran away with another woman, and they subsequently came back to the neighborhood where his former wife resided and to her knowledge lived together openly and notoriously as man and wife and discharged all of the duties of that relation toward each other until he died. Rev. St. 1909, § 342, provides that the issue of all marriages "decreed null in law or dissolved by divorce shall be legitimate." Held, that the word "decreed" was substantially equivalent to the word "deemed," which was used in the statute as it formerly stood, and, under the statute as construed, the children begotten by the husband of his alleged second wife were legitimate. Nelson v. Jones, 151 S. W. 80, 84, 245 Mo. 579.

As mean

The expression "shall be construed" and "shall be deemed" have been used time out of mind in statutes to import the same as "shall mean." Dilworth v. Schuylkill Imp. Land Co. of Philadelphia, 69 Atl. 47, 48, 219 Pa. 527.

As involving discretion

"Deem" does not signify an arbitrary exercise of will, but a deliberate exercise of judgment. "To deem" is to think, judge, hold as an opinion, decide or believe on consideration, to adjudge. State v. Cohen, 63 Atl. 928, 930, 73 N. H. 543 (citing Cent. Dict.).

As presumed

The word "deemed" is equivalent to "presumed," in an instruction that, if the location of a boundary line was in dispute, and if the adjoining owners caused it to be established and acquiesced in the line as established, the plaintiff would be "deemed" the owner of all lands up to such line. Cooper v. Slaughter (Ala.) 57 South. 477, 481.

DEEM BEST

Authority to executors and trustees under a will to invest the trust property in such manner "as they shall deem best" must be held to vest in them a reasonable and not an arbitrary discretion, and to imply a duty to execute the trust in accordance with existing laws governing trustees in the execution of their trust. Pabst v. Goodrich, 113 N. W. 398, 407, 133 Wis. 43, 14 Ann. Cas. 824.

DEEM FRAUDULENT

The language of Act March 28, 1905 (P. L. 62), making a sale in bulk of the whole, or a large part of a stock of merchandise and fixtures, not in the ordinary course of business, fraudulent as to creditors, that such sale without notice "shall be deemed fraudulent and voidable as against the creditors of the seller," is not to be construed as simply casting the burden of proving the good faith of the transaction on the purchaser, but is to be construed as meaning that non-

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compliance by the purchaser with the provisions of the act shall make the sale voidable as to creditors without regard to the intent of the parties to it. Wilson v. Edwards, 32 Pa. Super. Ct. 295, 301.

DEEP

DEEP CUTTINGS

The phrase "deep cuttings," in a charter provision authorizing a railroad company to acquire land for its tracks not to exceed four rods in width, except in the neighborhood of deep cuttings, means such cuts as may be necessary to enable the company to use for its track the entire authorized 66-foot right of way. Pennsylvania R. Co. v. Braddock Borough, 83 Atl. 304, 306, 234 Pa. 312.

DEEPEN

As repairs, see Repair—Repairs.

DEER

See Wild Deer.
Such deer, see Such.

The word "deer," as used in Laws 1905, p. 161, § 13, declaring it unlawful to have in possession the carcass of any deer which has not thereon the natural evidence of its sex, extends to all deer, whether in a wild state or domesticated. State v. Weber, 102 S. W. 955, 956, 205 Mo. 36, 10 L. R. A. (N. S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382.

The prohibition in the Forest, Fish, and Game Law, against the transportation of deer killed in the state, or possession for that purpose, except that one carcass or part thereof may be transported from the county where killed, when accompanied by the owner, etc., applies to domesticated as well as wild deer. Dieterich v. Fargo, 104 N. Y. Supp. 334, 336, 119 App. Div. 315.

As property

See Property.

DEER HAVING HORNS

See Horn.

DEFALCATION

See, also, Default.

"Defalcation" is the failure of one who has received money in trust or in a fiduciary capacity to account and pay over as he ought, and it particularly applies to the acts of a public and corporate officer. In re Harper, 133 Fed. 970, 973 (quoting and adopting definition in Courtney v. Beale, 5 S. E. 708, 84 Va. 692); the word does not necessarily imply any fraud or criminal act of the person guilty of it, and has a wider meaning than the words "fraud," "embezzlement," or "misappropriation." A municipal officer failing to pay over public moneys for which he is properly chargeable is guilty of a defalcation. City of Syracuse v. Roscoe, 123 N. Y. Supp. 403, 410, 66 Misc. Rep. 317.

DEFAMATION—DEFAMATORY

See, also, Slander.

To "defame" is to speak evil of one maliciously; to dishonor; to render infamous. "Defamation" comprehends injury of another's reputation by calumny; aspersion by lying. Diener v. Star-Chronicle Pub. Co., 135 S. W. 6, 11, 232 Mo. 416.

"Defamation" is anything which tends to blacken or injure one's character or reputation. Dungan v. State, 57 South. 117, 118, 2 Ala. App. 235.

Ballinger's Ann. Codes & St. § 7087, defines "defamation" as a false publication calculated to bring the person defamed into disrepute. State v. Mays, 107 Pac. 363, 365, 57 Wash. 540, 21 Ann. Cas. 830.

Any written words which directly or indirectly charge one with a crime or tend to injure his reputation or expose him to hatred, contempt, or ridicule are "defamatory." Richardson v. Thorpe, 63 Atl. 580, 73 N. H. 532.

A "defamatory" charge may be made indirectly, by insinuation, by sarcasm, or by mere questions, as well as by direct assertion in positive terms; and it matters not how artful or disguised the modes in which the meaning is concealed, if it is in fact defamatory. Lauder v. Jones, 101 N. W. 907, 910, 13 N. D. 525 (quoting definitions in Schenck v. Schenck, 20 N. J. Law, 208; Gorham v. Ives [N. Y.] 2 Wend. 536; McCoy v. Lightner [Pa.] 2 Watts, 352; Hotchkiss v. Oliphant [N. Y.] 2 Hill, 510; Rundell v. Butler [N. Y.] 7 Barb. 260; Gibson v. Williams [N. Y.] 4 Wend. 320; Andrews v. Woodmansee, [N. Y.] 15 Wend. 232; Solverson v. Peterson, 25 N. W. 14, 64 Wis. 198, 54 Am. Rep. 607; Buckstaff v. Viall, 54 N. W. 111, 84 Wis. 129; Allen v. News Pub. Co., 50 N. W. 1093, 81 Wis. 121; Goodrich v. Woolcott [N. Y.] 3 Cow. 231; Commonwealth v. Child, 13 Pick. [30 Mass.] 198; Wilson v. Noonan, 23 Wis. 105; Kennedy v. Gifford [N. Y.] 19 Wend. 296; Adams v. Lawson, 17 Grat. [58 Va.] 250, 94 Am. Dec. 455; Townshend, Slander & Libel [4th Ed.] §§ 164, 169; Newell, Slander & Libel [2d Ed.] 264–268).

The distinction between "criticism" and "defamation" is that criticism deals only with things that invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns. It is not concerned with the individual but only with his work, as a true critic never indulges in personalities, but confines himself to the merits of the subject-matter by conducting a fair discussion of matters of public interest, for the judicious guidance of public taste or opinion. Triggs v. Sun Printing &

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Pub. Ass'n, 71 N. E. 739, 743, 179 N. Y. 144, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326.

DEFAULT

See Contract to Answer Default of Another; Debt, Default, or Miscarriage of Another; Omissions, Neglects, and Defaults; Promise to Answer for Debt, Default, etc.; Put in Default; Willful Default.

"Default" means anything wrongful—some omission to do that which ought to have been done by one of the parties; and a mere allegation that "because of the default of the defendant said premises were not conveyed" does not state the necessary facts to show to the court that the defendant did omit to do any thing that she was called upon to do. Davis v. Silverman, 90 N. Y. Supp. 589, 590, 98 App. Div. 305.

"Default" is the nonpayment of an obligation by the party bound to pay, without the consent of the parties having the right to waive the payment. Therefore, when the party entitled to demand payment waives the same by extending the time for payment, either for a definite or indefinite period of time, the person bound by the obligation cannot be said to be in "default." Arnot v. Union Salt Co., 79 N. E. 719, 721, 186 N. Y. 501 (citing De Groot v. McCotter, 19 N. J. Eq. 531; Thomson v. Poor, 42 N. E. 13, 147 N. Y. 402, 409; Toplitz v. Bauer, 55 N. E. 1059, 161 N. Y. 325, 333).

Default by a corporation in paying taxes on its capital stock was a default within a provision of the corporation's mortgage that, if it should suffer any lawful tax or charges to fall in arrear, whereby the security might become impaired, the mortgagee might foreclose, etc., and hence the mortgagee was entitled to a decree of sale under the terms of the mortgage. Union Trust Co. of Maryland v. Thomas, 66 Atl. 450, 453, 105 Md. 507.

A contract, which provided that the deed should be delivered to the vendee upon payment of a certain amount each year, from 1904 to 1910, and in case of "default in payment" the deed should be returned to the vendor, and previous payments should be used as rent on the premises, could not be construed so as not to put the vendee in default for nonpayment until 1910, and his failure to make any payment when it became due would amount to a default. Foxley v. Rich, 99 Pac. 666, 667, 35 Utah, 162.

In a provision of a charter party for the payment of demurrage "for each and every day's detention by default of charterers," the word "default" should be construed as meaning the failure to perform some duty imposed by the contract, and such failure only renders the charterer liable for demurrage. Washington Marine Co. v. Rainier Mill & Lumber Co., 198 Fed. 142, 144.

Where a life insurance premium is paid by operation of an automatic loan provision, there can be no "default in premium payments." Mutual Ben. Life Ins. Co. v. Commissioner of Insurance, 115 N. W. 707, 709, 151 Mich. 610.

In practice

As proceeding, see Proceeding.

A "default" is a failure to appear. Wolfert v. New York City R. Co., 103 N. Y. Supp. 768, 769, 53 Misc. Rep. 536. Failure of a party to take a step required by law in the progress of a legal action. Acheson v. Inglis Bros. (Iowa) 135 N. W. 632, 633; Peterson v. Kissell, 125 N. W. 808, 809, 148 Iowa, 516. Thus when a defendant omits to plead within the time allowed for that purpose, or fails to appear at the trial, he makes "default." Leahy v. Wayne Circuit Judge, 107 N. W. 1060, 1062, 144 Mich. 304, 115 Am. St. Rep. 443 (quoting and adopting definition in Anderson's Law Dict. tit. "Default," and Burrill's Dict.).

A "default" confesses the material facts in the complaint and precludes defendant from making any objection to the relief authorized by the complaint until set aside in a proper proceeding. Title Ins. & Trust Co. v. King Land & Improvement Co., 120 Pac. 1066, 1067, 162 Cal. 44.

"Default," within Sayles' Ann. Civ. St. 1897, art. 1881, providing that no will shall be probated after four years from the death of testator unless the applicant was not in default in failing to present it for probate, is the applicant's default, so that the right of a purchaser of a devisee will not be lost by any default of his grantor. St. Mary's Orphan Asylum of Texas v. Masterson, 122 S. W. 587, 590, 57 Tex. Civ. App. 646.

DEFAULT JUDGMENT

See Judgment by Default.

As judgment, see Judgment.

DEFAULT OF ISSUE

See In Default of Issue.

DEFAULTING OFFICIAL

As used in Laws 1892, p. 620, c. 301, § 1, providing that in certain cases a defaulting official may be adjudged personally responsible, the term "defaulting official" should be construed in its broad sense and as including every official who fails to perform his full duty, and not be limited merely to officers found guilty of collusion or defalcation. Annis v. McNulty, 100 N. Y. Supp. 951, 956, 51 Misc. Rep. 121.

DEFEASANCE

An instrument which defeats the force or operation of some other deed or of an estate

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is a 'defeasance"; but, if the provision is in the same deed, it is a condition. Epperson v. Epperson, 62 S. E. 344, 345, 108 Va. 471.

"A 'defeasance' is a collateral deed, made at the same time of an feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone." Where the original transaction between a mortgagor and mortgagee was not in the form of a mortgage, but an absolute deed with a collateral written agreement to reconvey upon the payment of money at a specified time, the collateral instrument did not constitute a technical defeasance, though it was sufficient to secure to the grantor an equitable right of redemption, which may be released by parol or extinguished by such transaction between the parties as would render it inequitable that the mortgagor should be permitted to redeem. Ferguson v. Boyd, 81 N. E. 71, 72, 169 Ind. 537 (quoting and adopting definition in 2 Black, Com. 327).

Where a deed of land conveyed in consideration of a contract for support, and a stipulation for the avoidance of the agreement in case of failure to perform the contract embraced in a separate instrument form parts of one transaction, the stipulation for avoidance constitutes a defeasance. Epperson v. Epperson, 62 S. E. 344, 345, 108 Va. 471.

DEFEAT

A plea that plaintiffs were "defeated" in another action between the parties involving the same controversy is insufficient as a plea of res adjudicata, as not showing that they were defeated on the merits. Goff v. Wilburn (Ky.) 79 S. W. 232, 233.

Where a purchaser of land at a tax sale voluntarily abandoned his suit subsequently brought to recover possession, he was not "defeated" therein within Kansas City Charter, art. 5, § 59, providing that, if a purchaser claiming under a tax deed, executed substantially as provided in the preceding section, should be defeated in a suit to recoved the property, he might recover the purchase price, etc., from the owner. Russell v. Woerner, 110 S. W. 691, 692, 131 Mo. App. 253.

A portion of the heirs at law of a decedent employed an attorney to render services in a contest against the probate of an alleged will of the decedent, by which the heirs agreed to pay the attorney a stipulated fee "in case the will is defeated." The will was defeated, within the meaning of the contract, where a decree was entered by the probate court in accordance with a stipulation between all the parties in interest, secured with the aid of the efforts of the attorney, and of his advice, fixing the basis of distribution of the property of the decedent in kind, which, with the exception of some inconsequential bequests, was wholly at variance with the provisions of the will, and under which the clients of the obligors in the contract received a larger part of the estate than their share as heirs at law. Ingersoll v. Coram, 127 Fed. 418, 431.

DEFECT

See Formal Defect; Jurisdictional Defect; Latent Defect; Open and Obvious Defect.

Any defect, see Any.

Other defects, see Other.

The term "defect," as used in Code Iowa 1873, §§ 478, 479, which provide for the collection of assessments for public improvements completed notwithstanding any defect in any such municipal corporation, or its officers, means a mere informality or irregularity, and not a failure to make a valid contract. Allen v. Davenport, 132 Fed. 209, 223, 65 C. C. A. 641.

An imperfect description in an assessment roll is a "defect" in the proceedings affecting the jurisdiction to sell the land for taxes within Tax Law, § 132, authorizing the cancellation of tax deeds for such defects. People ex rel. Staples v. Sohmer, 134 N. Y. Supp. 543, 546, 150 App. Div. 8.

A defective plan adopted by a city for the construction of a sewer, resulting in the flooding of plaintiff's mine, was not a "defect," within Rev. Codes, § 3289, providing that notice of claim for injuries must be given before the city shall be liable for damages for any defect in a bridge, street, public work, etc. Kelly v. City of Butte, 119 Pac. 171, 172, 44 Mont. 115.

A sink hole in the floor of the brewery room used for washing empty beer kegs, being a proper part of the works and not a way, was not a "defect" within the meaning of such statute, and hence there could be no liability under the statute for injury to a brewery teamster, who, while incidentally in the washroom on his employer's business, slipped into the sink hole. Kern v. Welz & Zerweck, 136 N. Y. Supp. 412, 417, 151 App. Div. 432.

In highway

A "defect" for which a municipality is liable for injury resulting therefrom is anything in the state or condition of a highway which renders it unsafe or inconvenient for ordinary travel and may be ether inert matter incumbering the highway or a structural defect therein; but an illegal use of the highway by men, animals, vehicles, engines, or other objects, while movable and actually being moved by human will or direction, is not such a defect. Hence a horse race upon a street is not a defect. Marth v. City of Kingfisher, 98 Pac. 436, 441, 22 Okl. 602, 18 L. R. A. (N. S.) 1238. Nor is a rope used in moving a building and left stretched above a street after dark while not in use. Craig v.

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Inhabitants of Leominster, 85 N. E. 855, 857, 200 Mass. 101.

A statute making every town liable for damages caused by any "defect in a highway," existing because of the neglect of its highway commissioner, applies only to defects interfering with travel along the highway, and does not apply to the failure of the commissioner to remove rubbish from a sluice under the traveled part of the highway, so that surface water is backed upon the adjoining premises. Winchell v. Town of Camillus, 95 N. Y. Supp. 688, 689, 109 App. Div. 341.

A limb of a tree standing in a public street, does not constitute a "defect" in the street, though constituting a menace to travel by reason of its liability to fall on pedestrians on a sidewalk, since the city is not required to remove the limb as a part of its duty to build and repair highways within its limits. Dyer v. City of Danbury, 81 Atl. 958, 959, 85 Conn. 128, 39 L. R. A. (N. S.) 405, Ann. Cas. 1913A, 784.

An instruction, that "by 'defect in the highway' is meant any condition that renders the highway not reasonably safe for travelers who exercise ordinary care in traveling upon it," was not open to the objection that there may be numerous defects in highways which render them unsafe for travelers in the exercise of ordinary care, but which are not defects in an actionable sense. Kortendick v. Town of Waterford, 125 N. W. 945, 947, 142 Wis. 413.

In railroad

The word "defect" within a statute making railroad companies liable for injuries sustained by employés through defects in cars, etc., means an existing unsafe and dangerous condition resulting from actionable negligence attributable to the employer. Ketchum v. Chicago, St. P. M. & O. Ry. Co., 136 N. W. 634, 636, 150 Wis. 211.

The presence on a railroad track of coke which had fallen from cars other than that on which plaintiff had been working and which had been lying on the ground several hours, before plaintiff stumbled against it and was injured while trying to make a coupling, was a "defect" within the meaning of Acts 1905, p. 386, c. 163, providing that the defense of assumed risk shall not be available in actions against a railroad company where a person of ordinary care would have continued in the service with knowledge of the defect. El Paso & S. W. Ry. Co. v. Alexander (Tex.) 117 S. W. 927, 935.

A wire stretched over the track of a railroad company, not sufficiently high above a freight car on the track to permit an employé standing on the top of such car to safely pass under the wire, is not a defect in the way or track, where it is not shown that the wire is not a mere movable object temporarily placed too near the track. Hubbard v. Central of Georgia Ry. Co., 63 S. E. 19, 131 Ga. 658, 19 L. R. A. (N. S.) 738.

In sidewalk

The word "defect," as used in a charter giving a city complete control of its sidewalks and providing a method of enforcing the construction of walks by means of resolutions, notice to the property owner, assessment of the cost on the property, and sale thereunder, and that, if for any reason the city should be unable to compel the owner to construct and repair a sidewalk by fixing a lien on the property, the city should not be liable for any "defect" therein, means such defects as are intended to be prevented by the exercise of the power so granted and which exists because such power proves futile. Lentz v. Dallas, 72 S. W. 59, 61, 96 Tex. 258.

A dangerous accumulation of snow and ice on a sidewalk was a "defect" therein within Comp. St. 1905, c. 13, art. 2, § 107, exempting a city from liability for damages from a defective sidewalk, unless notice of the accident was filed with the city clerk within 20 days. McCollum v. City of South Omaha, 121 N. W. 438, 84 Neb. 413.

DEFECT IN DESCRIPTION

The words "defect in description," as used in a statute providing that realty taxes shall be assessed to the owners and separate tracts shall be separately described and valued, provided that no defect in description or mistake in valuation shall be taken advantage of to avoid payment of taxes unless the owner brought to the assessors a true account of his ratable estate, include an imperfect statement of area, courses, distances, or boundaries of the taxpayer's property, but only errors of description are included within the statute. Matteson v. Warwick & Coventry Water Co., 68 Atl. 577, 582, 28 R. I. 570.

DEFECT OF FORM

See Defect of Substance.

DEFECT OF HEIRS

The term "defect of heirs," as used in Ky. St. 1903, § 2971, part of the law for the government of cities of the first class, providing that so much property in a city as from alienage, "defect of heirs," failure of homestead, or other causes, shall escheat to the commonwealth, shall vest in the municipal board for school purposes, taken with the other modes of escheat, comprehends every case of escheat allowed and enumerated by the statute. Commonwealth for Use of Louisville School Board v. Chicago, St. L. & N. O. R. Co., 99 S. W. 596, 598, 124 Ky. 497.

DEFECT OF PARTIES

A "defect of parties" plaintiff or defendant means sufficient parties, and has no application to a case of too many parties, or

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the joining of a person having no interest in the litigation. Mader v. Plano Mfg. Co., 97 N. W. 843, 845, 17 S. D. 553.

"Defect of parties" as a ground of demurrer means too few and not too many, and a demurrer on that ground can be interposed only for nonjoinder of necessary parties, and not for misjoinder. Tieman v. Sachs, 98 Pac. 163, 164, 52 Or. 560; United States v. Comet Oil & Gas Co., 187 Fed. 674, 679.

DEFECT OF REASON

A "defect of reason" is a disease of the mind, within Pen. Code, § 21, providing that one is not excused from criminal responsibility as insane except on proof that when he labored under such "defect of reason" as either not to know the nature and quality of the act or not to know it was wrong. People v. Carlin, 87 N. E. 805, 808, 194 N. Y. 448.

DEFECT OF SUBSTANCE

The delivery of blank informations signed by the county attorney to the clerk of a county court is not a defect of form only within the curative provision of the statute (section 6705, Snyder's Comp. St.) that no indictment or information shall be deemed insufficient by reason of a defect or imperfection in the matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits, but is a "defect of substance" and prejudicial to the substantial rights of the defendant. Fullingim v. State, 123 Pac. 558, 559, 7 Okl. Cr. 333.

DEFECT OF TITLE

That the water-closets of a tenement house are in the yard, instead of the house, or other violation of Tenement House Act, Laws 1901, p. 889, c. 334, is not such a "defect of title" as to justify refusal to accept the property under an agreement to convey good title. Woodenbury v. Spier, 106 N. Y. Supp. 817, 818, 122 App. Div. 396.

DEFECTIVE

A writ is defective when it lacks something which the law requires it to contain; and the defect, as in other cases where amendments are allowed, must appear on its face. McArthur v. Boynton, 74 Pac. 540, 542, 19 Colo. App. 234.

The title of a person who negotiates an instrument is "defective" when he obtains the instrument or any signature thereto by fraud, duress, or force and fear, or other unlawful means, or for an unlawful consideration, or negotiates it in breach of faith, or under such circumstances as amount to a fraud. Jobes v. Wilson, 124 S. W. 548, 551, 140 Mo. App. 281 (quoting and adopting the definition in Negotiable Instruments Law [Laws 1905, p. 243; Ann. St. 1906, § 463] § 55).

A machine constructed to be thrown into and out of gear by a lever and clutch, which cannot be controlled thereby but starts of its own accord, may well be found to be "defective" within the meaning of the word, notwithstanding the opinion of witnesses to the contrary. Fries v. Bettendorf Axle Co., 101 N. W. 859, 860, 126 Iowa, 138.

A pulley with a small piece broken out of its rim is defective, and, in an instruction in an action for personal injuries alleged to have been caused by such defect, it is proper to refer to the break as a defect, the jury being instructed at the same time that plaintiff could not recover unless the break or defect caused the injuries sued for. Eagle & Phenix Mills v. Herron, 46 S. E. 405, 408, 119 Ga. 389.

DEFECTIVE HIGHWAYS

The words "defective highways," as used in an act making cities liable for bodily injuries sustained on highways, taken in connection with the body of the act held to make it entirely clear that the Legislature had in mind exclusively defects existing for want of repair, and did not intend that a highway should be considered defective when some private individual had wrongfully placed stones, vehicles, or other obstructions upon the street, and left them there. McEvoy v. City of Sault Ste. Marie, 98 N. W. 1006, 1011, 136 Mich. 172.

Where the water department of a city dug an excavation in a street four feet wide and four or five feet long to lay or repair a water pipe, without taking any precaution to warn travelers of any danger, the jury could find that the street was defective, under Rev. Laws, c. 51, § 1, requiring highways to be kept in repair. Igo v. City of Cambridge, 95 N. E. 557, 558, 208 Mass. 571.

DEFECTIVE MACHINERY

Machinery permitted to remain unguarded, in violation of Labor Law, § 81, is "defective," within the meaning of the Employers' Liability Act. Bell v. Proctor & Gamble Mfg. Co., 137 N. Y. Supp. 266, 268, 152 App. Div. 434.

DEFEND

The word "defend," as used in a policy of employer's liability insurance providing that the insurer, if suit was brought against the insured to enforce a claim for damages on account of an accident covered by the policy, on notice thereof, would take charge of the litigation, and on behalf of the insured defend against such proceedings, means, necessarily, that all the proceedings in the suit founded on the claim for damages against the insured must be taken care of by the insurer; and, after taking control of the proceedings, the insurer cannot thereafter be discharged except by payment of the indemnity to the assured, or securing his discharge. Sanders v. Frankfort Marine,

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Accident & Plate Glass Ins. Co., 57 Atl. 655, 658, 72 N. H. 485, 101 Am. St. Rep. 688. In this sense "defend" means to bear the burden of the litigation, to defray the expense of carrying it on. Munro v. Maryland Casualty Co., 96 N. Y. Supp. 705, 707, 48 Misc. Rep. 183.

DEFENDANT

See Codefendant; Material Defendant.
Any defendant, see Any.
See, also, Reus.

"Defendant" is the party called on to make satisfaction for the injury complained of by plaintiff. Accousi v. G. A. Stowers Furniture Co. (Tex.) 83 S. W. 1104, 1105 (citing Chase's Blackstone, 626, 627). He is the party who defends a suit. His attitude, as the word "defendant" implies, is one of defense; he being only required to stand and repel the assaults of his adversary. Latta v. Wiley (Tex.) 92 S. W. 433, 437.

"Defendant" in a decree may be taken to mean defendants. Jewett v. Feldheiser, 67 N. E. 1072, 1073, 68 Ohio St. 523. The word as used in a verdict against "defendant" in an action for personal injuries by a passenger against a company operating a street railroad and a company owning the road and leasing it to the operating company, in which but one defense is interposed, was used as a collective noun and included all the parties defendant. West Chicago St. R. Co. v. Horne, 64 N. E. 331, 332, 197 Ill. 250 (citing Bacon v. Schepflin, 56 N. E. 1123, 185 Ill. 122).

In condemnation proceedings the word "defendant" can be used only in an uncommon and liberal sense. The plaintiff complains of nothing, and the defendant denies no past or threatened wrong. Both parties are actors; one to acquire title, the other to get as large pay as he can. Metropolitan Water Co. v. Kansas City, 164 Fed. 738, 745.

The term "defendant," as used in a statute providing that an order of sale in foreclosure shall be stayed for nine months on request of the defendant, applies to the mortgagor or persons in privity with him, and not to cross-petitioners seeking to enforce a lien, or to parties defendant having only a contingent or collateral interest in the property. Clack v. Pahl, 106 N. W. 420, 421, 75 Neb. 161.

Code Civ. Proc. § 382, provides that, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, and section 395 provides that, in all cases not specially provided for, the action must be tried in the county in which the defendants or some of them reside, etc. Held, that where plaintiffs sued on a joint cause of action in favor of themselves and F., and F. refused to join as plaintiff and was therefore made a defendant, he was not "a defendant" within section 395 for the purpose of determining the venue of the action, which was properly changed notwithstanding his residence in the county where suit was brought to the county of the residence of the actual defendant. Donohoe v. Wooster, 124 Pac. 730, 731, 163 Cal. 114.

As claimant

The "defendant and his sureties," as referred to in Rev. St. 1892, § 1200, providing that if the verdict in claim proceedings is for plaintiff the court shall enter judgment awarding a recovery by the plaintiff from the "defendant and his sureties," are the claimant in the claim proceedings and principal in the claim bond and the sureties who sign the claim bond. Strobhar v. Jesse French Piano & Organ Co., 37 South. 177, 178, 48 Fla. 158.

As construed in plural

Where an affidavit in garnishment proceedings involving more than one defendant averred that "defendant has not, within the knowledge of the plaintiff, or of the person making affidavit in support of the application, property in their possession within the state, subject to execution, sufficient to satisfy such debt," it was held that the words "property in their possession" rendered the affidavit sufficient as extended to all the defendants. United States Fidelity & Guaranty Co. v. Warnell (Tex.) 103 S. W. 690, 691.

As each defendant

The words "defendants except," in a record reciting that the court overrules the separate demurrer by each of the defendants to the complaint, to which ruling of the court the defendants except, mean the same as if the clerk had written "each of the defendants except." Whitesell v. Strickler, 78 N. E. 845, 847, 167 Ind. 602, 119 Am. St. Rep. 524.

Garnishee

One summoned as trustee in a process of foreign attachment is a "defendant" within St. 1827, c. 359, providing that, where there are two or more defendants living in different counties, a justice suit may be maintained against them all in the county in which either resides. Boynton v. Fly, 12 Me. 17, 19.

As judgment or execution debtor

A "defendant" against whose body Gen. St. 1872, c. 211, § 14, authorizes issuance of an execution, is the defendant in execution, and not merely the defendant in the suit, and will therefore include a plaintiff against whom a judgment has been obtained by defendant. Ex parte Thayer, 11 R. I. 160, 161.

Under a statute authorizing a "defendant" against whom a judgment has been rendered, or any person interested therein, having matters of discharge which have arisen since the judgment, to have the same discharged, on motion in a summary way, either in whole or in part, according to the circum-

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stances, by "defendant" is meant the party against whom the judgment or decree has been entered, and not necessarily the defendant in the suit. Dunton v. McCook (Iowa) 94 N. W. 943, 944.

As party defendant

The word "defendant," as used in the earlier removal acts, having been construed by the Supreme Court to include only a party who was a defendant on the record in the state court, it must be given the same construction as used in Act March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended, which limits the right of removal to the "defendant or defendants." Illinois Cent. R. Co. v. A. Waller & Co., 164 Fed. 358, 360.

"Defendants herein," as used in a decree reciting "the court finds that due and legal notice of the pendency and prayer of this suit has been given to the 'defendants herein' in conformity of law," and adjudging that judgments in favor of those similarly situated as well as the judgments in favor of the ten defendants named and in favor of the other defendants who appeared be annulled does not refer to the ten defendants whose names are written in the title of the decree and to them alone, as such a construction would be inconsistent with the decree against those similarly situated which could have been lawfully rendered only in case the publication of the notice had been made, and the words "defendants herein" must therefore be given a broader interpretation and must include those who are similarly situated as well as those whose names were written. Wallace v. Adams, 143 Fed. 716, 728, 74 C. C. A. 540.

As real party

The word "defendant," as used in a statute declaring that an action must be instituted in the county in which the defendant or some of the defendants resided or may be summoned, does not mean a nominal defendant, but one who has a substantial interest in the suit adverse to plaintiff. Miller v. Meeker, 74 N. W. 962, 963, 54 Neb. 452.

Unnecessary party

In view of section 539 denominating the parties to an action by referring to the plaintiff as the complaining party and "defendant" as the adverse party, under Rev. St. 1899, § 562, providing that suits shall be brought either in the county where defendant resides or where plaintiff resides, and defendant may be found, or, when there are several defendants residing in different counties, then in any such county, the joinder of a person as defendant who is not jointly liable with the other defendant and is not a necessary party is sufficient to give the court jurisdiction as against the party not residing in the county where the suit is brought. State ex rel. Jackson v. Bradley, 91 S. W. 483, 486, 193 Mo. 33.

DEFENSE

See Affirmative Defense; Be No Defense; Cause of Defense; Equitable Defense; Ground of Defense; Inconsistent Defenses; Meritorious Defense; Pretermitted Defense; Self-Defense; Valid Defense.

Any defense, see Any.

Frivolous defense, see Frivolous Pleading.

Other defense, see Other.

See, also, Denial.

A "defense" is any fact or state of facts which will defeat a cause of action in whole or in part. Scott v. District Court of Fifth Judicial Dist. of Barnes County, 107 N. W. 61, 62, 15 N. D. 259 (citing 2 Words and Phrases, p. 1939); but a recital of irrelevant facts does not constitute a defense. Frank v. Miller, 102 N. Y. Supp. 277, 278, 116 App. Div. 855.

A "defense" consists of matter which goes to defeat a right of action. Kilgore Lumber Co. v. Thomas & Hammonds, 128 S. W. 62, 64, 95 Ark. 43.

Gould says that "defense" is, in a less technical sense, used as well in legal as in popular language, to signify, not a form in pleading, but the subject-matter of the plea. In Nebraska it has been defined as applying to every matter tending to diminish or entirely defeat the plaintiff's cause of action. In other jurisdictions it has been interpreted as dealing with principles and not with pleadings. As employed in Const. 1901, § 95, providing that after suit is brought the legislature cannot destroy an existing defense, it has reference to the cause of action and not to the form, and objections for misjoinder and multifariousness are not "defenses" within that meaning of the term. Skains v. Barnes, 53 South. 268, 270, 168 Ala. 426 (citing Gould, Pl. § 15, p. 32; Baier v. Humpall, 20 N. W. 108, 16 Neb. 127; Youngblood v. South Carolina & G. R. Co., 38 S. E. 232, 60 S. C. 9, 85 Am. St. Rep. 824; 13 Cyc. pp. 762, 763).

While the word "defense" ordinarily denotes the means by which defendant prevents the success of plaintiff's action, as used in Act April 6, 1850 (Laws 1850, c. 172, p. 334), prohibiting corporations from interposing the defense of usury, it means any position or attitude in an action in which a corporation seeks to avoid its own contract by showing that it is usurious; but it will not preclude a corporate assignee of a pledgor from asserting the usury in the pledge where the original pledgor could have done so. Merchants' Exch. Nat. Bank of City of New York v. Commercial Warehouse Co. of New York, 49 N. Y. 635, 641.

"Defense," as used in Sayles' Ann. Civ. St. 1897, art. 3107 excluding evidence of usury in certain actions "unless the same

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shall be specially pleaded and verified by the affidavit of the party wishing to avail himself of such defense," means "cause of action." Nocona Nat. Bank v. Bolton (Tex.) 143 S. W. 242, 243.

In the phrase "constitutes no defense to the action," the word "defense" is used in the sense of "bar," and is the language of text-writers generally in such connection. Kendall v. Dunn (W. Va.) 76 S. E. 454, 456, 43 L. R. A. (N. S.) 556.

Counterclaim distinguished

The word "defenses," as used in the rule that statutes of limitation affect remedies, not defenses, is limited to matters purely of defense, and does not embrace matters which may be used as the basis of a counterclaim or a cross-petition. Louisville Banking Co. v. Buchanan, 80 S. W. 193, 194, 117 Ky. 975, 4 Ann. Cas. 929.

Rev. St. 1898, § 2969, defines a "counterclaim" as one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and constituting a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. In an action on a written contract, the answer, after denying the allegations of the complaint, alleged that a mutual mistake had been made in the contract and prayed to have it corrected, to which no reply was filed. Held, that the answer constituted a "counterclaim," not merely matter alleged in defense, and under Rev. St. § 2981, providing that, if the plaintiff fails to reply to the counterclaim, the same shall be deemed admitted, was to be taken as true. Dunham v. Travis, 69 Pac. 468, 470, 25 Utah, 65.

Failure of the payees of a note, on being sued thereon by their indorsee and on the maker's bankruptcy, to assert misrepresentations by the indorsee as to maker's solvency, which induced the payees to take the note, precludes subsequent suit by the payees to recover, on that ground, the amount they paid on judgment against them; the matter being "defensive" and not available as a "counterclaim," within Civ. Code Proc. § 17, permitting independent suit on matter which might have been used as a counterclaim. Jefferson, Noyes & Brown v. Western Nat. Bank, 138 S. W. 308, 310, 144 Ky. 62.

Plaintiffs contracted to cut the timber on defendant's land within two years for a certain price per thousand, part payable on receipt of bill of lading and invoice, and the balance when the cars were unloaded. A year later plaintiffs sued for the amount agreed on for a shipment of two cars. Defendants answered that plaintiffs had wholly failed to perform, whereby they were indebted to defendants in a specified sum (liquidated damages stipulated in the contract), less a credit for the two cars shipped. Held, that the answer did not state a defense, a "defense" going to defeat the right of action, plaintiffs not being bound by the contract to complete performance before being entitled to any payments thereunder, and the time for performance having still some time to run, but only stated a "counterclaim," which is a demand in favor of defendant, against the plaintiff, and one which he might have prosecuted, though the plaintiff had brought no action. Kilgore Lumber Co. v. Thomas & Hammonds, 128 S. W. 62, 64, 95 Ark. 43.

A "counterclaim" presupposes affirmative relief, and, while it may be a full defense to the action, it is not so necessarily. A "counterclaim" may also contain facts sufficient to constitute a defense to a cause of action and yet not be sufficient to warrant affirmative relief. Therefore the rule is that such substantive facts must be averred as will show a liability on the part of plaintiff to the defendant disclosing a complete right of action in his favor against the plaintiff growing out of the subject-matter alleged in the complaint. Where, in an action to cancel a note and mortgage on real estate on the ground of an alleged breach of warranty in the deed of the land from defendant to complainant, a paragraph of defendant's pleading sought a reformation of the deed and mortgage and a foreclosure of the latter, it was to be treated as a counterclaim, notwithstanding that it was designated by defendant as an "answer by way of counterclaim." Johnson v. Sherwood, 73 N. E. 180, 186, 34 Ind. App. 490.

Where plaintiff agreed to sell all its lumber to a foreign corporation and brought suit against the corporation for the price of lumber sold, an answer, alleging that plaintiff had not delivered all the lumber manufactured by it but had wrongfully disposed of a large part of it, was a "defense" operating to defeat plaintiff's recovery, and therefore not a "counterclaim" or "cross-complaint" within St. § 3656, declaring that the statutory counterclaim embraced both recoupment and set-off, must be applied in the sense in which it is employed in the statute, namely, a cross-demand of the defendant against the award in which the plaintiff is entitled upon the cause of action alleged by him, and the term "counterclaim" must be used, as referring to a cause of action of the defendant constituting a defense for affirmative relief, and not as a defense which goes only to defeat plaintiff's cause of action. Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co., 129 N. W. 595, 597, 144 Wis. 362.

Denial

A denial is not a "defense." Zilver v. Cooper, 74 N. Y. Supp. 850, 851, 37 Misc. Rep. 158; Dunlap v. Stewart, 75 N. Y. Supp. 1085; Eells v. Dumary, 82 N. Y. Supp. 531, 532, 84 App. Div. 105. At common law a distinction

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was made between a denial and a "defense." A "denial" was said to be a traverse only of the complaint, while a "defense" was said to to be an affirmative statement of new matter only. A "defense" denies the right of recovery and shows that plaintiff had no cause of action, or that it has been discharged. Skains v. Barnes, 53 South. 268, 270, 168 Ala. 426.

Although a "denial" is often spoken of as a "defense," strictly a "defense" can only consist of new matter. If there be no such new matter to plead as a defense, the answer should end with the denial or denials, and no fact which can be proved under a denial should be pleaded as a defense. Silver & Co. v. Waterman, 111 N. Y. Supp. 546, 549, 127 App. Div. 339.

Partial defense

"Defense," as used in the Code provision authorizing a defendant to set forth in his answer as many grounds of defense as he may have, contemplates either a total denial of the truth or validity of the complaint, or matters which go to the partial extinguishment of the claim. Bush v. Prosser, 11 N. Y. 347, 352.

As a plea of new matter

A "defense" consists of matter which cannot be proved under a denial. Stroock Plush Co. v. Talcott, 113 N. Y. Supp. 214, 216, 129 App. Div. 14; Schultz v. Greenwood Cemetery, 93 N. Y. Supp. 180, 181, 46 Misc. Rep. 299; Silver & Co. v. Waterman, 111 N. Y. Supp. 546, 549, 127 App. Div. 339.

Set-off

The word "defenses," as used in the opinion of the court in the case of Seeman v. Biemann, 84 N. W. 490, 108 Wis. 376, that in an action to enforce a subcontractor's lien the owner of the property affected is entitled to the benefit of all the "defenses" against the claim possessed by the principal contractor, includes all claims by way of set-off which the principal contractor has against the subcontractor. West Allis Lumber Co. v. Wiesenthal, 124 N. W. 498, 500, 141 Wis. 460.

DEFERRED

In a contract providing that "deferred" payments should bear interest at 6 per cent., "deferred" was used in the sense of "put off" credit. Goss Printing Press Co. v. Daily States Pub. Co., 33 South. 760, 761, 109 La. 759.

DEFERRED DIVIDEND POLICY

A "deferred dividend insurance policy" is one which provides that dividends from the surplus shall be declared only among those who survive a period of distribution. United States Life Ins. Co. v. Spinks, 103 S. W. 335, 336, 126 Ky. 405.

DEFICIENCY

See Casual Deficiency.

A mortgage "deficiency" is the balance due after exhausting the property given as security. The deficiency is contingent until it is made certain by sale of the mortgaged property and application of the proceeds. Bailey v. Block, 134 S. W. 323, 325, 104 Tex. 101.

Under Laws 1890, c. 322, tit. 7, empowering the trustees of a town to apply any excess in one fund to any "deficiency" in another, there is a "deficiency" where a tax imposed has not resulted in raising the amount authorized to be raised by the trustees; but, where there has been an amount expended or contracted to be expended for a specific purpose in excess of the amount appropriated for that purpose, the expense so contracted is not a deficiency. In re Taxpayers & Freeholders of Village of Plattsburgh, 50 N. Y. Supp. 356, 361, 27 App. Div. 353.

A "deficiency in the preceding year," within Insurance Law, § 268, as amended, which authorizes directors of a county cooperative insurance company to borrow money to pay a loss and to make an estimate of the sum necessary to pay losses and expenses for the current year and supply any deficiency in the preceding year, and assess the amount at such times as would be most advantageous to the company, embraces outstanding claims not paid when the year closed, including money borrowed to pay losses, and is not confined to claims originating in the preceding year. Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co. of Monroe County, 114 N. Y. Supp. 200, 205, 61 Misc. Rep. 457.

The detention of a vessel under a time charter at an intermediate port under a quarantine regulation of the state because she came from a port which was presumptively infected was not caused by a "deficiency of men," within a clause of the charter party relieving the charterer from the payment of hire in case of delay from such deficiency. Clyde Commercial S. S. Co. v. West India S. S. Co., 169 Fed. 275, 278, 94 C. C. A. 551.

DEFILE

See Forcible Defilement.

Defilement of a female is accomplished when any male person not her husband has had sexual intercourse with her, regardless of whether she has given her consent. State v. Botha, 75 Pac. 731, 735, 27 Utah, 289.

DEFINE

See Undefined.

To "define" is to express with precision the constituent ingredients of the essence of that which is to be defined; incongruous,

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accidental, and extraneous features being left out—in such manner that the definition will not apply to any other object than that defined. McDougall v. Monlezun, 38 La. Ann. 223, 229.

The word "define," when used in the title of an act reading "An act to define and punish crimes against children," suggests that some offense is to be created and defined or a definition of some offense that already exists is to be inserted. Milne v. People, 79 N. E. 631, 632, 224 Ill. 125.

As contract or bound

Within the classification of water courses as those whose channels are known and defined and those unknown and undefined, the word "defined" includes a contracted and bounded channel, though the course of the stream may be unknown. Deadwood Cent. Ry. Co. v. Barker, 86 N. W. 619, 621, 14 S. D. 558.

As fix or establish

"Define," as used in the statutes and in Const. art. 11, § 14, declaring that laws shall be passed more clearly defining the property rights of the wife, signifies to prescribe, to fix the bounds, to establish and declare the limits of, any right, power, duty, etc. Dow v. Gould & Curry Silver Min. Co., 31 Cal. 629, 639.

The word "define," when used in connection with the duties of a public officer, means to "fix, establish, or prescribe authoritatively." A statute in placing upon a person appointed the duties of superintending a public institution, subject to the supervision of the county board of commissioners, defines his duties within the meaning of the statutory definition of a public officer, declaring that the term public officer shall be construed to mean all the officers of the state, and other persons whose duties are defined by law. Sanders v. Belue, 58 S. E. 762-764, 78 S. C. 171 (quoting Cent. Dict.).

Since the word "define" is frequently used in legislation to mean "create," or "establish," Act March 1, 1911 (Acts 1911, c. 67), entitled "An act defining the judicial district of the Shelby and Marion superior court, fixing the time and place of holding courts therein," etc., is not unconstitutional because it uses the word "defining" instead of "creating" or "establishing." State v. Bartholomew, 95 N. E. 417, 419, 176 Ind. 182.

DEFINED TERRITORY

By the terms of a contract plaintiff was appointed by defendant an agent for the sale of machinery at De Pere, such agent to have the privilege of making sales in the vicinity of De Pere. On the back of the printed form of contract was the following indorsement: "The design of a vicinity contract is to pay an agent the stipulated commission on whatever machinery he may sell under the provisions of the contract, not in the territory of another agent who had the exclusive right to sell in a defined territory." The agent's territory is not a "defined territory" within the meaning of the indorsement on the contract. The business of these agents is not to sit still at some place and sell machinery to those who come to the agent and want to buy it, but to canvass or work their territory; and these "vicinity contracts" are made, rather than those of a definite territory, on purpose to meet cases of this kind, where a locality may be more closely connected in a business way with any one village than one near by, and to avoid conflict between different agents from border territory. McGeehan v. Gaar, Scott & Co., 100 N. W. 1072, 1074, 122 Wis. 630.

DEFINITE

The word "definite," as used in Acts June 4, 1901 (P. L. 456), providing that from any definite judgment, order, or decree entered by the court of common pleas an appeal may be taken by the party aggrieved to the Supreme Court or superior court, is not used in the sense of "clear" or "unambiguous," but it is used in the same sense as "definitive" is used when preceded to a decree, order, or judgment; that is, opposed to "interlocutory." Where a subcontractor agrees that no lien shall be filed by him, and that, if any is filed, any attorney may appear and strike it off, and a receiver for the owner of the building takes a rule to show cause why an attorney should not enter an appearance for the lien claimant and discontinue a lien proceeding begun by him, an order discharging the rule is interlocutory and not appealable, and not "definite" order within the meaning of the word as used in the statute. Kurrie v. Cottingham, 57 Ala. 1106, 1107, 209 Pa. 12.

DEFINITE AND CERTAIN

The test whether a complaint should be made more "definite and certain" is whether it contains a plain and concise statement of facts constituting the cause of action, enabling defendant to ascertain the charge against him with sufficient definiteness to enable him to properly plead; and therefore the complaint need not show the dates or amounts of payments which are not specifically recoverable, but are merely evidence of the damages in an action for general damages for wrongful acts or negligence of defendant as agent of plaintiff. Mutual Life Ins. Co. of New York v. Granniss, 103 N. Y. Supp. 835, 836, 11 App. Div. 830.

DEFINITE PERIOD

The rule that the payment of a debt due may be extended for a "definite period of time" upon a valuable consideration does not imply that the extension should be to a certain day, and when the extension is susceptible of being made definite or is understood

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by the parties to be for a definite period the agreement should be liberally construed, and hence an extension during one year and until December or Christmas of the next is a definite extension. Cummings v. Badger Lumber Co., 109 S. W. 68, 69, 130 Mo. App. 557 (quoting and adopting definition in West v. Brison, 13 S. W. 95, 99 Mo. 684).

DEFINITELY FIX

Under a congressional grant for a right of way for a railroad through an Indian reservation, providing for the filing of maps of definite location and the approval thereof by the Secretary of the Interior, the grant was a "floating" grant in præsenti until the company filed its map of definite location, and the same was approved by the Secretary of the Interior, whereupon the grant became definite and fixed, attaching to the particular strip of land indicated by the map thus filed and approved, and the title to the land became thereupon vested in the railway company. The route must be considered as "definitely fixed" and cannot be the subject of change at the volition of the company. Spokane & B. C. Ry. Co. v. Washington & G. N. Ry. Co., 95 Pac. 64, 66, 49 Wash. 280 (citing Van Wyck v. Knevals, 1 Sup. Ct. 336, 106 U. S. 360, 366, 367, 27 L. Ed. 201); Oregon Short Line R. Co. v. Stalker, 94 Pac. 59, 63, 14 Idaho, 371 (quoting Van Wyck v. Knevals, 1 Sup. Ct. 336, 106 U. S. 360, 27 L. Ed. 201).

DEFINITION

The word "definition" is in itself difficult to define. What would be possible under a given state of facts would be impossible under another. The word must be accepted with reference to its relation to other words and terms. School Dist. No. 20, Spokane County, v. Bryan, 99 Pac. 28, 29, 51 Wash. 498, 20 L. R. A. (N. S.) 1033.

DEF'LT

The entry, "def'lt," on a judge's docket, is a sufficient entry of the fact that no defense has been filed. Brawner v. Maddox, 58 S. E. 278, 281, 1 Ga. App. 332.

DEFORCEMENT

"Deforcement," within the law relating to ouster from possession, signifies the holding of any lands or tenements to which another person has a right and includes ouster affected by abatement, intrusion, disseisin, and discontinuance, any other species of wrong whatsoever, whereby he who has a right to the freehold is kept out of possession, but is contradistinguished from these in that it is only a detainer of the freehold from him who has the right of property, but never had any possession under that right. A species of deforcement is when the ancestor dies seised of an estate in fee simple, which descends to two of his heirs as parceners and one of them enters before the other and will not suffer the coparcener to enter and enjoy his moiety. Dobbins v. Dobbins, 53 S. E. 870, 872, 141 N. C. 210, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682 (citing 3 Black. Com. 167, 174).

DEFORMITY

See Bodily Deformity.

DEFRAUD

See Hinder, Delay, and Defraud.
Injure or defraud, see Injure.
Scheme to defraud, see Scheme.

As defined by lexicographers, the word "defraud" means to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully; to defeat or frustrate wrongfully. The meaning of the word "defraud," when used in the common law or in a statute, is largely influenced by the sense in which it is used and the subject to which it relates. Curley v. United States, 130 Fed. 1, 7, 12, 64 C. C. A. 369.

"If a person shall fraudulently represent a fact to be true, knowing at the time that it is not true, and resorts to the fraudulent representation to obtain money from another, and does so obtain it, he would be guilty of 'defrauding another by deceitful means.'" Young v. State, 46 South. 580, 581, 155 Ala. 145.

The term "defraud," as used in Rev. St. § 5440, covering conspiracies to defraud the United States, cannot be regarded as used in its broadest sense or as covering constructive fraud known only in equity, but must be taken in its criminal aspect as known, if so known, to the common law. A conspiracy to have other persons make entry and purchase public lands, such lands to be conveyed to a corporation for the purpose of enabling the corporation to acquire a larger quantity of such lands than it could lawfully purchase, is not a conspiracy to defraud the United States; the common-law crime of obtaining goods and chattels by false pretenses not extending to the acquisition of realty. United States v. Keitel, 157 Fed. 396, 402.

Advantage and damage implied

To "defraud" implies the obtaining of an unconscionable advantage to one party or the unjust deprivation of property or rights belonging to the other. Under Pen. Code, § 515, providing that one who, with intent to defraud makes a false entry in a book of accounts, shall be guilty of forgery, and sections 718, 721, declaring that, where an intent to defraud is required, intent to defraud any person or association, etc., is sufficient, proof that the president of an insurance company made false entries in the company's

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books, with a view of excluding from the annual reports to the state insurance department all references to syndicate operations and collateral loans, is not alone evidence of an intent to defraud essential to constitute forgery. People v. Hegeman, 107 N. Y. Supp. 261, 267, 57 Misc. Rep. 295.

Artifice or deception implied

The term "defraud," as used in Rev. St. U. S. § 5440, prohibiting a conspiracy to defraud the United States in any manner or for any purpose, should not be construed as limited to frauds respecting property rights, but includes the deprivation of any right by deception or artifice; the act being intended to secure the wholesome administration of the laws and affairs of the United States in the interests of the government. United States v. Stevenson, 30 Sup. Ct. 37, 38, 215 U. S. 200, 54 L. Ed. 157; United States v. Moore, 173 Fed. 122, 123, 128, 131 (citing United States v. Stone, 135 Fed. 392). "Defraud," as used in Rev. St. § 5440, providing for the punishment of conspiracy to defraud the United States, is not limited to frauds respecting property rights, but includes the deprivation by deception or artifice, of its right to perform a governmental duty. Curley v. United States, 130 Fed. 1, 3, 6, 7, 9, 11, 64 C. C. A. 369.

Criminal intent

"To render a deed fraudulent, it is not necessary that the debtor should intend to entirely defeat the creditor in the collection of his claim. Creditors are entitled not only to be paid, but to be paid as their claims accrue; and a debtor has no more right to postpone payment simply for his own advantage than to defeat it altogether. A purpose to delay and hinder a creditor is therefore fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid. Wait, Fraud. Conv. §§ 11, 318, will sustain this view. A conveyance may be made with intent to hinder or delay without an intent to absolutely defraud. Either intent is sufficient. The statute is in the disjunctive, and attempts to attach a separate and specific meaning to each of the words which it employs. A conveyance made by an embarrassed debtor with a view, which was known to the purchaser, to secure the property from attachment, is void, though honestly made; the debtor intending that all creditors should be paid in full." Edgell v. Smith, 40 S. E. 402, 404, 50 W. Va. 349.

Disturb, hinder, or delay synonymous

The word "defraud," as used in the phrase "disturb, hinder, delay, or defraud" creditors, is the most generic term of the four, and really includes all the others, since "to disturb, hinder, or delay" a creditor in the collection of his debts are only different modes of defrauding him of his rights, and these words are used merely as specific statements of various forms of fraud. The words "for the purpose and with the fraudulent intent to defraud their creditors," as used in an affidavit for attachment, are sufficiently broad to include an intent to "hinder and delay their creditors," and, upon a motion to dissolve the attachment for the reason that the specific intent to defraud has not been established by the evidence, it is error to sustain the motion when it appears that the acts complained of were done with intent to hinder and delay creditors. Clayton v. Clark, 92 Pac. 1117, 1118, 76 Kan. 832, 123 Am. St. Rep. 169 (quoting 2 Words and Phrases, p. 1949).

The terms "defraud," "hinder," and "delay" are not equivalent terms, and to hinder or delay creditors is as much within Code 1906, § 3099, as to wholly defraud a creditor. Halfpenny & Hamilton v. Tate & McDevitt, 64 S. E. 28, 29, 65 W. Va. 296; Edgell v. Smith, 40 S. E. 402, 404, 50 W. Va. 349.

Use of mails to defraud

The federal statute making it an offense to use the mails to defraud does not make any discrimination with respect to the right to use of the mails by persons whose vocation is healing between those who profess to cure by the use of mental science and those who use drugs. The healer's good faith is the cardinal question, and, if he practices in good faith without intention to defraud he commits no offense, although in fact the theory and practice followed are worthless. Post v. United States, 135 Fed. 1, 9, 67 C. C. A. 569, 70 L. R. A. 989.

The provisions of the federal statute empowering the Postmaster General to issue orders stopping the use of the mails as an agency in conducting schemes or devices for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, are not restricted to schemes or devices which are wanting of all the elements of a legitimate business, or in which it is intended to return nothing whatever, or nothing at all, equivalent in value for the money obtained, but embraces those whereby a business, otherwise legitimate, is systematically and designedly so conducted that, by means of false representations, its patrons are induced to part with their money in the belief that they are purchasing something different from, superior to, and worth more, than what is actually being sold, although they may approximate in commercial value the price asked and received. Harris v. Rosenberger, 145 Fed. 449, 455–458, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762.

Officers of a labor union who send letters or circulars through the mails to customers of a manufacturing corporation to induce them to withdraw their custom from it for the purpose of ruining its business or forcing it to pay a fine imposed on it for employing nonunion workmen, whether such fine and boycott were initiated by such officers or by

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the union with their participation and approval, are guilty of the offense of using the mails to defraud, in violation of Rev. St. § 5480. United States v. Raish, 163 Fed. 911, 912.

DEGREE

See Appreciable Degree; Highest Degree of Care; Material Degree; Medical Degree.
Any degree, see Any.
Degrees of negligence, see Negligence.
In commission of crime, see Principal.

The term "degrees," in a statute providing that when by law an offense comprises different degrees an indictment may contain counts for the different degrees, is not used in a strictly technical sense, "but as indicating the principal crime as the genus and the lesser as the species and necessarily included within the larger offense," hence the statute does not apply to cases where the crime is not divided by statute and cannot be separated into degrees. State v. McKee, 104 S. W. 486, 488, 126 Mo. App. 524 (quoting and adopting definition in State v. Keeland, 2 S. W. 442, 90 Mo. 337).

In Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 127, 30 Stat. 160, relating to forgings of whatever "degree or stage of manufacture," the words quoted relate only to different stages of the forging process, not extending beyond the completion of that process; and forms that, after being subjected to the final forging process, are further advanced into completed articles practically ready for use, such as axles, piston rods, etc., are removed from said provision into that for manufactured metal in paragraph 193, 30 Stat. 167. United States v. Thomas Prosser & Son, 177 Fed. 569, 570.

Pub. Acts 1909, No. 104, § 2, provides that in all actions against any railroad company by an employé for personal injuries contributory negligence shall not bar recovery, provided the employé's negligence was of a lesser degree than that of the defendant, its officers, agents, or employés, etc. Held, that such act was not merely declaratory of the common law, and that the word "degree" should be construed in the sense of "less," as though the proviso was "provided the negligence of such employé was less than the negligence of such company, its officers, agents or employés." Bruce v. Michigan Cent. R. Co., 138 N. W. 362, 363, 172 Mich. 441.

DEGREE OF CARE

See High Degree of Care and Diligence; Highest Possible Degree of Care and Diligence.

DEGUMMED

Within Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 387, 30 Stat. 186, imposing a duty of $2.50 a pound, if in the gum, and $3 a pound if boiled off, silk fabrics are "degummed" when they are "boiled off" or subjected to a process which removes the gum, and whether a particular piece has been degummed cannot be determined by mere inspection and manipulation, but only by weighing, boiling it off, and then weighing again. H. Mendelson & Co. v. United States, 154 Fed. 33, 34, 83 C. C. A. 145.

DELAY

See Hinder and Delay; Hinder, Delay, and Defraud; Unavoidable Delay; Unreasonable Delay; With as Little Delay as Possible; Without Delay.
Good cause for, see Good Cause.

The word "delay," in Code Civ. Proc. § 572, providing for the discharge of defendant under arrest in civil action where plaintiff unreasonably delays the trial of the action, means a positive act in the way of obstructing the trial, and not a mere neglect to proceed, though the term in its ordinary sense may not imply a positive act. Goff v. Charlier, 89 N. Y. Supp. 722, 44 Misc. Rep. 28.

"Defraud," "hinder," and "delay," as used in a statute relating to fraudulent conveyances, are not synonymous. A purpose to hinder and delay a creditor is therefore fraudulent although the debtor may honestly intend that all his debts shall ultimately be paid. Halfpenny & Hamilton v. Tate & McDevitt, 64 S. E. 28, 29, 65 W. Va. 296. The word "delay" as used in such a statute refers not merely to a question of time, but to the interposition of obstacles in the way of creditors with fraudulent intent to hinder and delay. Linn v. Wright, 18 Tex. 317, 340, 70 Am. Dec. 282; Edgell v. Smith, 40 S. E. 402, 404, 50 W. Va. 349.

The words "vexation" and "delay" in Rev. St. 1909, § 2040, requiring appellant to file an affidavit stating that the appeal is not made for vexation or delay, are not synonymous, but the word "vexation" expresses a peculiar meaning not expressed by any other word in the statute, and an affidavit must contain the word "vexation" as well as the word "delay." Cassidy v. City of St. Joseph, 152 S. W. 306, 308, 247 Mo. 197.

As conversion

See Conversion.

Discrimination

Under Rev. St. Tex. 1895, art. 4574, providing that a railroad company which shall fail or refuse, under regulations of the Railroad Commission, to receive and transport without "delay" or discrimination, tonnage, etc., destined to any point on or over the line of a connecting line, shall be guilty of unjust discrimination, etc., the term "discrimination" is used in its ordinary acceptation as meaning a delivery showing a preference in favor of or against a shipper in the per-

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formance of any act essential to the completion of that service, and is synonymous with "delay" as used in the section. Missouri, K. & T. Ry. Co. of Texas v. Thompson (Tex.) 118 S. W. 618, 622.

DELECTUS PERSONARUM

The principle known as "delectus personarum," under which a third person cannot be introduced into a partnership as a partner without or against the consent of a single member, does not apply to mining partnerships. Blackmarr v. Williamson, 50 S. E. 254, 255, 57 W. Va. 249, 4 Ann. Cas. 265.

DELEGATA POTESTAS NON POTEST DELEGARI

The maxim, "Delegata potestas non potest delegari," expresses the general rule that an agent in whom trust or confidence is imposed, or who is required to exercise discretion or judgment, may not intrust the performance of his duties to another without the consent of his principal, and that one clothed with authority to act for a principal must ordinarily perform the act himself. Winkleblack v. Exchange Nat. Bank, 136 S. W. 712, 716, 155 Mo. App. 1 (quoting and adopting 31 Cyc. p. 1425).

DELEGATE

DELEGATION OF POWER

See Legislative Power; Police Power.

DELEGATIO

"Delegatio" is a form of novation wherein the debtor remains the same as at the first but a new creditor is substituted for the old. "This obligation is discussed by Pothier in his Treatise on the Law of Obligations (Evans' Ed.) vol. 1, pp. 434, 444, and it was at an early day recognized by the common law. See Bracton de Leg. Angl. Lib. 3, c. 2, § 13. In order to the validity of this particular form of the obigation, the concurrence of all three of the parties is requisite: The original creditor, on being otherwise satisfied, discharging the debtor; the new, or indicated, creditor, accepting the debtor as his own; and the debtor, on being discharged from the original contract, entering into the new obligation." Loper v. Somers, 61 Atl. 85, 86, 71 N. J. Law, 657.

DELETERIOUS

A preparation is not "deleterious" to human health, in the ordinary acceptation of that term, simply because one person in a multitude of those using it happens to meet with ill effects. Willson v. Faxon, Williams & Faxon, 122 N. Y. Supp. 778, 781, 138 App. Div. 359.

DELIBERATE—DELIBERATION—DELIBERATELY

The word "deliberate" is derived from two Latin words, which literally mean "concerning" and "to weigh." As an adjective it means that the manner of performance is determined upon after examination and reflection; that the consequences, chances, and means are weighed, carefully considered, and estimated. Craft v. State, 3 Kan. 451, 481, 483.

"Deliberation" means to carefully consider and examine the reasons for and against a choice or measure. The term is often used with reference to the deliberation of a legislative body, or of a board or council, as well as of a jury. People v. Richards, 82 Pac. 691, 693, 1 Cal. App. 566.

The word "deliberate," in a statute making it murder in the first degree for any person purposely and in his deliberate and premeditated malice to kill another, means the mental state or condition of the mind in considering, weighing, and deliberating on the motive which prompts or induces a certain act or line of action. State v. Lindgrind, 74 Pac. 565, 566, 33 Wash. 440. It involves prior purpose to do the act in question. Blevins v. State, 107 S. W. 393, 394, 85 Ark. 195.

"Deliberation" in murder means the weighing of considerations pro and con, after which the killing being determined on becomes willful, deliberate, and premeditated. State v. Mangano, 72 Atl. 366, 367, 77 N. J. Law, 544.

"Deliberately" premeditated malice aforethought means simply "thought upon, resolved upon beforehand, not a thing done suddenly, not a thing that comes into the mind of a sudden, and is done before there is time to think about it, but a thing thought upon or planned some time before, or thought upon long enough before the act is done so that it can reasonably be said to have become a purpose of the mind." Commonwealth v. Tucker, 76 N. E. 127, 138, 140, 141, 189 Mass. 457, 7 L. R. A. (N. S.) 1056.

An information charging that a homicide was committed of defendant's "deliberatedly premeditated malice," instead of "deliberate premeditated malice," as used in the statute defining murder in the first degree, while not couched in the best English, was not defective, and was not rendered defective by misspelling the word "deliberatedly." State v. Lu Sing, 85 Pac. 521, 522, 34 Mont. 31, 9 Ann. Cas. 344.

Upon the trial of an indictment for murder, the defendant was convicted of murder in the first degree by a jury who had been instructed that "the human mind acts so quickly that if you find that this man shot, and had the interval of time, however short,

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to form that intention, it is enough, if he formed the intention and carried it out, that is what is meant by deliberation in the law." Held, that this instruction was erroneous under State v. Deliso, 69 Atl. 218, 75 N. J. Law, 808, and State v. Mangano, 72 Atl. 366, 77 N. J. Law, 544. State v. Clayton, 85 Atl. 173, 83 N. J. Law, 673.

As in a cool state of blood

Deliberation is prolonged premeditation, and as used in the statutes defining murder in the first degree implies a cool state of the blood, and is intended to characterize murders such as proceed from deep malignity of heart, or are prompted by motives of revenge or gain. State v. Speyer, 106 S. W. 505, 509, 207 Mo. 540, 14 L. R. A. (N. S.) 836.

"'Deliberately' means in a cool state of blood. It does not mean brooded over, considered, reflected upon for a week, a day, or an hour, but means an intent to kill, not under influence of passion aroused by some just or lawful cause, but in the furtherance of a formed design to gratify a feeling of revenge or accomplish some other unlawful act." State v. Forsha, 88 S. W. 746, 751, 190 Mo. 296, 4 L. R. A. (N. S.) 576; State v. Megorden, 88 Pac. 306, 312, 49 Or. 259, 14 Ann. Cas. 130; State v. Hottman, 94 S. W. 237, 239, 196 Mo. 110; State v. Kinder, 83 S. W. 964, 966, 184 Mo. 276; State v. McCarver, 92 S. W. 684, 686, 194 Mo. 717; State v. Sharp, 82 S. W. 134, 136, 183 Mo. 715; State v. Todd, 92 S. W. 674, 676, 194 Mo. 377; State v. West, 100 S. W. 478, 481, 202 Mo. 128; State v. Spaugh, 98 S. W. 55, 65, 200 Mo. 571; State v. Davis, 126 S. W. 470, 226 Mo. 493; State v. Vaughan, 98 S. W. 2, 5, 200 Mo. 1; Territory v. Gonzales, 68 Pac. 925, 928, 11 N. M. 301; State v. Barrington, 95 S. W. 235, 261, 198 Mo. 23; Hamblin v. State, 115 N. W. 850, 853, 81 Neb. 148, 16 Ann. Cas. 569; State v. Atchley, 84 S. W. 984, 989, 186 Mo. 174; State v. Jackson, 66 S. W. 938, 939, 167 Mo. 291.

Mind capable of conceiving a purpose implied

The word "deliberate" means to weigh the motives for an act, its consequences, the nature of the crime, or the things connected with the intention, with a view to a decision thereon, and implies that accused was capable of the exercise of mental powers. State v. Jancigaj, 103 Pac. 54, 56, 54 Or. 361 (quoting 2 Words and Phrases, p. 1953).

Premeditate synonymous

"Deliberation" and "premeditated" are synonymous. Cook v. State, 35 South. 665, 676, 46 Fla. 20; Dillon v. State, 119 N. W. 352, 356, 137 Wis. 655, 16 Ann. Cas. 913.

The two terms "deliberate" and "premeditate," while frequently used in connection with homicide as interchangeable, have not exactly the same meaning. "Premeditate" involves the idea of prior consideration, while "deliberation" indicates reflection, a weighing of the consequences of the act in more or less calmness. State v. Exum, 50 S. E. 283, 289, 138 N. C. 599.

No specific length of time implied

"Deliberation" means the lapse of a considerable time between the malicious intent to take life and the actual execution of that intent. Marzen v. People, 50 N. E. 249, 255, 173 Ill. 43.

"Premeditation" means thought of beforehand for any length of time no matter how short. There must be some appreciable period of time between the conception of the intention and the act of killing. State v. Prolow, 108 N. W. 873–875, 98 Minn. 459 (citing State v. Lentz, 47 N. W. 720, 45 Minn. 177; People v. Beckwith, 8 N. E. 662, 103 N. Y. 360; People v. Callaghan, 6 Pac. 49, 4 Utah, 49; People v. Nichol, 34 Cal. 211; People v. Hunt, 59 Cal. 430; Wharton, Crim. Law [10th Ed.] § 380; McClain, Crim. Law, vol. 1, § 358; 6 Words and Phrases, p. 5503); State v. Arata, 105 Pac. 227, 228, 56 Wash. 185, 21 Ann. Cas. 242. But the length of time that the intention existed is immaterial. State v. Powell (Del.) 61 Atl. 966, 971, 5 Pennewill, 24; Franklin v. State, 39 South. 979, 981, 145 Ala. 669 (citing Cleveland v. State, 5 South. 426, 86 Ala. 1, 6); State v. Daniel, 51 S. E. 858, 859, 139 N. C. 549; State v. Davis, 126 S. W. 470, 477, 226 Mo. 493; State v. Roberson, 64 S. E. 182, 184, 150 N. C. 837; People v. Gilbert, 92 N. E. 85, 89, 199 N. Y. 10, 20 Ann. Cas. 769; Green v. State, 39 South. 362, 363, 143 Ala. 2. The "deliberation" need not continue for an hour or even for a minute, but it is sufficient that the design to kill be fully formed and purposely executed. State v. Lang, 66 Atl. 942, 945, 75 N. J. Law, 1; State v. Megordeu, 88 Pac. 306, 311, 49 Or. 259, 14 Ann. Cas. 130.

If a person reflects, though but for a moment, before he acts, it is unquestionably a sufficient "deliberation within the law of homicide." State v. Dodds, 46 S. E. 228, 231, 54 W. Va. 289; State v. Honey (Del.) 65 Atl. 764–766, 6 Pennewill, 148; Dunn v. State, 39 South. 147, 148, 143 Ala. 67 (citing Daughdrill v. State, 21 South. 378, 113 Ala. 32; Cleveland v. State, 5 South. 426, 86 Ala. 1; Smith v. State, 68 Ala. 424; Mitchell v. State, 60 Ala. 26).

If a killing is not the instant effect of impulse, if there is hesitation or doubt to overcome a choice matter as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as "deliberate and premeditated murder." People v. Koenig, 72 N. E. 993, 994, 180 N. Y. 155 (quoting Leighton v. People, 88 N. Y. 117). If a robber with a dirk or pistol turns a corner and meets a bank messenger with a roll of bills, and determines in one moment to get it, and the next shoots or stabs the messen-

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ger dead, takes the package, and flees, his malice is deliberately premeditated, though it occupies only a few seconds. Commonwealth v. Tucker, 76 N. E. 127, 138, 140, 141, 189 Mass 457, 7 L. R. A. (N. S.) 1056.

As willful or willfully

See Willful—Willfully.

DELIBERATIONS AND INVESTIGATIONS

The fact that the assistant district attorney was present and examined witnesses in the grand jury room and consulted with the grand jury regarding the case of accused, although not shown to have been present when the grand jury was voting upon the indictment or deliberating upon it, is not equivalent to proof that he was present at the grand jury's "deliberations and investigations" in violation of Code Cr. Proc. 1895, arts. 414, 559. Moody v. State, 121 S. W. 1117, 1118, 57 Tex. Cr. R. 76.

DELICACY

The word "delicacy" means "extreme propriety," "critical niceness," and "fastidious accuracy." Raley v. State (Tex.) 105 S. W. 342, 344.

DELICT

See Corpus Delicti; In Pari Delicto.

The word "delict" in the definition of a right of action, to the effect that there must be a right claimed or wrong suffered by the plaintiff on the one hand and a duty or "delict" of defendant on the other, means an obligation repudiated or a duty unfulfilled. Bennett v. Thorne, 78 Pac. 936, 940, 36 Wash. 253, 68 L. R. A. 113.

DELINQUENCY

"Delinquency" is "a failure or omission of duty, a fault, a misdeed, an offense, a misdemeanor, a crime." A "delinquent" is one "failing in duty; offending by neglect of duty." Default of the owner of insured property in misstating the nature of his title constitutes a delinquency within a fire policy, providing that loss, if any, shall be payable to the mortgagee, and that 15 days' notice of any delinquency of the assured would be given to him before any suspension or cancellation affecting his interests. People's Sav. Bank v. Retail Merchants' Mut. Fire Ass'n of Iowa, 123 N. W. 198, 199, 146 Iowa, 536, 31 L. R. A. (N. S.) 455.

"Delinquency" and "misconduct" are synonomous. Bailey v. Examining and Trial Board of Police Department of City of Helena, 122 Pac. 572, 574, 45 Mont. 197.

The word "delinquent," as used in statutes relating to taxation, means nothing more than "overdue" and "unpaid." Jenswold v. Minnesota Canal Co., 101 N. W. 603, 604, 93 Minn. 382.

DELINQUENT CHILD

A "delinquent child" referred to in St. 1905, p. 81, § 3, providing that any dependent or delinquent child may be committed to the state school for juvenile offenders, is defined in chapter 610, § 2, subsec. 1, as an "incorrigible minor." Ex parte Lewis, 86 Pac. 996, 3 Cal. App. 738.

The delinquent children law (Sess. Laws 1903, p. 178, c. 85) provides that the words "delinquent child" shall include any child "16 years of age or under" who violates any law. Gibson v. People, 99 Pac. 333, 334, 44 Colo. 600; Wilson v. Same, 99 Pac. 335, 44 Colo. 608.

Under Laws 1907, p. 40, § 1, defining a "delinquent child" as one under 18 years of age who violates any law, is incorrigible, etc., an information charging that accused removed the clothes of an infant female and tried to induce her to have sexual intercourse by arousing her passions, etc., and alleging that the acts tended to lead such child to become a delinquent, sufficiently charged acts tending to induce a child to become "delinquent" as defined by the statute. State v. Dunn, 99 Pac. 278, 280, 53 Or. 304.

The words "delinquent children," as used in Act No. 82, p. 134, of 1906, defining the power of courts with reference to the care, treatment, and control of dependent, neglected, incorrigible, and "delinquent" children, mean children who may be charged with the violation of any criminal law of the state, excepting certain specified offenses, or any criminal ordinance of any city or parish in the state. In re Parker, 43 South. 54, 55, 118 La. 471.

DELINQUENT TAX

All delinquent taxes, see All.

A purchaser in a deed recorded in the auditor's office on December 30th of one year, who paid the taxes against him for the following year, need not pay a duplicate assessment against his vendor, levied through the negligence of the county auditor in failing to correct the tax duplicate, as required by Civ. Code 1902, § 366, so that the taxes against the vendor, though unpaid, are not "delinquent taxes," and sale of the land for nonpayment of such taxes is void. Smith v. Cox, 65 S. E. 222, 224, 83 S. C. 1.

By the phrase "on the third Monday in January following the assessment of taxes all unpaid taxes shall become delinquent," as used in Wilson's Rev. & Ann. St. 1903, c. 75, art. 10, § 101 (section 6013), providing that one-half of all the taxes shall be due on the 15th day of June and the 15th day of December of each year, and "on the third Monday in January following the assessment of taxes all unpaid taxes shall become delinquent," is meant only such taxes as are at that time due and unpaid, and its practical operation is this: If one-half of the tax levied is not

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paid by December 15th of each year, then upon the third Monday of January following the whole amount of the taxes shall be held to have become delinquent. If, however, one half of the tax be paid on or before the 15th of December, the remaining half cannot be held to be due before the 15th of June of the calendar year following. Norton v. Choctaw, O. & G. R. Co., 86 Pac. 287, 289, 16 Okl. 482.

DELINQUENT TAX LIST

Return of, see Return.

By common usage of the term "delinquent tax list" is understood to refer to the notices or other matters with which such lists are included. State ex rel. Cronin v. Cronin, 106 N. W. 986, 987, 75 Neb. 738.

DELINQUENT TAXPAYER

After sale of lands for taxes, the owner is not a "delinquent taxpayer." Honeycutt v. Colgan, 85 Pac. 165, 186, 3 Cal. App. 348.

Under provisions requiring that notice of a proposed tax sale be served on the "delinquent taxpayer," a decedent cannot be considered as a "delinquent taxpayer." When the apparent or registered owner is dead, the notice should be served on the actual owner as the "delinquent taxpayer" as contemplated by the Constitution and statutes. Notice addressed to a deceased owner and served upon a major co-owner is sufficient to bind minor co-owners who have no qualified tutor, even though they reside with the major co-owner upon the property in question where the service is made. In re Interstate Land Co., 43 South. 173, 174, 118 La. 587.

DELIRIUM

"Delirium" is a mental state or condition for the time being of mental unsoundness and irresponsibility. State v. Nowells, 109 N. W. 1016, 1019, 135 Iowa, 53.

DELIRIUM TREMENS

"Delirium tremens" is defined as a violent delirium induced by the excessive and prolonged use of intoxicating liquors. A person suffering under or afflicted with delirium tremens for the time being may be as absolutely insane as an idiot or a maniac. Parrish v. State, 36 South. 1012, 1022, 139 Ala. 16 (citing Webst. Dict.). "An attack of delirium tremens may sometimes follow a single excessive indulgence. Ray, in his treatise on Medical Jurisprudence, says that though it most commonly occurs in habitual drinkers, after a few days of total abstinence from spirituous liquors, it may be the immediate effect of an excess or series of excesses in those who are not habitually intemperate as well as in those who are." Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350, 354, 26 L. Ed. 1055.

While it is well established that insanity will excuse crime, although superinduced by habitual drunkenness and only temporary in the sense that it is curable or will naturally pass off, a distinction is made between a fit of drunkenness sometimes called "delirium tremens" and temporary insanity, a disease resulting from violent dissipation and indulgence in liquors, technically called "delirium tremens." State v. Kidwell, 59 S. E. 494, 495, 62 W. Va. 466, 13 L. R. A. (N. S.) 1024.

DELIVER—DELIVERY

See Claim and Delivery; Constructive Delivery; Failure to Deliver; Immediate Delivery; Manual Delivery; Misdelivery; Money Delivered; Sale and Delivery; Signed, Sealed and Delivered in the Presence of; Symbolical Delivery; Track Delivery; Valid Delivery.

Element of sale, see Sale.

"Delivery" means to place in the power or possession of another, to hand over or transfer to another, or to communicate or make known, but not necessarily an actual passing from one hand to another. Gloucester Mut. Fishing Ins. Co. v. Hall, 96 N. E. 679, 680, 210 Mass. 332, Ann. Cas. 1912D, 348.

"Delivery" of a deed means the final absolute transfer to the grantee of a complete legal instrument sealed by the grantor, covenantor, or obligor. Rendlen v. Edwards, 92 S. W. 731, 732, 116 Mo. App. 390. It is the final act and the formal declaration of the grantor's determination to complete the conveyance or enter into the contract. Garrett v. Goff, 56 S. E. 351, 356, 61 W. Va. 221. A deed is "delivered" where, after its execution, the scrivener, in accordance with the unconditional instructions of the grantor, turns it over to the grantee. Conway v. Rock, 117 N. W. 273, 274, 139 Iowa, 162.

"The acts that will constitute a delivery will vary with the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case." Rapple v. Hughes, 77 Pac. 722, 725, 10 Idaho, 338 (citing Lay v. Neville, 25 Cal. 545).

A letter from a husband to his wife bespeaking either an intention that a savings bank account in his name represented by a book remaining in his possession should belong to his wife, or an assurance that it already belonged to her, can in neither case be taken to evidence or effectuate the delivery necessary to a valid gift. In re Miller, 119 N. Y. Supp. 52, 55, 64 Misc. Rep. 232.

Where title to personal property is retained by the seller by attaching a draft for the purchase price to a bill of lading drawn to his own order, notice to be given the buyer, there is no "delivery" until after payment. Dilman Bros. v. Patterson Produce &

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Commission Co., 58 S. E. 365, 366, 2 Ga. App. 213.

The first and fifth clauses of a contract for the sale of coal provided for delivery on the coal company's docks f. o. b. cars, prior loss to fall on the seller, to be paid for according to weights then determined, at a specified price per ton. The contract also required certain acts by the seller or by both buyer and seller jointly, creating the physical competency of the seller to perform. The second clause specified the time of accumulation of the coal and storage on the dock, and for inspection at the mine or elsewhere. A further paragraph provided for correction of weights applicable only to car weights after delivery at the dock, and the fourth clause required separation on the dock of the coal from which final deliveries were to be made, the last clause declaring that, if the seller should fail to deliver on the docks the full amount of coal of the quality provided for before the close of navigation, the railroad company might on 30 days' notice require other deliveries. Held, that the words "deliver" or "delivery," as used in the last clause, did not mean a final delivery, but a delivery as mentioned in the first clause, and that title to the coal did not pass to the railroad under the contract until final delivery f. o. b. on the cars at the dock. State ex rel. Pittsburgh Coal Co. v. Patterson, 120 N. W. 227, 230, 138 Wis. 475.

The word "deliver," in Rev. St. 1895, arts. 4574, 4575, which provide that a railroad company which refuses to transport and "deliver," without discrimination, tonnage, etc., destined to any point on or over the lines of any connecting line, shall be guilty of unjust discrimination, means more than physical delivery. A shipper at a station, having no freight agent, made out bills of lading routing car loads of lumber over a specified connecting line, and his wishes were known by the railroad. The conductor, who accepted the bills, erased, at the instance of the company, from the bill of lading such routing, and routed the goods over another line, by which they would secure a longer haul. The cars were placed on the track of the specified connecting line, and were in the "physical possession" of such line, but, by reason of a threat of the initial carrier that they would divert all its shipments from that line unless they followed the railroad's routing, such connecting line routed the lumber as fixed by the railroad, though it knew of the wishes of the shipper. Held, that the fact that the shipment was delivered to the designated connecting carrier, but not controlled and routed on its own line because of the action of the initial carrier, was refusal by the initial carrier to "deliver" without discrimination. Thompson v. Missouri, K. & T. R. Co. of Texas, 126 S. W. 257, 103 Tex. 372.

In a charter party, clauses as to "delivery," even as against any parol evidence, simply mean that the ship is turned over for the purpose of the charter. Callahan v. Munson S. S. Co., 130 N. Y. Supp. 869, 870, 71 Misc. Rep. 525. The word "deliver" in a charter party binding the charterer to "deliver" the vessel in port of destination to the owner, etc., is not inconsistent with a contract of affreightment merely. Grimberg v. Columbia Packers' Ass'n, 83 Pac. 194, 195, 47 Or. 257, 114 Am. St. Rep. 927, 8 Ann. Cas. 491.

Where a ship in response to the directions of the charterer put in at a given port and remained there to coal, there was a "delivery" within the terms of the charter party, providing for delivery at that port, even though the crowded condition of the dock prevented the ship from being coaled for several days. Anderson v. Bowring & Co., 197 Fed. 675, 676.

In an action against an administratrix to compel an accounting, a plea that defendant had "delivered and surrendered all assets in her hands as provided by law" is to be construed as meaning that she had delivered the assets to the legatees, or to the probate judge for their benefit. Odom v. Moore, 41 South. 162, 164, 147 Ala. 567.

A telephone company does not "deliver" a message in the ordinary acceptation of that word. It merely furnishes to the patron facilities for carrying on a conversation at long distance. Southern Tel. Co. v. King, 146 S. W. 489, 490, 491, 103 Ark. 160, 39 L. R. A. (N. S.) 402 (citing Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. R. Co., 79 N. W. 315, 76 Minn. 334).

A delivery to one mortgagee of chattels taken out of the legal rightful possession of another mortgagee by the joint wrongful act of the first mortgagee and the mortgagor is not a "delivery" within Rev. Laws, c. 198, § 1. Keepers v. Fleitmann, 100 N. E. 333, 334, 213 Mass. 210.

As either actual or constructive

It is not necessary that there should be a manual "delivery" of a deed to make it effectual. A constructive delivery, or in other words acts showing an intention on the part of the grantor that the deed shall be considered as completely executed, and the title transferred, is sufficient. Kelsa v. Graves, 68 Pac. 607, 608, 64 Kan. 777. Whether the delivery is so far completed as to pass the title is a question of fact, rather than of law, depending largely upon the intent of the grantor to vest the estate in the grantee. Chastek v. Souba, 101 N. W. 618, 619, 93 Minn. 418; Matson v. Johnson, 93 Pac. 324, 325, 48 Wash. 256, 125 Am. St. Rep. 924.

"Delivery" of a deed may be made by acts alone (that is, by doing something and saying nothing), or by words alone (that is,

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by saying something and doing nothing), or it may be delivered by both acts and words. It must, however, be delivered by something answering to the one or the other, or both, and with the intent thereby to give effect to the deed. Elliott v. Murray, 80 N. E. 77, 79, 225 Ill. 107 (citing Rountree v. Smith, 38 N. E. 680, 152 Ill. 493).

The acts necessary to constitute "delivery" within Mills' Ann. St. § 2027, providing that every sale of goods and chattels, unless accompanied by an immediate delivery and by an actual and continued change of possession, is presumptively fraudulent as against creditors of the seller or subsequent purchasers in good faith, are dependent on the nature and situation of the property, and, where the property does not reasonably admit of an actual delivery, it is sufficient if the buyer assume the control and dominion of the property so as to indicate to all concerned a change of ownership. J. W. Hugus & Co. v. Hardenburg, 76 Pac. 543, 545, 19 Colo. App. 464 (citing Cook v. Mann, 6 Colo. 21).

Actual manual delivery, when essential

"Delivery," within Civ. Code, § 1147, making a delivery essential to the validity of a gift, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject. Driscoll v. Driscoll, 77 Pac. 471, 473, 143 Cal. 528.

Acceptance implied

To constitute delivery, there must not only be a parting with control of the deed by the grantor, with present intention that it shall operate as a conveyance of land, but there must likewise be an acceptance, either by the grantee or by some one for him. Smith v. Moore, 62 S. E. 892, 897, 149 N. C. 185; McCune v. Goodwillie, 102 S. W. 997, 1006, 204 Mo. 306.

There was a "delivery and acceptance of a part of the goods" within the statute of frauds, where after the terms of the sale of coal were agreed upon, the seller requested the buyer to confirm their agreement in writing, and the buyer wrote the seller the next day confirming the contract, stating the price and other terms, and within six days thereafter the seller delivered 560 tons of the coal to the buyer, who paid for it. 2 Birdseye's Rev. St. (3d Ed.) p. 2634; Thedford v. Herbert, 87 N. E. 798, 799, 195 N. Y. 63.

Plaintiff contracted with a transfer company to deliver his trunk at a depot. The transfer company's servant placed the trunk in the entrance of the baggageroom of the depot company unchecked, without calling it to the attention of any agent of such company, or advising anyone to whom the trunk belonged. Thereafter another person mistook the trunk for his own and had it checked out. Held, that the mere placing of the trunk in the baggageroom was not a "delivery" to the depot company, and that such company was therefore not liable for its loss. Gregory v. Webb, 89 S. W. 1109, 1111, 40 Tex. Civ. App. 360.

Placing of a car by one carrier on a transfer track maintained by it was not a delivery of the car to defendant road until the car was actually accepted by the train crew of defendant, whose duty it was to carry it to the place to which the car was destined. Seaboard Air Line Ry. v. Friedman, 57 S. E. 778, 779, 128 Ga. 316.

Acceptance by other than grantee

The delivery of a deed by the grantor to a third person, to be held by him and delivered to grantee upon grantor's death, is a valid delivery where there is no reservation by grantor of any control over the deed, though grantee has not empowered such third person to act for him. Rowley v. Bowyer, 71 Atl. 398, 399, 75 N. J. Eq. 80.

The delivery of a check as a gift causa mortis to a person other than the donee, but for his use and benefit, and with instructions to deliver the same to the donee, is a sufficient delivery to pass title, though it does not reach the hands of the donee until after the donor's death. Varley v. Sims, 111 N. W. 269, 271, 100 Minn. 331, 8 L. R. A. (N. S.) 828, 117 Am. St. Rep. 694, 10 Ann. Cas. 473.

Where decedent, an old bachelor of means, caused money to be deposited in a savings bank to the credit of his two sisters, the delivery to the bank was a delivery to them, and the donation had full effect eo instante. Succession of Zacharie, 43 South. 988, 990, 119 La. 150.

Change of possession implied

A written agreement by the vendor to "deliver" a ranch by a specified date obliges him to turn over the actual physical possession. Pierce v. Edwards, 89 Pac. 600, 601, 150 Cal. 650.

The term "delivered," when used in a contract of sale, means a transfer sufficient to give the seller an action for goods sold and delivered, or at least a complete voluntary transfer of the possession of goods from one to another. Under an agreement that, if plaintiff secured for defendant a contract for the sale of certain carriages, he should, when they were delivered, receive a commission, the defendant's offer of delivery and the buyer's refusal of acceptance will not support an action for the commission, unless there was an actual transfer of possession, or the buyer's refusal was caused by defendant's fault. Stanley v. Dryer, 127 N. Y. Supp. 468, 469, 70 Misc. Rep. 561.

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A declaration alleged that plaintiff was in the employ of R.; that R. had contracted with defendants to deliver to them stone for building purposes on certain premises within the control of defendants; that, while in the employ of R. and as his servant, in the execution of the contract with defendants, plaintiff with a team delivered loads of stone on the premises; that it was the duty of defendants to provide for R. and his servants a safe and suitable way for delivery of the stone on the premises within their control, but defendants negligently failed to do so, but furnished plaintiff an unsafe, dangerous, and defective way, whereby plaintiff was injured. Held, that the word "delivery" as used in the declaration should not be construed in a narrow or technical sense, and, when read in connection with the other language of the declaration, imported a transfer of possession of the stone from R., through the agency of plaintiff to defendants with the consent of the latter, so that plaintiff was rightfully on their premises in making such transfer and entitled to a reasonably safe place to make the delivery, or a reasonable opportunity to determine for himself whether he would undertake to make the delivery under the circumstances. Power v. Beattie, 80 N. E. 606, 607, 194 Mass. 170.

To constitute a good "delivery" of policies, it is not necessary that they should have been in the actual possession of the insured. Hardy v. Ætna Life Ins. Co., 70 S. E. 828, 832, 154 N. C. 430.

Change of title implied

To constitute "delivery of a deed," it must clearly appear that it was the intention of the grantor that the deed should pass the title at the time, and that he should lose all control over it. Brumby v. Jones, 141 Fed. 318, 323, 72 C. C. A. 466 (quoting and adopting definition in Gould v. Day, 94 U. S. 405, 24 L. Ed. 232).

Delivery by mail or to carrier

A copy of a motion for new trial is "delivered" to the adverse party when deposited in the mails addressed to him, within Superior Court Rule 41, which provides that no motion for a new trial shall be sustained unless within three days after verdict counsel of the complaining party shall file a motion for a new trial and cause a copy thereof to be "delivered to the adverse counsel on the day the same is filed or within such further time as the court may allow," in view of rule 27, which provides that such notice shall be served by delivering the same personally, or depositing it in the post office, postage prepaid. Gloucester Mut. Fishing Ins. Co. v. Hall, 96 N. E. 679, 680, 210 Mass. 332, Ann. Cas. 1912D, 348.

Delivery of goods to a carrier for transportation to the buyer thereof, in the absence of any agreement as to place of delivery, is "delivery" to the buyer. Burns v. Goddard, 51 S. E. 915, 916, 72 S. C. 355.

A delivery of intoxicating liquors to an express company in wet territory for carriage to the consignee in dry territory is not a "delivery" within Local Option Law (Laws 1907, p. 302) § 13, declaring unlawful the giving away or delivery of intoxicating liquor for the purpose of evading the law in anti-saloon territory. People v. Young, 86 N. E. 589, 591, 237 Ill. 196.

Where a contract of sale specified that "delivery" should be made to a certain railway, which ran through two places, where the sellers maintained their business office and factory, respectively, delivery to the railway at the factory, instead of at the place where the sellers' business office was located, constituted a sufficient delivery under the contract. Baird Bros. v. Walter Pratt & Co., 89 S. W. 648, 652, 6 Ind. T. 38.

Execution as importing

See Execute.

Form of ceremony

A "delivery" of a deed may be by acts without words, or words without acts; the only requirement being that the evidence should show an intention of the grantor that the deed shall become operative and effectual. Noble v. Fickes, 82 N. E. 950, 954, 230 Ill. 594, 13 L. R. A. (N. S.) 1203, 12 Ann. Cas. 282.

No particular form or ceremony is necessary to constitute a "delivery" of a deed. It may be by acts without words, or by words without acts, or both. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, and that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient "delivery." Baker v. Hall, 73 N. E. 351, 353, 214 Ill. 364; Webster v. Sherman, 84 Pac. 878, 881, 33 Mont. 448 (quoting Cady v. Zimmerman, 50 Pac. 553, 20 Mont. 225). Where a husband and wife executed a deed conveying her realty, and the husband and wife agreed that there should be no actual delivery of it to the grantee until after the wife's death, but there was nothing to show that the grantee knew of the understanding, and the deed was actually delivered and recorded during the lifetime of the wife, it was held that the title passed as against the husband. Blake v. Ogden, 79 N. E. 68, 69, 223 Ill. 204.

An owner of a bond executed a formal assignment of it, and delivered the bond and assignment to the assignee, when it was put in the owner's safety deposit box for safekeeping, marked as the property of the assignee, who thereafter took the bond from the box and kept it in her own box for a while, when it was returned to the owner's

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box, where it remained until the latter's death. Held, that there was a sufficient "delivery" with intent to pass title to constitute a valid gift of the bond inter vivos. Bone v. Holmes, 81 N. E. 290, 291, 195 Mass. 495.

As give

"Deliver" and "give" may be treated as synonymous.—Southern Exp. Co. v. State, 58 S. E. 67, 69, 1 Ga. App. 700.

Where the owner of a mercantile business decided to incorporate the same, and, on doing so, one-third of the stock was issued to an employé who had formerly been given one-fourth of the profits of the business in lieu of a salary, the owner taking the employé's notes for the stock and retaining the stock as security, but subsequently speaking of the employé's valuable services, and declaring his intention to give him the stock, and delivering the certificate to him and tearing up the notes, there is a sufficient delivery of the subject-matter to constitute a gift inter vivos. Denunzio's Receiver v. Scholtz, 77 S. W. 715, 716, 117 Ky. 182, 4 Ann. Cas. 529.

As give up for safe-keeping

A "delivery" of a deed is ineffective to pass title, where the grantor does not absolutely devest himself of control over it, or if it is not actually delivered, but is to become effective only upon the grantor's death, there is no valid delivery. Intent to give effect to the deed is essential to a valid delivery, and giving the grantee possession thereof for safe-keeping would not pass title. Benner v. Bailey, 84 N. E. 638, 639, 234 Ill. 79.

Intent

Intention is the controlling element which determines whether a deed has been delivered; a manual transfer from the grantor to the grantee not being essential, and not being sufficient in the absence of an intention to pass title. Hoyt v. Northup, 100 N. E. 164, 165, 256 Ill. 604.

Delivery is consummated when the grantor, by act, word, or both, parts with domination over the instrument, with intent to make it operative, which is accepted by grantee, and such intent is of the essence thereof. Chambers v. Chambers, 127 S. W. 86, 90, 227 Mo. 262, 137 Am. St. Rep. 567. Mere manual transition of an instrument is one thing; "delivery" thereof, as an element of contractual obligation, is another. The former without mutual intent to give validity to the paper, but a mutual intent to the contrary, does not constitute the latter. Carpenter v. Carpenter, 124 N. W. 488, 489, 141 Wis. 544.

A "delivery" of a deed is not effective without an intent on the part of the grantor that it is to be delivered, accompanied by an act to carry out such intent. Franklin Ins. Co. v. Feist, 68 N. E. 188, 190, 31 Ind. App. 390 (citing German Ins. Co. of Freeport v. Gibe, 44 N. E. 490, 162 Ill. 251; Osborne v. Eslinger, 58 N. E. 439, 155 Ind. 357, 80 Am. St. Rep. 240; Fifer v. Rachels, 62 N. E. 68, 27 Ind. App. 654). The mere placing of a deed in the hands of the grantee does not conclusively establish a "delivery" thereof, within the legal meaning of that word. Elliott v. Murray, 80 N. E. 77, 79, 225 Ill. 107 (citing Hollenbeck v. Hollenbeck, 57 N. E. 36, 185 Ill. 101, 103); Oswald v. Caldwell, 80 N. E. 131, 134, 225 Ill. 224; Ward v. Conklin, 83 N. E. 1058, 1060, 232 Ill. 553.

To constitute "delivery of a deed," it is not sufficient that there be a mere delivery of its possession, but the act must be accompanied with intent that the deed shall become operative as such. Melvin v. Melvin, 97 Pac. 696, 698, 8 Cal. App. 684 (citing Kenney v. Parks, 57 Pac. 772, 125 Cal. 146); Baker v. Hall, 73 N. E. 351, 353, 214 Ill. 364; In re Bell's Estate, 130 N. W. 798, 799, 150 Iowa, 725; Schlicher v. Keeler, 61 Atl. 434, 435, 67 N. J. Eq. 635. There must be an intention to part with control over it, and to place it under the power of the grantee, or some one for his use. New v. Germania Fire Ins. Co. (Ind.) 82 N. E. 1005, 1006; Indiana Trust Co. v. Byram, 72 N. E. 670, 672, 36 Ind. App. 6 (citing Berry v. Anderson, 22 Ind. 36; Dearmond v. Dearmond, 10 Ind. 191; Vaughan v. Godman, 94 Ind. 191); Corr v. Martin, 77 N. E. 870, 871, 37 Ind. App. 655.

What is a "delivery" of a deed depends on the intention of the grantor, and any disposal of a deed, accompanied by acts, words, or circumstances which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery. Russell v. May, 90 S. W. 617, 618, 77 Ark. 89; Aber v. Twichell, 116 N. W. 95, 96, 17 N. D. 229; Sappingfield v. King (Or.) 89 Pac. 142, 143, 8 L. R. A. (N. S.) 1066. The real test is: Did the grantor by his acts or words, or both, intend to devest himself of title? If so, the deed is delivered. Young v. McWilliams, 89 Pac. 12, 15, 75 Kan. 243 (citing Latimer v. Latimer, 51 N. E. 548, 174 Ill. 418, 428; Albrecht v. Albrecht, 96 N. W. 1087, 121 Iowa, 521, 524).

The manual deposit of a deed with a third person, to receive and hold for the grantee, with intent thereby to give such paper effect as a deed, and to place the same beyond the custody and control of the grantor, will give such deed validity and efficacy as against the grantor, although some condition is imposed precedent to final delivery to the grantee which may serve to prevent vesting of actual title in him meanwhile. There must be physical tradition of the deed out of the grantor's possession, and there must be the intent to place it out of his control for the benefit of the grantee, in order to constitute delivery. Kittoe v. Willey, 99 N. W. 337, 121 Wis. 548.

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There was no "delivery" of a deed, where the owner of a government homestead, to ostensibly devest himself of title in furtherance of a design to pre-empt other public land signed, acknowledged and recorded the deed which ran to his brother without the latter's knowledge, with no intention to deliver it, and where the grantor kept the deed in his own hands and retained possession of the homestead. McGuire v. Clark, 122 N. W. 675, 676, 85 Neb. 102, 23 L. R. A. (N. S.) 873.

"'Delivery of a deed' is the consummation of the act, the completion of the contract, and in order to its accomplishment there must be a meeting of the minds of the parties of the purpose." Where a quitclaim deed, not intended to pass title, was given by a mother to her son and never recorded but immediately returned to secure the son's promise to support her, there was not a legal delivery sufficient to pass title. Rausch v. Michel, 91 S. W. 99, 104, 192 Mo. 293 (quoting and adopting the definition in McNear v. Williamson, 66 S. W. 160, 166 Mo. 367).

But there was delivery, when a grantor, executing a deed conveying land to take effect at his death, delivered the same to a third person, not for safe-keeping, but with the intention of parting with all control over it, and with instructions to deliver the deed to the grantee after the grantor's death and on payment of a specified sum to a third person, though the grantee died before the grantor. Held to show a delivery of the deed. McCurry v. McCurry (Tex.) 95 S. W. 35, 36.

The requisites of a "delivery" of an insurance policy are: (1) An intention on the part of the person executing the policy to give it legal effect as a completed instrument; (2) the evidencing of the intention by some word or act indicating that the insurer has put the instrument beyond his legal control, though not necessarily beyond his physical control; and (3) acquiescence by the insured in such intention. Hartford Fire Ins. Co. v. Whitman, 79 N. E. 459, 461, 75 Ohio St. 312, 9 Ann. Cas. 218 (citing Vance, Ins. 169).

Whether there has been a "delivery" of a bond depends upon the intent of the obligor to perfect the instrument and make it at once the absolute property of the obligee, and it may be delivered by words without acts, by acts without words, or by both. Ehrlich v. Sklamberg, 119 N. Y. Supp. 337, 339, 65 Misc. Rep. 5.

To constitute a "delivery" of a note, it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself according to its terms by surrendering control over it and intentionally placing it under the power of the payee or of some third person for his use. Digan v. Mandel, 79 N. E. 899, 901, 167 Ind. 586, 119 Am. St. Rep. 515 (quoting Purviance v. Jones, 21 N. E. 1099, 120 Ind. 162, 16 Am. St. Rep. 319).

Notice

Where a bankrupt, two years prior to adjudication, assigned his equity of redemption in certain pledged securities, and notified the pledgee of such assignment, such notice was equivalent to a "delivery" and a taking possession thereof by the assignee within the provisions of the bankruptcy act for notice to creditors of transfers, etc. In re Bird, 180 Fed. 229, 232.

Parting with dominion or control over implied

To constitute "delivery" of a deed, the grantor must part with all dominion, power, and control over it and must retain no right to reclaim or recall it. Stevens v. Stevens, 99 N. E. 917, 918, 256 Ill. 140.

"Retention by the grantor of power of control over the papers in the possession of a depositary deprives the manual tradition of effect as a delivery. The papers are still held by the latter merely as agent for the former, and therefore, in legal effect, by him." Ward v. Russell, 98 N. W. 939, 940, 121 Wis. 77.

To constitute a valid "delivery," a deed must pass from the possession and control of the grantor to that of the grantee, or to some one for his use and benefit, with the intent, at the time, that the title shall pass, or the instrument become effective as a conveyance. Gaylord v. Gaylord, 63 S. E. 1028, 1033, 150 N. C. 222. The "delivery" is consummated when the instrument has passed from the grantor to the grantee or some third person for his use without right of recall. The test of delivery is the relinquishment by the grantor of the custody or control of the deed. When he has formally executed it and acknowledged it and has delivered it unconditionally to the grantee or one acting for him, the transfer is completed and the title has passed. Clark v. Creswell, 76 Atl. 579, 580, 112 Md. 339, 21 Ann. Cas. 338.

The "delivery" of a deed implies a parting with the possession and a surrender of authority over it by the grantor, at the time, and no delivery, either absolute or conditional, can be made without parting at the time with the possession and with all power and control over it by the grantor for the benefit of the grantee. The delivery of a deed is as essential to the passing of the title to the land described in it as is the signing of it or the acknowledgment. It is the final act, without which all other formalities are ineffectual. To constitute a delivery, the grantor must part with the legal possession of the deed and of all right to retain it. The present and future dominion over the deed must pass from the grantor. Cassidy v. Holland, 130 N. W. 771, 773, 27 S. D. 287; Franklin v. Killilea, 104 N. W. 993, 996, 126 Wis. 88.

"Delivery" of a deed is accomplished by the grantor voluntarily passing it to the gran-

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tee, or handing it to some person for him, or by the grantor doing or saying something by means of which he discloses an unmistakable purpose to part with all control over the instrument and puts it out of his power to regain possession thereof. Pierson v. Fisher, 85 Pac. 621, 624, 48 Or. 223.

Where the grantor deposits a deed with a third person to be turned over on his death to the grantee, it constitutes a good "delivery" if he thereby surrenders all control over it. Young v. McWilliams, 89 Pac. 12, 13, 75 Kan. 243 (citing 13 Cyc. p. 569). But he must absolutely devest himself of all control over the same, and if he retains any custody or control over it, or if it is not actually delivered, but is to become effective only upon the grantor's death, there is no valid delivery. Benner v. Bailey, 84 N. E. 638, 639, 234 Ill. 79; Emmons v. Harding, 70 N. E. 142, 145, 162 Ind. 154. Where the grantor gives the deed to a third person with a direction to take and keep it, and, if the grantor never calls for it, to deliver it to the grantee, and the grantor dies without more being done, there is no delivery as there would have been had the grantor parted with control of the deed, and given an unqualified direction that it be delivered, though after his death. Fortune v. Hunt, 63 S. E. 82, 83, 149 N. C. 358. In a suit to restore a deed it appeared that complainant and wife purchased a farm, the title being taken in the wife's name, and resided thereon up to the time of the wife's death. About ten years before the wife died she executed a deed of the farm to her husband, and gave it to him, to be destroyed if she survived him, and to be recorded only in case she did not. The husband survived the wife, but could not find the deed. Held sufficient to show that the deed had been executed and delivered, the fact that the grantor did not reserve the right to control the deed during the lifetime of her husband and delivered possession thereof to him operating as a "delivery" conveying the title in præsenti. Dyer v. Skadan, 87 N. W. 277, 278, 128 Mich. 348, 92 Am. St. Rep. 461.

There can be no "delivery" of a deed unless the deed passes out of and beyond the control of the grantor, and into the actual or constructive control of the grantee. So long as the grantor retains control or the power to recall the possession of the paper, it cannot be said to have been delivered. The custody of the deed may remain with the grantor, provided the control or power to recall it has passed from him. Smith v. Moore (N. C.) 62 S. E. 893, 897 (citing Devlin, Deeds, § 278 et seq.); Taylor v. Selter, 65 N. E. 433, 435, 199 Ill. 555; Bogan v. Swearingen, 65 N. E. 426, 427, 199 Ill. 454; Noble v. Tipton, 76 N. E. 151, 152, 219 Ill. 182, 3 L. R. A. (N. S.) 645 (citing Hawes v. Hawes, 53 N. E. 78, 177 Ill. 409; Spacy v. Ritter, 73 N. E. 447, 214 Ill. 266). Hence where deeds were delivered to and held by one of the grantees, who was the grantor's man of business, subject to the grantor's control, revocation, or alteration while she lived, and the other grantee knew nothing of their existence until after the death of the grantor, there was no "delivery" of the deeds. Joslin v. Goddard, 72 N. E. 948, 949, 187 Mass. 165.

While "delivery" of a deed may be accomplished by a word or act, or by both, by which a grantor expresses a present intention to devest himself of title to property in an appropriate deed, the conduct of the grantor must be such as to devest himself of the title and all other control over the document purporting to convey it. Where the grantor sealed a deed in an envelope, and gave it to one of the grantees, with the request that she keep it for him until he called for it, and neither of the grantees knew the contents of the envelope after the grantor's death, there was no "delivery" of the deed. Sutton v. Gibson, 84 S. W. 335, 336, 119 Ky. 422 (citing Hudson v. Redford [Ky.] 67 S. W. 35).

The test of what constitutes a "delivery" of a gift is that the transfer must be such that, in conjunction with the donative intention, it completely strips the donor of the dominion of the thing given whether it were a tangible chattel or a chose in action. Parker v. Copland, 64 Atl. 129, 130, 70 N. J. Eq. 685 (quoting and adopting definition in Cook v. Lum, 26 Atl. 803, 55 N. J. Law, 373). If a donor with the clearly expressed intention of making a gift make an actual "delivery" into the hands of the donee, the fact that the donor has lawful access to the depository of the thing given does not invalidate the gift, if the donee has also the same access to said depository, and has such control over the thing given that he may remove it at any time he chooses to do so. Beaumont v. Beaumont, 152 Fed. 55, 59, 81 C. C. A. 251 (citing Corle v. Monkhouse, 25 Atl. 157, 50 N. J. Eq. 537, 546; Matthews v. Hoagland, 21 Atl. 1054, 48 N. J. Eq. 455, 485; Industrial Trust Co. v. Scanlon, 58 Atl. 786, 26 R. I. 228, 3 Ann. Cas. 863; Dennin v. Hilton [N. J.] 50 Atl. 600).

Relative to the statute of frauds the "delivery" of possession necessarily implies a change of dominion and control over the property. Where a seller of hogs had agreed to deliver them at the stockyards of a certain railroad company and took them there, but no one was there to receive them and weigh them, there was no "delivery." Shelton v. Thompson, 70 S. W. 256, 257, 96 Mo. App. 327.

Where an instrument is given by one of the signers to the obligee named therein, not as a completed instrument, but subject to the signer's control, or upon an agreed condition, the person receiving it is a mere depository, there not being a technical de-

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livery to him, so that where the principal on a suretyship obligation running to a corporation gave the obligation to the chairman of the board of directors to get another to sign it as surety, who had promised to do so, and told the chairman to return it to him after such other had signed it, so that it could be presented to the board of directors, but it was never signed by such other, and the chairman kept it until it was delivered to the receiver of the corporation to be sued on, there was no "delivery" of the obligation. Dunlap v. Willett, 69 S. E. 222, 224, 153 N. C. 317 (citing 2 Words and Phrases, pp. 1965, 1966).

Recording

The recording of a deed is presumptive evidence of its "delivery," and, being for the grantee's benefit, is presumptive evidence of acceptance thereof, though the presumptions are rebuttable. McCune v. Goodwillie, 102 S. W. 997, 1006, 204 Mo. 306; Hartman v. Thompson, 65 Atl. 117, 122, 104 Md. 389, 118 Am. St. Rep. 422, 10 Ann. Cas. 92 (quoting and adopting definition in Stewart v. Redditt, 3 Md. 79).

The presumption cannot be overcome by declarations by the grantor that the deed was not delivered. Dickey v. Norris, 65 Atl. 541, 216 Pa. 184.

Sale implied

The word "deliver," in a memorandum of an oral contract for the sale of chattels, subscribed by the seller only, which is in these words, "I hereby agree to deliver at Cable eight hundred bushels of No. 2 rye to B. Bros. on or before September 25, 1901," imports a sale and delivery of the rye, and is a sufficient memorandum to satisfy the statute of frauds Bowers v. Whitney, 92 N. W. 540, 541, 88 Minn. 168.

A resolution by corporate directors authorizing the president and secretary to execute and deliver bonds to be issued authorizes the sale of such bonds; the word "delivery" frequently being used to mean the change of title as well as the change of possession of property. McCormick v. Unity Co., 87 N. E. 924, 927, 239 Ill. 306.

As used in an ordinance providing that any person who shall sell, give away, furnish, or cause to be furnished or delivered any intoxicating liquors on Sunday shall be fined, the word "delivered" implies other and more general meaning than the specific or particular words "sell" or "give away"; and one who, at the request of a saloonkeeper, procures liquor from the saloon, which they use together, cannot be fined, since the word "delivered" must be held to extend only to a disposition ejusdem generis with a sale or gift. Norris v. Oakman, 35 South. 450, 451, 138 Ala. 411.

Sealing and acknowledging

Reading, signing, and acknowledgment of a deed without reservation, as a general rule amounts to "delivery." Glade Coal Min. Co. v. Harris, 63 S. E. 873, 876, 65 W. Va. 152.

As set apart

The mere setting aside of goods sold under executory contract of sale is not a "delivery"; they must at least be placed in the power of the vendee. Gross v. Ajello, 116 N. Y. Supp. 380, 382, 132 App. Div. 25. And the setting apart of a certain quantity of lead in a warehouse on mining property is not a "delivery" under a general contract to deliver a certain quantity of lead f. o. b. at another place. American Metal Co. v. Daugherty, 102 S. W. 538, 541, 204 Mo. 71.

But there was a "delivery" of coffee valid against an execution creditor, where it was left with the seller to be roasted, was set apart in different piles from the other stock of the seller, on the front bag of each pile a tag was sewed giving plaintiff's name and address and the kind of coffee and the number of bags, and it was to be delivered to plaintiff when roasted as he should from time to time order, and plaintiff paid part cash and gave notes for the balance, which he subsequently paid. Riggs v. Bair, 62 Atl. 1086-1088, 213 Pa. 402.

As shipment

See Shipment.

Temporary surrender for examination

The fact that a grantee in a deed may, after the execution of the instrument, take it into his hands, does not, of itself, establish a "delivery." Elliott v. Murray, 80 N. E. 77, 79, 225 Ill. 107 (citing Oliver v. Oliver, 36 N. E. 955, 956, 149 Ill. 542, 547).

Transport distinguished

Transport distinguished, see Transport—Transportation.

Of freight

Where a railway company, engaged in switching cars over its switch tracks to and from the transfer tracks of other lines of road, for fixed system of charges, had adopted the custom of receiving loaded cars on its switching tracks, and undertaking to deliver them to the transfer tracks at other points, there was a sufficient delivery to it of certain cars where the shipper had loaded and sealed the cars and notified the carrier's agent of that fact, and directed him to move the cars out, which the agent agreed to do. Texarkana & Ft. S. Ry. Co. v. Rosebrook-Josey Grain Co., 114 S. W. 436, 439, 52 Tex. Civ. App. 156.

Of telegram

"Deliver," as applied to a telegram, means "transmit and deliver." Kirby v. Western Union Telegraph Co., 58 S. E. 10, 12, 77 S. C. 404, 122 Am. St. Rep. 580.

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DELIVERED

As given, see Given.

DELIVERED GALVESTON

The term "delivered Galveston," contained in letters of the buyer and the seller of wheat under an oral contract stating that it was to be "delivered Galveston," cannot be construed as a matter of law to require delivery in elevators at Galveston, and, the testimony as to the terms of the oral contract being contradictory, the construction of the contract in that respect was for the jury. Cameron Mill & Elevator Co. v. Chas. F. Orthwein's Sons, 120 Fed. 463, 469, 56 C. C. A. 613.

DELIVERING CARRIER

The distinction between a "delivering carrier" and a "forwarding carrier" is that the latter term applies to all carriers who transport goods to the "delivering carrier" and the former to the carrier who actually delivers the goods at their destination. Brunk v. Ohio & K. R. Co., 105 S. W. 443, 444, 127 Ky. 304.

DELIVERY IN ESCROW

See Escrow.

DELUSION

See Insane Delusion; Insane—Insanity; Paranoia.

A systematized "delusion" is one based on a false premise, pursued by a logical process of reasoning to an insane conclusion; there being one central delusion, around which other aberrations of the mind converge. One may be possessed of a delusion concerning one subject, and yet be of sound mind on all other subjects, according to the weight of modern authority. A delusion cannot be predicated upon any purely esoteric and abstract subject, for the reason that beliefs concerning such subjects are speculative, and could not be proved false. Taylor v. McClintock, 112 S. W. 405, 412, 414, 87 Ark. 243.

Mistake of fact

"A 'delusion' is a belief in a fact for which there is no foundation." In re Merriman's Appeal, 66 N. W. 372, 373, 108 Mich. 454.

A "delusion" is the mind's spontaneous conception and acceptance of that as a fact which has no real existence except in the imagination, and its persistent adherence to it against all evidence. "Delusion" arises from morbid internal impulse, and has no basis in reason. Taylor v. McClintock, 112 S. W. 405, 412, 413, 414, 87 Ark. 243 (quoting and adopting definition in 4 Words and Phrases 3644; Whart. & S. Med. Jur. §§ 10, 20; And. Law Dict. "Delusion"; Smith v. Smith, 25 Atl. 12, 48 N. J. Eq. 570).

If one persistently believes supposed facts which have no real existence except in his imagination and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, with reference to this subject, under a morbid "delusion," and a delusion in that sense is insanity. Johnson v. Johnson, 65 Atl. 918, 920, 105 Md. 81, 121 Am. St. Rep. 570; Taylor v. McClintock, 112 S. W. 405, 412–414, 87 Ark. 243.

A "delusion" of a testator which will render him of insufficient testamentary capacity to execute a will must be the spontaneous product of the subjective processes of a disordered intellect, inducing a belief without any support in extrinsic evidence; and a mere error in judgment upon proven or admitted facts does not constitute a "delusion," however much it may be at variance with the conclusion reached by unprejudiced minds from the same facts. Stevens v. Myers, 121 Pac. 434, 438, 62 Or. 372.

Unchangeable belief

A "delusion" which might incapacitate one from making a will is a conception of the existence of something extravagant which has no existence whatever, but of which the person entertaining it is incapable of becoming permanently disabused by argument, reason, or proof. All delusions are not insane delusions; the difference between the two species being that one is the product of the reason, the other a figment of the imagination. A will may be set aside because induced by an insane delusion existing at the time of its making. Buford v. Gruber, 122 S. W. 717, 721, 223 Mo. 231 (quoting and adopting 2 Words and Phrases, pp. 1971–1973; Knapp v. Trust Co., 98 S. W. 70, 199 Mo. 668; Benoist v. Murrin, 58 Mo. 307).

A "delusion" is "a diseased state of mind in which a person believes things to exist, which exist only, or, in the degree they are conceived of, only in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary." A person has a "delusion" who believes that a certain state of affairs exists which in fact does not and which can only be accounted for as the result of a perverted imagination without cause or evidence. Where a testator during nearly all his married life entertained a mistaken belief founded upon no sufficient grounds in regard to the fidelity of his wife, he was under a "delusion" such as would void a devise of his property to others on account thereof. In re Jenkins' Will, 80 N. Y. Supp. 664, 665, 39 Misc. Rep. 618 (quoting and adopting definition in Bouv. Law Dict. Citing In re Lapham's Will, 44 N. Y. Supp. 90, 19 Misc. Rep. 77; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 624; Riggs v. American Tract Soc., 95 N. Y. 503).

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DEMAND

See Just and Reasonable Demand; On Demand; Statement of Demand; Written Demand.

After demand, see After.

Other demand, see Other.

A "demand" is a requisition or request to do a particular thing specified, under a claim of right on the part of the person making the request. Penn Mutual Life Ins. Co. v. Maner, 109 S. W. 1084, 1088, 101 Tex. 553. This is the sense in which the word is used in Rev. St. 1899, § 3705, which provides for interest "on accounts after they become due and demand of payment is made." The word "demand" need not be used in making such a legal request; but it is sufficient if any words are used which are understood by both parties to be a demand, or existence of a demand may be shown by circumstantial evidence or inferred from acts and declarations of the parties proven by direct evidence. Babbitt v. Chicago & A. Ry. Co., 130 S. W. 364, 367, 149 Mo. App. 439.

The commencement of an action for money is a "demand" therefor. Beekman Lbr. Co. v. Acme Harvester Co., 114 S. W. 1087, 1097, 215 Mo. 221. The bringing by a trustee in bankruptcy of an action to recover a sum alleged to have been paid by the bankrupt to a creditor as a preference is a demand which starts the running of interest on the claim. Kaufman v. Tredway, 25 Sup. Ct. 33, 34, 195 U. S. 271, 49 L. Ed. 190.

Where a broker who was carrying stocks for a customer which he had bought on margin made a general assignment, and a few days afterwards the customer wrote him asking the amount of his account, which he did not know, and stating that he would remit the amount to defendant for the stocks, and no action was taken by the broker or assignee on such letter, the stocks having been previously pledged by the broker and sold by the pledgee, and the broker was subsequently adjudged a bankrupt, the letter constituted a "demand," failure to comply with which was a breach of the contract and gave the customer an immediate right of action. In re Swift, 114 Fed. 947, 949.

The word "demand" in Laws 1898, No. 25, § 1, which permits a child residing in the vicinity of a school in an adjoining town, who can conveniently be better accommodated in such school, to demand the privileges of the school, and the tuition charged to be paid from the school money in the town in which the pupil resides, implies that the demand is to be made to some person or board, and does not mean the assertion by a pupil of an absolute right to attend another school, but contemplates an application to the board which they should consider. Town of Wallingford v. Town of Clarendon, 69 Atl. 734, 735, 81 Vt. 245.

The word "demand," in St. 1893, [illegible] 511, providing that, if freight addressed to a place beyond the usual route of the carrier first receiving it is injured or lost, must within a reasonable time after demand" give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will himself liable therefor, etc., does not make a "demand" for payment for a loss, and a shipper is entitled to full and complete information regarding the shipment, so far as known to the first carrier, which could be used by such carrier in defending an action for damages. St. Louis & S. F. R. Co. v. McGivney, 91 Pac. 693, 694, 19 Okl. 36[illegible]

Where a custom prevailed at defendant's mine, by which a miner was required to deposit a written demand for props in a box provided by defendant for that purpose, a miner's deposit of a signed order for props in the box was a sufficient "demand" for them, within Mines Act, § 16, providing that it shall be the duty of a mine manager to furnish a sufficient supply of props when demanded. Brazil Block Coal Co. v. [illegible]el, 192 Fed. 108, 110, 112 C. C. A. 448.

As actual demand

In the civil courts constructive d[illegible]is may be, and are, recognized, but n[illegible] in a criminal court in the prosecution [illegible] offense having as one of its statutor[illegible] dients a refusal to pay on demand. [illegible] mand there means actual demand. [illegible] clerk of court held public funds collec[illegible] der an agreement with the county pe[illegible] judicial determination as to whether [illegible] the county was entitled to them, and the only demand made upon him was prior to the conclusion of the suit in the civil court in favor of the county, he could not be convicted of failure to pay over the same. Commonwealth v. Shoener, 61 Atl. 1093, 1095, 212 Pa. 527.

Rev. St. 1895, art. 3071, imposing a penalty for failure of an insurance company to pay a policy within a specified time when demand for payment has been made, does not authorize recovery unless there is a specific demand, and evidence of the furnishing of proofs of death, and of a statement by insured to the policy holder that it would not pay, and the bringing of suit on the policy, is insufficient. Mutual Life Ins. Co. v. Ford (Tex.) 130 S. W. 769, 778.

As appearance

See Appearance.

Debt due indicated

In the case of a demand note, the word "demand" is not to be treated as a part of the contract, but is used to show that the debt is due. Van Vliet v. Kanter, 119 N. Y. Supp. 187, 188, 65 Misc. Rep. 48 (citing McMullen v. Rafferty, 89 N. Y. 459).

It is well established that a promissory note payable on "demand" is due at once,

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and no demand is necessary before suit; the suit itself being a sufficient demand. Ex parte Howtiz, 84 Pac. 229, 230, 2 Cal. App. 752.

DEMAND (Legal Obligation)

See Debt or Demand; Existing Demand.
Liquidated demand, see Liquidated.
State demand, see State.

Bouvier defines "demand" as a claim, a legal obligation, a word of art of an extent greater in its significance than any other word except "claim." Webster defines it as a thing or amount claimed to be due. It is broad enough to take in all claims demandable or solvable in money. Burns v. Reeves, 28 South. 554, 557, 127 Ala. 127.

The term "demand" may be used to indicate the amount that plaintiff could recover on the face of the summons, in the absence of defense. Riddle v. Bridgewater Milling Co., 64 S. E. 782, 783, 150 N. C. 689.

"Demand" is properly used in reference to a cause of action. Injury to land in that a county unlawfully entered thereon and constructed a road is a "demand" within a statute requiring all demands against a county to be presented to the county commissioners before the action shall be maintainable thereon. Henry v. Board of Com'rs of San Miguel County, Colo., 92 Pac. 697, 41 Colo. 267.

Where a lease for one year provided that the rent should be payable monthly, and suit was brought in a justice court before the end of the term for the installments of rent then due under the lease, the installments subsequently to become due were not a demand existing at the time of commencing that suit within 2 Mills' Ann. St. § 2644, providing that in suits commenced in justice court each party shall bring forward all his demands existing at the time of commencing the suit which are of such a nature as to be consolidated into one action or defense, and on failing to do so he shall be barred from suing for the demand not so consolidated. Curtis v. Hammond, 95 Pac. 921, 922, 43 Colo. 277.

A statute or charter requiring "demands" against a city to be presented to the city council for rejection or allowance, or to be verified, does not apply to claims for damages for personal injuries. Gallamore v. Olympia, 75 Pac. 978, 979, 34 Wash. 379 (citing Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847); Hill v. City of Fond du Lac, 14 N. W. 25, 26, 56 Wis. 242.

Claim distinguished

The words "demand" and "claim" are often interchangeable, and are taken as synonymous. But "demand" is not used in its broadest sense as equivalent with "claims" in Greater New York Charter, § 101, Laws 1901, p. 426, c. 466, providing that interest shall cease to run on sums awarded as damages six months after the date of the confirmation of the report, unless within that time demand therefor be made on the comptroller. It refers to a request made by the payee for money which has theretofore been legally determined as then payable to him, and which is specifically held for payment to him by the city. In re City of New York, 86 N. Y. Supp. 1035, 1038, 91 App. Div. 532.

A "demand" is a peremptory claim to a thing of right. It differs from a claim in that it presupposes that there is no defense or doubt about the question of right. "Demand" will not admit of delay, while "claim" implies that the right is or may be doubtful, and that negotiations shall be had to determine the same. A statement by an owner of land to the adjacent owner after the parties had agreed on a boundary line that he was not satisfied and would like to have the thing settled peaceably is not a "demand" for any part of the land in dispute essential to the maintenance of ejectment therefor. Welborn v. Kimmerling, 89 N. E. 517, 520, 46 Ind. App. 98.

The terms "claims" and "demands," in P. S. 2814, providing for the appointment of commissioners to receive and adjust claims and demands of persons against a decedent, mean the same. Batchelder v. White's Adm'r, 71 Atl. 1111, 1112, 82 Vt. 132.

The word "claim" is comprehensive. It is in a just, juridicial sense a demand of some matter of a right made by one person upon another to do, or to forbear to do, some act or thing as a matter of duty. The term "demand," according to Lord Coke, is the largest word in law, except "claim," and a release of all demands discharges all sorts of actions, rights, titles, conditions before and after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, etc. Code Civ. Proc. § 3162, as amended by Laws 1897, p. 245, provides that the parties or assignees of parties to an action or proceeding against an executor or administrator on a claim or demand against the estate of a deceased person shall not be competent witnesses as to any matter of fact occurring before the death of such person. Held, that the complainant in a suit to enforce a trust in a mining claim against the executors of complainant's alleged co-owner was incompetent to testify to matters occurring before the death of the latter, and to conversations as to such claim, and to declarations of decedent that plaintiff was one of the grantees in the patent. Delmoe v. Long, 88 Pac. 778, 781, 35 Mont. 139, (quoting and adopting definition in Prigg v. Pennsylvania, 16 Pet. [41 U. S.] 615, 10 L. Ed. 1060; And. Law Dict.; and citing Bacon's Abridgement, title "Release," 283; Vedder v. Vedder [N. Y.] 1 Denio, 258).

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The word "claim," as used in Rev. St. §§ 894, 1077, giving county commissioners power to pass on claims of the auditor for services and claims other than those of the auditor, naturally imports a matter of charge which is based on some statute or grows out of the performance of some authorized contract, wherein the inquiry of the commissioners as to the auditor is confined to whether or not the services were rendered; and to other claims to determine the amount due, as contrasted with a mere "demand" unsupported by law. Jones v. Commissioners of Lucas County, 48 N. E. 882, 886, 57 Ohio St. 189, 63 Am. St. Rep. 710.

The word "demand," in Code, §§ 1308, 1309, making all credits taxable, and defining "credit" as including every claim or demand due, or to become due, for money, labor, or other valuable thing, and all money or property of any kind secured by deed or otherwise, is more comprehensive than the word "debt," which imports a sum of money owing on a contract express or implied, and embraces rightful claims, whether founded on a contract, tort, or a superior right of property, and is a word of wider signification than any other except "claim," which means a demand of some matter as of right by one person on another to do or to forbear to do some act or thing as a matter of duty. Under Code, §§ 1308, 1309, a claim on a fire policy for a loss occurring December 23d, which depends for its validity on whether there has been any breach of the conditions of the policy on the part of insured and on his making proofs of loss, is taxable, though the amount of damages had not been ascertained on January 1st following, but ascertained at the time of assessing, and though the insurer had the option to rebuild, since the value of the claim must be estimated by the assessor who is not limited to conditions known on January 1st, but who may use such information as may be available at the time of assessing, and since the claim of insured on insurer, even though there be an election to rebuild, is for property due on contract or a claim due or to become due for money, labor, or other valuable thing. Talley v. Brown, 125 N. W. 248, 249, 146 Iowa, 360, 140 Am. St. Rep. 282 (citing 2 Words and Phrases, pp. 1202, 1973).

Debt distinguished

"Demand," as used in Code 1896, § 3728, permitting set-off of demands not sounding in damages, means more than "debt." Burns v. Reeves, 28 South. 554, 557, 127 Ala. 127.

DEMAND AGAINST ESTATE

The term "demand" within Kirby's Dig. § 114, which requires a claimant against a decedent's estate to append to his demand an affidavit stating that nothing has been paid on the demand except what is credited thereon, and that the sum demanded is justly due, includes all claims capable of assertion against such estates whether arising out of contract or tort, and whether presented by ordinary action or in the probate court. Hayden v. Hayden (Ark.) 150 S. W. 415, 416.

The word "demand," as used in statutes with reference to the allowance and payment of demands against the estates of deceased persons, does not include a claim for attorney's services rendered to the executor; such claims are entitled to priority of payment over the claims of creditors as expenses of administration. Matson & May v. Pearson, 97 S. W. 983, 988, 121 Mo. App. 120.

Expenses accruing after the death of decedent and in connection with the administration of his estate are "demands against the estate," within Mills' Ann. St. § 4870, dividing demands against the estates of decedents into four classes, and providing that one class shall include the expenses of administration and settlement of the estate. United States Fidelity & Guaranty Co. v. People, 98 Pac. 828, 831, 44 Colo. 557.

"Demand" and "claim," as used in P. S. 2814, which provides for the appointment of commissioners to receive and adjust claims and demands of persons against decedent, section 2820 which gives the court power to limit time to present claims, and section 2824 which provides that claims not exhibited shall be barred, mean the same thing. Batchelder v. White's Adm'r, 71 Atl. 1111, 1112, 82 Vt. 132.

"Demand," as used in a statute, which makes persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a "claim or demand against the estate of a deceased person" incompetent as witnesses as to any fact occurring before death of such person, has the same meaning as when used in the Code provisions for the settlement of decedent's estates, where it is used synonymously with "claim" and has reference to such debts or demands against a decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only money judgments would have been rendered. It does not include a family allowance. In re McCausland's Estate, 52 Cal. 568, 576 (quoting and adopting definition in Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140). Nor a suit to enforce a trust in a mining claim against the executors of complainant's alleged co-owner. Delmoe v. Long, 88 Pac. 778, 781, 35 Mont. 139 (quoting and adopting definition in Prigg v. Pennsylvania, 16 Pet. 615, 10 L. Ed. 1060; Anderson's Law Dict.; and citing Bacon's Abridgement, title "Release," 283; Vedder v. Vedder [N. Y.] 1 Denio, 258).

DEMAND FOR RENT

The "demand for rent," within Code Civ. Proc. § 2231, subd. 2, authorizing summary

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proceedings against a tenant holding over after default in payment of rent, when "a demand of rent has been made" or at least three days' notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, is one made to the tenant personally for the payment of the rent absolutely, as distinguished from the three days' notice in the alternative. Peck v. Reid, 123 N. Y. Supp. 253, 255.

DEMAND NOTE

A "demand note," as between maker and payee, is due and payable immediately after delivery and without demand. It is an acknowledgment by the maker that a certain sum is due from him to the payee at the date of the note, and that the latter is entitled to payment of it immediately. The time of payment would be the same if the words "on demand" had been omitted. Curtis v. Smith, 53 Atl. 902, 903, 75 Conn. 429.

Where, in an action on a note, the jury found that an agreement had been made for an extension of the time of payment, that no definite time was agreed upon, and that a reasonable time for such delay was until plaintiff was dissatisfied with the security or until payment was demanded or offered, such finding cannot be considered as making the instrument a "demand note" in the ordinary legal meaning. Lyndon Sav. Bank v. International Co., 62 Atl. 50, 54, 78 Vt. 169, 112 Am. St. Rep. 900.

A note was not a "demand note" where it was not expressly payable on demand, and blanks were left for dates, and the holder was authorized by the maker and indorser to fill in the blanks, and did so, making the note payable on a certain date. Usefof v. Herzenstein, 119 N. Y. Supp. 290, 292, 65 Misc. Rep. 45.

DEMAND ON CONTRACT

See Money Demand on Contract.

DEMENTIA

See Senile Dementia.

"Dementia" is but another word for "crazy"; and when an expert witness said in effect that if he was required to give a name to the disease under which a man over 80 years of age, "practically crazy on the subject of marriage," was laboring, he would call it "senile dementia," he only substituted a technical name for a common one. Hamon v. Hamon, 79 S. W. 422, 426, 180 Mo. 685.

DEMISE

See Grant and Demise.

The term "demise" is usually applied to leases and conveyances of real estate, and contains the idea of a grant. When parties have used it as the operative word applied to a transfer of timber rights and contracts, passing such interest for 91 years and more, by fair interpretation, and considering the nature of the interests, the parties could only have intended an assignment. Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 61 S. E. 185, 190, 147 N. C. 368, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363. The word, also, properly applies to the instrument or means of conveyance. Weander v. Claussen Brew. Ass'n, 84 Pac. 735, 736, 42 Wash. 226, 114 Am. St. Rep. 110, 7 Ann. Cas. 536.

A contract between a life tenant and another was a cropping agreement and not a "demise," within Burns' Ann. St. 1908, § 8069, which provides that when a tenant for life, who shall have demised any land, shall die on or after the rent becomes due and payable, his executor or administrator may recover from the undertenant the whole rent due, etc., where the contract provided that the latter should plow the land let and rented to him, and cultivate a crop of wheat, have it cut and threshed, and deliver one-third of the wheat to the life tenant as the part and share belonging to her, and that he would receive as his part, and in payment for the work and labor done by him, and expenses incurred by him in the production of the crop, two-thirds of the wheat, and the straw. Vawter v. Frame, 96 N. E. 35, 36, 48 Ind. App. 481.

"Demise," in an instrument purporting to "demise" land described for a specified term, and giving the lessee the right to explore and develop the land for oil, gas, and other minerals, means more than a license to enter and occupy for a specified purpose; a demise being a conveyance in fee, for life, or for years. Chandler v. Hart, 119 Pac. 516, 519, 161 Cal. 405, Ann. Cas. 1913B, 1094.

Covenant for quiet enjoyment

Use of the word "demise" in a lease implies a covenant for quiet enjoyment. Clement v. Young-McShea Amusement Co., 67 Atl. 82, 83, 70 N. J. Eq. 677, 118 Am. St. Rep. 747 (citing 1 Washb. Real Prop. 323); Stott v. Rutherford, 92 U. S. 107, 109, 23 L. Ed. 486; Chandler v. Hart, 119 Pac. 516, 519, 161 Cal. 405, Ann. Cas. 1913B, 1094; Ware v. Lithgow, 71 Me. 62, 64 (citing Grannis v. Clark [N. Y.] 8 Cow. 36; Barney v. Keith [N. Y.] 4 Wend. 502; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350).

Covenant of power to give lease

The word "demise" in a lease for years created an implied warranty of title. Stott v. Rutherford, 92 U. S. 107, 109, 23 L. Ed. 486; Chandler v. Hart, 119 Pac. 516, 519, 161 Cal. 405, Ann. Cas. 1913B, 1094; Headley v. Hoopengarner, 55 S. E. 744, 747, 60 W. Va. 626.

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DEMISI

The words "dedi," "concessi," and "demisi," when used in a conveyance of real estate, import and make a conveyance in law. Headley v. Hoopengarner, 55 S. E. 744, 747, 60 W. Va. 626.

"If a man make a lease for years by the word 'concessi' or 'demisi' (which implies a covenant), if the assignee of the lessee be evicted, he shall have a writ of covenant." Wiggins v. Pender, 44 S. E. 362, 365, 132 N. C. 628, 61 L. R. A. 772 (quoting Rawle, Cov. [5th Ed.] § 318).

DEMONSTRATION

See Mathematical Demonstration.

DEMONSTRATIVE EVIDENCE

See Autoptic Proference.

The mere fact of negligence may be called "demonstrative evidence of negligence," for, although the evidence must always be detailed by the mouths of witnesses, yet, when the facts are thus disclosed, they either demonstrate negligence conclusively, or tend to demonstrate it, subject to explanation by the defendant showing that his conduct was consistent with due care. The principle is generally expressed in the Latin phrase "res ipsa loquitur." The meaning was thus expressed by Erle, J., in giving his judgment in a noted case: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." This definition has met with such general approval at the hands of judges in subsequent cases that it has become, so to speak, a legal classic. Oglesby v. Missouri Pac. Ry. Co., 76 S. W. 623, 638, 177 Mo. 272 (dissenting opinion by Valliant, J., quoting with approval from Thomp. Neg.).

DEMONSTRATIVE LEGACY.

See, also, General Legacy.

A "demonstrative legacy" is a bequest of a certain sum of money, stock, or the like, payable out of a particular fund or security. In re Fisher, 87 N. Y. Supp. 567, 568, 93 App. Div. 186 (citing Crawford v. McCarthy, 54 N. E. 277, 159 N. Y. 514); O'Day v. O'Day, 91 S. W. 921, 928, 193 Mo. 62, 4 L. R. A. (N. S.) 922 (quoting and adopting the definition in Armstrong's Appeal, 63 Pa. 312); Rogers v. Rogers (S. C.) 45 S. E. 176, 177 (quoting and adopting definition in Crawford v. McCarthy [N. Y.] 54 N. E. 278). A testator gave legacies of $2,000 each to five persons. He stated that his estate consisted of a claim against the United States, and in the clause naming the executor, he added that, when the claim should be collected from the United States, the legacies should be paid. Held, that the legacies were demonstrative, and on a deficiency of the fund they abated pro rata. Matthews v. Targarona, 65 Atl. 60, 64, 104 Md. 442, 10 Ann. Cas. 153 (quoting and adopting definition in Gelbach v. Shively, 10 Atl. 247, 67 Md. 501).

"A 'demonstrative legacy' is a bequest of a certain amount of money, stock, or the like, payable out of a particular fund or security." It partakes of the nature of a general legacy by bequeathing a specified amount, and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made, but differs from a specified legacy in the particular that, if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate. A direction in a will to a devisee to pay to another a certain sum on deposit in the devisee's name is a specific legacy and not a demonstrative one in favor of the latter. Crawford v. McCarthy, 54 N. E. 277, 278, 159 N. Y. 514.

A "demonstrative legacy" is a gift of money or other property charged on a particular fund in such way as not to amount to a gift of the corpus of the fund nor to evince an intent to relieve the general estate from liability in case the fund fails. Nusly v. Curtis, 85 Pac. 846, 847, 36 Colo. 464, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; White v. White, 53 S. E. 371, 372, 73 S. C. 261.

A "demonstrative legacy" is one of a certain amount or quantity, the particular fund or personal property being pointed out from which it is to be paid or taken; it differing from a "general legacy" in that it does not abate upon insufficiency of assets, and from a "specific legacy" in that there is recourse for its payment from the general estate in the event of ademption. Thompson v. Stephens, 75 S. E. 136, 137, 138 Ga. 205.

Bonds or stock

Where it appears that a legacy of bonds or securities is intended merely as the primary source for the payment of a legacy in money which is to be paid at all events, the legacy is demonstrative, and, on failure of the primary source of payment, the legacy, as one of money, is payable from the general estate. Blair v. Scribner, 57 Atl. 318, 326, 65 N. J. Eq. 498.

DEMURRAGE

As terminal charge, see Terminal Charge.
Interest distinguished, see Interest (On Money).
Rate including, see Rate.

"Demurrage," in the proper sense of the term, is an allowance to a vessel in compen-

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sation for the earnings she is improperly caused to lose, and can only be allowed when profits have either actually been lost or may reasonably be supposed to have been lost, and their amount was previously fixed by contract, or is proven with reasonable certainty. The Colombia, 197 Fed. 661, 662.

"Demurrage" is, strictly, a sum due by express contract for the detention of a vessel, in loading and unloading, beyond the time allowed in the contract of affreightment, and may also apply to the improper detention or delay of a vessel. Southern Ry. Co. v. Lewis, 51 South. 863, 864, 165 Ala. 451; Southern Ry. Co. v. Melton, 65 S. E. 665, 672, 133 Ga. 277 (citing 2 Words and Phrases, p. 1981). It also includes compensation for loss of a vessel's use during repair caused by collision. The Cumberland, 135 Fed. 234, 235.

Demurrage is an allowance made to the master of a ship by the freighters for staying longer in a place than the time first appointed for his departure. It generally depends on positive contract, and is inserted in the charter party; but it may also arise from the customs and usages of particular countries. Duff v. Lawrence (N. Y.) 3 Johns. Cas. 162, 168.

Railroad cars

A railroad may impose reasonable demurrage charges for delay in unloading cars. New Orleans & N. E. R. Co. v. George, 35 South. 193, 196, 82 Miss. 710.

It is competent for a common carrier whose customers, at their option, have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free from any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded. A railroad may demand reasonable charges for demurrage, although there is no stipulation therefor in the bill of lading. Miller v. Georgia Railroad & Banking Co., 15 S. E. 316, 88 Ga. 563, 573, 18 L. R. A. 323, 30 Am. St. Rep. 170.

A railroad company may make a reasonable charge for delay in unloading cars after notice of arrival to the consignee, and such charge is not for transportation, storage, or delivery of freight, within Code, §§ 1202, 1203, which declare that no charge other than that provided by law shall be made. Norfolk & W. R. Co. v. Adams, 18 S. E. 673, 674, 90 Va. 393, 22 L. R. A. 530, 44 Am. St. Rep. 916.

"The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by seagoing vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law wholly inapplicable to railroad carriers." Chicago & N. W. Ry. Co. v. Jenkins, 103 Ill. 588, 599 (cited in Burlington & M. R. R. Co. v. Chicago Lumber Co., 19 N. W. 451, 15 Neb. 390, 393).

DEMURRER

See General Demurrer; Oral Demurrer; Parol Demurrer; Speaking Demurrer; Special Demurrer.

Frivolous demurrer, see Frivolous Pleading.

A "demurrer" is but a legal exception to the sufficiency of the pleading. Wapello State Sav. Bank v. Colton, 122 N. W. 149, 151, 143 Iowa, 359; State Board of Pharmacy v. Davey, 107 N. Y. Supp. 46, 48, 56 Misc. Rep. 568.

A demurrer is a part of the proceeding by which a cause is put at issue, and the order sustaining it eliminates from the pleading the matter demurred to. State v. Portland General Electric Co., 95 Pac. 722, 726, 52 Or. 502.

The meaning of "demurrer" is that, admitting the allegations of the bill or declaration to be true, they are not sufficient to sustain the action. Allen v. South Penn Coal Co., 52 S. E. 454, 459, 58 W. Va. 197.

A "demurrer" is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not therefore be required to further plead. It is not its office to set out facts; but it must stand or fall by the facts as alleged in the opposing pleading, and it can raise only questions of law as to their sufficiency. It is a fundamental rule of law that a demurrer will only lie for defects which appear upon the face of the alleged defective pleading, and extraneous or collateral facts, stated in the demurrer, cannot be considered in deciding upon its validity. Wood v. Kincaid, 57 S. E. 4, 5, 144 N. C. 393.

A "demurrer" is a pleading which imports that the party filing it objects to pleading further or introducing any testimony until he obtains the judgment of the court whether the statement of facts made by his adversary in his pleading is such as to re-

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quire him to answer or proceed further. Bennett v. Bennett, 121 S. W. 495, 497, 137 Ky. 17, Ann. Cas. 1912A, 407 (quoting and adopting Newman, Plead. & Prac. § 540). The office of a demurrer is to specifically point out the defects in the pleading to which it is directed, so as to afford the opposite party the opportunity of curing such defect by amendment. Bryant v. Alabama Great Southern R. Co., 46 South. 484, 486, 155 Ala. 368.

A "demurrer," whatever it may be called, cannot be used to rid a single count of irrelevant, redundant, or improper matter. Under the Kansas Code, it is hardly accurate to designate a demurrer as general or special, and it has no other office than to challenge the sufficiency of pleadings upon one or more of the six specific grounds prescribed. Sparks v. Smeltzer, 93 Pac. 338, 339, 77 Kan. 44 (citing Mayberry v. Kelly, 1 Kan. 116).

The word "demurrer," as used in the statute allowing the state to appeal from a judgment on demurrer, has its usual significance as understood in criminal pleading; i. e., a pleading which puts in issue the legality of the last preceding pleading, and which is pleaded either to an indictment or to a special plea. State v. Moody, 64 S. E. 431, 432, 150 N. C. 847.

As an admission

A "demurrer" is an admission by the adverse party of the facts charged in the preceding pleading. It admits the truth of facts properly pleaded in pleading to which it is addressed, but demands judgment under the law applied to such facts. City of Baltimore v. Thomas, 80 Atl. 726, 728, 115 Md. 212.

The office of a "demurrer" is to admit the facts as alleged, but to declare them insufficient on which to predicate a cause of action or defense. Jefferson v. Scott (Tex.) 135 S. W. 705, 706.

A demurrer admits the truth of the facts stated in the pleading against which it is leveled, and invokes the judgment of the court thereon as to the law as to plaintiff's right of recovery or on matters in bar or avoidance set forth by the answer or reply. Pidgeon v. United Rys. Co. of St. Louis, 183 S. W. 130, 131, 154 Mo. App. 20.

"While a 'demurrer' admits the truth of the material allegations of fact in the pleading demurred to, it does not admit arguments, legal conclusions, or inferences not supported by facts and circumstances therein set forth, nor the construction of statutes or facts that are immaterial or against common knowledge." State ex rel. Wyoming Agricultural College v. Irvine, 84 Pac. 90-93, 14 Wyo. 318; State ex rel. McNamee v. Stobie, 92 S. W. 191, 207, 194 Mo. 14; Bennett v. Bennett, 121 S. W. 495, 497, 137 Ky. 17, Ann. Cas. 1912A, 407.

As answer

See Answer.

Motion to strike distinguished

A motion to strike seeks an order of court of less dignity than a judgment, while a demurrer raises an issue at law and seeks a trial and judgment on that issue. Ewing v. Vernon County, 116 S. W. 518, 519, 216 Mo. 681.

A "demurrer" goes to a pleading as a whole for insufficiency, and is thus distinguished from a motion to strike, which is applicable where the pleading, either as a whole or any part of it, is so framed as to prejudice, or embarrass, or delay a fair trial. If the answer to an alternative writ of mandamus is wholly insufficient as a pleading, a demurrer will lie; but, if it is wholly irrelevant and impedes a fair trial of the cause, it may be stricken on motion. State ex rel. Ellis v. Atlantic Coast Line R. Co., 44 South. 230, 236, 53 Fla. 711.

As plea

See Plea.

DEMURRER TO EVIDENCE

The purpose of a demurrer to the evidence is not to bring before the court an investigation of facts in dispute, nor the weight of evidence, but to refer to the court questions of law arising on the facts as ascertained. Where the parol evidence in a cause is indeterminate or circumstantial, the defendant cannot demur to the evidence, and oblige the plaintiff to join in a demurrer without distinctly admitting on the record every fact which plaintiff's evidence conduces to prove. Bass v. Rublee, 57 Atl. 965, 966, 76 Vt. 395.

"A 'demurrer to evidence' admits the facts the evidence tends to prove, and in passing upon it the court is required to make every inference of fact in favor of the party offering the evidence which a jury might, with propriety, have inferred in his favor, and, if when viewed in this light it is sufficient to support a verdict in his favor, the demurrer should be overruled." Pitthan v. Schaithman, 106 S. W. 103, 104, 127 Mo. App. 29; Clark v. O'Toole, 94 Pac. 547, 550, 20 Okl. 319.

It is not the province of a "demurrer to evidence" "to bring before the court an investigation of the facts in dispute. It is intended to admit and state the facts which the other party attempts to prove, and not merely the testimony which may conduce to prove them. It is intended, also, to admit whatever the jury may reasonably infer from the evidence." Mugge v. Jackson, 39 South. 157, 160, 50 Fla. 235 (citing Ingram v. Jacksonville St. R. Co., 30 South. 800, 43 Fla. 324, 328; Morrison v. McKinnon, 12 Fla. 552, 557).

A "demurrer to the evidence," a proceeding now practically obsolete, was analogous

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to a demurrer to a pleading. It was an objection by one of the parties to an action at law, to the effect that the evidence which his adversary had produced was insufficient in point of law to make out his case or sustain the issue. Upon joinder in such demurrer the jury was discharged and the case was argued to the court, who gave judgment upon the facts as shown in evidence. The expression "demurrer to the evidence" is not strictly accurate, as applied to criminal proceedings, since, after the trial judge has overruled the demurrer, he cannot direct a verdict against the defendant or give judgment against him upon the demurrer. State v. Moody, 64 S. E. 431, 432, 150 N. C. 847 (quoting with approval from Black's Law Dict.).

"Strictly speaking, 'sustaining a demurrer to the evidence' in an equity case means the same that it means in a law case. It means that there is no evidence tending to sustain the plaintiff's case, and therefore none for the trier of fact to weigh. In a law case the court might with propriety overrule a demurrer to the plaintiff's evidence, and the jury might with equal propriety find for the defendant. And the same is true in an equity case. The court might overrule the demurrer to the plaintiff's evidence, and yet, when the case is submitted on the evidence, find for the defendant. In each case, it means that, as a matter of law, there is some evidence to be weighed, but, as a matter of fact, the evidence, when weighed by the trier of fact, is not satisfactory." Anthony v. Kennard Bldg. Co., 87 S. W. 921, 924, 188 Mo. 704.

Motion to instruct verdict distinguished

There is a distinction between a demurrer to the plaintiff's evidence and a directed verdict by the court in plaintiff's favor. To sustain a demurrer to the evidence it is not necessary for the court to pass on the credibility of plaintiff's witnesses. Their credibility is assumed and the probative facts given every reasonable intendment, but a verdict for plaintiff in cases where the burden is on him is not often to be given, even on undisputed testimony, as the jury may not believe the witnesses, and might reach a different conclusion from the inference. Link v. Jackson, 139 S. W. 588, 596, 158 Mo. App. 63.

A motion by defendant at the close of plaintiff's testimony, reciting that plaintiff had failed to allege or prove certain specified things, "wherefore defendant moves the court to instruct the jury to return a verdict for the defendant," was not a "demurrer to the evidence" but a "motion to direct a verdict," and the interposition of the same did not preclude defendant from introducing defensive evidence after it was overruled. Woldert Grocery Co. v. Veltman (Tex.) 83 S. W. 224.

DENIAL

See General Denial; Specific Denial.
Argumentative denial, see Argumentative.
Frivolous denial, see Frivolous Pleading.
See, also, Defense; Deny.

"Denial" implies a previous request. Beckhard v. Rudolph, 63 Atl. 705, 707, 68 N. J. Eq. 740.

A "denial" is a declaration that a statement made is untrue. It is a traverse of the statement of the opposite party. Hankins v. Helms, 100 Pac. 460, 461, 12 Ariz. 178.

As counterclaim

See Counterclaim.

DENIAL OF KNOWLEDGE OR INFORMATION

A "denial of knowledge or information" includes a denial of any knowledge or information. Hence an answer denying knowledge and information sufficient to form a belief as to the allegations contained in specified paragraphs of the complaint is in substantial compliance with Code Civ. Proc. § 500, providing that the answer must contain a denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Hidden v. Godfrey, 85 N. Y. Supp. 197, 198, 88 App. Div. 496.

DENIED OR CANNOT ENFORCE

The phrase "denied or cannot enforce," in Rev. St. U. S. § 641, providing that when any civil suit or criminal prosecution is commenced in any state court against any person who is "denied or cannot enforce," in the judicial tribunals of the state, any right secured to him by any law providing for equal civil rights of citizens of the United States, such suit or prosecution may be removed into the federal Circuit Court, etc., has no application to any case where the rights secured to an accused by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States are recognized or are not denied by the Constitution or laws of the state in which the prosecution is pending. The denial in summoning or impaneling jurors of any equal civil rights secured to an accused by the federal Constitution or laws does not, unless authorized by the state Constitution or laws as interpreted by its highest court, give the right to remove a criminal prosecution from a state to a federal Circuit Court. Commonwealth of Kentucky v. Powers, 26 Sup. Ct. 387, 398, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692.

DENIZENS

"The king's grants shall not inure to the double intent, when made to an alien, of vesting in him the thing granted, and then,

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by implication, constituting him a 'denizen,' so as to enable him to hold an indefeasible estate." Doe ex dem. Governeur v. Robertson, 11 Wheat, 332, 352, 6 L. Ed. 488.

DENOMINATION

Our "denominations of money" are dollars, cents, and mills; the dollars being stated in figures in whole numbers, and the cents and mills decimally. It is a matter of common knowledge that .15, .25, .10, in a list of officers' fees, mean 15 cents, 25 cents, and 10 cents, respectively; that 3.31 means $3.31, and 1.50 means $1.50. Sawyer v. Wilson, 99 S. W. 389, 390, 81 Ark. 319.

DENSE

"Dense" is defined in Webster's International Dictionary as "having the constituent parts massed or crowded together; close; compact; thick; containing much matter in a small space; heavy; opaque." City of St. Paul v. Haugbro, 100 N. W. 470, 471, 93 Minn. 59, 66 L. R. A. 441, 106 Am. St. Rep. 427, 2 Ann. Cas. 580.

DENTIST

See Practice of Dentistry.

Right to practice under license to practice medicine and surgery, see Practice of Medicine and Surgery.

As surgeon

See Surgery.

DENY

See Denial.

To "deny" is to contradict; to gainsay. If a defendant should say in an affidavit, as to an instrument sued on, "I never executed the instrument," this would be a direct denial. Longwell v. Day, 1 Mich. N. P. 286, 288.

To "deny" or abridge, in the sense of the fifteenth amendment to the federal Constitution, providing that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude, there must be some act of a state through its legislative, judicial, or executive departments, or some one exercising the power of the state, whether with or without the sanction of the law, to deny to otherwise qualified voters the right to vote on account of race, color, or condition. If individuals prevented a voter from voting, it would simply be an act of lawless violence; the right of suffrage would not be denied. Karem v. United States, 121 Fed. 250, 258, 57 C. C. A. 486, 61 L. R. A. 437.

DEODANDS

"At common law any personal chattel that even accidentally caused the death of a rational being was forfeited to the sovereign and sold, and the proceeds distributed to the poor, as a cart that ran over a person, a weapon, and the like. They were styled 'deodands.'" Daniels v. Homer, 51 S. E. 992, 994, 139 N. C. 219, 3 L. R. A. (N. S.) 997 (citing 1 Black Com. 300).

DEODORIZE

In a published statement, referring to plaintiff, a candidate for public office, that "it is as much the duty of a citizen to vote against Jimsweeney to-day as it would be to 'deodorize' against the cholera," the word "deodorize" may mean that his moral traits of character are such as to require his banishment from society, and if there is an inducement and innuendo, which, fairly interpreted, would give this meaning, may be libelous. Sweeney v. Baker, 13 W. Va. 158, 193, 31 Am. Rep. 757.

DEP. ON A/C LICENSE

A receipt for money received as "dep. on a/c license" indicates the purpose for which the money was paid, but it does not imply that the money so deposited was to be held conditionally, but on the contrary that it was deposited unconditionally on account of the license. Johnson v. Atkins, 32 South. 879, 881, 44 Fla. 185.

DEPART

DEPART FROM PORT

A vessel "departed from port," within Rev. Laws Mass. c. 198, § 15, which provides that the lien on a vessel for supplies, etc., given by the preceding section, shall be dissolved unless a statement of the demand is filed for record within 30 days after the vessel "departs from the port at which she was when the debt was contracted," where it made daily fishing trips from the port of Boston to sea, beyond the limits of the port and the state, although she did not touch at any other port. The Satellite, 188 Fed. 717, 721.

DEPARTMENT

See Chief of Department; Head of Department; Head of Principal Department; Legislative Department; Municipal Department; Paid Department; Principal Department.

The Louisville school board is not strictly speaking, a "department of municipal government" of the city, but is an independent corporation having in charge the educational facilities of the city of Louisville, and that city is one of the school districts of the state,

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but in dividing the tax levy it is so classed. No substantial difference can be pointed out between its right to the interest on delinquent tax bills and that of the board of park commissioners, the commissioners of charity, or the trustees of the public library. City of Louisville v. Louisville School Board, 84 S. W. 729, 730, 119 Ky. 574.

The city council of Boston is not a "department," within St. 1885, c. 266, § 6, vesting the executive powers of the city in the mayor, to be exercised through the several officers and boards of the city in their respective departments, and providing that such officers and boards shall in their respective departments make all necessary contracts, and St. 1890, c. 418, § 6, providing that all contracts made by any department of the city, involving a certain amount, shall not be deemed executed till the mayor's written approval is affixed thereto. A lease executed only by the mayor in behalf of the city, acting under a vote of the city council, which purported to authorize the board of health to lease the premises as a location for a boat landing, the rental to be charged to the appropriation for city council incidental expenses, was inoperative and void. Commercial Wharf Corp. v. City of Boston, 94 N. E. 805, 807, 208 Mass. 482.

The question whether employés are engaged in the same "department" should be determined by inquiring inter alia whether they are habitually associated or brought together in the performance of their duties, whether they are under the immediate direction and control of the same superior, and whether the duties of one have any relation to or connection with those of the other. An employé in the ladies' suit department of a department store, and an elevator operator through whose negligence she was injured while riding in the elevator, were engaged in different departments as a matter of law, within a statute providing that the fellow-servant rule should not apply as between servants engaged in different departments of labor. Judd v. Letts, 111 Pac. 12, 13, 158 Cal. 359, 41 L. R. A. (N. S.) 156.

A carpenter engaged in the construction of a building and a man operating a freight elevator used in a retail store are engaged in different "departments of labor." Morgan v. J. W. Robinson Co., 107 Pac. 695, 698, 157 Cal. 348.

The "department rule," which is the rule that servants of the same master engaged in different lines of work are not fellow servants within the meaning of the fellow-servant rule, is not limited to railroad cases alone. Where a painter, working on a car under the direction of a paint foreman having authority to hire and discharge men and direct their work, was injured through the negligence of a switchman working under the direction of the general superintendent of the whole car works, in which from 1,000 to 2,500 men were employed, the painter was not a fellow servant of the switchman. Koerner v. St. Louis Car Co., 107 S. W. 481, 484, 209 Mo. 141, 17 L. R. A. (N. S.) 292 (citing Parker v. Hannibal & St. J. R. Co., 19 S. W. 1119, 109 Mo. 362, 18 L. R. A. 802).

Under Sand. & H. Dig. Ark. § 6248, declaring that employés of a railroad corporation shall not be considered fellow servants unless working together to a common purpose of the same grade, and in the same "department" of service, a fireman, who was injured by a collision of trains caused by the failure of a telegraph operator to deliver orders received by him from the train dispatcher, was not engaged in the same department or service of the corporation and was not a fellow servant with such telegraph operator. St. Louis & S. F. R. Co. v. Furry, 114 Fed. 898, 903, 52 C. C. A. 518.

DEPARTMENT REPORT

A report made by a court or by its direction, or in obedience to some requirement of the law, is a "department report." The reports enumerated in Const. arts. 4, 6, requiring all officers of executive departments and public institutions to make full and complete reports to the Governor, and requiring the judges of courts inferior to the Supreme Court to report in writing to the judges of the Supreme Court, are "department reports" contemplated by article 5, § 29, relating to the printing and distribution of department reports. Gillette v. Peabody, 75 Pac. 18, 20, 19 Colo. App. 356.

DEPARTURE

In pleading

See Material Departure.

A "departure" in pleading is where a party quits or departs from the case or defense he has first made and has recourse to another. Weiss v. Sandoval Zinc Co., 165 Ill. App. 417, 418.

"A 'departure' is the statement of matter in a reply, replication, rejoinder, or subsequent pleading, as a cause of action or defense, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it." New matter in a reply which plaintiff is forced to plead to meet the allegations of the answer will not constitute a departure if it does not contradict the facts stated in the petition, and is not adopted as a new basis for relief in place of the cause of action presented by the petition. Hunter Milling Co. v. Allen, 88 Pac. 252, 257, 74 Kan. 679, 8 L. R. A. (N. S.) 291 (quoting and adopting definition in Johnson v. State Bank of Seneca, 52 Pac. 860, 861, 59 Kan. 250, 252).

A "departure" in a pleading is a desertion of the ground which the pleader occupied in his last antecedent pleading and a resort

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to another ground. If the reply asserts some right not counted upon in the declaration, it is a departure. In a suit upon a fire insurance policy, the stipulation against additional insurance being a condition subsequent and set up as a matter of defense by plea, a replication alleging a waiver was not inconsistent with nor a departure from the allegations of the declaration. Eagle Fire Co. v. Lewallen, 47 South. 947, 956, 56 Fla. 246 (citing Andrews' Steph. Pl.).

A "departure" in pleading is said to be when a party quits or departs from the case or defense which he has first made, and has recourse to another. Nelson v. First Nat. Bank, 36 South. 707, 710, 139 Ala. 578, 101 Am. St. Rep. 52 (citing McAden v. Gibson, 5 Ala. 341). When the declaration avers a delivery, etc., and the plea that the plaintiff did not deliver, etc., a replication that plaintiff tendered and defendant refused is a "departure" from the declaration. Pollard v. Taylor, 2 Bibb (5 Ky.) 234, 235.

A reservation in a plea is no new acquisition of a right but a part of the whole title stated in the plea and can in no sense be regarded as matter foreign to that contained in it. It was no "departure" in pleading for a defendant, after pleading liberum tenementum, to rejoin to a replication setting forth a demise that in the demise was contained a reservation to do the acts complained of as trespass. Dutton v. Holden (N. Y.) 4 Wend. 643, 644.

Where, in an action on policies, the complaint was in the ordinary form, and defendant pleaded breach of warranty and false representations, a reply that defendant was estopped to plead such defenses because defendant's physician examined decedent prior to the issuance of the policies, and found him to be in good health, was authorized and did not constitute a "departure." Ferrandini v. Bankers' Life Ass'n of Des Moines, Iowa, 99 Pac. 6, 8, 51 Wash. 442.

DEPENDENCY

See Country or Dependency.

The Dominion of Canada is a "dependency" of Great Britain, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 393, 30 Stat. 187. Myers v. United States, 140 Fed. 648, 654.

DEPENDENT

See Legal Dependent.

"A 'dependent,' as the term is used in reference to benevolent associations, is one who is sustained by another or relies for support upon the aid of another." A child taken from an orphan asylum, when three years old, by a husband and wife, supported by them as a member of their family until 20 years old, and called and treated as their daughter, was during such time a "dependent" of the husband and could lawfully be made the beneficiary of a certificate issued to him by a benefit order which, under the statute and in its charter, was authorized to create a fund only "for the benefit of dependents of deceased members." Murphy v. Nowak, 79 N. E. 112, 114, 223 Ill. 301, 7 L. R. A. (N. S.) 393.

Act Pa. April 15, 1868 (P. L. 103), provided that all life policies which might thereafter mature, and which had been or should be taken out for the benefit of, or bona fide assigned to, the wife or children, or other relative "dependent" on the insured, should be vested in such wife, children, or other relative, free from the claim of insured's creditors. Shortly before the bankruptcy of a firm of which insured was a member, he directed a policy on his life, payable to his executors, administrators, or assigns, to be so changed as to be made payable to his sister as beneficiary. The sister at one time had lived with her father and brothers, including the insured, and had been their housekeeper; but there was no evidence that she was "dependent" on insured at any time. Held, that the attempted change of beneficiary to such sister was ineffectual to entitle her to the proceeds of the policy as against insured's trustee in bankruptcy. South Side Trust Co. v. Wilmarth, 199 Fed. 418, 420, 117 C. C. A. 650.

Where the constitution and by-laws of a fraternal benefit association and the statutes under which its charter is obtained, each authorize the issuance of beneficiary insurance certificates to members of the family, heirs, blood relation, or persons dependent upon the member, the term "dependent," as therein used, is intended to include persons other than members of the family, heirs, or persons related by blood. Sovereign Camp Woodmen of the World v. Noel, 126 Pac. 787, 789, 34 Okl. 596, 41 L. R. A. (N. S.) 648.

A hotel keeper, who agreed to furnish decedent, an unmarried man without living relatives, a home at the hotel for life, in consideration that decedent give him all his property, was not "dependent" on decedent within the above-cited statute. Modern Woodmen of America v. Comeaux, 101 Pac. 1, 2, 79 Kan. 493, 25 L. R. A. (N. S.) 814, 17 Ann. Cas. 865.

Dependence within Hurd's Rev. St. 1909, c. 73, § 258, authorizing the organization of fraternal benefit associations for the benefit of families, heirs, blood relations, and dependents of the members, is a question of fact; but dependence founded on a moral duty to provide for another must be recognized, and a state of dependency may exist though no legal or moral duty rests on one to give aid to the dependent, but dependency cannot rest alone on a promise or contract, and the word "dependent" is in some sense at least used

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as similar to the dependence which usually obtains in the family relation. Royal League v. Shields, 96 N. E. 45, 48, 251 Ill. 250, 36 L. R. A. (N. S.) 208.

Under Gen. St. N. J. p. 153, § 24, which authorizes the incorporation of benefit associations to pay death benefits to the husband, wife, father, mother, son, daughter, brother, sister, and legal representatives of the member, the word "dependents," in a certificate of such an association providing for the payment of benefits to the family, "dependents" or orphans of the member as he might direct, could not be construed in its usual broad sense, but must be held to apply only to one of the persons named in such act. Klee v. Klee, 93 N. Y. Supp. 588, 589, 47 Misc. Rep. 101.

Claimant and her two sisters lived together, and, prior to the marriage of one of them to deceased, it was arranged that after the marriage the four should continue to "run the house," whereupon the wife and one sister, who was in ill health, kept the house, and claimant continued to work for wages, which she contributed to the common fund. After the death of the wife, the home was continued as before, whereupon deceased took out a benefit certificate, naming claimant as beneficiary, in order to assist her to support herself and her invalid sister after his death. Held, sufficient to show that claimant was "dependent" on deceased, within Rev. Laws, c. 119, § 6, limiting beneficiaries in such societies to dependents on the member. Wilber v. Supreme Lodge of New England Order of Protection, 78 N. E. 445, 446, 192 Mass. 477.

As any one not self-supporting

The word "dependent," as used in the by-laws of a beneficial association allowing dependents to be beneficiaries, means that the beneficiary must be dependent on the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish must, it would seem, rest upon some moral, legal, or equitable grounds and not upon the purely voluntary or charitable impulse or disposition of the member. One who is grown and married and has a good salary is not a dependent, within the by-laws of a beneficial association allowing dependents to be beneficiaries. Morey v. Monk, 40 South. 411, 412, 145 Ala. 301.

Children

A daughter to whom her father paid over all his wages, and who managed a household and received board money from her brothers without accounting to her father, is "dependent" on the earnings of her father, within St. 1887, c. 270, § 2, providing that the next of kin who are dependent on an employé for support may maintain an action for his death. Houlihan v. Connecticut River R. Co., 42 N. E. 108, 110, 164 Mass. 555, 557.

Concubine

One who lived with the assured as his concubine is not a "dependent" person within the meaning of the by-laws of a fraternal benefit society, and is not entitled to the fund as a beneficiary. Miller v. Prelle, 122 Ill. App. 380, 385.

Parents

For a parent to be "dependent" on a child for support within Rem. & Bal. Code, § 194, giving dependent parents a right of action for wrongful death of an adult child, it must appear that there is a substantial degree of dependency, need on the part of the parent, and a recognition of it on the part of the child, and an occasional contribution from a son to a parent does not establish a condition of dependency. Bortle v. Northern Pac. Ry. Co., 111 Pac. 788, 789, 60 Wash. 552, Ann. Cas. 1912B, 731. But the statute will not be so strictly construed as to say that it means wholly dependent or that the parent must have no means of support or livelihood other than the deceased. Neither a father, 46 years old, who has successfully carried on a teaming business, is practically out of debt, and who could probably find employment, except for a depression in business conditions, nor his wife are "dependent" within the statute. Kanton v. Kelly, 118 Pac. 890, 891, 65 Wash. 614 (citing Bortle v. Northern Pac. R. Co., 111 Pac. 788, 60 Wash. 552, Ann. Cas. 1912B, 731).

Where a bankrupt lived with his mother and provided for her protection, though she was not "dependent" on him for financial support, he nevertheless cared for a dependent female, and was entitled to the exemption of his homestead, within Civ. Code Ga. 1895, § 5912, which provides that there shall be exempt from levy and sale of the property of every head of a family, or person having the care and support of dependent females of any age, who is not the head of a family, realty or personalty, or both, to the value in the aggregate of $1,600. In re Glisson, 182 Fed. 287, 288.

The mother of a member of a mutual benefit association not living with the insured but with her husband, an able-bodied man, 67 years old, who had recently failed in business, was not "dependent" on the insured because of gifts amounting to $200 within a few months before her death, and hence was not entitled to a benefit under a provision of the association's charter restricting the beneficiaries to dependents of members. Western Commercial Travelers' Ass'n v. Tennent, 106 S. W. 1073, 1077, 128 Mo. App. 541.

In order for a mother to recover, under the provisions of section 4424 of the Civil Code of 1910, for the tortious homicide of her minor child, it must appear that at the time of the homicide she was "dependent," either wholly or partially, upon the child, and that

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the child contributed substantially or materially to the mother's support. In such a case the mother may recover, notwithstanding the father of the child is in life, in good health, living with the family, and exercising his parental rights over the child up to the time of the child's death. It is the fact of contribution and dependency which creates the right of action in favor of the mother, and not the legal obligation to contribute to her support; and the contribution may be either in labor or in money. Fuller v. Inman, 74 S. E. 287, 290, 10 Ga. App. 680.

DEPENDENT CHILD

See State Public School for Dependent Children.

A minor child, who has during his entire life been maintained by his grandparents, who are able and willing to do so, and whose paternal relatives are also anxious to provide for him, is not a "dependent and neglected child" within Pub. Acts Ex. Sess. 1907, No. 6, § 1, as amended by Pub. Acts 1909, No. 310, providing that a dependent and neglected child shall be any child who, for any reason, is destitute or homeless, or dependent on the public, so as to give the probate court jurisdiction to dispose of his custody. Graham v. Gardner, 137 N. W. 223, 224, 171 Mich. 540.

Under Juvenile Court Law (St. 1911, pp. 658, 661, 666), providing in sections 1, 5, and 16 that the words "dependent person" shall mean any person under 21 years who has no parent or guardian willing or capable of exercising proper parental control, or who from any cause is in danger of growing up to lead an idle, dissolute, or immoral life, and section 26, making it a misdemeanor for any person to encourage, cause, or contribute to the dependency or delinquency of such person, an information in a prosecution for causing and encouraging the delinquency of a dependent child, which alleged that she was a female child of the age of 16 years or thereabouts, and had no parents or guardian willing and capable of exercising proper control, and by reason of that fact was in danger of growing up to lead an idle, dissolute, and immoral life, sufficiently charged the dependency of the minor child. Edgington v. Superior Court of Yolo County, 124 Pac. 450, 451, 18 Cal. App. 739.

The words "dependent children," as used in Act No. 82, p. 134, of 1906, entitled an act "defining the power of the district courts of this state and the city courts, with reference to the care, treatment, and control of dependent, neglected, incorrigible, and delinquent children under the age of 16 years," mean any children who are destitute, homeless, abandoned, or depending on the public for support, or who have not proper care or guardianship. In re Parker, 43 South. 54, 55, 118 La. 471.

Laws 1907, c. 41, § 1 (Burns' Ann. St. 1908, § 1642), defines a "dependent child" as one under the age stated who is dependent upon the public for support, or who is destitute, homeless, or abandoned, and section 2, Burns' Ann. St. 1908, § 1643, defines a "neglected child" as one who has not proper parental care or guardianship. Held, that children were neither "dependent" nor "neglected," so as to charge their father for contributing to their neglect under the statute, where their mother, after unsuccessfully attempting to procure a divorce, had taken them to her sister's and refused to bring them to the home which the father offered to furnish on condition that she return to it. Wheeler v. State (Ind.) 100 N. E. 25, 26.

Juvenile court law (St. 1909, c. 133) defines, in section 1, a "dependent child" as any child found wandering and not having any home or proper guardianship, or who has no parent or guardian capable of exercising proper parental control, or whose home, by reason of neglect of his parents or guardian or person in whose custody he may be, is an unfit place. Ex parte Mills Sing, 112 Pac. 582, 14 Cal. App. 512.

DEPENDENT COVENANT

See Independent Covenant; Mutual and Dependent Covenants.

Whether a covenant is "dependent" or "independent" depends on the intention of the parties. Where a covenant goes only to a part of the consideration on both sides, and a breach may be compensated for any damages, it is generally considered independent. Lincoln Trust Co. v. Nathan, 74 S. W. 1007, 1010, 175 Mo. 32; Daly v. City of Carthage, 128 S. W. 265, 267, 143 Mo. App. 564; Withers v. Wabash R. Co., 99 S. W. 34, 37, 122 Mo. App. 282 (quoting and adopting Poage v. Wabash, St. L. & P. Ry. Co., 24 Mo. App. 199).

DEPORTATION

See Order of Deportation.

"Deportation" is the removal of an alien out of the country simply because his presence is deemed inconsistent to public welfare, and without punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken. A proceeding for "deportation," under the Chinese Exclusion Act, is not a criminal proceeding. Low Foon Yin v. United States Immigration Com'r, 145 Fed. 791, 793, 794, 76 C. C. A. 355 (quoting Fong Yue Ting v. United States, 13 Sup. Ct. 1016, 1020, 149 U. S. 698-709, 37 L. Ed. 905).

"Deportation," within the provisions of the Immigration Act that any alien who shall come into the United States "in violation of law" may be deported at any time within two years after arrival, means actual depor-

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tation, and not merely the commencement of proceedings therefor. Botis v. Davies, 173 Fed. 996, 1002.

DEPORTATION PROCEEDING

See Civil Action—Case—Suit—Etc.

DEPOSE

The word "depose" means to give evidence, bear witness or testimony. Bliss v. Shuman, 47 Me. 248, 252.

DEPOSIT

The word "deposit," as used in an agreement by the consignee of a ring obligating him to "deposit" with the consignor a certain sum on the execution of the agreement and certain sums on certain days thereafter, means payment, because of provision in the agreement that the deposit should become the absolute property of the consignor. People v. Gluck, 80 N. E. 1022, 1024, 188 N. Y. 167.

The word "deposited," in a policy of insurance on a stock of sugar and molasses deposited in the sugar manufactory on a sugar plantation on which there is a growing crop, does not refer exclusively to sugar and molasses then existing, but the policy covers sugar to come into the sugar house on the plantation as the result of the future operation of the factory, though the word "deposited," when standing alone, might well be considered as referring exclusively to sugar and molasses then existing and in the sugar house. Royal Ins. Co. v. Miller, 26 Sup. Ct. 46, 49, 199 U. S. 353, 50 L. Ed. 226.

Under Comp. Laws 1909, § 4792, providing that resignations of elective officers may be made by filing or "depositing" such resignation in the office of the county clerk, where a resignation is in fact received in the office while it is open by those in charge, even temporarily, and the attention of the clerk is called to it, it is "deposited" within the meaning of the law. State ex rel. West v. Breckinridge, 126 Pac. 806, 808, 34 Okl. 649.

As file

The word "deposit," as used in Act May 28, 1896, abolishing the office of circuit court commissioner and requiring such commissioners to deposit official documents in their possession with the clerk of the circuit court by which they were appointed, is not synonymous with "filing," and a clerk of court is not entitled to any fee for filing the various papers surrendered. United States v. Van Duzee, 22 Sup. Ct. 648, 650, 185 U. S. 278, 46 L. Ed. 909.

DEPOSIT (Noun)

See Bank Deposit; Certificate of Deposit; Contract of Deposit; General Deposit; Irregular Deposit; Money Deposited in Bank; On Deposit; Special Deposit.

Any deposit, see Any.

Other valuable minerals or deposits, see Other.

Valuable mineral deposits, see Valuable Minerals.

A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor; for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. New York County Nat. Bank v. Massey, 24 Sup. Ct. 199, 201, 192 U. S. 138, 48 L. Ed. 380.

A "deposit" in a bank in discharge of an overdraft is not a deposit within a statute making it an offense to receive a deposit in a bank known to be unsafe or insolvent. But the deposit of a check in a bank, it being treated by the depositor and the bank as money, the former obtaining credit upon which he may draw money, is a deposit of money within the statute. Ellis v. State, 119 N. W. 1110, 1113, 138 Wis. 513, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022.

An indictment of the president of a bank for receiving a deposit knowing the bank to be insolvent, which alleged the receipt of a deposit of the value of $130, was sufficient to show that the deposit was in money, checks, or drafts aggregating the amount specified: the word "deposit" being used in its popular sense to imply that the depositor had placed in the bank money, or evidences or representatives of money such as banks of deposit are authorized to, and do, receive; so that the indictment was not defective for failure to accurately describe the items. Parrish v. Commonwealth, 123 S. W. 339, 341, 136 Ky. 77.

The expression "money deposited in bank," as used in section 4 of the revenue act of 1903, is intended to include money on general "deposit" in bank. Critchfield v. Nance County, 110 N. W. 538, 539, 77 Neb. 807.

Though, strictly speaking, a "deposit" of a portion of the purchase price of land, is not a payment to the vendor, still the word as ordinarily used, covers advanced payments to him. So construing the term, a purchaser upon the vendor failing to make title, as required by his contract for a sale of land, in equity is entitled to recover interest on any advances made on the purchase money, whether with a stakeholder or paid to the vendor, and is also entitled to a lien on the land for the amount of such deposits and the interest. Everett v. Mansfield, 148 Fed. 374, 375, 78 C. C. A. 188, 8 Ann. Cas. 956.

The term "deposit yielding metals or minerals of any kind," as used in B. & C. Comp. § 5668, gives laborers and material-

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men a lien for the working or development of any mine or deposit yielding metals or minerals of any kind. Escott v. Crescent Coal & Navigation Co., 106 Pac. 452, 453, 56 Or. 190.

As a bailment

"A 'deposit' is commonly defined to be a naked bailment of goods to be kept without recompense and to be returned when the bailor shall require it." The depositor is liable for interest in the event of breach of duty, but is not liable in an action on the debt created until there has been a demand, except in case of wrongful conversion or loss by gross negligence of the depositor. Payne v. Gardiner, 29 N. Y. 146, 147; Bates v. Capital State Bank, 110 Pac. 277, 279, 18 Idaho, 429.

General and special deposit distinguished

A "deposit" is in law as well as in fact the placing or leaving with a banker a sum of money for safe-keeping. If the agreement between the parties is that the identical coin or currency shall be laid aside and returned, it is a "special deposit." But if the agreement is that the money shall be returned, not in the specific coin or currency deposited, but in an equal sum, it is a "general deposit." In either case the money is deposited for safe-keeping, and the only distinction between the two kinds of deposit is in the character of the return that is to be made, whether it shall be returned in the identical thing deposited, or in kind. Warren v. Nix, 135 S. W. 896, 899, 97 Ark. 374 (quoting definition from 2 Words and Phrases, p. 1998; citing State v. McFetridge, 54 N. W. 1, 84 Wis. 473, 20 L. R. A. 223).

A "general deposit" is where the bank is given custody of the money deposited with the intention, expressed or implied, that the bank is not required to return the identical money, but only its equivalent; the legal title to the money in such cases passing to the bank. A special deposit is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive back the identical thing deposited, in which case the title remains with the depositor, and, if the subject be money, the bank has no right to mingle it with other funds. Where money was deposited in a bank to secure payment of compensation under a well drilling contract, and, while the depositor had no right to check against the deposit, there was no agreement that the money should be kept separate from the other funds of the bank, it was a general and not a special deposit, though the transaction was called a "trust fund account" on the bank's books. Butcher v. Butler, 114 S. W. 564, 566, 134 Mo. App. 61.

"Deposits" in a bank are special or specific, and general. When the identical money or other thing deposited is to be restored or is given to the bank for some specific and particular purpose, the deposit is special or specific, and the property in deposit remains in the depositor, while general deposits comprise all moneys that are simply deposited in the bank on account of the depositor without being complicated by any other transaction than that of the depositing and withdrawing of the moneys by the customer from time to time, and such a deposit transfers the ownership of the money to the bank, and the relation between the bank and the depositor is that of debtor and creditor. City of Miami v. Shutts, 51 South. 929, 931, 59 Fla. 462 (quoting and adopting definition in Collins v. State, 15 South. 214, 33 Fla. 429).

As a loan

The "deposit" of money in a savings bank, creating the relation of debtor and creditor between the depositor and the bank, returnable on demand, in accordance with certificates of deposit issued at the time, is a "loan" within Insurance Law (Consol. Laws 1909, c. 28) § 36. People v. Thomas, 130 N. Y. Supp. 246, 249, 71 Misc. Rep. 339.

The "deposit" of money in a savings bank creates the relation of debtor and creditor between the depositor and the bank. The transaction between the depositor and the bank is really a loan of money and not a deposit in the strict legal sense of the term. The bank borrows the money, becomes the owner of it, and is charged with a contractual obligation to repay an equal amount at a future time in accordance with the terms of the banker's contract. Schippers v. Kempkes (N. J.) 67 Atl. 1042, 1043.

The deposits of a national bank constitute loans to it and confer on the depositor a mere chose in action. State v. Clement Nat. Bank, 78 Atl. 944, 949, 84 Vt. 167, Ann. Cas. 1912D, 22.

An ordinary "deposit" of money in a bank is not a loan of the money to the bank. Elliott v. Capital City State Bank, 103 N. W. 777, 778, 128 Iowa, 275, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198.

A "deposit" in a bank is a loan payable on demand, and the depositor may not as a general rule maintain an action for his deposit until he has first made a demand for its payment. Pratt v. Union Nat. Bank, 75 Atl. 313, 314, 79 N. J. Law, 117.

A., an employé of a national bank, wrote to a savings bank, stating that he had $5,000 he would like to deposit for six months at 6 per cent., and asked if they could use it. Through its cashier, the savings bank replied that it would use it on a straight-time certificate for one year at 6 per cent. Thereupon A. sent a draft for $5,000 payable to the savings bank, with a request for the certificate of deposit payable to himself, which he indorsed to the national bank. Held, that

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the transaction was a "deposit." Subsequently, upon a request from the savings bank for more money, the national bank wrote, offering to deposit more money, but refusing to make a loan. In response, it received a certificate of deposit, with a letter, asking that it be placed to the credit of the savings bank. The certificate was issued to L., the president of the savings bank, and was by him indorsed to A., who in turn indorsed it to the bank, which gave credit on its books to the savings bank for the amount of the certificate. The certificate was marked "Paid," taken up, and renewal certificates issued from time to time in the same way. After failure of the savings bank, recovery was sought on the last certificate, which was issued directly to A., and signed by the cashier of the savings bank. Held, that the transaction was a "loan" and not a "deposit," and hence did not create a preferential claim. State v. Corning State Sav. Bank, 113 N. W. 500, 503, 136 Iowa, 79.

Time and call deposits distinguished

"Deposits," in banking circles, are disguished as "time" and "call" deposits. The former is for a specified time, and the latter is subject to call at the pleasure of the depositor, and banks receiving deposits offer no security, but the money is placed in the bank because of the confidence in its solvency and ability to repay. State v. Mitchell, 51 South. 4, 9, 96 Miss. 259, 26 L. R. A. (N. S.) 1072, Ann. Cas. 1912B, 309 (quoting State v. Cadwell, 44 N. W. 700, 79 Iowa, 432).

As money

See Money.

As payment

See Payment.

As property

See Property.

As tentative trust

See Tentative Trust.

As transfer

See Transfer.

DEPOSIT COMPANY

See Safe Deposit Company.

DEPOSITARY

See De Facto Depositary.

A manufacturer of automobile bodies to whom a chassis was delivered to be fitted with a body only, and not for storage, is not a "depositary," within a statute providing that one who delivers to another any merchandise for which a bill of lading, receipt, or voucher has been issued, unless such receipt or voucher bears on its face the words "not negotiable," or unless such receipt is surrendered to be canceled at the time of delivery, is punishable, etc. Manny v. Wilson, 122 N. Y. Supp. 16, 19, 137 App. Div. 140.

DEPOSITARY FOR HIRE

A warehouseman who agrees to hold goods for a specified time and deliver them on the owner's order becomes a "depositary for hire" under Civ. Code, § 1856, and his lien for charges is regulated by the title on liens. Shedoudy v. Spreckels Bros. Commercial Co., 99 Pac. 535, 537, 9 Cal. App. 398.

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